





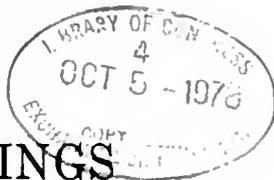


*Univ. of ... Committee ...*  
*" ... Subcom. ... on ...*  
*Constitutional Rights*

# BANKRUPTCY COURT REVISION

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**HEARINGS**  
BEFORE THE  
SUBCOMMITTEE ON  
CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
NINETY-FIFTH CONGRESS  
FIRST SESSION  
ON  
**H.R. 8200**  
SUPPLEMENTARY HEARINGS ON COURTS AND ADMINIS-  
TRATIVE STRUCTURE FOR BANKRUPTCY CASES

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DECEMBER 12, 13, AND 14, 1977

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**Serial No. 36**



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# BANKRUPTCY COURT REVISION

MONDAY, DECEMBER 12, 1977

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The hearing was convened at 2 p.m., in room 2226, Rayburn House Office Building; Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Volkmer, Butler, and McClory.

Also present: Thomas P. Breen, counsel; Richard B. Levin, assistant counsel; and Kenneth N. Klee, consultant.

Mr. EDWARDS. The subcommittee will come to order.

Today we are continuing consideration of H.R. 8200, the bankruptcy law revision bill that we have been working on for many, many months. And we are pleased to have with us three expert witnesses. The witnesses have kindly consented to give their testimony first and then to sit at the table as a panel so that the subcommittee can conduct a dialog with all members of the panel.

Our first witness today is Stanley Chauvin, Esq., of Louisville, Ky., who was the chairman of the Task Force on Revision of Bankruptcy Laws of the American Bar Association.

Mr. Chauvin, we are delighted to have you here.

Without objection, all of the statements will be included in the record.

Would you please sit here and proceed with your testimony.

The rest of the members of the panel who we are also going to have the pleasure of having as witnesses today, the Honorable Simon Rifkind of New York who is immediate past president of the American College of Trial Lawyers—Judge, why don't you come up to one of the microphones—and Mr. J. Stanley Shaw of Long Island, N.Y., who has very interesting testimony about an important case in that part of the country. And I believe with Mr. Shaw is Mr. Jessie Levine—is that correct? You are invited to sit up there, too, sir.

Mr. Chauvin, would you please proceed?

[The prepared statement of L. Stanley Chauvin, Jr., Esquire, follows:]

STATEMENT OF L. STANLEY CHAUVIN, JR., CHAIRMAN, TASK FORCE ON REVISION OF BANKRUPTCY LAWS ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and members of the subcommittee, the American Bar Association appreciates this opportunity to present its views on Title II of H.R. 8200. I am L. Stanley Chauvin, Jr., Chairman of the Association's Task Force on Revision of Bankruptcy Laws and I will be presenting the ABA's testimony.

In February 1976, the ABA House of Delegates adopted a resolution pertinent to H.R. 8200. That resolution is attached as Exhibit A. On December 2 of this year, the ABA Board of Governors adopted a second resolution pertinent to H.R. 8200. That resolution is attached as Exhibit B.

The American Bar Association has a number of recommendations to make regarding the court structure for bankruptcy courts. First, we strongly recommend that a judicial planning agency, as proposed by Chief Justice Burger (1970) and the Justice Department Bork Committee (1977), be established by the pending legislation to provide a judicial planning capability for the entire federal judicial system. We recommend that this agency study, analyze, evaluate and recommend changes, if any, in the federal judicial system.

Our recommendation is grounded on our belief that a planning capability through a judicial planning agency for the entire federal court system is seriously and critically overdue. The crisis in the federal courts has been fully documented many times. Chief Justice Burger in 1970 proposed a Judiciary Council; the Justice Department Bork Committee in 1977 proposed a Council on Federal Courts, following a similar proposal by the Commission on Revision of the Federal Court Appellate System in 1975. Each of these proposals basically and essentially suggested a permanent agency responsible for ongoing studies of the needs, functions and structures of the federal courts, with the responsibility for proposing plans for improvement and implementation to the Congress, President and Judicial Conference. In order to achieve legislative progress and the desired goals, the modern legislative process requires continuous audit, study, planning and documentation. A judicial planning agency would give a vital and authoritative voice and direction to the cause of maintaining the historic excellence of our federal judicial system.

The current contentions regarding bankruptcy court structure(s) clearly demonstrate the need for a reasonable and effective means of obtaining adequate information with which sufficient study and professional planning could go forward. The transition period included in the legislation provides a unique opportunity to properly study the impact of legislative changes in substantive law, procedure and jurisdiction on an existing court system. We believe that the current circumstances precipitate the need for such an agency to study and propose solutions for the bankruptcy court structure problem, and that additionally such an agency is called for permanently to provide planning capability for the federal judicial system.

In general, we believe that bankruptcy courts should be an integral part of the federal judicial system and part of an overall comprehensive plan to process fairly and effectively all necessary federal judicial business at reasonable cost. We are sympathetic to the proposals and reasons stated for separate and independent bankruptcy courts. We believe, however, that such courts should not be permanently established until the transition studies are completed and the judicial planning agency has adequate opportunity to study the federal judicial system, generally, including bankruptcy courts since previous studies have basically considered the bankruptcy courts alone and separately. The overwhelming needs for federal judicial services, generally, at a time when public resources are becoming more limited requires this approach.

In providing a transition period from the present to the new bankruptcy system, the period should be seven years rather than five years as provided for in H.R. 8200, as reported on September 8.

The House Judiciary Committee Report suggests that the five years set forth in H.R. 8200 is based upon one year for the bench and bar to become familiar with the procedural and substantive law changes made by the legislation, two years for collection of all relevant data, six months for study and recommendations, and eighteen months for consideration by Congress. We suggest these time limits are inadequate for legislation so complex and voluminous, and suggest the seven years instead, based upon two years for bench and bar, two years for compiling statistics, one year for evaluation and report, and two final years for consideration by Congress. The legislation extends the term of existing bankruptcy judges to the end of the transition period and we assume that such terms will also be extended to the same seven years if the transition period is so extended.

We next recommend that during the transition period, the existing bankruptcy judges be given the enlarged jurisdiction provided for in H.R. 8200, as reported.

However, a decision of the bankruptcy court "not to abstain" from hearing a matter within the enlarged jurisdiction should be appealable.

Essentially, giving bankruptcy judges the enlarged jurisdiction will reduce litigation, in general, but will moderately increase necessary litigation in the bankruptcy courts. We suggest that decisions not to abstain from hearing a matter within this enlarged jurisdiction be appealable in order to provide some restraint upon the judicial discretion provided. We do not support any restriction on this enlarged jurisdiction itself, such as having to prove "detriment" before a matter could be brought before the bankruptcy court.

Our last recommendation on the subject of court structure for bankruptcy judges is that separate bankruptcy courts, as provided for in H.R. 8200, as reported by the House Judiciary Committee on September 8, 1977, not be established now, but during the transition period appropriate contingency planning go forward for the eventual handling of bankruptcy cases either by separate bankruptcy courts, by bankruptcy divisions of the district courts, or by the district courts themselves. After the transition period and judicial planning studies have been completed and reported, we believe that Congress should at that time establish the final courts for bankruptcy cases and create the necessary and appropriate additional judgeships, with such status and tenure as Congress then determines appropriate. Any additional judges should be appointed in accordance with existing procedures for appointing district court judges.

We note in passing that there is currently pending before Congress legislation to create a substantial number of additional federal judgeships.

When legislation to create these judgeships is enacted, we believe there will be substantial impact on the federal judicial system. We believe that this impact should be studied by the judicial planning agency that we propose should be established.

The American Bar Association has one recommendation to make regarding the U.S. Trustee System contained in H.R. 8200, as reported.

We recommend that a U.S. Trustee System for professional salaried trustees be inaugurated, and placed in the Administrative Office of the U.S. Courts for selection, supervision and control rather than in the Justice Department; and additional provisions should clarify that the U.S. trustee should, among other administrative duties, both appoint and supervise the private trustees.

On the subject of appeals from decisions of bankruptcy judges, the American Bar Association takes the position that appeals from decisions of bankruptcy judges should be taken directly to the courts of appeals.

In closing, we are particularly pleased by two aspects of the bill. First, patient and careful drafting has resulted, generally, in provisions which are clear and precise and can be applied with a minimum of uncertainty. Second, bankruptcy continues to be recognized as inherently adversary, needing personal attorney representation throughout the case, yet every effort possible has been made to simplify the process so that attorney services can be rendered both effectively and economically.

We are pleased that so many provisions of the February 1976 resolution of the ABA are included in H.R. 8200.

We would be glad to answer any questions you may have.

#### EXHIBIT A

#### RESOLUTION OF THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION— ADOPTED FEBRUARY 1976

*Resolved*, That the American Bar Association urges the enactment by the Congress of the United States of a new Bankruptcy Act substantially in the form proposed in H.R. 31 and 32 and S. 235 and 236, 94th Cong., 1st Sess. (1975), with appropriate changes to reconcile those proposals, to correct defects, and to carry out the following principles to be followed in perfecting the proposed new Bankruptcy Act:

1. The American Bar Association favors incorporation of provisions in any bankruptcy legislation affecting consumer bankruptcies to be adopted by the Congress that would: (1) retain a court-supervised judicial proceeding for consumer bankruptcies; (2) continue the system of private legal representation of consumer bankrupts; (3) establish an Administrative Office of the U.S. Bankruptcy Courts to provide necessary independent administrative support and support sys-

tems; and (4) provide for court appointment of legal counsel for assistance to indigent consumer bankrupts.

2. To insure continuity of operation, present personnel should be carried into the new system at least for a limited period.

3. Appeals from decisions of bankruptcy judges should be taken directly to the courts of appeals.

4. The reorganization functions of the Securities and Exchange Commission should not be transferred to the new administrator.

5. Trustees in bankruptcy should be appointed by the administrator from a panel including salaried government employees, but in asset cases creditors should have the right to elect a trustee superseding the trustee appointed by the administrator; provided however, that the trustee shall continue to be accountable to the bankruptcy judge having jurisdiction of the case.

6. The administration of consumer or no-asset cases should be made more efficient, and rehabilitation plans should be encouraged.

7. There should be adequate safeguards for the property rights of secured creditors.

8. The provisions of chapters 10 and 11 of the present Bankruptcy Act should be consolidated, and the simplified procedure of chapter 11 should be made available even though there are public holders of equity securities or junior debt, unless a plan is proposed which adversely affects them.

9. The American Bar Association reserves its position on the tax problems raised in H.R. 31 and 32 and S. 235 and 236.

*Resolved*, That the President of the Association or his designee may present the views of the Association on this proposal to the appropriate committees of the Congress and to other appropriate government officials.

#### EXHIBIT B

#### RESOLUTION OF THE BOARD OF GOVERNORS OF THE AMERICAN BAR ASSOCIATION— ADOPTED DECEMBER 2, 1977

*Resolved*, that the American Bar Association supports, in principle, enactment by Congress of appropriate new comprehensive bankruptcy legislation to provide a modern bankruptcy law and an effective bankruptcy system, which legislation is represented generally by H.R. 8200, as reported by the House Judiciary Committee on September 8, 1977, provided that H.R. 8200 is amended to carry out the following principles:

1. A judicial planning agency, as proposed by Chief Justice Burger (1970) and the Justice Department Bork Committee (1977), should be established to provide judicial planning capability for the entire federal judicial system and the agency should study, analyze, evaluate and recommend changes, if any, in the federal judicial system.

2. The final court structure should include bankruptcy courts as an integral part of the federal judicial system and should be part of an overall comprehensive plan to process fairly and effectively all necessary federal judicial business at reasonable cost.

3. A transition period from the present to the new bankruptcy system should be provided for in the legislation, but the period should be extended to seven years rather than five years as now provided in H.R. 8200, as reported by the House Judiciary Committee on September 8.

4. During the transition period, the existing bankruptcy judges should be recognized as an important part of the federal judicial system, with the enlarged jurisdiction provided for in the legislation. However, a decision of the bankruptcy court "not to abstain" from hearing a matter within the enlarged jurisdiction should be appealable.

5. Separate bankruptcy courts, as provided for in H.R. 8200, as reported by the House Judiciary Committee on September 8, 1977, should not be established now, but during the transition period appropriate contingency planning should go forward for the eventual handling of bankruptcy cases either by separate bankruptcy courts, by bankruptcy divisions of the district courts, or by the district courts themselves. After the transition period and judicial planning studies have been completed and reported, Congress should establish the final courts for bankruptcy cases and create the necessary additional judgeships, to take effect at the end of the transition period, and with such status and tenure as Congress then determines appropriate, but in any event any additional judges should be ap-

pointed in accordance with existing procedures for appointing district court judges.

6. A U.S. trustee system for professional salaried trustees should be inaugurated, and should be placed in the Administrative Office of the U.S. Courts for selection, supervision and control rather than in the Justice Department as provided for in H.R. 8200, as reported on September 8; and additional provisions should clarify that the U.S. trustee should, among other administrative duties, both appoint and supervise the private trustees.

7. The foregoing is consistent with the previous policies of the ABA except that the possible establishment of separate bankruptcy courts may not be consistent with the ABA court organization standards.

*FURTHER RESOLVED*, that the President of this Association or his designee is authorized to present and publicize these views to the appropriate committees and members of the Congress and other government officials.

### **TESTIMONY OF L. STANLEY CHAUVIN, JR., CHAIRMAN, AMERICAN BAR ASSOCIATION TASK FORCE ON REVISION OF BANKRUPTCY LAWS**

Mr. CHAUVIN. Thank you, Mr. Chairman, members of the subcommittee. The American Bar Association appreciates this opportunity to present its views on title II of H.R. 8200.

I am L. Stanley Chauvin, Jr., chairman of the association's task force on revision of bankruptcy laws, and I will be presenting the ABA's testimony.

In February 1976 the ABA house of delegates adopted a resolution pertinent to H.R. 8200. That resolution is attached to these remarks and marked as exhibit A.

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We recommend that this agency study, analyze, evaluate, and recommend changes, if any, in the Federal judicial system.

Our recommendation is grounded on our belief that a planning capability through a judicial planning agency for the entire Federal court system is seriously and critically overdue. The crisis in the Federal courts has been fully documented many times, not the least of which in the reports which I mentioned from Chief Justice Burger in 1970 proposing a Judiciary Council, the Justice Department Bork Committee in 1977 proposing a Council on Federal Courts, following a similar proposal by the Commission on the Revision of the Federal Court Appellate System in 1975.

Each of these proposals basically and essentially suggested a permanent agency responsible for ongoing studies of the needs, functions, and structures of the Federal courts, with the responsibility for proposing plans for improvement and implementation to the Congress, President, and Judicial Conference.

In order to achieve legislative progress and the desired goals, the modern legislative process requires continuous audit, study, planning, and documentation. A judicial planning agency would give a vital and authoritative voice and direction to the cause of maintaining the historic excellence of our Federal judicial system.

The current contentions regarding bankruptcy court structure clearly demonstrate the need for a reasonable and effective means of obtaining adequate information with which sufficient study and professional planning could go forward.

The transition period included in the legislation provides a unique opportunity to properly study the impact of legislative changes in substantive law, procedure, and jurisdiction on an existing court system.

We believe that the current circumstances precipitate the need for such an agency to study and propose solutions for the bankruptcy court structure problem and that additionally such an agency is called for permanently so as to provide this planning capability for the Federal judicial system in general for the Federal judicial system.

In general, we believe that bankruptcy courts should be an integral part of the Federal judicial system and part of an overall, comprehensive plan to process fairly and effectively all necessary Federal judicial business at reasonable cost.

We are sympathetic to the proposals and reasons stated for separate and independent bankruptcy courts. We believe, however, that such courts should not be permanently established until the transition studies are completed and the judicial planning agency has adequate opportunity to study the Federal judicial system generally, including the bankruptcy courts, since previous studies have basically considered the bankruptcy courts alone and separately.

The overwhelming needs for Federal judicial services generally at a time when public resources are becoming more limited requires this approach.

In providing a transition period from the present to the new bankruptcy system, the period, we believe, should be 7 years rather than 5 years as provided in H.R. 8200 as reported on September 8.

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In closing, we are particularly pleased by two aspects of the bill.

First, patient and careful drafting has resulted, generally, in provisions which are clear and precise and can be applied with a minimum of uncertainty.

Second, bankruptcy continues to be recognized as inherently adversary, needing personal attorney representation throughout the case; yet every effort possible has been made to simplify the process so that attorney services can be rendered both effectively and economically.

We are pleased that so many provisions of the February 1976 resolution of the ABA are included in H.R. 8200.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Chauvin, for the excellent testimony for the American Bar Association.

Now, representing the American College of Trial Lawyers, we will hear from the Honorable Simon Rifkind. Judge, you may proceed. [The prepared statement of Judge Simon H. Rifkind follows:]

STATEMENT OF SIMON H. RIFKIND ON BEHALF OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

I am honored to appear on behalf of the American College of Trial Lawyers with regard to the proposed creation of a separate Article III bankruptcy court, with life-tenured judges. I am in the happy position of an advocate who fully agrees with the position he has been requested to present.

The College opposes the creation of separate specialized courts to handle bankruptcy cases, and also opposes the significant increase in the number of Article III federal judges which the creation of a specialized bankruptcy court would necessitate. The proposed legislation was reviewed under the auspices of a committee established by the College after the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, held last year, to commemorate the 70th anniversary of Dean Roscoe Pound's speech on that subject.

There are three major reasons for our opposition to these provisions of the bill.

First, the vitality of our federal courts depends on the fact that district courts are courts of general jurisdiction, whose judges are required to deal, on a daily basis, with the full range of substantive law. Because of this basic structure, changes in one area of the law influence the development of other areas of law. New ideas are allowed to filter through the legal system, so the law does not become stagnant.

Bankruptcy law, as it is now adjudicated in the federal district courts, is part of this process. It is not a distinct body of learning, isolated from the rest of the law. It is separated only by a permeable membrane through which the full range of procedural and substantive law passes, at every stage of bankruptcy proceedings. When a court must determine the validity of a creditor's claim, it turns to the substantive law underlying that claim. A creditor's claim based on a contract does not depend on a separate body of bankruptcy law, but on the law of contracts. The same is true when a creditor presents a claim based on a tort, a mortgage, or a security agreement. Similarly, when a court must supervise the disposition of a bankrupt's estate, it must decide a broad range of substantive questions—from securities, to anti-trust, to tax—depending upon the assets held by the bankrupt. Judges trying bankruptcy cases do not need narrow, specialized expertise but instead need knowledge of, and exposure to, the full range of substantive and procedural law.

Indeed, the profile of bankruptcy court cases prepared for the Committee by the bankruptcy referees supports this assessment. They argue that because of the complexity of bankruptcy cases, the significant sums of money involved, and the range of legal questions presented, bankruptcy referees should be converted into life-tenured Article III judges. I reach the opposite conclusion: For these same reasons, bankruptcy cases should remain in the federal district court.

As long as bankruptcy cases are tried by federal district judges exercising a general jurisdiction, the winds of change of legal doctrines will be felt in the bankruptcy law to the same degree as in the general body of the law. The validity of a claim on a contract should not depend on whether it is presented by a plaintiff in a court of general jurisdiction, or by a creditor in a bankruptcy proceeding.

If bankruptcy cases are tried in a specialized bankruptcy court, they will be insulated from the rest of the law. Some have argued that such a procedure already exists, because of the increased responsibility given to bankruptcy referees. However, bankruptcy referees act under the jurisdiction and supervision of the district court. Even if only a trickle of the cases in bankruptcy are reviewed by district judges, the benefit of a confluence of doctrines will still be present.

In addition, a specialized bankruptcy court would have other unfortunate consequences. To some extent, a specialized bankruptcy bar has already begun to develop. If a specialized bankruptcy court, with its own procedures, were established, this specialization would be aggravated. General practitioners would become hesitant to appear in bankruptcy courts. The specialization and insulation would then be complete: A specialized bar would practice before a specialized court, applying what is not now and should not be, but would become, a specialized body of law.

These dangers would be felt throughout the federal judicial system, but would be most acute in those districts whose size would warrant only one or two bankruptcy judges. In that situation, regardless of the talent of those particular judges, the bankruptcy court would tend to become a specialized preserve, deprived not only of the benefits of exposure to the full range of substantive law, but also of the benefits of judicial collegiality.

It is my view, and that of the American College of Trial Lawyers, that such a change is regressive. The entire movement in judicial reform in this century has been in the direction of consolidating courts. At the beginning of this century, it was the general pattern of our state judicial systems to have separate courts for law and equity, and also separate criminal and civil jurisdictions. Many of the states have followed the lead of the federal courts, in recognizing the benefit of a unified judicial system whose judges become familiar with the full range of the substantive law. The American Bar Association's Standards Relating to Court Organization have also recognized this, and discourage the creation of separate specialized courts.<sup>1</sup>

In addition to these general considerations which militate against the creation of a specialized bankruptcy court, there are two practical problems which lead the College to oppose the creation of such a court.

The first of these practical considerations is that a significant increase in the number of Article III judges, contemplated by the proposed law, would dilute the significance, and prestige, of district judgeships. Prestige is a very important factor in attracting highly qualified men and women to the federal bench, from more lucrative pursuits. As Judge Friendly has noted:

"The largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on the federal salary the most acute. There is real danger that in such areas, once the prestige factor was removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice."<sup>2</sup>

Proponents of the specialized bankruptcy court have argued that the conversion of bankruptcy referees into Article III judges will make that post more prestigious and thus make it possible to attract more qualified men and women. That is undoubtedly true, but I do not believe that there has been any problem in attracting qualified candidates to accept appointments as bankruptcy referees. The benefits which might flow from increasing the prestige of that post would be far outweighed by the dangers brought by a loss of prestige of federal district judgeships.

The second practical consideration is that it is likely that the creation of a specialized bankruptcy court would lead to wholesale appointment of current bankruptcy referees to the newly created Article III judgeships, short-circuiting the existing machinery for selection of federal judges. I understand that the proposed legislation contemplates that the new Article III bankruptcy judges would be appointed through the traditional selection process, including review by the American Bar Association. The bill also provides that those bankruptcy referees not selected to be bankruptcy judges would be retired at the end of a five-year transition period.

However well-crafted and well-intentioned this mechanism, I seriously doubt that it will work. The pressure to elevate all of the current bankruptcy referees to Article III bankruptcy judges, with life tenure, would be enormous. It is unlikely that the current bankruptcy referees would support the proposed legislation, as they overwhelmingly have, if they truly thought that it would lead to their mandatory retirement in five years. And even if this pressure could

<sup>1</sup> A.B.A. Standards Relating to Court Organization § 1.11(b), at 7-10 (1974).

<sup>2</sup> Friendly, *Federal Jurisdiction: A General View* 29-30 (1973).

be resisted, there would remain the task of finding, during the next five years, 300 qualified men and women to sit as Article III bankruptcy judges, and thus be eligible to sit by designation in all federal circuit and district courts. Men and women capable of performing the judicial function are of limited supply. That rare combination of character, education, experience, and temperament which comprise a qualified judge does not occur in abundance. The task of finding 300 such persons would strain the selection machinery, particularly because it would come at a time when there is a great need to appoint additional federal judges in both the circuit and district courts.

The American College of Trial Lawyers therefore opposes the creation of a separate Article III bankruptcy court, both because it would have an adverse effect on the manner in which bankruptcy cases are adjudicated, and because it would be detrimental to the federal district courts.

### **TESTIMONY OF HON. SIMON H. RIFKIND, IMMEDIATE PAST PRESIDENT, AMERICAN COLLEGE OF TRIAL LAWYERS**

Judge RIFKIND. Thank you, Mr. Chairman.

I have submitted a written statement. I hope it is agreeable to the chairman and the committee that I not necessarily follow its text.

Since I am about to express some opinions, I have been trained that the utterance of those should be accompanied by some degree of qualification; so if you will permit me, I will just make a brief statement that may be regarded as my qualification.

I have been a member of the bar for over 50 years.

I was appointed to the Federal bench by President Roosevelt and served from 1941 to 1950.

I have served on a number of ad hoc assignments upon the appointment of Presidents Truman, Kennedy, and Johnson.

I am presently a member of the firm in New York of Paul, Weiss, Rifkind, Wharton and Garrison.

I have had exposure to almost every aspect of law practice that I can think of. If I were put under oath and asked to identify one I have not handled, I would be hard put to answer the question. I've had some exposure to bankruptcy, but I do not pretend to be a bankruptcy lawyer.

My contacts with bankruptcy law have been concentrated in the field of corporate reorganization, rather than in straight bankruptcy field. My most recent exposure in the Federal courts has been as counsel in a number of matters for the trustees of the Penn Central before Judge Fullam in Philadelphia.

And I suppose that my most recent exposure to the general field of insolvency has been to resist bankruptcy, as counsel for the Municipal Assistance Corp., otherwise known as Big Mac, in New York City.

So far, so good, on that.

I am here, Mr. Chairman, in the limited role as spokesman for the American College of Trial Lawyers, and I will confine my remarks to those authorized by that organization.

I am immediate past president of the American College of Trial Lawyers. The views of the College have been limited to two major questions: Shall there be a separate bankruptcy court; and shall it be officered by a tenured article III judiciary?

The college sent a written communication last May addressed to the chairman of the Senate Judiciary Committee expressing opposition to both of those proposals. If I may, I would like to submit that letter

written by Mr. Deacy, chairman of the committee which studied the proposal for the College as a summary statement of its views.

Mr. EDWARDS. Without objection, it will be made a part of the record at this point.

[The letter referred to follows:]

AMERICAN COLLEGE OF TRIAL LAWYERS,  
Los Angeles, Calif., May 13, 1977.

Senator JAMES O. EASTLAND,  
Chairman, Senate Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: The legislative proposals incorporated in H.R. 6, 95th Congress, to convert bankruptcy courts into separate courts under either article I or article III of the United States Constitution, and to convert referees in bankruptcy to article III judges to preside in those specialized courts, has been considered by a subcommittee of the Pound Revisited Committee of the American College of Trial Lawyers which has recommended that the College oppose these proposals. That recommendation has been considered and approved by the executive committee of the college; therefore, you are advised that the college opposes those proposals.

The principal reasons for the opposition by the college to these proposals are:

- (1) We oppose specialized courts;
- (2) We oppose the significant increase in the number of article III federal judges which would dilute the prestige of district judgeships, thus reduce the number of well qualified persons willing to serve; and
- (3) We oppose wholesale appointments which would shortcircuit the existing machinery for selection of federal judges, including the review by the American Bar Association of persons under consideration for appointment.

Accordingly, the American College of Trial Lawyers urges that these aspects of H.R. 6 not be enacted into law.

Sincerely,

THOMAS E. DEACY, Jr.,  
Chairman, Pound Revisited Committee.

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Copy to each member of the Senate Judiciary Committee and the House Judiciary Committee and to the Hon. Warren E. Burger, Chief Justice of the United States, Hon. Mark W. Cannon, Administrative Assistant to the Chief Justice, Gen. Rowland F. Kirks, Director, Administrative Office of the United States Courts, Hon. Griffin B. Bell, Attorney General of the United States, Hon. Daniel J. Meador, Assistant Attorney General, Office for Improvement in the Administration of Justice, Hon. Walter E. Hoffman, Director, Federal Judicial Center, Justin A. Stanley, President, American Bar Association, William B. Spann, Jr., President-Elect, American Bar Association, Board of Regents, American College of Trial Lawyers, Pound Revisited Committee, American College of Trial Lawyers.

Judge RIFKIND. I will confess to you, Mr. Chairman, that I share the views expressed by the college, that I am not here simply as a hired or volunteer agent to express somebody else's views which I do not myself avow. And I will say further that my views on this general subject of specialized courts are not of recent vintage. It isn't a case where I just bought myself an argument like a ticket for a 1-day excursion. I've held these views for a long time. I have brought with me, as evidence of the longevity of my opinion on this subject, an article which I caused to be published in the American Bar Association Journal in June of 1951, that was addressed to the movement which was then in full sway for the creation of a specialized court for patent litigation.

I opposed that. I'm happy to say that it has not come to pass. And if I may, I would like to submit a copy of that article, because it represents a statement of the general philosophy behind that point of view.

Mr. EDWARDS. Without objection, it will be received into the record.  
[The article referred to follows:]

A SPECIAL COURT FOR PATENT LITIGATION? THE DANGER OF A SPECIALIZED  
JUDICIARY

(By Simon Rifkind of the New York Bar (New York City))

*In this article, Judge Rifkind answers the recurring demand that a special court for trying patent cases be created. His argument rests on the assumption that judges would be men with a broad outlook upon the law and he declares that creating specialized judges in the patent field would soon lead to sterility in that area of the law.*

Periodically one hears the suggestion that patent cases should be tried by the patent judges. The proposals take a variety of forms but they all revolve about the proposition that the judicial product of patent litigation would be improved if the trials were conducted by judges specializing in patent cases.

I deny this pivotal proposition; consequently I am opposed to patent courts or patent judges.

The highly industrialized society in which we live has a great appetite for "know-how". Such a society elevates and aggrandizes the position of the expert. His is the voice with the ready answer. His opinions become the facts upon which lesser mortals—laymen—risk life and fortune.

Against the citadel of the expert I tilt no quixotic lance. My contention is that the judicial process requires a different kind of *expertise* the unique capacity to see things in their context. Great judges embrace within their vision a remarkably ample context. But even lesser men, presiding in courts of wide jurisdiction, are constantly exposed to pressures that tend to expand the ambit of their ken.

The patent law does not live in the seclusion and silence of a Trappist monastery. It is part and parcel of the whole body of our law. It ministers to a system of monopolies within a larger competitive system.

This monopoly system is separated from the rest of the law not by a steel barrier but by a permeable membrane constantly bathed in the general substantive and procedural law. Patent lawyers tend to forget that license agreements are essentially contracts subject to the law of contracts; that infringements are essentially trespasses subject to the law of torts; that patent rights are a species of property rights; and that proof in patent litigation is subject to the laws of evidence. Changes in all these branches of the law today have an effect on the patent law as well. As long as judges exercising a wide jurisdiction also try patent cases, so long do the winds of doctrine, the impulses towards slow change and accommodation, affect the patent law to the same degree as they affect the general body of the law.

In a democratic society the law, in the long run, tends to approach commonly accepted views of right and wrong. Thereby it continues its hold on the respect and allegiance of the people—in the last analysis its major sanction. Once you segregate the patent law from the natural environment in which it now has its being, you contract the area of its exposure to the self-correcting forces of the law. In time such a body of law, secluded from the rest, develops a jargon of its own, thought-patterns that are unique, internal policies which it subserves and which are different from and sometimes at odds with the policies pursued by the general law.

Such conflicts, when they emerge in spectacular form, induce a public cynicism about the law and a sense of injustice. In such a climate the patent system may not fare too well.

SPECIALIZED JUDICIARY LEADS TO DECADENCE OF LAW

Moreover, a specialized patent court would breed other unfortunate consequences. The patent Bar is already specialized. At present, however, patent lawyers practice before nonspecialized judges and accommodate themselves to the necessity of conveying the purposes of their calling to laymen. Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligi-

ble to the uninitiated. That in turn intensifies the seclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

The root of the matter is that there is a difference between specialization on the administrative level and specialization on the judicial level. On the administrative level there is advantage to be derived from close familiarity with the pattern of activity which is the subject of administrative action and regulation. The very essence of the judicial function, however, is a detachment from, a dispassionateness about the activity under scrutiny.

The views thus far expressed are of general derivation. They are not especially related to the patent law. They are equally pertinent to the admiralty law, to bankruptcy, to security regulation, or any other of the great provinces of the law. The views expressed stem from a conception of the place and function of the law in a democratic society as the arbiter and mediator of conflicting social interests and demands. A one-function court cannot assist the law to discharge that responsibility.

#### NO BENEFIT WILL BE OBTAINED FROM HAVING PATENT COURT

The patent law itself contributes a number of considerations which weigh against the proposal for a patent court. One of these is that the benefits of expert knowledge which are forecast by the proponents of the change will not be realized in any substantial degree. It is hardly to be supposed that the members of a patent court will be so omniscient as to possess specialized skill in chemistry, in electronics, mechanics and in vast fields of discovery as yet uncharted. The expert in organic chemistry brings no special light to guide him in the decision of a problem relating to radioactivity. Consequently, even judges serving upon a specialized patent court will, in any particular case, prove to be nonexperts except only with respect to the patent law itself. But knowledge of the patent law has never presented any grave problem. The patent law presents no greater difficulties to its mastery than any other branch of the law. Reading the judicial literature created through patent litigation I am not aware of any marked deficiency on the part of the present judiciary in comprehending the principles of law relevant to a decision in patent cases.

Another consideration derived from the patent law is that changes in patent litigation have already made the proposal stale. Patent litigation has overflowed its ancient channel. Today one who can navigate only in so-called pure patent law is inadequate as a patent lawyer and insufficient as a patent judge. Today patent litigation is most frequently met with in close association with other branches of the law such as unfair competition, trade-marks, confidential submissions, antitrust and corporate reorganizations. It is apparent that the patent expert can be only moderately learned in all these additional departments. It follows that, like most experts, he can bring his special knowledge to bear on the problem but is not especially fitted to perform the judicial task of extracting a solution by subjecting the problem to the filtering process of many strata of knowledge.

Very recently, Judge Harold Medina in an address to the patent Bar, widely published, described the distressing experiences he encountered in trying his first patent case. The address was very entertaining as it was meant to be. However, it did not support the inference which some have drawn from it that the cure for such judicial distress is a special patent Bench. Every new judge is confronted by cases in fields of law in which he had not previously practiced. Every competent judge overcomes this handicap of lack of familiarity within a reasonable time. If the patent law has already become so esoteric a mystery that a man of reasonable intelligence cannot comprehend it, then something has gone seriously wrong with the patent law. If that is so—and I do not hold this view—the cure lies in correcting the law, not tinkering with the Bench.

Judge RIFKIND. Now, if I may say so, I have reexamined the views I held at that time in the light of an additional quarter century of experience. I haven't found any reason to change my opinion.

The views which I have expressed which are opposed to the creation of specialized courts spring from a general philosophy about the wisdom of having a unified judicial system.

I don't mind admitting the fact that these views may spring from my personal experience. Most dearly held views are derived from personal experience. And I look back upon the practice of law with its exposure to a multitude of different situations, with the variety which American law practice provides, and I come to the conclusion that that's the best way by which a good and effective legal system develops.

The present system that we have in the U.S. district courts is a unified legal system in which Federal judges sometimes sit in bankruptcy; they sometimes sit in admiralty; they sit in criminal cases; they sit in antitrust cases; they sit in patent cases and copyright cases; they even sit in naturalization cases.

Now, each one of those departments is characterized by the operation of a few principles of law which are unique to the particular branch of the law spoken of. There are, of course, some principles in the criminal law that don't apply to patent law, or some principles of copyright law that have nothing to do with personal injury cases. But there is a common sea of law in which they all share.

When a Federal court today sits in bankruptcy by reason of the large volume of work which that particular branch of the law has generated, it has the assistance of a group of referees. In other kinds of cases during the recent past they have had the assistance of magistrates, a comparable body of assistants. In particular cases, a Federal judge may have the cooperation and assistance of a special master.

They're all members of the same species, assistants to judges. They render a very great service in improving the quality and maximizing the quantity of judicial work.

In this committee's report, No. 95-595, dated September 1977, there's reference to the proposition that bankruptcy referees are no longer bankruptcy referees but bankruptcy judges, and the statement is made that the title was changed by Bankruptcy Rule 901.

It's not a very important thing, but I would like to differ with the author of the statement. If I may make just a sentence about it, Bankruptcy Rule 901 says in its definitional section that, as used in these rules, the word "bankruptcy judge" shall mean either the referee of the court of bankruptcy in which a bankruptcy case is pending or the district judge, as the case may be. It might just as well have said the word "turtle dove" shall mean bankruptcy referee. That wouldn't make a referee a turtle dove, and this doesn't make him a bankruptcy judge, in my opinion.

That's not very significant. It does have some bearing on the question of whether we already have a de facto system of bankruptcy courts, a proposition on which I do not share the opinion expressed in the reports.

The system proposed in H.R. 8200 would create a separate and independent court for bankruptcy, a separate and independent judiciary for bankruptcy, and the court and its judges would acquire article III status.

I find these proposals very questionable.

I think it is an idea whose time has not come.

I think that it is at odds with at least what I believe to be the underlying conception of Anglo-American law, which has its roots in the common law and the unique quality of what we call Anglo-American law, as distinguished from continental law. Our conception is that the law is not static, that it is not rigid, that it undergoes change, that it evolves by mutation, that it suffers erosion, that it grows by accretion, both legislatively and judicially generated.

Therefore, the law is a growing thing, constantly in a state of development, and American society is afloat on a sea of law so created.

If that body of law is to remain civilized and relevant to our times, it is important—I think it is vital that it should be exposed to the winds of changing doctrine and to currents of law generated in one branch of the law and intermingling with other branches of the law. That the various sections of law which we have identified by title as bankruptcy or personal injury or antitrust or copyright or patent or admiralty, are not different seas, but are all in the same sea. If they are separated at all, they are separated by very permeable membranes so that there is a complete interflow back and forth between the doctrines of the adjacent seas.

If you take a section in a living environment so organized and immature it behind a seawall so that it no longer has contact with the main body of the law and with the other streams and currents that flow through it, you create a dead sea which neither gets nourishment from the general sea, nor contributes its share to the growth, development, and enrichment of the rest of the law.

How does the bankruptcy practice fit into this general description that I have given? The truth of the matter is as I believe your report correctly states. The truth is that bankruptcy cases deal with all the materials of the law—contracts, torts, real estate, leases, employer-employee relations, union and employer relations, securities laws, antitrust laws, constitutional law, tax laws. Every one of those is part of the matrix of the material that is the subject matter of the bankruptcy proceedings.

I didn't make that statement up, or read it in a book. I've lived it. And I know that what I'm saying is true. There is not a branch of the law which is alien to the bankruptcy practice. The analysis of the legal principles which relate to these subjects, as they come to the surface in a bankruptcy case, feed into the general body of law and receive instruction from and stimulation from these bodies of law when entertained in nonbankruptcy cases. That has been a successful operation.

The fact is, in my opinion, Mr. Chairman, that bankruptcy is not really a specialized body of law. Oh, I know, of course, that there are a few principles which we call bankruptcy law. Discharges in bankruptcy occur only in bankruptcy. They don't occur in a personal injury case. And preferences are more often spoken of in bankruptcy than in other branches of the law, but not exclusively so.

But those are very few. In every body of law, whether it's personal injury or contract law or securities law, there are a few principles which are peculiarly oriented toward that body of law and tend to some extent to distinguish it; but the truth is that in a bankruptcy court you can hear a contract case, a tort case, a securities case. In presenting a plan of reorganization, you have to satisfy the presiding

officer that it's feasible under the securities laws, the tax laws, the labor relations laws, et cetera, et cetera.

Now, then, I'm fully aware of the fact—I've watched it all of my professional life—that at the bar there is a parochial hunger which keeps recurring and reexpressing itself periodically for the practitioners in a particular field to get themselves a little courthouse of their own, a little bar of their own, a little judiciary of their own so that they become the ministers of a private temple in which they are the priests and nobody else knows how to function. That gives them a little bit of a monopoly in a field of practice.

You get a little courthouse, like a little bankruptcy courthouse, with a bankruptcy bar and a bankruptcy judge, and pretty soon they start talking only to each other, and pretty soon they have a jargon which nobody else understands, and pretty soon anybody who doesn't live in that little temple becomes hesitant to enter it, and pretty soon the laity think that if they want to go into that particular courthouse they have to hire a lawyer who's got a label on him—"bankruptcy lawyer."

It ought not be allowed to happen because a lawyer who is only a bankruptcy lawyer is never as good a lawyer as one who is a bankruptcy lawyer and an antitrust lawyer and a tax lawyer.

I'm not talking about clerks. Clerks should become specialized because they do repetitive tasks and they should learn to do those things quickly. I'm talking about judges, and judges ought to be people who engage in reflection, who engage in cogitation, who reach into other areas of the law in order to illuminate the tasks that they are doing. They are not going to do that if they live solely in one constricted area of the law which is impoverished because it doesn't have access to any other branch of the law.

And if you want examples, I hear a reference to the tax court—that's a good example—which should hold its own warning. Nobody any longer talks tax law. The layman on the street is afraid to open his mouth on the subject of taxation because he doesn't understand what the lawyers say and he doesn't understand what the judges say and he doesn't know what happens to him. And it is not a good thing in a democracy when a body of the law becomes so strange, acquires a Delphic language all its own so the public doesn't understand.

I believe that the law ought to keep in close contact with the public and talk in a language the public understands.

You see, therefore, that my resistance to the idea of a separate court doesn't spring from any parochial considerations but from a general philosophy of what I think the law is all about, and I haven't said a word about expense because I haven't studied expenses here, but I have no doubt it will be more expensive. I read that somebody, either a Congressman or a Senator, who made an analysis, and he said, "I know it's going to be more expensive, but how much more expensive I don't know."

There's one more thing that I want to say.

I think the whole direction of setting up specialized courts is regressive and not progressive.

The movement for judicial reform throughout the 20th century has been in the direction of consolidating courts, not fragmentizing them.

I'm sure that every member of this committee remembers or has read that at the beginning of this century it was the general pattern

of our State judicial systems to have separate courts for law and equity and separate courts for criminal cases and separate courts for civil cases.

There's been a vast movement away from that. Today I think there are only one or two States that still follow that practice. I think in Texas they still have a separate system of criminal appeals. But, otherwise, the whole movement has been in the direction of unifying the courts, following the example of the Federal courts, which proved to be a successful amalgamation of all of these bodies of law in one place. That's the thing that makes the federal judiciary such an attractive position for an active lawyer, and that's why we're able to get highly qualified people to surrender large lucrative practices and take positions on the federal courts, because of the excitement of its variety, of the richness of its experience.

The American Bar Association Standards Relating to Court Organization also discouraged the creation of separate, specialized courts.

Now I would like to speak about two practical problems which may sound trivial, but I don't think they are.

A significant increase in the number of article III judges as is contemplated by the proposed law would, in my opinion, dilute the prestige of district judges. And I say that prestige is a very important factor in attracting highly qualified men and women to the Federal bench from more lucrative pursuits.

I divide judicial candidacies into two groups—those to whom it is a sacrifice but who want to render the public service which it represents because of whatever it is that appeals to them, and those to whom it is a financial promotion. And I think the great judges that I have known all belonged in the former category.

Now, I'm not alone in the opinion I have expressed and I would have regarded it as idiosyncratic on my part if I were alone.

But I will quote a very great judge for whom I have enormous respect, Judge Henry Friendly of United States Court of Appeals for the Second Circuit, who said, and I quote:

The largest district courts will be in the very metropolitan areas where the discrepancy between uniform federal salaries and the financial rewards of private practice is the greatest, and the difficulty of maintaining an accustomed standard of living on a federal salary the most acute. There is real danger that in such areas, once the prestige factor is removed, lawyers with successful practices, particularly young men, would not be willing to make the sacrifice.\*

I was once fresh enough, impertinent enough, to say to a conference of judges that when it gets to the point where we're going to have as many judges as ribbon clerks, we're going to get ribbon clerks for judges, and I don't think that that's a good idea for the judiciary.

Now, I've heard it said that a conversion of bankruptcy referees into article III judges will make that post more prestigious and therefore possible to attract more qualified men and women, and there is, of course, a measure of truth in that. But I do not believe that in the tradeoff that we're making it's what we need. I think we need to attract qualified candidates from the district courts and increase their numbers as necessary to serve, not only the general practice but also the bankruptcy practice. And I don't think that we'll have trouble, as we have

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\*Friendly, *Federal Jurisdiction: A General View* 29-30 (1973).

not had trouble, in recruiting the necessary number of persons for the post of bankruptcy referees.

The second practical consideration is the danger—I know that the committee has tried to warn against that danger and to take measures to resist the danger, but nevertheless I believe there is a danger—of wholesale appointment of bankruptcy referees to the newly created article III judgeships.

I understand the proposed legislation contemplates that the new article III bankruptcy judges would be appointed through traditional selection procedures, including review by bar committees, but no matter how well intentioned this mechanism, I seriously doubt that it will work out in practice.

The pressure to elevate most of the current bankruptcy referees to article III bankruptcy judges with life tenure would be enormous. I draw my conclusion from this simple human fact: It is unlikely, it seems to me, that the current bankruptcy referees would so enthusiastically support the proposed legislation if they truly believed that what they were doing would lead to their mandatory retirement at the end of 5 years.

Then, of course, assuming you didn't do it that way, you would have the task of trying to find 300 or 250 qualified men and women to add to the Federal judiciary.

Gentlemen, in my opinion, men and women capable of performing the judicial function are in limited supply. It takes a rare combination of character, education, experience, and temperament to make a qualified judge, and that class of people do not exist in abundance.

The American College of Trial Lawyers opposes the creation of a separate article III bankruptcy court, both because it would have an adverse effect on the manner in which bankruptcy cases are adjudicated and because it would be detrimental to the Federal district courts.

Thank you.

Mr. EDWARDS. Thank you very much, Judge Rifkind.

Our next witness is J. Stanley Shaw of Long Island. Mr. Shaw, we welcome you, and you may proceed with your testimony.

[The prepared statement of J. Stanley Shaw, Esq., follows:]

#### STATEMENT OF J. STANLEY SHAW

I appear before this honorable body to relate to it some of the experiences I have encountered over the past three and one half years while spending virtually 90 percent my working days over that period engaged in one case pending before the Bankruptcy Court in the Eastern District of United States. I do not claim to be an expert in the field of Court reorganization and structure, but I have encountered over that period of time virtually every type of problem imaginable in the conduct of a Chapter XI Proceeding relating to a large corporation, and can relate to you my experiences with the court, with other lawyers, with creditors, with employees of the debtor, with Federal Regulatory Agencies, and with all those "interested parties" not enumerated above, but who always appear within the contemplation of the existing Bankruptcy Act. I might also add that neither am I a member of that segment of the Bar, whose members practice Bankruptcy Law almost exclusively, so that my testimony here this morning is from the perspective of a general trial lawyer, as well as a bankruptcy law practitioner.

I believe that my experience and that of the members of my law firm can serve to illustrate what I feel is a compelling need for the expansion of the jurisdiction of the Bankruptcy Court, expansion of its staff to handle the work necessary to properly carry out the purposes of the Bankruptcy Act, and the recognition of

the role of the Bankruptcy Judge as an important administrator of justice in the conduct of proceedings which have become commonplace in an increasingly complex commercial world.

Although my firm has been involved in many other bankruptcy cases, I would like to relate most of my testimony before you today to the case of The Bohack Corporation, debtor-in-possession, 74B933, a Chapter XI Proceeding pending before the Hon. C. Parente, Bankruptcy Judge for the United States District Court for the Eastern District of New York. At the time, the petition was filed on July 30, 1974, Bohack, which was a large regional supermarket chain, which primarily served Brooklyn, Queens and Long Island in the State of New York, had approximately 4500 employees working in its administrative offices and store locations. From a peak of about 200 retail stores in 1973, it had slowly contracted its business so that there were approximately 150 stores operating as of the date of the filing of the petition.

In addition, Bohack owned and operated a 37½ acre terminal in Brooklyn which included thereon a meat warehouse, a delicatessen warehouse, a grocery warehouse, a frozen foods and dairy warehouse and railroad sidings as well as facilities for the maintenance and parking of its truck fleet, which was operated by one of its subsidiaries. Naturally, in addition to all of the above, the terminal also contained a carpenter shop, maintenance shop, paint shop, facilities for the repair of all of the retail stores and the administrative offices of the corporation. At the time of the filing of the original petition, Bohack was selling approximately \$400,000,000 of groceries per year. In fact, from the date of the filing of the petition, on July 30, 1974, until it liquidated its last store operations on July 23, 1977, Bohack sold approximately three-quarters of a billion dollars worth of retail goods.

Much of Bohack's financial difficulty stemmed from a weak capital structure and long term debt which had been incurred as a result of an attempted expansion into large suburban stores, as well as a very severe price competition with the Great Atlantic and Pacific Tea Company. This competition was direct and head to head by virtue of the fact that A & P was the largest grocery chain in the New York Metropolitan area and Bohack was the second largest chain in the area, accounting for approximately six percent of all sales in the relevant market area. Thus, at the time Bohack filed its Chapter XI Petition it had several thousand creditors and its unsecured debts amounted to approximately \$60,000,000.

By virtue of the fact that the Bohack Terminal was located on the Brooklyn-Queens border, and Bohack's certificate of incorporation indicated that its principal place of business was located in the County of Queens, when Bohack filed its Chapter XI Petition, it was considered a Queens County case and thus the entire burden fell by chance upon the shoulders of Bankruptcy Judge Parente, who at the time was responsible for all bankruptcy cases filed in the County of Queens; that County, incidentally has a population of almost two and a quarter million people, and a substantial number of large and medium-size businesses located in its industrial areas.

An unofficial creditors' meeting was held in a large room at the Waldorf Astoria and after a creditors' committee was tentatively appointed, the first official meeting took place in the Courtroom designated for use by Judge Parente. That courtroom consisted of a large rectangular room located in an office building in the Jamaica section of Queens. It had a raised podium for the judge's bench and a witness stand, and was otherwise empty except for the plastic molded chairs which one might encounter in any reasonably good institutional cafeteria in the nature of a high school or plant lunch room. Judge Parente's chambers consisted of a small office and a tiny library, and encompassed also the clerk's office for the conduct of all bankruptcy proceedings for the County of Queens. It should be noted that these surroundings constituted a drastic improvement from the quality of his previous courtroom, which was located in another office building that was not only a fire trap but which had been out-moded in terms of any kind of useability as an office for many years. The previous courtroom was located above a mattress and furniture store and just below a methadone clinic. Not only did it pose an apparent threat in terms of personal security, it posed an actual threat with respect thereto, as Judge Parente's secretary was mugged within a few yards of the court, which placed her in the company of many well known bankruptcy lawyers in the City of New York. It was only through Judge Parente's efforts and the intervention of

Chief Judge Mishler that he was able to obtain the facilities of which I have spoken in somewhat derogatory terms a few moments ago. Finally, with respect to this issue, it should be noted that the Bankruptcy Court was forced to abandon the Jamaica area entirely for reasons of personal security. Apparently, lacking the trappings and dignity of a court setting, the Bankruptcy Court in Queens was looked upon as little more than another office susceptible to prey by street criminals.

Hundreds of creditors attended Bohack's first meeting before the court, and many issues were raised, both legal and practical, with respect to the jurisdiction and the power of the court to deal with the conflicting claims made not only as to debts provable in bankruptcy, but as to the legal rights of various persons to attack and defend the estate of the debtor. For instance, there was an immediate fight between persons seeking to represent the Creditors' Committee and there were charges of improper solicitation and purchasing of claims for the purpose of voting them in a contest to elect counsel for the committee.

Several large creditors immediately commenced reclamation proceedings seeking the recovery of goods that had been delivered to Bohack shortly before the filing of the petition. Missouri Beef Packers, in fact, instituted a claim for \$900,000.00, and attempted to retrieve the beef it had shipped to Bohack.

Mechanics lienors sought to enforce liens that had been perfected or they were in the process of perfecting in the state courts, and in each and every instance, the jurisdiction of the Bankruptcy Court to preserve and protect the assets of the debtor's estate was challenged by the creditors. Thus, for openers, the Bankruptcy Judge was compelled to determine, at least on a temporary basis, issues of jurisdiction relating to liens under the Uniform Commercial Code, and relating to the Canons of Legal Ethics and Bankruptcy Rules with respect to solicitation and voting of claims for the purpose of selecting counsel for the creditors. It was required to do this with the aid only of a volunteer legal assistant, with no library, with staff that was unable to help him in providing supportive services with respect to his conduct of hearings and rendering of opinions by virtue of the fact that they were also doing the ordinary clerical work of the Bankruptcy Court with respect to all matters other than Bohack.

Under the circumstances, the bringing of some semblance of order out of chaos was in and of itself a remarkable achievement. Again, given the surroundings and the setting of the first meeting of creditors and the hearings held immediately thereafter, individual creditors not represented by experienced bankruptcy counsel did not perceive the courtroom as such, and engaged in what could be kindly described as marketplace techniques of communication, to the point where the judge was constantly required to admonish claimants and their attorneys to either remain silent or step out of the courtroom as if they were school children who were not paying attention in class. Of course, there was no bailiff, no court officer, or marshal who was available to help the judge in this task, and he was compelled to act as a monitor of conduct of the various people in attendance at the first few hearings, until he could impose upon them the understanding that they were indeed in a courtroom; and he was able to do that only by the force of his own will.

Before discussing in some detail the nature and extent of the various types of controversies that have arisen in the course of the administration of the Bohack estate, it would be well to point out certain overall statistics. Since the filing of the petition, there have been almost 500 proceedings in litigation within the Bohack case. 430 of them were adversary proceedings commenced in the Bankruptcy Court and there were an additional 48 other contested matters. I might note at this point that these are findings of several months ago and are very conservative statistics, inasmuch as the second and third time each matter came back before the court on various motion had not been counted. For the lawyers on this committee, it is reasonably easy to recognize the burden, in just one case mind you, that falls upon a Bankruptcy Judge, where in three years almost 500 litigated matters are presented to a court in at least the pleading stage. Especially is this so when this fact is combined with the fact that Judge Parente had before him some 900 other cases other than Bohack over the three years we are concerned with here. Of the approximately 500 litigation matters brought before Judge Parente in Bohack, approximately 45 were decided on motion, approximately 320 were settled or withdrawn after conferences held by the Judge in almost every instance, and approximately 120 were actually tried before Judge Parente. This, of course, along with the fact that my firm litigated

approximately 60 to 75 cases in other courts, either with the permission or at the direction of the Bankruptcy Judge. Even in those instances any settlements or compromises had to be reviewed by the Judge, and he had to review an application for permission to conduct the litigation in terms of the proposed pleadings and the underlying facts involved. Thus, one can see that apart from any aspect of the administration of the estate of the debtor, the Bankruptcy Judge was totally inundated with extensive, time consuming and expensive litigation.

Apart then from being an expert in virtually every area of commercial law that might possibly arise, the bankruptcy judge had to become an expert in conflict of laws in the sense that he had to determine the applicability of state laws to the bankruptcy proceedings, the appropriateness of allowing litigation to proceed in state courts, the presence or lack of equitable considerations that would enable creditors to seek special relief at the expense of other creditors, the right of the debtor to pursue claims on other forums, and he was required then to review conflicting claims of jurisdiction in respect to most of the litigated matters that came before him.

Inasmuch as the subject of my testimony here today is basically the question of the jurisdiction of the bankruptcy court, I must point out to you that in a very large percentage of the litigation I encountered during pendency of this proceeding, although I never made a statistical analysis thereof, the issue of jurisdiction arose in such manner as to make the work of bankruptcy judge, as well as the litigating attorneys, extremely difficult. Any time the debtor sought quick relief, a jurisdictional issue would be raised which would have to be met and decided by the Judge in the first instance before a hearing on the merits could proceed. This obviously took a substantial amount of time and interfered with the Judge's attempts to write decisions on the merits of other litigation that was pending before him. In many instances, the creditors' attorneys, viewing the Bankruptcy Court as the friend of the debtor, would attempt to seek other forums for the sole purpose of receiving what they perceive to be a friendlier hearing than in the Bankruptcy Court. To cite one extreme example, only last week I was served with a temporary restraining order by one alleged creditor of Bohack attempting to prevent the payment of monies due to Bohack which had been conceded by another party in a plenary suit by Bohack, even though the first alleged creditor was maintaining its own independent action and was not party to the action in which Bohack's adversary had conceded liability to Bohack. The obvious purpose was to prevent this asset of the estate from coming under the jurisdiction of the Bankruptcy Court.

A short listing of the various issues that have arisen in this case should be instructive in helping this committee to decide whether the Bankruptcy Court's jurisdiction should be expanded, and its services increased and expanded complementary to the expanded jurisdiction, or whether to continue the fragmentation that presently exists with respect to the jurisdiction of the court.

The following issues have not only arisen with respect to this case but are typical in that more than one claimant or other party would raise the same issue with slightly different fact patterns requiring new legal analysis. First, in view of the fact that Bohack was a retail supermarket chain, we have the issue of the validity of leases between Bohack and its landlords, and in many instances, its subtenants, raised from both sides of the fence. Thus, landlords who did not like the leases Bohack had, attempted to terminate them, either on the basis of a bankruptcy clause written into the lease or on the basis of alleged violations of the lease before the Chapter XI petition was filed or on the basis of alleged violations of the lease subsequent to the filing of the Chapter XI; or upon any combination of such factors. On the other hand, Bohack disaffirmed many of the leases, almost 100 of them, on the basis that they were onerous and burdensome to the estate of the debtor. In this regard, factual hearings were held on many of these cases, briefs were written on every one and the bankruptcy judge was constantly forced to balance equities between the creditors and the debtor. Similarly, sometimes Bohack would attempt to terminate a sublease on the grounds that it was unprofitable to it, or on the grounds that it was burdensome to it, or on the grounds that it was seeking to terminate the prime lease to which the sublease was subject and which might result in an award of damages to the subtenant. Many of the subtenants wanted to keep those leases and fought the termination from that end. On the other hand, some sublessees wanted to terminate their leases by virtue of their feeling that they could make a better deal with the landlord, and brought actions to pursue that end. Again,

each one required a presentation of fact, writing of briefs and the eventual adjudication of both fact and law by the bankruptcy judge.

It should be noted that at the time these proceedings commenced, in August and September of 1974, the law with respect to termination of leases was in a state of flux as a result of the Queens Boulevard and Overmyer decisions, in which it had been held for the first time that under certain equitable circumstances, a landlord could be estopped from invoking the bankruptcy termination clauses in leases with debtors-in-possession. As a result thereof the Bankruptcy Court, again without the aid of a law secretary or adequate library, was required to interpret these new Court of Appeals cases and to make exhaustive inquiry into the facts of each termination proceeding in the Bohack case for the purpose of applying the standards set forth in those Court of Appeals cases. Obviously, there was no tried and true formula which could be applied and thus, each case was in effect a full plenary trial, although brought in the form of motion or application to the court.

The right of a reclaiming creditor under the Uniform Commercial Code similarly presented both an immediate peril to the survival of the debtor and a tremendous problem for the Court in analyzing and determining legal issues of great significance and difficulty. Under the provisions of the Uniform Commercial Code, a creditor shipping goods to a bankrupt, or insolvent, purchaser was entitled to reclaim those goods and obtain physical possession of them depending on compliance with certain guidelines set forth in the code. Some Federal Courts had held that inasmuch as those provisions of the Uniform Commercial Code were inimical to the interest of the debtor in a reorganization proceeding, they could not be applied and that the Bankruptcy Court should stay any attempts to reclaim the goods. Other Federal Courts had ruled directly contrary. In approximately 25 to 35 situations, the suppliers of goods attempted to reclaim them from Bohack. They both attempted to physically reclaim and brought on reclamation proceedings in the Bankruptcy Court. The Bankruptcy Court was then required to make a general rule with respect to the potential of reclamation, was required to determine whether the claimants had complied with the provisions of the Uniform Commercial Code and was required to balance the equities pursuant to the Bankruptcy Act. Again, without staff, the court was required to decide almost immediately issues of great difficulty and importance.

Similarly, much of Bohack's trade fixtures and equipment was leased from major lessors. Immediately after the filing, some of the lessors moved to foreclose their security interests on the basis of the Debtor's default under the leases. The Court again had to deal with this thorny issue in regard to leases covering equipment worth almost \$5,000,000 on an immediate, emergency basis.

A third major area with which the court had to deal was labor relations. In fact, due to the contraction of the debtor's business, Bohack shut down in successive stages its warehousing and trucking operations. In November of 1974 it started to close down the warehousing operations and eventually, in July of 1975, completely terminated those operations and turned to wholesalers or other supermarket chains' with warehousing facilities in excess of those needed by the respective chains' retail outlets to act as purchasing agents and distributors. As a direct result of that method of doing business, Bohack was forced to make successive lay-offs of its warehousemen and teamsters so that by the end of July, 1975, there were no longer any such employees working for the corporation. Obviously, that course of conduct involved complicated negotiations and litigation with respect to the various issues that arose as a result. Two of the more prominent which come immediately to mind and which reached the Court of Appeals, are the issues of severance pay and the right to arbitrate under a rejected bargaining agreement.

In the first instance, warehousemen claimed the right to severance pay as an administration expense by virtue of the fact that their jobs were terminated during the pendency of the Chapter XI Proceeding. The Bankruptcy Court intensively investigated the issue and found itself bound by a Second Circuit case called *In the Matter of Straus-Duparquet*. At the same time another Bankruptcy Court in the First Circuit reached an opposite conclusion, which was eventually sustained by the First Circuit Court of Appeals. Bohack, being bound by the Second Circuit decision, applied for certiorari to the Supreme Court and was denied that review by a 6 to 3 vote. Notwithstanding the fact that the First Circuit came down with an opposite conclusion subsequent to that application for certiorari, we were denied certiorari upon our application for rehearing. It seems

to me that this particular result points out in emphatic form the need for specialists in bankruptcy to sit in judgment of such matters with the full authority and ability to act that is necessary to give weight to the decisions they render. Parallel cases in different circuits resulted in diametrically opposing decisions, and, I suggest, that one reason for that is that in all candor the opinions of the Bankruptcy Judges sitting as they are required to do now, are cavalierly dismissed by higher courts. If, in fact, the Bankruptcy Judges had the status and prestige to which they are entitled, their views would be considered more gravely and given more weight. There is no question that in my mind the First Circuit opinion which gave great weight to the policy factors involved was correct; however, the Second Circuit would not reconsider its own previous decision and with all due respect, I suggest that possibly the lack of familiarity with the practical problems of the administration of a bankruptcy case and the refusal to heed the views of its Bankruptcy Judges is one reason for that refusal to review.

The next major labor issue was the right of the court to enjoin a strike which was brought on by the debtor's laying off of the teamsters it employed and its application for rejection of the teamsters' contract. It is very difficult to go into the complex nature of the particular case involved at this time, but again, the particular case we are speaking of, *Bohack v. Local 807*, points out in two particular areas the need for the expanded jurisdiction of the Bankruptcy Court. The first, of course, is that the Bankruptcy Court was held to be without power to enjoin a strike under the Taft-Hartley Act notwithstanding the Supreme Court's decision in *Boys Market* or any other holding of substantive law. The District Court found that only a District Court could enjoin a strike, regardless of the merits and that the Bankruptcy Judge did not have that power as an adjunct of the District Court. Obviously, if the Bankruptcy Court was sitting on a bench that had the same status, prestige and power as the District Court, the issue of jurisdiction would never have arisen, and it would have saved the court, the litigants and the Appellate Courts a great deal of time and effort, not to mention the fact that the injunction at that time probably saved the company's very existence.

Moreover, the basic legal position of the Union with respect to its right to strike was that the strike was legal in that Bohack refused to comply with an arbitration award that was made by a local joint council upon submission to the Union. Obviously, the right of the Bankruptcy Judge to review the arbitration awards was being challenged. In the first place, the arbitration was held in contravention of the Bankruptcy Act itself and secondly, it was improper, we submit, under the terms of the collective bargaining agreement at issue. If the Bankruptcy Court was endowed with the jurisdiction and power it needs to properly administer bankruptcy cases, obviously the issue of arbitration would have been before the court in the first instance, not the State Court in which the Union sought to initially confirm the arbitration award, and much of the furor and resulting walk out that ensued could have been averted. By virtue of the fragmentation of jurisdiction and authority, however, the Bankruptcy Court was faced with a situation in which it was compelled to act in a manner higher Courts ultimately found to be not sanctioned by Federal Labor Laws, in order to give the company any chance of surviving. The policy conflict between the Bankruptcy Act and the Norris-LaGuardia Act is still a question of great difficulty and is being resolved in Appellate Courts throughout the country.

In this regard, it should be noted that the right of a debtor-in-possession to reject an executory labor agreement is still the subject of great scrutiny by the Bankruptcy Court. The *Kerrin-Steel* case was decided shortly before the rejection of the contract with the teamsters by Bohack, and once again the Bankruptcy Court was forced to determine difficult issues of law and fact, even though those issues were pinpointed by the Second Circuit Court of Appeals in remanding the rejection issue to the Bankruptcy Judge in its opinion on the appeal from the order of the District Court which eventually granted the injunction against the strike to which I have previously referred. The difficulty which arises as the result of fragmentation of jurisdiction and authority is pointed out by this case, inasmuch as a rejection hearing was held and again there was an extra cost to the litigants and the judicial system by virtue of the fact that the rejection which had to be eventually reviewed by the Court of Appeals had to be first reviewed in an intermediate appeal by the District Court. By the time the Second Circuit reviewed the case and wrote its opinion remanding for a hearing on the issue of rejection, a rejection hearing had already been heard and decided by the Bankruptcy Judge. It seems to me absurd that such procedure was required, but under

the present act, it is. It would make much more sense, I submit, for a Bankruptcy Court, sitting in position of equal authority and status of the District Court, to have its judgments and orders reviewed directly by the Circuit Court of Appeals. As long as there was an absolute right to go to the Court of Appeals, the intermediate step of appeal to the District Court was a futile and expensive act.

I have outlined above three major areas of concern which any large corporate debtor would force upon a Bankruptcy Court by the filing of the Chapter XI Petition. Before going on to generalizations about the legislation before this Committee, I would like to refer briefly to other issues which have arisen, and although they may be extraordinary and applicable to Bohack in particular they may be helpful with reference to the issues of jurisdiction in the Bankruptcy Court.

One interesting issue was the attempt by the New York State Sales Tax Commission to enforce a claim for alleged Sales Tax deficiency of \$2,000,000.00. That was a concededly arbitrary figure, and in order to assess any claim, thousands of items will have to be reviewed by accountants. The only alternatives open to the debtor are to present this burdensome task to the understaffed Bankruptcy Court or to go into the obviously unfriendly forum of the Sales Tax Commission. An adequate facility in the Bankruptcy Court would be the best solution, of course.

Another issue of great significance in respect of the Court's ancillary jurisdiction arose when an auctioneer deliberately conducted an auction of the debtor's property in violation of a restraining order issued by the Bankruptcy Judge. Knowing that the contempt power of the Bankruptcy Judge is presently limited to a fine of \$250.00, the auctioneer said, "I've done this before and I haven't gone to jail yet".

Still another issue relates to the right of the New York City Human Rights Commission to seek an affirmative action program of hiring at a time when Bohack was laying off hundred of employees. Although the debtor consented to a lifting of the stay of suits to negotiate this matter, obviously to allow decisions on personnel practices by another forum would be a grave constraint on the ability of the Bankruptcy Court to oversee the proposed rehabilitation of the Company.

One grave issue that the Bankruptcy Court is without the necessary power to deal with, is review of claims of illegal pricing schemes of various suppliers. Thus, from time to time, there have arisen during the pendency of Bohack's Chapter XI Proceeding, claims that various suppliers have engaged in price discrimination schemes, price fixing schemes and other unlawful conspiracies and restraints of trade. In each case where Bohack sought redress from the Bankruptcy Court, the jurisdiction of the Court was challenged by the putative wrongdoer. Bohack was, thus, forced to institute plenary suits in other forums, or to compromise those claims rather than institute expensive and lengthy litigation. One matter, in fact, which is now pending in the District Court in the Eastern District of New York is a claim against a major meat packer for price discrimination. The allegations of the complaint indicate that not only did the discrimination exist before The Bohack Corporation filed its Chapter XI Proceeding, but that the discriminatory pricing scheme continued after the filing of the petition. Regardless of the merits of the claim, it is obvious that something that so effects the administration of the estate should be the subject of litigation in the Bankruptcy Court so the Bankruptcy Judge would at least have the power to set the priorities of the schedule determining issues, regardless of their eventual outcome. It should be noted that in Bohack's business, the supermarket business, obviously the day to day relations between the company and its suppliers is of paramount importance of its ability to rehabilitate itself, and any litigation relating to that paramount relationship should be determined by the court that has at least nominally exclusive jurisdiction of the assets of the debtor and actual supervision of its operations. Where those assets consist of choses in action, those too should be within the exclusive jurisdiction of the Bankruptcy Court.

A second major litigation that is now being maintained by Bohack is against a large conglomerate, of which Bohack was considered a subsidiary, and the individual who was Bohack's largest single shareholder. It is alleged that the actions of these two defendants and others contributed to and in large part caused directly the filing of the Chapter XI Petition. The Bankruptcy Act gives the Bankruptcy Court the right to inquire into the causes of the filing of the petition, but it does not give the Bankruptcy Court the power to make an ad-

judication of potential fault or liability as a result of that inquiry. Obviously, there can be no more unnecessary fragmentation of jurisdiction than to conduct an extensive investigation in the Bankruptcy Court under its jurisdiction and supervision, and then, depending on the results of that investigation, embark upon litigation in another forum without regard to the investigation that has already been conducted, and the results thereof.

Needless to say, in addition to the kinds of issues we have had to deal with as outlined above, the Bankruptcy Court was forced to decide many other issues which arise in the ordinary course of commerce and which are commonplace in the administration of a Chapter XI Proceeding. Rights of parties with tort claims, both pre and post filing, are litigated; Bohack's real estate operations both as tenant and landlord come into focus as a result of disputes over leases, and summary proceedings which have to be brought in various other courts with the permission of the Bankruptcy Judge; claims for administration expenses by suppliers during the pendency of the Chapter XI Proceeding are met on a regular basis; federal and state regulatory agencies and taxing authorities make their claims, which must be dealt with under basic premises of constitutional and statutory law and, of course, we must not forget, claims of various stockholders and debenture holders will be reviewed. Finally, in respect to the kinds of issues we refer to above, a large banking institution in the City of New York was the largest creditor of Bohack, both prior to the filing of the Chapter XI Petition and during the pendency of the proceedings. It made substantial advances since the filing of the Chapter XI and claims a secured interest in most of the assets of the debtor for advances made prior to the filing of the Chapter XI. Obviously, the Bankruptcy Judge will be faced with grave issues of the validity of the liens of the bank with respect to pre-Chapter XI debts, the right of the bank to recover sums as administration expenses for the advances made during the pendency of the Chapter XI, as well as the ordinary bankruptcy issues of priority of claims with respect to administration expenses and general unsecured debts for both pre and post filing obligations of the debtor.

This, of course, ignores the mammoth job that will fall upon the Bankruptcy Court in determining the objections to claims that will be filed by the debtor and which will involve substantial evidentiary hearings. Inasmuch as there are several thousand creditors with many millions of dollars worth of claims, it can be safely assumed that if the Plan of arrangement is confirmed and funded, the Bankruptcy Judge will be faced with a substantial amount of litigation on objection to claims which he will have to decide on the merits with respect to both legal and factual issues.

From the foregoing, it can be seen that to devolve all of the responsibility of determining the merits of a reorganization proceeding of this magnitude upon the Bankruptcy Judge, without giving him the power, jurisdiction, status, authority and staff he needs to do the job, presents the gravest difficulties. It has been suggested by some that the problem can be safely ignored by statistical analysis indicating that very few Chapter XI Proceedings in effect work, to the extent that Plans of Arrangement are composed, accepted and confirmed. However, this argument that the reorganization of the Bankruptcy Court would not really affect Chapter XI proceedings is fallacious, because it ignores the direct cause and effect relationship between the inadequacies in the present structure and the inability in large measure to meet the aims and goals of the Bankruptcy Act to rehabilitate the debtor. I might note as an aside that in the Eastern District of New York in the Queens Division, Chapter XI Proceedings result in confirmed Plans of Arrangement at the rate of approximately 70 percent of all plans filed.

The purpose of the reorganization of the Bankruptcy Courts is not to rely on the energy and ability of a particular Bankruptcy Judge, however, but to establish a structure whereby all members of the judiciary who sit in the Bankruptcy Court have the jurisdiction and staff to see that justice and equity can be carried out in bankruptcy proceedings. It is with some surprise that I view the opposition of the Judicial Conference, and more particularly the District Court Judge, to a restructuring which would create a court of significant status and prestige. Time and again, although not in this case, I have encountered District Court Judges who view Bankruptcy Law as some occult discipline with which they would rather not be bothered. I am surprised that they would want to keep the Bankruptcy Court as an adjunct of the District Court because by virtue of the very structure, including the limited powers of the

Bankruptcy Judge and the intermediate appeal process, they are faced with the issues that routinely arise in bankruptcy matters and are compelled to pass upon them without either the expertise or, in candor, the interest in determining those issues that the issues deserve. In my view, the concept of a subservient judiciary is outmoded, and totally inconsistent with contemporary views of court reorganization. The waste of time and money occasioned by a separate and unequal branch of the judiciary is much greater than the funds needed to properly staff a Court with new jurisdiction.

I believe that the passage of HR 8200 would be a significant step in advancing the cause of justice as it relates to the Bankruptcy Act in an increasingly complex commercial world. Bankruptcy Law is in some respects a specialty, but by nature of the complex commercial relationships that develop between the commercial debtor and its various creditors and others with whom the debtor does business, virtually every other aspect of commercial law is involved in a bankruptcy proceeding both as to the jurisdiction of the court and as to the merits of the various controversies that come before it. One need hardly be a professional economist to recognize the ripple effect of a large Chapter XI proceeding, and the impact on the surrounding geo-political community.

The distinction between summary and plenary jurisdiction of the Bankruptcy Court is an artificial one and should be ended. Hearings on matters affecting the property and assets of the bankrupt or the debtor should be held in the Bankruptcy Court by the Bankruptcy Judge. Ideally, there could be a special trial part to hear plenary trials, but that part should be within the enlarged jurisdiction of the Bankruptcy Court. The Bankruptcy Judge should serve as true judge; not as a quasi-judicial officer more concerned with administrative detail and functions than with the determination of legal and equitable issues.

The Bankruptcy Court should be afforded the staff and the facilities to physically do the job that is required of it. The judge should be afforded the prestige and status of any other judicial officer in the federal judiciary, so that intermediate appeals which are superfluous in practical effect would become superfluous in law, and so that Courts of Appeals would view the judge as more than a hearing officer or magistrate. I submit to this committee that some of the Bankruptcy Judges who sit are as learned in the law as any District Court Judges in the country. The questions of tenure do not really affect the practical application of bankruptcy law, but they do affect the kind of judges who sit on the bench, and affect the litigants and their counsel insofar as they wish to see on the bench judges in every way as qualified as any other federal or state judicial officer. Again, as I started before early in my remarks, I do not come here as one learned in court organization or in the field of restructuring of the federal judiciary. I come here as a practicing attorney with practical knowledge of the way the Bankruptcy Courts work, at least in the New York Metropolitan area, and feel that the restructuring proposed by HR 8200 would go a long way towards making the practice of Bankruptcy Law and the result thereof to the participants more equitable, more practical and more within the ambit of the goals of the Bankruptcy Act.

As an aside I would like to point out that although my practice is basically in the New York area, I have had occasion to appear in Bankruptcy Courts throughout the country including one in the Southern Division of the Western District of Missouri.

Although there the setting and the application of the law are both in stark contrast, in terms of style, to the large urban areas, from my experience there I can report to you that the basic problems are the same. Substantial issues of law and fact must be decided by judges without the staff or the time to adequately explore those issues. In fact I have found in some courts that rather than decide these issues without the proper facilities for doing so, there is a tendency to ignore and almost bury those difficult proceedings in the hopes that they will eventually go away with the eventual termination, whether successful or not of the Bankruptcy proceeding. In any event, suffice it to say that a restructuring of the courts on a national basis will be a boon to all areas of the country.

I would like to address myself briefly to the divorce of the administrative and judicial functions of the Bankruptcy Court. The proposal for the creation of the office of the United States Trustee seems to me to be a sound one. The basic problems from a practical point of view are two. First, the administrative

functions take away from the time the court needs to adequately perform the judicial duties assigned to it. Secondly, litigating attorneys in one bankruptcy proceeding are often trustees in another. It seems to me that the Bankruptcy Court should not be burdened by having to choose between litigating attorneys for appointments to serve as officers of the court. That would be best left to another party.

I might add as a footnote one of the more interesting examples of a combination of a judicial and administrative function, although the success thereof might conceivably militate against my argument as to the desirability of separation. When Bohack, pursuant to the order of the Court, liquidated its store operations, it endeavored to sell its remaining 59 store locations to marshal the assets of the corporation. Judge Parente acted as the actual auctioneer using the large courtroom of the Eastern District Court. Through his efforts, he was able to obtain bids of almost \$12,000,000 and virtually every bid was brought to a successful conclusion in terms of actual closing of each sale of a store. Additionally the judge obtained beyond the actual cash realized the assumption to the successful purchasers of several million dollars of obligations owned by Bohack. Although the Bankruptcy Judge performed an essential service for the estate of the debtor and its general creditors by realizing those assets, it would seem to me that a true judicial officer should not have to be placed in the position of acting as a supermarket auctioneer. Thus, a separation of the judicial and administrative functions is most desirable in my view.

In conclusion, I hope that my presentation today has been of help to the Committee in viewing the proposal before it from the point of view of the practicing attorney in the Bankruptcy Court. Although, I have essentially given the anatomy of a large Chapter XI Proceeding as it relates to the issues before this committee, I would respectfully suggest that general conclusions can adequately be drawn from our experience. I urge passage of HR8200 in the form introduced by Mr. Edwards, as the best pending proposal for reorganization of the Bankruptcy Court. Thank you for your attention to my views on this matter.

**TESTIMONY OF J. STANLEY SHAW, ESQ., LONG ISLAND, N.Y.,  
ACCOMPANIED BY JESSE I. LEVINE, ESQ., LONG ISLAND, N.Y.**

Mr. SHAW. Thank you, Mr. Chairman.

Initially, let me say that I thank the chairman and the members of the committee for inviting me here today with my partner, Mr. Jesse I. Levine, for the purposes of giving you some insight into the experiences that we have had in a major bankruptcy in the New York area and how those experiences relate to the position that we're taking today, that this country, if you will, needs an independent bankruptcy court, with an expanded staff and expanded jurisdiction.

Now, I will devote my time to that issue and give you some of my experiences.

I will ask my partner, Mr. Levine, to take on the question of the appellate structures that exist today in the bankruptcy court and the proposals in H.R. 8200.

But before I do, I wonder whether, Mr. Chairman, you could grant me the privilege of just in a short, brief moment alluding to some of the statements that Judge Rifkind made, because they are fresh in my mind.

The position taken by the American College of Trial Lawyers and others throughout this country appears to me to concern itself not with the substantive question of, Can we and must we have a bankruptcy system of law that is proper for the economic structure of this country? Rather, I believe that the position taken by those people who are against H.R. 8200 on the question, should be bankruptcy judges—and I say "judges"—receive lifetime tenure as an article III court?

And I think what bothers me most of all is that they're saying that somehow, if it is an article III court and judge, an independent court, it will somehow minimize the significance and prestige of our district court judges.

Let me say this. There is no finer bench in the world than our district court judges today, and I submit that nothing could be done in any way to demean or to take away that stature and prestige that our district court judges have.

And I think what we are bordering on is a little bit of petty politics, respectfully—politics between the people now in the temple and the people who feel that they are doing justifiably, in coming forth and pronouncing a law which today by virtue of our economic conditions is a necessity.

The Bankruptcy Courts are specialized courts today. No one can take it away from them. It's a specialized court by virtue of the system we have in this country.

Our economy is based on credit. The foundation of every business and of every consumer transaction is based on credit.

The natural phenomenon, as we say, is that with credit goes insolvency, and as a result of the insolvency we have now created a monster, if you will, that the Bankruptcy Court now needs independence; it now needs, as proved, an expanded staff, which it doesn't have; and it now needs the expanded jurisdiction.

Now, if you want to make them article I or article III courts, I don't think that's the question. I think the question is, The bankruptcy system that we have today, can we put it in the right posture?

And now I will return, if I may, to what I have found in my experiences in 3½ years total on the firing line in a major bankruptcy case, not by way of reading the decisions but by way of making them. And we have devoted 90 percent and more of our time to that bankruptcy case.

The case is the Bohack Corp. (E.D. N.Y. 74B933). It's a super-market chain in New York, and at one time, I might say, it was one of the top two in the State of New York.

In that case 4,500 employees were involved.

In that case in excess of \$60 million in unsecured creditors were involved—and I venture to guess today it's probably \$85 to \$90 million—not only secured creditors but creditors of all sorts, amounting to probably 3,000 or more.

Now, if we can imagine the ripple effect of this chapter XI, not only on the banks who support by way of credit those creditors who are involved with Bohack, not only the individuals who were involved with loss of jobs and the natural increment to our social security and unemployment funds, but now the pension guarantee fund under ERISA, that has to pick up the entire pension of all these people, it boggles the mind to believe what has happened as a result of a significantly large chapter XI in the State of New York.

Now, being on the firing line every day for 3½ years or more I could tell you that the bankruptcy court that I appear with and before—and I might add, Mr. Chairman, I have been to the bankruptcy court in your State; I have been to the bankruptcy court in California; and I've been in New Jersey and—well, Missouri isn't even the chair-

man's—the chairman's is California. Excuse me. I guess Mr. Volkmer, Congressman Volkmer, is from Missouri. I have been there. Our firm has been representing creditors, not the debtor in possession in those cases.

That experience has brought me to where I am today, and I come to you today not as a member of a specialized bar—I must admit that I'm a trial lawyer and proud of it—but backed into a chapter XI proceeding, so I can give you objectively how I feel the proceedings in that bankruptcy court have gone on, what the deficits are, and what the pluses are; because I'm not a member of the so-called bankruptcy bar—some have called it the bankruptcy ring—and I believe that I can bring you candidly the experiences and show you how I reflect on them, how I feel about them.

That chapter XI is still going on today. That chapter XI is an enormous amount of legal work. It has touched every incident of law.

It has found itself involved in labor relations. It has found itself involved with the rights of employees.

In excess of 500 adversary proceedings were started in that bankruptcy court either by myself and my firm or by various creditors—120 of those have gone to trial, a full trial; 25 major truncated trials took months of completion, months. And I might add that as a result of the fact that we could not get due process—and I say this in reference to time—both litigants on the plaintiff's side or the defendant's side were disposed to settlement because there was not an opportunity for full trial where all views could be disposed of. It must be truncated. And without a special trial term in a bankruptcy court, you will not have true due process.

I will hope that if H.R. 8200 becomes the law, that there will be a trial term for bankruptcy judges.

Now, 120 trials were fractionalized, absolutely fractionalized. It took time for the judge to come back to the issues at hand.

Now, these trials and these adversary proceedings were important ones.

To give you some idea of what has come about, under the Uniform Commercial Code we have reclamation proceedings. Those reclamation proceedings, as you know, deal with the delivery of goods within 10 days of the filing of chapter XI. And in this retail business, food was the living; meat was the living.

I refer in my report, Mr. Chairman, which I believe I'd like to have made as a part of this record, to a \$900,000 claim by Missouri Beef man seeking the return of its meat. And I tell you, that U.C.C. 2-702 cases in reclamation is in a State of hiatus. Not only was the statute ambiguous, but the case law has not even been consistent on it.

As a result of that, rather than hold hundreds of hearings for the determination of major issues in the 2-702 cases, I felt it was in the best interest of the estate, in order to come to get a certified plan, for the first time known to me to include reclamation creditors in the plan arrangement as a separate class. And that was done.

I think it was done as a compromise position, principally and primarily because they would never, never have been able to reach the conclusion of who was right in the reclamation proceeding, whether it be the person who was delivering the goods or whether it be the debtor in that case.

Now, we have gone further into other areas of law.

On jurisdiction alone, if you want delay in the bankruptcy court, the byword is, file a motion and contest the jurisdiction of the court. Everything stops. The red lights go up. And the hearing must be held on jurisdiction.

And then after you hold the hearing, it could readily be appealed.

Jurisdiction itself is a major issue in the bankruptcy court. One example—and it is interesting and befitting that I tell this body of this experience.

Under Bankruptcy Rule 205, the bankruptcy judge, the debtor in possession, and the creditors have a right to examine anyone on any question relating to the filing of the petition. They do examine and they have examined. And then when they find what the cause is, and if there is a cause which is actionable, we're relegated to a plenary suit in the State court. And I tell you now, gentlemen, there is one pending.

And it's interesting, as I just told Judge Rifkind when we walked into the chambers here, that I am involved in a case where—it's a major matter—that Judge Rifkind's firm is representing the defendant on what we allege to be the cause of the filing of the chapter XI.

Now, had we had the broad jurisdictional power and had we had the separate trial term of the bankruptcy court, that issue—how important it was—could have been decided speedily. And that's the byword of any chapter XI, because if you don't have speed, you don't have efficiency; and if you don't have efficiency, you have frustration; and if you have frustration, then you come to a straight bankruptcy where there's liquidation.

And the basic principle of trying to rehabilitate a company is thrown out the window.

Now, to that end, let me tell you that when we speak of demeanor and respect of the bankruptcy court, one experience comes to mind, and this is where I got an order to show cause signed by the bankruptcy judge to stay a sale of the debtor's property that was going to take place the following morning, and there we served the auctioneer with the restraining order not to go forward with that sale.

For whatever reason, best known to him, that auctioneer decided to go forward with the sale.

At the hearing when I moved to hold him in contempt before the bankruptcy judge, he said, and I quote—and it is in my statement—“I have done this before, and I haven't gone to jail yet.”

That is the way the bankruptcy court is thought of, if you will, by the auctioneers approved by the District Court judges and by the people who know bankruptcy court.

Now, that is a very strange phenomenon, because as we have it now, the contempt jurisdiction of the bankruptcy judge is merely to fine \$250 or refer it, if you will, to the district court for further proceedings. And I must say that we've had a further proceeding in that court which dealt with the position of a bankruptcy lawyer in buying claims. That matter is still in the district court today. It was referred to them; the hearing was held; he took the fifth amendment, and we haven't had a disposition yet.

Now, other cases which would make it impossible on the jurisdictional level for this bankruptcy court to handle this chapter XI, the

New York State Sales Tax Commission filed an administrative claim and filed a priority claim for prechapter XI in excess of \$3 million. The success or failure of the chapter XI will depend largely on whether that is or is not a valid claim, and to the extent of its priority. There are over 30,000 items in the claim which must be reviewed.

Now, do we review it in the bankruptcy court?

Gentlemen, respectfully, there wouldn't be one tenth of one percent of the time to go through expert testimony and review on an adversary proceeding each one of the items and whether or not the debtor did in fact pay the sales tax as he should have or collect it from the purchasing of goods.

We had hearings with respect to civil rights in hiring practices in New York City. We had to defer. I asked the judge to defer to the Human Rights Commission, and we were fixed in their bailiwick. It belonged in the bankruptcy court. It's part of the bankruptcy case, which employees are to be laid off or retained.

There are on file now close to 3,500—near 4,000—claims which must be reviewed individually because the determination of how much is paid out and the deposit that has to be put down when and if Bohack is confirmed will be determined on the validity and the priority of each one of these claims.

Now, it's significant that the district court judges spend no more than 1 percent of their time on bankruptcy matters.

The district court judges, we have found—and I say it most respectfully—neither have the inclination nor the desire to familiarize themselves and become experts in bankruptcy law.

Now, I have a matter here, Mr. Chairman, which is a decision of the bankruptcy judge, 16-page decision, a very detailed decision, with respect to the constitutionality and the right of sovereignty of the State of New York, of the right of the debtor to disgorge from the State, if he will, as a preference to the State, various dollars collected by the State, and it went into all of the fundamental questions involved in that particular hearing, after a trial.

Subsequent to that, after the hearing, there's a written, two-paragraph decision which says, and I must quote it—it says that "we want to avoid the serious constitutional problems."

Now, this disturbs me, because the judge, the district judge, in this case, is an outstanding member of the judiciary, a man that we can be well proud of, and yet if he found that this is the way he decided to handle a major bankruptcy matter, I am concerned and troubled, because I don't believe that the district court judges have either the time or inclination. The docket's been so heavy and, as pointed out in your report, with respect to the criminal dispositions they must make under the Speedy Trial Act, I am concerned that they give bankruptcy the time that it requires. Forget about a formal decision, but a handwritten decision conceivably made off the bench is something that leaves a lot to be desired.

And I point that out not in criticism, but I point it out in that this is the frame of mind of reference of the district judge.

Now, that is not completely the case, and I will grant you that. But when a fine district judge such as this did it this way, I am very troubled, because if his workload and backlog reveals that he must handle it this way, it becomes disturbing to the bankruptcy court.

May I say that the prompt disposition of a chapter XI proceeding is the byword of any possible rehabilitation of any company in chapter XI, and I have found, frustratingly so, that the total amount of the work and the staff or lack of staff (the judge that I appeared before never even had a library, used voluntary people to go to the Fordham Library, which is approximately an hour away), the facilities that he had when this chapter was started would make you cringe.

I have related in my testimony that is part of the record of the possible muggings that existed amongst clerks. That may be something that is peculiar to that area where he had his offices and where he had the court, but I must tell you that the demeanor was reduced. I think judicial temperament was there. And I was there the first day when hundreds and hundreds of people came to the first meeting of creditors, and if that is the public relations that we have to give out on bankruptcy law and judges, I think we've failed miserably, particularly in that area.

The improvement of staff and the expansion of jurisdiction and the improvement of the facilities of where the bankruptcy judge holds trial is of vital importance to hold the dignity and respect that our courts need and want.

The current system, I believe, is totally insufficient. It denies due process to all litigants, not only the debtor in possession, requiring us to try to compromise matters where maybe we should not compromise because there isn't enough time, because we will be dead before that is litigated. And I must know in order to propose a plan to my clients and to the creditors of this company what will be the eventual obligations—administrative claims, priority claims, and unsecured claims. And in order to do that, we would not have enough time of the day or of the year.

Now, the importance of the bankruptcy court has been brought to fore only yesterday, by yesterday's news, and I add that we are hopefully not on the threshold of a major bankruptcy of the City of New York.

Now, I say that advisedly, and hopefully I will not see it come to pass. We must prepare this court, the bankruptcy court, with facilities, with jurisdiction, and with men and women who are capable and able to handle the strenuous load that has now come about. Major companies have gone into chapter XI—and I'm talking about United Merchants Co.; I'm talking about the Bohack, Unishops in New York, Grant's in New York, and that's just scratching the surface. It is getting bigger because of the economic problems that this country has today.

The concomitant is that there will be chapter XI's.

Now, chapter XI is on the books to be successful, to rehabilitate in a speedy and orderly manner, and if we allow the bankruptcy court as it now exists to be frustrated, to be ineffective, in my view, then as a result of that we shall be going against the direction and the spirit of what is in the chapter XI act.

For these reasons I fully support—wholeheartedly, Mr. Chairman and members of the committee—H.R. 8200, and I leave to you the question of article III, article I courts, or otherwise. I don't think that is the issue that is so germane. I think that can be decided by court re-

formers, by people who are knowledgeable and expert in the field, and I leave it to them.

But I say that you cannot allow this court to be demeaned any further than it is by way of an auctioneer, by way of its facilities, by a lack of staff, a lack of ability to function properly.

Now I leave to my partner, Mr. Levine, the position with regard to the now appellate structure in the Bankruptcy Act.

Mr. Chairman, this is Mr. Jesse I. Levine.

Mr. EDWARDS. Mr. Levine, you are recognized.

Mr. LEVINE. Thank you.

I would like to address myself to two issues. One is the divorce between the judicial and administrative functions of the bankruptcy court and the second is appellate structure. I think I'd like to take them in that order now because Judge Rifkind's testimony posed some important issues.

There is now a specialized bankruptcy court.

I think anybody who's been in one recently must recognize the fact that a bankruptcy practice in a metropolitan area is a specialized practice, to a certain extent.

There is indeed a bankruptcy bar. Stanley indicated before that we were not members of it, and I'd like to point out that when we filed the Bohack chapter XI, one of the big issues was, who are these guys, and how did they get the case—or how did so-and-so get the case?

OK, we happened to be there. We represented Bohack as litigators prior to that, and that's the way things worked out. But that was a very real concern—why are these people who are not members of the bar—the bankruptcy club, so to speak—representing this large debtor in chapter XI?

I think the concept of the U.S. trustee is a good one, and it will help solve that practical difficulty. I don't see it appropriate for a bankruptcy judge who has to decide between opposing adversaries in one case to be appointing one of them as a trustee in another case. I think that burden should be taken from both the district court judges and the bankruptcy judges. No matter who eventually has the power of appointment is irrelevant. I don't think it should come from the court. It should come from the Department of Justice.

I think more than just the question of trusteeship should be divorced from the judicial function of the bankruptcy court judge, that virtually all of the administrative function should be given insofar as possible to an agency other than the bankruptcy judge.

The clerk's office should be able to tabulate claims. The clerk's office should be able to review all claims as to form, et cetera. But none of that should be under the direct supervision of the bankruptcy judge. He should be a true judicial officer.

Another issue that was posed by Judge Rifkind's testimony is the question of the broad scope of matters that comes before a bankruptcy court.

I think we agree on the basic premise and reach opposite conclusions.

It would seem to me that this broad scope of issues mandates an enlarged court with an enlarged jurisdiction and the capability to physically and intellectually handle these issues.

As a practical matter, in the prepared statement of Mr. Shaw which he submitted to the committee, we have given a parade of horrors, in effect—not that the cases or the results were that horrible, but horrors in the sense that you have an accumulation of major issues of a law of varying degrees of difficulty and varying degrees of intensity with respect to the type of business that has filed a petition for reorganization, and have shown how that places a tremendous burden on the bankruptcy judge.

There has never been a suggestion, as far as I known, in my practice before bankruptcy courts and the district courts that district court judges assume much more of this burden. In fact, most of the attitude that I have encountered is, let the bankruptcy judge's decision be handled on review. I pass it though to the court of appeals.

But, basically, what you have is a disinclination of the district court judge to get involved in those matters and a requirement that the bankruptcy judge does.

And I want to zero in on the appellate structure.

Now, there is a specialized bankruptcy law, and it arises in two ways. The issue of jurisdiction in and of itself is a specialty of bankruptcy law. Most of the litigation we have involves a threshold issue of which forum does this particular case belong in.

Now, if you have clearly established that the bankruptcy court does have jurisdiction over all the assets of the debtor, and those debtors' assets consist of choices in action, claims, and any other intangible, as well as its physical property, very simply, you have cut the Gordian knot. You have eliminated more than half of the litigation that we have to get involved with because you eliminate the jurisdictional questions that a bankruptcy judge is faced with in every instance, whether as a tactical ploy brought on by a litigator or as a substantive issue. Then the bankruptcy judge can be faced with those substantive issues and can use a hopefully expanded staff and library to meet those issues and decide them on their merits without getting entangled in these other conceptual considerations of, does this man belong in a State court, and does he belong in this court, does he belong in the district court.

Now, in terms of the appellate process. I'd like to address myself to one of the matters we handled. It's particularly instructive.

As a result of the contraction of its business, Bohack reduced and finally eliminated its warehousing and trucking operations, and turned to wholesalers and other regional supermarket chains to act as suppliers. As a result, in successive stages it laid off the Teamsters, who were doing the driving for Bohack.

The Teamsters obtained an arbitration award from their joint local council that prohibited what Bohack was doing.

When the last Teamsters were finally laid off, Bohack moved to reject the executory labor contract.

At that point the Teamsters sought to enforce the arbitration award and went out on strike, claiming that they had the right to strike, notwithstanding provisions of the contract, because they were seeking to enforce a valid arbitration contract.

The bankruptcy judge issued a TRO, then a preliminary injunction against the strike.

Now, as we subsequently found out 6, 8, to 10 months later, the bankruptcy judge had no right to issue that because only the district court judge had the right to grant that injunction, which he did on review, but he did it in the appellate process.

Now, in the first place, if the bankruptcy court judge had concomitant jurisdiction with the district court judge, there would have been no question as to whether he had the power to issue a preliminary injunction against a walkout based on a collective bargaining agreement.

Second, if the archaic intermediate appellate process of going through the district court and then to the court of appeals was eliminated, you could have gotten immediate review of that situation by the court of appeals, and the matter would have been ended.

Now, that all started back in July of 1975.

Last week I argued the second round of appeals to the court of appeals on this whole matter, and I'd like to give you a skeleton of the way it worked out.

First you had the TRO and the preliminary injunction. You had a review by the district court judge who affirmed in part, modified in part, and reversed in part.

Then the union moved for a writ of mandamus to the court of appeals and an expedited appeal. They were granted the mandamus but not the expedited appeal.

So we went up to the court of appeals on the question of the power of the bankruptcy court to issue the preliminary injunction, the power of the district court to modify it, reverse it, and affirm it in part and then to issue his own injunction, and also on the right of the union to enforce its arbitration agreement in a State court, which it attempted to do.

That finally got to the court of appeals in April 1976.

In May 1976 a hearing came on before the bankruptcy judge with respect to both the question of the rejection of the executory labor contract. The bankruptcy court granted the rejection of the executory labor contract, and deferred the issue of the arbitration.

In August 1976 the court of appeals wrote an opinion saying that the bankruptcy judge should hold a hearing on the rejecting of the executory labor contract and set down guidelines in that hearing as to what issues should be raised and decided by the court.

But the bankruptcy court by that time had already held its rejection hearing.

Now, to complicate matters—because it's been very simple so far—there was a question of interpretation of two cases out of the second circuit—*REA Express* and *Kevin Steel*. They determined that there were conflicts of Federal policies as expressed in the Norris-La Guardia Act and as expressed in the Bankruptcy Act.

Again, referring to the fact that there is a specialized body of law in bankruptcy, the court set out specific guidelines as to how to attempt to resolve this seemingly irreconcilable conflict between Federal labor arbitration policy, and bankruptcy policy.

That, of course, has been so simple that there have been four different decisions from four different circuits interpreting those two cases, interpreting the conflict, or the reconciliation of conflict between the two policies.

Now, it seems to me that this case in particular points out that a simplification of the appellate structure and simplification of the issue of jurisdiction, is very, very important in terms of bankruptcy proceedings. There is only one issue, notwithstanding Judge Rifkind's reference to the interesting and divergent issues of law that come before a court—there is one issue in a bankruptcy—money: how much is there, and who gets their hands on it. That's what it boils down to. And the ability to dispose of assets, the ability of creditors to place liens and enforce liens on assets is all that really matters. You need a simple, efficient, and hopefully inexpensive structure.

There is no reason for bankruptcy courts in the first instance to spend half their time determining issues of jurisdiction. There is no reason for a superfluous district court sitting as an appellate court to again review the question of jurisdiction and then make a go/no-go determination on the merits.

I might point out that it is interesting, as a matter of case law, that now the standard of review in the district court is that the bankruptcy courts must be affirmed unless clearly erroneous.

Now, if the Federal district court has no greater power of review than that, then what is it there for except as a transient to pass the case along to the courts of appeals.

My recommendations with respect to 8200 are that the bankruptcy court's jurisdiction be extended to the extent that it has jurisdiction over all of the assets of any bankrupt or debtor in possession, that the intermediate appellate process of the district court be done away with, and that it go either to the court of appeals or a specialized bankruptcy court of appeals.

My present inclination is, because of the wide variety of legal issues that do come up and the substantive resolutions that are important, that it remain with the U.S. courts of appeals and not in a specialized bankruptcy court of appeals.

But that doesn't matter. What matters is speedy and certain resolutions, because just as in criminal cases, I think in bankruptcy cases, justice delayed is justice denied.

Thank you.

Mr. EDWARDS. Thank you, Mr. Levine. We have the same sharp differences of opinion amongst the panel that we found when we got before the House of Representatives. So all the views are most welcome.

The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I appreciate the contribution of the panel to the discussion, and we do have a few divergent views here. Just as a matter of curiosity, I ask you Mr. Shaw, what has happened to the value of Bohack during this period? Do you have an assessment of whether you are going to have anything left when your chapter XI is finally approved?

Mr. SHAW. We have a very interesting and unique situation with Bohack. Bohack, by virtue of what was accomplished through the judge sitting—there was a public auction. And all of the supermarket stores and the lease itself was sold for the amount of approximately \$12 million. So they are out of the supermarket business.

They are now—the plan has been certified in number and amount of every class, and it is waiting now to be funded. Now, what is to be

funded? You now have a real estate company which shows approximately \$150,000 to \$200,000 net a year.

But what you have is unique, as I said. It's a loss carry-forward of approximately \$90 million, wherein that loss carry-forward can only be used by the company, providing it is funded correctly. So that it can get the benefit of the tax laws of this Nation to utilize the loss carry-forward, and not pay taxes on gains for a period of approximately 7 years going forward.

So to answer that, that is a very valuable commodity. The stock of the Bohack Corp. can be given to its creditors to satisfy it for all of the losses that they had prechapter XI. That's the objective. And the plan to be funded now requires one or two resolutions: one to take care of all the priority claims and administrative claims; and there are sufficient assets, we believe, to take care of all the administrative claims.

We believe that to be certain. The priority claimants know it. It probably needs about \$2.5 million. The major creditors of Bohack are now reviewing on a very, very wide basis, the suggestion that the plan be funded, either by its creditors, or allow Bohack to then go back to the public market under a rights offering, to raise what dollars it needs to pay its priority creditors, get it out of chapter XI, allow all the administrative creditors to be paid, and to go forward with a loss carry-forward of \$90 million for 7 years as an ongoing company: unique, yes; possible, yes. Will it happen? Only God knows.

Mr. BUTLER. Your best asset is your loss; is that what you're saying?

Mr. SHAW. As I say, it's unique; yes.

Mr. BUTLER. Well, thank you. I really am sorry I asked the question now. [Laughter.]

Judge RIFKIND. I have the impression from what you're saying that you have the feeling that bankruptcy—the bankruptcy judge and the bankruptcy bar is pretty mediocre; is that true?

Judge RIFKIND. I do not share that view at all. I have known some very distinguished bankruptcy referees sitting in my district, of great quality and great distinction. And they were very proud to hold the office they held.

Mr. BUTLER. That's certainly true. I had the impression from what you said that the quality of people we are presently able to attract to be referees in bankruptcy, or bankruptcy judges, is—I used the word "mediocre," you may use what word you want—of a lesser caliber. Is that your view?

Judge RIFKIND. I would say that it is easier to find people whom you'd be willing to appoint bankruptcy referees, than to find people whom you'd be willing to appoint district judges; I do believe that to be true.

Mr. BUTLER. Do you believe this is a problem that we ought to be addressing?

Judge RIFKIND. In other words, a bankruptcy referee does not quite have to measure up to the stature, station, philosophy that we ought to expect from a district judge.

Yes; I believe that to be the case, for the same reason that when you select a magistrate that you appoint to a district court, you

don't quite get the people or look for the people that you would look for if you were looking for a district judge.

That doesn't mean that they're not able, intelligent, good citizens. But we look for exceptional standing for a district judge; at least I hope so.

Mr. BUTLER. In other words, you don't think that's a problem we ought to be addressing: elevating the quality of the judges on the bankruptcy bench?

Judge RIFKIND. I'd be delighted to see the quality lifted all through the entire governmental system; yes, of course, that's a fine ideal.

But I must confess, it's hard to find top-quality judges. It will be harder to find them if you're going to double the demand for them.

Mr. BUTLER. Well, turning now to another area, is it your view that the creation of the specialized Tax Court was a mistake?

Judge RIFKIND. Tax law presents a very special problem, there's no doubt about that. And I'm not saying it was a mistake. All I'm saying is that the tax law decisions by the Tax Court do not feed any streams of wisdom into the general body of law. If you will look at the opinions of the courts of appeal, of the district courts, of the United States Supreme Court, I'll bet you a quarter you will not find a citation of a Tax Court decision, except possibly in a tax case.

Mr. BUTLER. You addressed yourself to a statement generally by following up on what happens when you get specialized courts and judges that you kind of get inbred.

Judge RIFKIND. You certainly do.

Mr. BUTLER. And I think the gentleman, Mr. Shaw, has also said this presently exists pretty much in the bankruptcy law.

Judge RIFKIND. Not quite. I will say to Your Honors, not quite.

Mr. BUTLER. We have no honor here. [Laughter.]

Judge RIFKIND. Just a professional habit. But the truth is that, to date, the bar is to some extent specialized. And you will find it specialized particularly in the lowest order, all the small bankruptcy, no-asset case, and so on, they'll go to the fellow who files a rubber-stamp petition, and gets a rubberstamp discharge and so on. That's true.

Mr. BUTLER. That's the bankruptcy ring we hear about.

Judge RIFKIND. But as soon as you get into the field of important bankruptcy business, indeed, the kind that my friend, Mr. Shaw, has described, there you'll find the bars get lifted pretty wide, and everybody is in it: qualified people; sometimes unqualified. But the bar generally is in it. And they're not at all serviced by so-called bankruptcy lawyers.

I would say in the *Penn Central* case, which I attended for many months—maybe years—I don't remember seeing a so-called bankruptcy lawyer in the courtroom at any time. All distinguished lawyers, all very able, all had had experience in bankruptcy and reorganization. But they're not what we would call bankruptcy lawyers.

Mr. BUTLER. Well, then, I guess my real question is: is the so-called inbred development—that's the word I used—the bankruptcy ring, is that a problem that we ought to be addressing in this legislation or not?

Judge RIFKIND. As long as you keep the doors open, as long as the bankruptcy court is a part of the district court, supervised by district judges, as long as bankruptcy referees are aides of the Federal judges, I don't think you would need to face that problem. It at least can be handled by the judges in their respective districts. If you create a separate court, a little courthouse, then it'll be a problem.

Mr. BUTLER. I pretty much have the impression with what you have said that the generalist judges—as opposed to the specialist judges—should be handling bankruptcy problems.

Judge RIFKIND. Yes, sir.

Mr. BUTLER. Now, why don't you suggest—or why didn't you suggest—that it be handled by the district judges at the district court level instead of the lesser level? What is the reason for making that distinction?

Judge RIFKIND. This is purely a matter of the division of labor. Now, as you very well know, at least until now—this is not a branch of the bill that I'm addressing myself to—a substantial portion of the work of bankruptcy referees has been very administrative, sending out notices, calling meetings, holding first meetings of creditors, et cetera, et cetera, distributing checks; very administrative work. There's no reason why district judges should have to do that, anymore than they should do the work of the clerical system. A clerk's office does a great many things of that kind.

Then the referees perform the identical function that a magistrate performs for the judge. He assists the judge. The judge says, here is a bunch of interrogatories and there are objections to them. I'll refer them to the magistrate, to take the burden off my back. But it comes back to the judge if there's any problem about it, the problem arising if the lawyers don't acquiesce in a decision by the magistrate.

Mr. BUTLER. The legislative judgment as to the division of labor; that's basically what you're saying?

Judge RIFKIND. Yes.

Mr. BUTLER. What is your view about the pervasive jurisdiction which we in this bill—

Judge RIFKIND. The enlarged jurisdiction?

Mr. BUTLER. The enlarged jurisdiction along the lines of particularly the complaints of Mr. Shaw?

Judge RIFKIND. I have not been authorized to speak on that subject; consequently, I don't want to represent the views of the American College of Trial Lawyers.

All I would suggest to you is that it is a subject that requires very careful study for this reason: jurisdiction today is based upon many considerations, such as geography and fairness. The idea that because a fellow has filed a petition in bankruptcy in the borough of Manhattan in the city of New York, he should be able to drag his adversary from California, bring him into New York, is one that deserves attention.

Judge Hufstедler in this report said some things about that. She counseled caution on the subject. My view would be to simply counsel caution on that subject.

You know, there's another problem there. Mr. Butler, let me refer to it. Ever since *Erie v. Tompkins*, 304 U.S. 64 (1938), the Federal

courts have been trying to apply State law in diversity cases, as you know. It hasn't been the great success that it was sometimes touted to be, because they do not have the power to make State law.

Consequently, we've developed a doctrine of "abstention", to wait until the State court decides what the State law is that you're going to apply. Are you going to expand the jurisdiction of a Federal court—whether you call it a bankruptcy court or not, it would still be a Federal court—to try a thousand times more State cases. What are they going to use for law? It's hard enough for the State judges to discover the laws of their States when they have the power to make it.

Federal judges don't have the power to make State law. All I say is caution before you jump so fast.

Mr. BUTLER. Thank you. You know, I have some reservations about the power of Federal judges to make Federal laws. That's a legislative reaction.

[Laughter.]

Judge RIFKIND. That's a doubt I share with you.

Mr. BUTLER. Thank you, Mr. Chairman.

Mr. EDWARDS. The gentleman from Missouri, Mr. Volkmer.

Mr. VOLKMER. I wish to first apologize for not being here for all the presentations, but I'd like to have the other gentleman's viewpoint on the matter being pursued by the gentleman from Virginia as to why we couldn't have the district court judges handle the bankruptcy cases and do away with referees.

Judge RIFKIND. Why can't they do it without referees?

Mr. VOLKMER. I think you answered that, judge, pretty well, and I think you would object to that.

I'd like to have the viewpoints of the other gentlemen.

Mr. CHAUVIN. Mr. Chairman, one of the reasons that we asked for the time to study this matter is that while we were looking at the bankruptcy courts we heard in our task force many horror stories.

So we urge caution. And the American Bar Association thinks that once many of the administrative matters are taken from the bankruptcy referee and once some of the problems of jurisdiction are solved, so at least they're all under the same roof, and many of the problems that Mr. Shaw talked about with his case are simplified, and with the inauguration of the U.S. trustee system, which we urge be placed in the Administrative Office rather than the Justice Department, then Congress can decide how best to handle bankruptcy case. We believe the U.S. trustees should not be in the Justice Department because in our opinion their's a conflict if it's in the Justice Department. But in the Administrative Office, the U.S. trustee will do many of the things that the bankruptcy judge has done up to now, and so forth.

After all of these things have been taken care of, and the great problems of finding out which court you're in and how long you're going to be there, as well as these problems of review and jurisdiction, then it is possible, in my opinion, and in our opinion, that these cases could possibly be "feathered in" to the district court, or that there could be a division of the Federal court that could hear these cases.

Because you see, we're not talking about tying up a U.S. district court judge's time hearing a no-asset case; we're not talking about

tying up the district court's time by ruling on some problem of jurisdiction because the substantive part of your bill addresses itself to that.

So it's the opinion of the task force—and I might add that I share this opinion—that once many of these problems, some of them by the law, some of them by custom, some of them by design—some of these problems have been erased. I think that many of the so-called big bankruptcy cases—I want to come back to that in just a minute—but many of the big bankruptcy cases could possibly be handled by the district judges themselves. For example, we had a race track and a brewery go under in my home district, and a special trustee was appointed although the case was handled by the district judge for all practical purposes. Under this act as envisioned by the House, the judge wouldn't spend any time hearing who goes bankrupt, and that kind of thing. Because the simplicity of it will make it much easier for the district judge to handle.

I made the same slip. But I want to point out, if you're going bankrupt, the case is big, if they're going to come out and get your furniture that night, it's a big case; it's the biggest one you'll ever have. So I fall into the slot sometimes of saying, well, we're talking about big cases. But really, we really should give the same attention to the wage earner who over extends himself and finds the problem of more going out than is coming in.

Mr. EDWARDS. Do you think it ought to be handled by an assistant judge if it's that important?

Mr. CHAUVIN. I personally think that any case that goes to any court at any time should be handled by a qualified judge. Many matters are routine; many matters are duplicates. We know what the law is on some of these things, but I think that to say that a matter is not important because it doesn't involve a certain number of dollars is really to overlook what courts are for.

Mr. VOLKMER. That's what starts to bother me.

Mr. CHAUVIN. It bothers me.

Mr. VOLKMER. Judge Rifkind, it seems to bother me a little bit too that according to one of your statements—the way I heard it—we don't have enough qualified attorneys in this country to be district judges, but if we add another couple of hundred, there aren't that many in the United States.

Now I believe that's a condemnation of the judicial system or the legal profession, one of the two, of this country.

Judge RIFKIND. All I'm saying is that it's hard to find the rare people, the gifted people.

Mr. VOLKMER. I disagree with that. For a person of your stature to say it—I guess that depends on what type of person you're looking for.

Judge RIFKIND. I'm looking for the best that's available.

Mr. VOLKMER. Who are they?

Judge RIFKIND. I don't know.

Mr. CHAUVIN. I was going to say that a corollary to this is, we hear often in State courts—you don't hear it too much in Federal courts—"Well, it's a lower court." Well, let me tell you, if you're going to jail, that's the biggest court you'll ever be around.

Mr. VOLKMER. Most people see the little ones.

Mr. CHAUVIN. That's right. Maybe 85 percent of the cases are handled by the "smaller" courts. Now, as we go along—and this is a good example of it—the Federal system may well be doing what the State system is trying to correct. Many States have divided their courts mostly by historical division into so many things such as road district courts, as you may have in Missouri.

Mr. VOLKMER. After January 1, 1979, we're going to have a three-tier basic system; two, really. It's a trial court system, and a supreme court.

Mr. CHAUVIN. We start the same thing in Kentucky next month, our new system. The courts are either trial courts or appellate courts, and that's one of the reasons we urge that they go to the court of appeals.

Judge RIFKIND. It will be a unified court.

Mr. VOLKMER. We have a supreme court plus appellate courts. Basically on the trial level, the associate circuit judge or the circuit judge, either one, could try the same case; there won't be any question about it.

Judge RIFKIND. That's what I want.

Mr. VOLKMER. A circuit judge could end up trying a traffic case.

Mr. CHAUVIN. Specialization is a hard thing to have for lawyers in courts, too.

Mr. VOLKMER. It doesn't hurt—I don't think it hurts sometimes for a circuit judge to try that traffic case.

Mr. CHAUVIN. I think it's good. I remember the case of a lawyer who said, "I had a limited practice. It's limited to people who will pay me in advance, because I spend more than I make."

That's a form of specialty right there.

Mr. VOLKMER. That goes right back to how I feel about this whole thing a little bit, that maybe it wouldn't hurt a district judge sometimes to sit in on a no-asset case.

Judge RIFKIND. Of course.

Mr. SHAW. May I address myself to the question that you raised?

Mr. VOLKMER. The first question that I raised?

Mr. SHAW. The original question is whether the district court judges shouldn't really handle the bankruptcy cases. You've got to separate that.

The way we've progressed in our society—no fault of anything but perhaps the system—is that the major bankruptcies, the chapter XI's and the straight bankruptcies, have increased in leaps and bounds. And I venture to say that it may go higher and higher, and we have no idea as we sit here today what could conceivably happen.

Mr. VOLKMER. USDO.

Mr. SHAW. USDO; others, I don't want to name them. [Laughter.]

Because 5 years ago, when somebody said, Penn Central, or Penn Railroad, we would say, "You got to be kidding." And then when you went to Grant's and then when you get to their retail outlets, it may go higher than that.

What about the real estate investment trusts?

Mr. VOLKMER. We've got land developers in Missouri doing the same thing.

Mr. SHAW. I was on that case that you're probably referring to.

It was significant now. I sat in that courtroom arguing, and the district judge was sitting on the higher tier and Judge Jones was on a lower tier. And I said I couldn't really conceive what was being done, because what I did before Judge Jones would go on appeal, or review at that time, to the judge then sitting above him. And I questioned it.

But it would be impossible for a district court judge to do that with his workload today and because perhaps the judiciary is spending a tremendous time with the civil rights and criminal proceedings and getting them properly served, getting them before Justice and getting them tried as quickly as possible. Their workload is impossible today.

Increase the judges to the district court, infuse 200 of what we now call bankruptcy judges into the district court system. That's what you're really doing in H.R. 8200. You are now creating article III judges who have the constitutional power to hear general jurisdiction cases which affect bankruptcy cases.

Aren't you really doing that by creating them? Yes; you are.

Mr. VOLKMER. We were doing that.

Mr. SHAW. And that's part of the purpose. You can only feel the pulse of the time in doing it.

If the city of New York ever went into whatever we consider the ripple effect throughout the city, the State, the country will be tremendous. And then say, let's give it to district court judges. And let's get to that issue.

The district court, the bankruptcy judges, will be chosen the same way, by the nomination of the President of the United States to the Senate on advice and consent of the Senate, the same way our district court judges are chosen. And I've got to say, I think they've been pretty good. My own personal view is, I'd leave it the way it is, because that system has worked well.

If we look at all the district judges and we see the work they have put out—and, sure, they've been reversed by courts of appeals; sure, they've had errors in trials—but by and large, it is an excellent bench. All we're doing is expanding it. We're not minimizing the respect and the prestige; we're enlarging it.

Mr. VOLKMER. I'd like to ask Judge Rifkind if we should have referees for civil rights cases.

Judge RIFKIND. Pardon me?

Mr. VOLKMER. Should we have referees for civil rights cases?

Judge RIFKIND. The judge can appoint a master if his calendar is burdened and he hasn't got the time to try the case. He can appoint a master in any case.

Mr. VOLKMER. How many times does he do it?

Judge RIFKIND. Because he's a conscientious man, he wouldn't do it. And I have tried many bankruptcy cases before judges because they took it without referring it to the referee in bankruptcy, many of them.

I have been through *McKesson & Robbins* for 5 years. I don't think we were before the referee in bankruptcy five times in that experience.

No; the judges are doing a job, and if we need more judges, we should have more judges. But they should have the assistance they get from the referees in bankruptcy. Let the referees in bankruptcy do

what referees in bankruptcy have traditionally done, but let us relieve them of the unnecessary administrative work which they are now doing so they'll be more effective. And when you do that, you appoint a clerk to do something that the referee has done. When we appoint a referee, we let him do some of the things that a judge has done. That is all to the good. But let's face the fact that if you need more manpower, you should have it in the right place, and you ought not to dilute the judicial system we have successfully run for two hundred years by introducing this idea which I think is a bad one.

Mr. VOLKMER. Let me hear one more view, please.

Mr. LEVINE. My view is, I don't see what is so terrible about a specialized court if you understand what the purpose and the concept of the Bankruptcy Act is.

What you have here is not the adjudication of relationships in a normal commercial situation. You have a deliberate interference with the normal commercial situation where a creditor can't get what he's entitled to unless the bankruptcy judge says he can.

And the purpose of that is to rehabilitate the wage earner, the real estate investment trust, or anybody else, the large corporation, to enable them to make some kind of an arrangement to take care of their debts and be discharged.

Now, if you take that as a premise of what the bankruptcy law is about, there doesn't seem to be anything inherently wrong with having a court specializing in seeing that the purpose of that act is carried out, and of course, the substantive issues that will be raised in any other court will have to be tried before such a specialized court, but once you have the basic assumption that you've got a legislative policy to be carried out, there's nothing wrong—and I suppose this may be an indication that maybe an article I court is a better vehicle than an article III court—there's nothing wrong with a specialized court whose purpose is to carry out the policy considerations of that act.

I don't think specialization is harmful in that respect at all.

Mr. VOLKMER. One of the practical effects, if I may proceed for a brief period of time, Mr. Chairman one of the practical effects for those of us, I think, who are interested in the bill and saw it on the floor was that one of the basic arguments which most nonjudiciary members seem to go with—at least before the amendment of the gentleman from California and the gentleman from Illinois, Mr. Railsback—was that the bill was creating 200 judges. That was their argument. That was it. This amendment was getting rid of those judges, and that was the argument.

So if we don't provide for article III judges at all but just leave it alone, the variety of bankruptcy cases will be handled by district judges, period. We are not creating any judges, if you get what I mean. It may be necessary later on.

Mr. CHUVIN. That was the part that bothered me.

When Mr. Shaw made that statement, it may have been not his choice of words, but H.R. 8200 does not create 100-and-some district judges. It creates 100-and-some article III bankruptcy judges. It doesn't do anything for the district court.

Mr. EDWARDS. But it makes them available.

Mr. CHAUVIN. That's true. But the point is that I didn't want to be confused with what this is doing.

The primary obligation, of course, is going to be with the Bankruptcy Act. It isn't going to help on the problems on a speedy trial. It doesn't do anything to help on the antitrust problems or securities problems.

You know, there is something to be said about keeping a spot open in the court system for folks that just on occasion have to use it. Those folks right now are the ones that are suffering the most, and are missing the boat. The folks in any number of matters who aren't involved in criminal misbehavior or a bad marketplace or any number of things; just folks that need to use the courts once in a while. And I'll tell you, it's tough these days.

Judge RIFKIND. I'm sure you wouldn't recommend a specialized criminal court or a specialized antitrust court or a specialized copyright court and so on.

I mean, all of the arguments that have been advanced in favor of this particular priority can be applied, sometimes with more persuasion, about the others.

Mr. VOLKMER. I'm just asking a question—not to make it necessarily a specialized court, not to even make it a division, but just to say that your district judge is going to handle them.

Judge RIFKIND. That's the law today.

Mr. VOLKMER. Without referees.

Judge RIFKIND. Oh, they have masters today; they have magistrates; why not referees today?

Mr. EDWARDS. The gentleman from Illinois, Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman.

I think we should recognize the dilemma that this committee finds itself in.

The House of Representatives recently rejected the unanimous recommendation of all of the members of the subcommittee supporting the creation of article III-type bankruptcy judges to be named at the end of a 5-year transition period.

It's true, as has been brought out here just recently, that there was no designation of any particular number of judges that might be appointed at that time, and I don't think it is appropriate to assume that all of the existing referees would automatically be named by the then President of the United States, as bankruptcy judges. I don't think it follows at all.

I think that we will determine what the need is at that time for bankruptcy judges.

But I would say this with respect to the American Bar Association position and your statement, Mr. Chauvin, and that is that to defer until some later time the question as to the structure of the bankruptcy judiciary, I think, would be quite unwise on our part.

It's very easy for us to do, to say that we're not going to do anything right now, but during a 7-year period we're going to study this, and we're going to find out at some later time and in some later Congress.

And I think that would be a most unfortunate position to take.

As a matter of fact, when you recommend that the bankruptcy judges, are going to assume the enlarged jurisdiction during the 5-year transition period, what you are really saying is that there is already authority for the Congress to establish these bankruptcy

judges with this enlarged authority, and that we'll see how that kind of enlarged authority stands up.

The problem, it seems to me, that we're dealing with here is really brought out very rapidly by the very fascinating and the very readable and the very illuminating statement of Mr. Shaw. He and Mr. Levine have given us an extemporaneous statement here, but their written statement makes a really fascinating narrative of the experience which a general practitioner of the law has with regard to a substantial bankruptcy case.

And I would say that the need is great, as we recognized, to have bankruptcy judges available with the expanded authority to handle all or most of the types of problems that arise.

You all seem to agree that you get into all kinds of different types of legal problems in bankruptcy and particularly in the reorganization cases, which we are trying to encourage. We're trying to encourage people to resolve and enter new arrangements and to continue in business, including the individuals who might otherwise file bankruptcy to discharge their obligations, to instead have them deferred and not have them rejected.

So I think that if you could perhaps help us a little further—you see, the problem we met with in designating article III judges is that the Attorney General and others have told us, well, the things that you will want to do you can only do through the creation of article III judges, and if that's the case, then we want to provide, it seems to me, if we're carrying out the thesis, the concept of this legislation—we want to create that number of article III judges in addition to what we have now to carry out these functions.

Now, if we are not going to do it and we're going to create another type of district court judge such as the American Bar Association appears to recommend, then we'd like you to tell us whether we can establish article I-type judges for a fixed period of years and get on with this legislation.

But to say that you're going to have referees or bankruptcy judges exercise enlarged jurisdiction sometime in the future and then some time in the future we're going to find out what kind of a court we need, is not a good judgment, I don't think, for us to apply at this time.

I would say this: There are many other things involved besides money. I know and you know, who gets the money in a straight bankruptcy. But there are jobs when you reorganize and continue in business. And in the case of a municipality, why, there are a great many other things that are involved, too.

So we're trying to resolve not only economic questions but social questions, as well.

I just add one other thing, and that is, I think what we're doing is creating or trying to create new courts of rather general jurisdiction for general practitioners and get rid of the bankruptcy rings which we have heard so much about, and that's the specialized business that has such a questionable reputation now that we want to overcome. And that's a large part of the motivation behind the work of the Commission in recommending these changes and the motivation behind the members of this subcommittee in trying to augment and enhance the role of bankruptcy which, as Mr. Levine has indicated, takes on larger

proportions all the time and affects so many hundreds of thousands of Americans every year and so many billions of dollars in assets.

So I've appreciated the testimony. Maybe I've suggested some things to you.

Excuse me for not asking any questions.

Mr. EDWARDS. Thank you, Mr. McClory.

Mr. Shaw, this process that you're going through must be pretty expensive, unnecessarily expensive. If the system were different, it wouldn't be costing the litigants, the company, the Government that much money; is that also your testimony?

Mr. SHAW. Absolutely, because we have 25 cases that we had to go to other jurisdictions, either Federal or State courts, because it would be impossible for the bankruptcy judge or referee to be able to hear these cases.

Now, when you take it at that point, the legal fees—and respectfully, for all members of the bar, there's one thing of earning the fee; there's one thing that the pleading is an estate of its major assets by the fees.

I think it is duplicating effort.

It is engendering the danger of the chapter XI going under.

In addition to that, the expenses become enormous. You have specialized counsel going into the State courts, specialized counsel going into the Federal court.

I give you one example of one matter. There are others, others which we are now in the State courts, the legal fees and the time.

Now, in bankruptcy, time is money, and I don't like to use the phrase, advisedly, but the speedier you dispose of an XI for reorganization purposes, the more money is saved by the estate and its creditors and it flows through.

So that, if you have to wait either in a straight bankruptcy for the disposition—we have one now, a lawsuit in the State of Washington—before I can close out a straight bankruptcy, the amount of time, the money involved, and the expense involved makes it almost prohibitive.

So what do you have to weigh in your mind to make a recommendation to abandon, if you will, that chosen action, because no matter what you get out of it, it's not going to be of great value to what you can do today, if you close the estate today and distribute it.

That's a straight bankruptcy.

Chapter XI, if you don't have the speed, you don't have the efficiency—I think it was well said in the report of this committee that the patient is dying, or died, and you still haven't had a diagnosis yet. Well, that's exactly what happens. It's tremendous expense. And that's where the bankruptcy ring respectfully comes in, because what they do is, they bleed on this.

We can't afford to have that, and I just may, if I may, Congressman McClory, say one item.

If we do have the article III judges, 300, wherever they come from—they come from the bankruptcy court or I'll stay with the system, the President making the nominations to the Senate—then the chief judge of the circuit court of appeals in that circuit can then take these generalized judges and put them where they belong if there is a slack in the bankruptcy court, because now they are full judges.

Then you will see that the logjam that you create in the district court judges with the "speedy act" and all the problems that the district court judge has will be diminished, because then the chief judge who is in charge of that circuit can pick out if it's a slow month 1 or 2 or 10 of the bankruptcy judges, wherever they may be, and put them where the logjam is and then make the speedy trials.

So, in effect, what you're doing here today in discussing H.R. 8200 is in effect creating more article III judges, which can help the system, as Congressman Volkmer said. It can help because, in effect, they will be district court judges who can aid in any one of the problems that face a district court judge—not only bankruptcy—we believe it's needed now in the bankruptcy court—but if it's a district court judge with an article III count, he can readily be delegated to take care of some other matter that the district court has a logjam on. You will help. You are not hindering. You are helping the judiciary system by bringing in more qualified people into our system and using them where they are needed.

We believe they are needed here in the bankruptcy realm, but not necessarily every month. Reports come in quarterly. We know which bankruptcy judge has a small calendar. We know where the logjams are. And you can break them throughout the country and then provide what this committee is here for, the speedy, efficient determination of all judicial matters. And by doing that we will be giving due process not only to the debtors in possession, to the criminal defendants and their lawyers—but to all litigants who use the Federal courts.

Mr. EDWARDS. Thank you.

I think the record ought to be made clear that I know of no estimate that there would be as many as 300 bankruptcy judges. I think the highest estimate we have ever had was 200 in 5 years, and most estimates are less than that figure.

Now, Mr. Shaw's problem that he so eloquently described is not new to the Bankruptcy Commission, of which I was a member. We have been working on this matter for 6 years.

The record is replete with cases such as Bohack throughout the country.

Otherwise, we would be wasting our time if the bankruptcy situation in the United States didn't need substantial improvement.

There is a problem, though. You start talking about article I courts that the Commission recommended, then you have a constitutional problem because we've enlarged the jurisdiction to perhaps such a large extent that it would be unconstitutional.

Also, with any kind of non-article III court, you'd immediately get into jurisdictional problems and 4, or 5 years of appeals and lawsuits.

Wouldn't you think that that would result from a court such as a article I court?

Mr. SHAW. Yes. I think it would be counterproductive. I frankly believe that the article III court would be the better court, and I think that if you go back or utilize the article I procedures, I don't think that you are really resolving problems that exist, even in bankruptcy court or in the Federal judiciary system.

Mr. EDWARDS. Well, how do we then, Judge Rifkind, resolve the problem described by Mr. Shaw?

Judge RIFKIND. Well, the 25 cases that Mr. Shaw says he has to try elsewhere, where is he going to find the bankruptcy judges to try them at the present time? You're not going to multiply the number of bankruptcy judges by three or four.

If you assume that every referee's place will be filled by a judge, he'd have exactly the same problem.

At the present time he gets helped by being able to go elsewhere, because he certainly couldn't get his bankruptcy referee to try these 25 cases and not be there forever.

No. This is a division of labor. This is a salutary thing.

But if you ask me how to resolve the problem, all I say is, if we are short of manpower in the overall judicial system, let's increase the manpower in the overall judicial system. Let's enlarge it so that it is adequate to perform the task that it is designed to perform.

Mr. BUTLER. If the gentleman will yield—I think the problem, as Mr. Shaw stated it, was that even existing referees would have more time to resolve these differences if they did not spend 75 percent of their time and energy resolving the question of whether they have jurisdiction.

Judge RIFKIND. I have no objection to your defining jurisdiction in your statute so that it is precise, clear and beyond dispute. That is a problem of legislative draftsmanship that has nothing to do with manpower.

Mr. BUTLER. Then you agree, I think.

Judge RIFKIND. I'm in favor of defining it, I agree. But there are a lot of disputes as to whether a claim is in bankruptcy administration procedure or in a plenary suit situation.

And if you could so write the language so that the answer is clear and plain, I would applaud your efforts. But if your problem is that you think you have a shortage of manpower, you're not going to solve the problem by changing the title of the man doing the job.

I say we have a good judicial system. If it is insufficiently large to digest all the materials that it has to deal with, then please, increase the number of Federal judges so that they can perform their job adequately. Give them some referees to assist them.

That is what the system is designed to do. And you can do it rationally and effectively. You have a unitary judicial system which creates a body of civilized law for the American people.

Let's not have a bankruptcy court and an antitrust court and a copyright court and a patent court and a criminal court and so on. That's the way to disaster, in my opinion. I feel very keenly about that. And I know I'm advocating an unpopular cause with this committee.

But Mr. Chairman, that's not the first time I've undertaken an unpopular cause. But I know I'm right. And I suggest to you, Your Honor.—

Mr. EDWARDS. I don't object to the term. [Laughter.]

Judge RIFKIND. Mr. Chairman, why is the Judicial Conference opposed to this idea? They're all composed of experienced judges from the highest level down. Why is every judge in the second circuit—

I'm told by Chief Judge Kaufman—opposed to this idea of a separate article III bankruptcy court.

There must be a reason, and it's deep in the philosophy of a unitary system. You do not increase capacity by simply putting them in two buildings instead of one building.

Mr. McCLORY. Would the chairman yield?

Mr. EDWARDS. I yield.

Mr. McCLORY. We are not looking for a popular or unpopular position. We're looking for an answer to a problem that we have. And increasing the number of judges, unless we increase their authority, unless we increase their jurisdiction, doesn't provide an answer to the problem.

And you can't solve the problem by legislative action alone. You have to provide an answer through legislative action, consistent with the Constitution, and the problem we have is, that it would not be constitutionally possible for us to increase the number of judges and enlarge their jurisdiction unless we have article III-type judges.

Now, if there is a way to do that, then that's the purpose of these hearings. And we're looking for that answer.

Judge RIFKIND. The district judges have all the jurisdiction they need. And if there's not enough of them, create more district judgeships. You don't have to enlarge the jurisdiction of the referees.

Mr. McCLORY. The thing is, the district judges don't handle the regular bankruptcy problems, you see, unless we designate the district judges to handle those problems.

Judge RIFKIND. Of course, they handle the bankruptcy problems.

Mr. McCLORY. One very good reason why district judges don't want to change the system, I think we must recognize, is that they enjoy appointing the referees, and they enjoy appointing special masters, too.

Judge RIFKIND. Maybe they do.

Mr. McCLORY. I'm very sorry to infringe on their very-long-time enjoyed prerogatives, but I think this is part of the problem we have. The specialists in bankruptcy, and the referees, and this kind of coterie of involvement in bankruptcy which is—

Judge RIFKIND. Mr. McClory, the lesser of the evils would be, if you really think we need 200 more people with the full authority of a judge, in lieu of the present 200 referees who are now functioning in that capacity, then please create 200 more Federal judgeships and abolish the referees. You would be doing a great deal better service.

Mr. EDWARDS. Then would you suggest that if this is done—abolish the referees and appoint 200 district judges—that at the same time Congress should provide for divisions of the district judges that would handle—

Judge RIFKIND. Only bankruptcies? No, Mr. Chairman; I would think that would be a grievous mistake. Let them handle the whole gamut of cases that they now handle. That's the way you create great judges, and it takes great judges to build a great judicial system. And it takes a great judicial system to produce a civilized system of law.

We're dealing and talking about something that envisages a century-long or two-century-long development. And what you're doing is counterproductive. It is incompatible with the course of American history from 1789 to today.

If what you think is that the referees need judicial power in order to perform their function—which I doubt—but if you think so, then it would do less harm to create 200 more judicial posts, and have them become regular district judges, abolish the referees, and say, let the judges handle their own bankruptcy work. That's a feasible method. At least it would be coherent, and it would be compatible with the philosophy and spirit of American law.

What we're doing now is to fragmentize the judicial system in a self-defeating program.

Mr. EDWARDS. Does the gentleman from Missouri wish time? I'd like to yield to counsel.

Mr. VOLKMER. My only comment would be, that in the areas where the district judges use masters, and the few times that they do, we don't have provision like we have in the law for appointment of standing masters. We don't have masters in other cases, like we have referees in bankruptcy.

Judge RIFKIND. Well, the volume of material obviously calls for standing masters in one field, and not standing masters in another field.

But the principle is the same. We have standing magistrates today who handle a volume of business, because the business warrants it.

Mr. VOLKMER. Yes; in certain things. And I question that. I seriously question that.

But I like your idea to give the district judges the power to determine bankruptcy cases.

Judge RIFKIND. They have that power today.

Mr. VOLKMER. The referees, too.

I'd like to point out one other thing, too. In our survey, when we were looking at the total judiciary, it became obvious to me that in certain areas, certain district courts were seen to be at least more specialized in certain fields, that certain cases like antitrust cases were being transferred to certain courts out of others.

Now, that's specialization; within the district courts certain judges tend to take certain cases more often than other cases. And I can find that for you, too.

Judge RIFKIND. That may be, but they're available for any kind of case on their calendars.

Mr. VOLKMER. I agree. But what you're finding is an area of specialization, even though you are not calling it an antitrust division, a civil rights division, a court division, or whatever it is.

Judge RIFKIND. In most of the circuits today, Mr. Volkmer, we have a wheel which determines which judge is going to get which cases. If he gets an antitrust case, he stays with the antitrust case. They are sometimes removed to another district under the congressional provision for convenience of parties and witnesses and interest of justice; but that's to a district, not to a judge.

The rotation through which judge gets a case in most districts is automatic and by lot. I mean, on a spinning wheel.

Mr. EDWARDS. Mr. Shaw.

Mr. SHAW. Mr. Chairman. I'd like to point out one interesting factor in the State of New York. When Governor Rockefeller was the Governor of the State, there was a need for additional supreme court

judges in the State of New York. And he was unable to get the bill, as I understand it, across to increase the supreme court judges. And what he did was, under his power, had an increase in the number of court-of-claim judges which have the general jurisdictional powers of the supreme court judges.

Now, by doing that, then they were assigned as supreme court judges, and they did exactly what the supreme court judges did. And that helped the logjam on narcotics cases and criminal cases. That's what they really were involved in.

So they did by indirection what he couldn't do by direction. And I say that we are alluding to, as Judge Rifkind is saying, is eliminate all the referees. Let's do it by indirection: put all new district court judges in, and then decide which bankruptcy cases have to go before them. You reach the same result.

But what happens is, you lose the impact and the force and the knowledge and the experience of all of the bankruptcy judges—maybe not all of them—substantially all of them—that conceivably would be nominated by the President to go to the Senate to be appointed, and we don't think we want to do that.

So what I say is, we shouldn't do by indirection, by creating all the district court judges. What we are aiming for and committed for, to do by direction; that is, to ease the burden, to create a system of bankruptcy law that's workable, that is efficient, and disposes of matters, particularly in chapter XI cases. So that time there is of the essence. If you do that indirectly, I think you are circumventing the game, and I don't think that's the intent of Congress or the act or this committee.

Mr. EDWARDS. Counsel?

Mr. LEVIN. Thank you, Mr. Chairman.

Judge Rifkind, if we were to adopt a district court proposal, the creation of more district judges and elimination of the referee system—

Judge RIFKIND. I haven't proposed it, but I said that it would be a lesser evil than the creation of a separate bankruptcy court.

Mr. LEVIN. If that were to happen, the Supreme Court as far back as Mr. Justice Story and as recently as Mr. Justice White, and the Congress through all the Bankruptcy Acts, have always emphasized that there is a need for speed in bankruptcy cases. I think Mr. Shaw emphasized that as well.

Would you oppose granting some sort of special priority for bankruptcy cases, if they were to be heard by general district judges?

Judge RIFKIND. I would leave it to the particular circuit to decide amongst the judges themselves as to the nature of the problem in the particular circuit, which is a power they now have. That would be my preference.

I would suppose that a really more rational system would be to increase the number of district judges to meet the requirements of the present day, to continue with a limited number of referees to assist them. But they should be people who assist and aid the judges, not a court of bankruptcy, separate and apart from the rest of the system.

Mr. LEVIN. Judge Rifkind, on that point, the Bankruptcy Rules promulgated in 1973 by the Supreme Court under congressional au-

thorization state, in rule 102, "The clerk shall refer the case forthwith to a referee. Thereafter, all proceedings in the case shall be before the referee."

The rules also say, "Unless notice of appeal is filed, the judgment of the referee shall become final." And rule 810 says, "The district court shall accept the referee's findings in fact, unless they are clearly erroneous."

Judge RIFKIND. That's the same rule that applies to every special master. The Federal Rules of Civil Procedure (Rule 53(e) (2)) today provide that the findings of a special master shall be conclusive unless clearly erroneous; the same standard that applies to referees in bankruptcy.

Mr. LEVIN. Is the judgment of the special master final?

Judge RIFKIND. No; it is not. It is not.

Mr. LEVIN. They are subject to approval, then?

Judge RIFKIND. Yes.

Mr. LEVIN. If we were to go with the district court idea, the general district court idea, would you favor limiting referees' powers so they would be just like special masters?

Judge RIFKIND. I would prefer to keep the system as it is today, subject to review by the district court on the application of either party. In other words, if both parties are acquiescent in the decision of the referee, there's no reason why it should be disturbed and why it can't be automatic. And indeed, that's what happens.

If, however, any party feels aggrieved, he goes to the district court, which is an intermediate application. If you make this an appellate procedure, like you go to the court of appeals with the rules of finality and so forth, you would go crazy in bankruptcy.

Mr. LEVIN. In other cases, general civil cases, the parties go before a magistrate only for preliminary matters, or if they consent?

Judge RIFKIND. That's right.

Mr. LEVIN. That's not true for bankruptcy cases. There is an automatic reference. Do you feel that's unfair to the litigants that they have to go before a master of a kind, rather than allowing, as all other Federal litigants, to proceed before a full judge?

Judge RIFKIND. I regard the referees as being the arms of the judge. And I see nothing wrong with their being subjected to the system which now prevails, which is, that if the parties are agreeable to his decision, that's the rule of the case.

If they are discontented, they go to the district judge, who has the final authority to make the decision. I see nothing wrong with that. It's a perfectly convenient system.

Mr. LEVIN. Mr. Chauvin, I have a question I'd like to direct to you.

If the subcommittee were to adopt the ABA proposal, should it place a provision in the bill that the transition period will expire by its own terms, and if not, is there a danger that the problem will not be addressed again for an indefinitely long period?

Mr. CHAUVIN. There was a considerable amount of discussion by the task force that 5 years wasn't long enough. Seven would be better.

The answer is "yes". It should expire at the end of 7 years. Because I believe that if the legislation creates this, there will be a burden on it to get its work done.

I see no reason for any further extension. I think in all candor that it will take that long to make a final judgment on the status intended.

We know the problem. We're looking now at the solution.

Mr. LEVIN. If a sunset provision weren't in the law, would you fear that the system might be left intact, and the problem might never again be addressed for a substantially long period of time?

Mr. CHAUVIN. You mean the creation of an agency to review?

Mr. LEVIN. No, in the transition period for the court system, if there were no sunset law in the transition provision, would you feel that that would aid the ABA's proposal, or would defeat it?

Mr. CHAUVIN. I don't understand the question. We want the matter studied. And I think that with the sunset provision, it'll get studied.

The answer is, we're not trying to get rid of it.

Mr. EDWARDS. During the transition period, where the bankruptcy judges are exercising this expanded jurisdiction, do you not see the possibility of a constitutional attack on these appointive arms of the district judge doing this expanded work?

Mr. CHAUVIN. I honestly don't Mr. Chairman. I see no problem with it.

Mr. BUTLER. Will you yield at this point, Mr. Chairman?

Following up on the sense of that question, as I view your proposal, it is: at the end of 7 years; we don't know what we're going to do, but we're going to decide in the meanwhile. Would your requirements be satisfied if instead we phrased it, "The article III proposal would come into effect unless there is a different judgment as a result of the proposal of your commission"?

In other words, I don't just want this thing to drop.

Mr. CHAUVIN. I understand.

Our task force had a great deal of problems with making it an article III court. We have very strong opinions on that, very strong opinions.

I don't think, in my own opinion, the task force would say that if you said article III now and forever, unless otherwise changed, during the 7 years, that it would meet the requirements, because I don't think you can decide today whether it should be article III.

Think about it just a second. To put the matter at ease, I would have no problem coming back, if I knew what I could know after the rest of the bill had been put into effect. I would have no problem, if at that time it looked as though they should be article III; maybe they will, maybe they won't. I honestly don't know.

I have the nervous sensation, the fractionalization of the Federal court system, the historic excellence of both the trial and appellate bench. I think that if it were to go through, of course our own ABA standards against the creation of special courts would possibly be violated. However, we already have bankruptcy courts, so we're not creating them; they're already in effect.

But I think you would find that if it became the law, there would be an inordinate amount of pressure for conservation courts and ecology courts in some States. I think you'd find it for antitrust. There's already some debate about whether the court system itself is big enough to handle the antitrust problem. The IBM case in New York has now gone to 2 million exhibits already, and there are matters of bankruptcy, securities fraud. The Speedy Trial Act after all, for

all practical purposes, created a special division in the court because of the way it worked out.

And I think you'd be opening the doors to something that without the study which this has required—the impact which this would make on the system—I think, gentlemen, you'd be opening yourselves to some problems in the future for you.

Mr. BUTLER. Well, we recognize that, but where are you going to leave us at the end of your 7 years? Where are you going to leave us?

Mr. CHAUVIN. I'll trust the Congress.

Mr. BUTLER. We'll be in a hell of a shape. [Laughter.]

Mr. CHAUVIN. I would trust it. If you can't figure it out in 7 years, you can't in 70. And if we've come up with something bad, we've just got it, that's all.

I think, though—it just runs against the grain of what I personally think. I understand the reasoning behind it.

Mr. EDWARDS. Your task force did recognize all of the problems that Mr. Shaw described.

Mr. CHAUVIN. Oh, yes. I don't want to prolong this, but when I started as a member of this task force—you know, all task forces are created for something. Two people on there were active practitioners in bankruptcy and of two others on there—one of them was a Federal judge and the other practiced a lot of Federal cases. And I think today this seating is appropriate, where I am sort of in between, because I think that's why I got to be chairman of that task force. I was not identified either way. And I learned more about bankruptcy than I ever really wanted to know, to tell you the truth. I couldn't believe some of these horror stories that we heard. I've never been that deeply into the practice of bankruptcy cases.

We heard stories that you would not believe. And they were credible stories.

So when we came down to resolving our problems, if you will take a look at it, I have no hesitancy to say the report represents all views.

Mr. EDWARDS. That's also our problem. We've been listening to some of these horror stories for 6 years—at least I have.

Mr. CHAUVIN. Former Senator Cook was on that committee.

Mr. EDWARDS. Yes; he was; and Senator Burdick and Mr. Wiggins. Chuck Wiggins, a member of the Judiciary Committee. And we got all the horror stories, all the problems, and we recognized the importance of what we were trying to do. Yet we don't get any real help from the district judges as to how to resolve the problem, or we get no help, really help, from the chief justice. They just say, "Just keep the system as it is."

Well, we have been charged by the leadership of the House and the Senate with trying to make some sense out of this mess, and it's really very difficult.

I recognize Mr. Klee.

Mr. VOLKMER. Mr. Chairman, can I make one inquiry?

Is there anyone here that believes that the district court judges presently overall would be capable or not capable of taking care of bankruptcy cases?

Judge RIFKIND. Not capable?

Mr. CHAUVIN. They're perfectly capable.

Mr. VOLKMER. Not capable.

Judge RIFKIND. They're capable.

Mr. SHAW. I don't think there is any question, if they zeroed in on the problem of bankruptcy laws, they would be capable.

Mr. VOLKMER. In other words, if they decided these issues, primarily, instead of referees, we wouldn't have any big problem, because they are not familiar with the law and everything.

Mr. CHAUVIN. They'll get more capable, Mr. Volkmer, you'll find, if it becomes their responsibilities or under additional Article III Bankruptcy Judges.

You'd be surprised. [Laughter.]

Mr. EDWARDS. You're sure they wouldn't put it right back at the bottom of the pack and deal with it last?

Mr. Levine?

Mr. LEVINE. I would like to enter a slight demurer on that.

I think that there is a great disinclination on the part of district judges to take—have anything to do with bankruptcy, notwithstanding their capability. Their disinterest is astounding, and is reflected by their careful judicial review of the opinions of the bankruptcy judges.

I think from the statistics in the report, they indicate that bankruptcy constitutes 1 percent of the caseload of the district court judges.

And yet you know that there are 250,000 bankruptcies by the year. That means somebody's doing a lot of work that the district court judges aren't. And I think that disinterest will continue.

Mr. VOLKMER. I'm not addressing myself to the disinterest; I'm addressing myself to the capabilities.

Are the district court judges capable of handling bankruptcy?

Forget the number. What I'm talking about is quality.

Mr. LEVINE. If you dismiss the issue of jurisdiction—because the jurisdictional issues are the most arcane and the most difficult in the bankruptcy litigation—if that is resolved, then there wouldn't be.

Mr. SHAW. I might add that there are two very interesting matters that came up—and I'll just take a minute—to show the disinterest not only in the district court but in the circuit court.

There was a heavy docket and a heavy calendar for the day that we had to argue one matter on the court of appeals, and I think of all the cases, the bankruptcy cases, absolutely, they just took it su responde and put it away for about a month, and we just adjourned for the month—U.S. Supreme Court.

Now, I make reference, Mr. Chairman, in my testimony in a major matter. The first thing that I think I learned in law school in constitutional law is that certiorari—you will have a very good chance of it being granted in the Supreme Court if there is divergence on two separate court of appeals on the exact point of law.

We had that in the second and in the first circuit on a question of bankruptcy.

Would there be an administrative claim or an unsecured claim of severance pay in the event it is disposed of in bankruptcy?

Two circuits on the same question came up with the same way. We went to the U.S. Supreme Court. Cert was denied. We only had three justices granting cert. We needed one more. We didn't get it.

It seems to pose a distinterest even though there is a question which should have gone before the U.S. Supreme Court. It was not as interesting as it should have been to them to grant cert, which in my view must have and should have been granted.

Mr. VOLKMER. May I pursue this a little further.

What jurisdictional problems would we have—I know there are some—but would they be insurmountable if the district judges right now—let's say some are in one district—would start hearing the bankruptcy cases?

Judge RIFKIND. None whatever. No question about the power of the district courts to hear bankruptcy cases.

Mr. VOLKMER. That's my point. If only we could find more. If only we wait your 7 years. I've got a pilot project that could go on and we could find out how terrible all this is and everything.

Judge RIFKIND. Mr. Volkmer, when I was in district court I had 2 days a week of nothing but bankruptcy, because it was during the depression. Every week, 2 days a week, we heard bankruptcy in the district court.

Mr. EDWARDS. How about you going back on?

Mr. VOLKMER. It didn't hurt you a bit, did it? But it didn't hurt anything. It isn't demeaning, is it?

Judge RIFKIND. Not in the slightest.

And I said before that some of the referees in bankruptcy I practiced before were distinguished men, and they commanded enormous respect, and they were treated with all the dignity that the office of referee commands, and it commanded an enormous respect.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Judge Rifkind, I would like to follow up on that question.

Earlier you stated that it was not necessary for bankruptcy referees to have the same high stature as district judges; but under this bill, once the administrative functions are taken away from the bankruptcy judges and all the bankruptcy judges will be doing is resolving disputes, what will distinguish the work of those bankruptcy judges from the work of the district judges?

Judge RIFKIND. They will be, in a sense, indistinguishable.

Mr. KLEE. So the stature then of the bankruptcy judges should be the same as the stature of the district judges?

Judge RIFKIND. The work of magistrates is indistinguishable from the work of judges when they act in the area in which magistrates act in. But nevertheless, magistrates do not have quite the stature that judges do. That's part of the system.

Mr. KLEE. Then let's talk about the division of labor.

What distinguishes the resolution of a dispute in a bankruptcy case from the resolution of a dispute in an antitrust case or a civil rights case or all of the cases that are adjudicated by district judges?

Judge RIFKIND. It is not distinguishable.

Mr. KLEE. Then why should it not be adjudicated by a district judge?

Judge RIFKIND. I have no objection to its being handled by a district judge, but I object to it being handled by a bankruptcy judge who is not a district judge. All I'm saying is, let's have a unitary system. Let's not have judges who are parochial and provincial and only dedicated to one branch of the law.

Mr. KLEE. I think that's a feasible system, but then we have to get to the issue that Mr. Shaw raised. He mentioned that in bankruptcy cases, time is of the essence. If you wait around in bankruptcy cases, the *res* dissipates. Everybody loses money.

Would you be willing to have a system that gave bankruptcy top priority in the district courts over criminal cases?

Judge RIFKIND. Does the Congress want bankruptcy to have top priority? If the answer is yes, that's what we'll have.

I doubt that bankruptcy is entitled to top priority.

But let me give you another example.

Injunctions are more urgent than bankruptcy cases. District judges handle injunctions every day of the week, every hour of the day, Saturdays and Sundays included. I have not heard any complaint that they are not giving them prompt attention.

Mr. KLEE. So you feel that if bankruptcy is not given top priority in the Federal district court system and the *res* is going to dissipate, then perhaps district judges should not adjudicate bankruptcy cases because they cannot process the cases quickly enough?

Judge RIFKIND. I don't say anything of the kind. I say, if the Congress wants bankruptcy cases to receive priority as against all other litigations which are demanding attention, then the Congress should say so, and the courts will obey the command. There isn't any doubt about it. I would express some doubt as to whether bankruptcy cases are entitled to topmost priority.

Mr. KLEE. In light of your vast experience as a judge with bankruptcy matters, what do you say to Mr. Shaw who says that unless we get into court right away, the case is dead and we have to liquidate.

Judge RIFKIND. I had never had a situation in the district court when I was there when a bankruptcy petition didn't get prompt and immediate attention, even before we had the automatic reference to the referees.

Mr. LEVIN. Judge Rifkind, if I may ask a question about assigning it to the district judges.

As the chart indicates, we are going to take a big jump in district judgeships next year if the omnibus judgeship becomes law. Now, that's from 400 to about 500.

We might need another 150 or so to handle the bankruptcy cases.

That would be an increase over the next few years of 400 to 6,500.

Do you feel that that would cause the same problems?

You've supported this system as a viable alternative but not the system where those 150 extra judges would have a different title because it would reduce the prestige of the district courts. Would that same problem happen if they were called district judges?

Judge RIFKIND. Look, if you increase the number of judges precipitously, it will have a diluent effect. There is no question about it.

But it's a question of degree.

If you double it and triple it within a very short space of time, then you're going to be in trouble.

It's as if tomorrow we were going to increase the membership of the House of Representatives to 1,500. I think you would agree that there might be some diminution of distinction and status in that event.

You'd have to build another courthouse, and that's exactly what's

going to happen. You have to have another courthouse in every district of the United States if you adopt this program.

Mr. LEVIN. The American Bar Association standards relating to court organization call for a "unified trial court," as you proposed.

They go on to say: "the trial court should have jurisdiction of all cases and proceedings. It should have specialized procedures and divisions to accommodate the various types of criminal and civil matters within its jurisdiction."

Judge RIFKIND. Of course, but the judges circulate through those divisions. That's the whole point. Of course, you have specialized divisions, but the judges circulate through them. They take a term, sit one term in civil cases; another in criminal cases. Now we have the unified centralized calendar, so each judge decides for himself. But when I was there we used to sit for 1 month in equity, 1 month in personal injury, 1 month in criminal, and so on. We took turns.

Mr. LEVIN. Mr. Chauvin, would you comment on that ABA standard, please.

Mr. CHAUVIN. I think, overriding that is the matter of efficiency. The background of that is this:

One can have subject courts without having subject judges.

By that it's meant that you have a system—this is in State courts, for instance—where if you need to have criminal court in the same place each day because that's where all the prisoners are taken and the holdover is there, you probably need to have common pleas cases or jury cases in certain courtrooms because that's where the jury boxes are. You need to have juvenile matters where they can comply with the statute.

So what that means is that the handing of all matters running through a trial bench should be adequate, and should be identifiable, and that there shouldn't be a preference for one court here, one court there, because you see you run the risk of poor management and selective backlogs. I think maybe this is something that came up in our discussion that's been overlooked—if article III judges are article III bankruptcy judges, that in a way is a limiting of the distinction of being a district court judge.

I had that come up when I served on the board of directors of the Legal Aid Society in Louisville. A lady came into my office one day and said, "I came in to talk to you about this matter."

I said, "You know, we have neighborhood legal aid offices."

She said, "Yes; that's why I came to you. I went there; this is what he told me; I agreed with it, but I want to talk to a real lawyer."

I said, "What is a real lawyer?"

She said, "Well, you've got carpets on the floor, lamps hanging on the wall, books that's a real lawyer."

And I think we run into that because we have these district judges who are bankruptcy judges that say, "Well, are you a real judge," and they say, "No; I'm a bankruptcy judge."

"What's the difference between you and this other judge?"

I think we're creating a problem.

So I think my answer to you is that the standard which you read accurately reflects the thinking of the American Bar Association, that

there should be a uniform, integrated, unified court system giving full consideration to all matters, not giving consideration only to certain matters.

Mr. LEVIN. When a litigant goes before a referee, does he ask the referee, "Are you a real judge?"

Mr. CHAUVIN. In some of the horror stories that we've had they could legitimately doubt whether he was.

Mr. LEVIN. Is that an important goal of this legislation, in your view, to make them look like real judges?

Mr. CHAUVIN. I would say that all judges should be part of the system; yes.

I think you'll find on some of this what you call cross-sitting in bankruptcy. If you have a person who is an eminently qualified person, an article III judge appointed by the President—there still is a limiting factor if that person sits only in a criminal case.

Call them all the same, but make that decision when you decide how much they have to do.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Following up on that, Mr. Chauvin, the ABA Board of Governors' Resolution recommends three alternatives: A division of the district court, vesting jurisdiction in the district courts, or having separate bankruptcy courts.

Do any of these contemplate a referee or adjunct system such as we have today?

Mr. CHAUVIN. Not really; no.

Mr. KLEE. Do you think it's consistent with principle 1.10, which Mr. Levin was reading from, which recommends the reference cases to assistant judges or magistrates of cases in the nature of preliminary hearings, noncriminal traffic cases, small claims to refer bankruptcy cases in a similar fashion; do you feel that the resolution of bankruptcy disputes is in that class?

Mr. CHAUVIN. No. I think that the resolution of bankruptcy disputes is in a class that this legislation will cure because so many thinks are going to be administrative, and goodness knows, that would be a plus for any legislation, to take it out of the court system. I think a lot of these matters can be handled administratively.

And the thrust of the Governors' Resolution is that it's consistent with the standards which you read.

Mr. KLEE. Then do you think, to follow up on one of Mr. Butler's questions, if the bill contained a provision, at the end of the transition, vesting the jurisdiction in the district court without the possibility of reference to a referee or special master, that would be acceptable to your task force?

Mr. CHAUVIN. I think that would be awfully restrictive. It would be the only thing in the federal system that couldn't be referred to a special master or a referee. Anything else can be.

Mr. KLEE. I think we are talking about permanent referees.

Certainly in a specialized matter reference would be permissible; I am talking about reference by rule of the whole proceeding.

Mr. CHAUVIN. I think the need for that would be obviated if that were to become the case.

Mr. KLEE. Did your task force make a recommendation to the Board of Governors on the issue of the article III court?

Mr. CHAUVIN. Did we make—

Mr. KLEE. Did the task force in its recommendation to the Board of Governors contain anything in its resolution concerning article III bankruptcy courts?

Mr. CHAUVIN. Only that the matter be looked at at the end of 7 years.

Mr. KLEE. I see.

Mr. CHAUVIN. We could not in good conscience make any recommendation until we knew how much of this matter is administrative and how much of it is going to remain in an adversary position.

I think you make that decision at the end of 7 years.

But I think if you don't have a sunset provision in there, I think we'll go on all the rest of our natural lives. I think we've got to get it out of somewhere.

Mr. KLEE. Mr. Chauvin, does the recent creation of the Tax Court, and the granting of full constitutional status to the court of claims, the court of customs and patent appeals, and the customs court indicate that the trend is toward rather than away from specialized courts?

Mr. CHAUVIN. Yes, sir, it does.

Mr. KLEE. Judge Rifkind, in your prepared statement you state that review by the district court of a trickle of bankruptcy cases is a sufficient supervision by the district courts of the bankruptcy referees.

Would that kind of supervision also be satisfied by an independent bankruptcy court with review of a trickle of cases by the generalist courts of appeals?

Judge RIFKIND. Well, first of all, you have created a separated court. To me, that is a digression, incompatible with my conception of the American judicial system.

But whereas review by the court of appeals is an elaborate procedure, review by the district judge as occurs today is quite simple—no printed papers, no printed records, very short notice, both on interlocutory orders and on final orders. Whereas the court of appeals generally is governed by program of finality. You've got to come there at the end of the case.

It would be utterly impractical in that situation.

Mr. KLEE. Judge Rifkind, do you think it's appropriate for a district court judge or a trial court judge of general jurisdiction to be hearing appeals of any kind?

Judge RIFKIND. If the Congress confers that power upon them, why not? District judges sit in the court of appeals very frequently by designation of the chief judge of the circuit.

Mr. KLEE. But when they are sitting in their capacity as a trial court, do you feel it is appropriate for them to hear appeals in that forum?

Judge RIFKIND. Why not; if the Congress says so, why not?

The grant of authority is not self-derived; it's by the grant of the Legislature of the United States.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. EDWARDS. Any further questions?

Mr. BUTLER. Yes; if I may, one question.

Mr. Chauvin, I have a reference to a sentence in your statement—  
 “We do not support any restrictions on the enlarged jurisdiction itself, such as having to prove detriment before a matter could be brought before the bankruptcy court.”

That, of course, has reference to the amendment which passed our body, and I think that's a very sound judgment on your part, and I would like to know if the rest of the panel agrees that jurisdiction by detriment is an inappropriate way to expand the jurisdiction of bankruptcy courts.

If you want to plead ignorance, that's all right.

Mr. SHAW. I'm trying to ferret out the meanings of that.

Mr. BUTLER. The Danielson proposal, the amendment which was passed before, included with it a provision that the adjunct system would remain; jurisdiction of district courts would be expanded to those cases in which detriment could be proven; pervasive jurisdiction would be limited by ability to prove a detriment before you could get it.

Mr. SHAW. Disagree with it completely.

I'm taking the position that the American Bar Association has.

Judge RIFKIND. If I were an English barrister, I would say that I have not been instructed on the subject. I would express some doubts on it.

Mr. VOLKMER. I don't think you'd be in favor of that, either.

Mr. BUTLER. I can't find anybody really who favors it, and that's why I'm pleased with this report, because it represented to us in part that this jurisdictional proposal had collateral American Bar support.

Mr. EDWARDS. The subcommittee thanks the witnesses for most interesting and helpful testimony.

The subcommittee will meet again tomorrow morning at 9:30 in this same room.

We really thank you all very much.

[Whereupon, at 4:45 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Tuesday, December 13, 1977.]

# BANKRUPTCY COURT REVISION

TUESDAY, DECEMBER 13, 1977

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The hearing was reconvened at 9:30 a.m., in room 2226, Rayburn House Office Building; Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Volkmer, Butler, and McClory.

Also present: Richard B. Levin, assistant counsel; and Kenneth N. Klee, consultant.

Mr. EDWARDS. The subcommittee will come to order. We're continuing here today on H.R. 8200, the bankruptcy bill that we've been engaged in for many months—and some of us, for a number of years.

We have three distinguished witnesses, and the witnesses have consented to present their testimony, and then to sit at a panel for our questions. And we hope that the witnesses will ask us questions, too, because we have some very sticky problems that we would like to resolve in here.

But we're just delighted to have all of the witnesses here. Without further ado, we will proceed.

Our first witness today is the Honorable Shirley M. Hufstedler, a Judge in the Ninth Circuit Court of Appeals from my home State of California, a most distinguished jurist.

Judge Hufstedler, we welcome you. You may proceed with your testimony.

[The prepared statement of Judge Shirley M. Hufstedler follows:]

STATEMENT OF HON. SHIRLEY M. HUFSTEDLER, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Mr. Chairman and members of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, my name is Shirley M. Hufstedler. I am a judge of the United States Court of Appeals for the Ninth Circuit. I am appearing before your Subcommittee in response to your kind invitation to offer my views upon two issues arising from H.R. 8200, reorganizing the bankruptcy courts. First, I offer a proposed alternative structural design for the bankruptcy courts, and, second, I propose an alternative to the appointment of United States Trustees.

Accordingly, the first part of my statement is addressed entirely to the structural design of the bankruptcy courts, and second is a brief description of my suggestion for the means of appointing United States Trustees.

## I. BANKRUPTCY COURT SYSTEM

### 4. Introduction

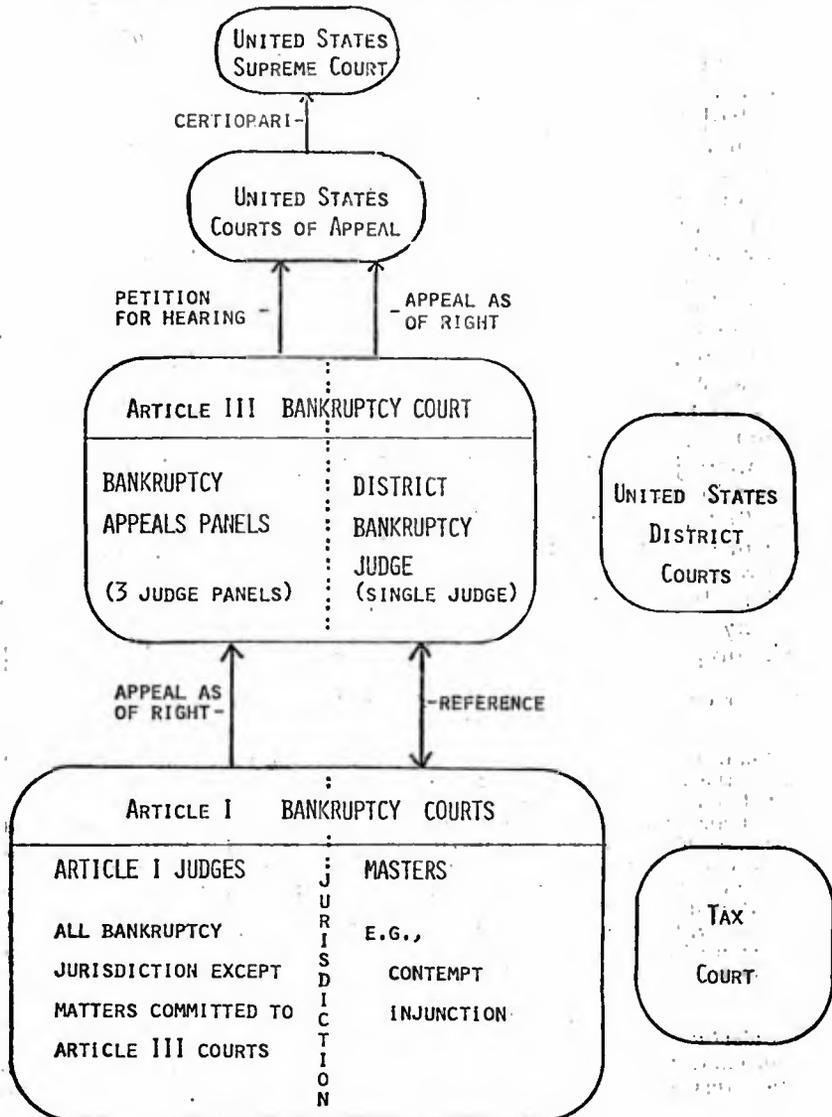
It is an effort to create a new bankruptcy court which provides the benefits of the proponents of Article III bankruptcy courts sought, while at the same

time avoiding the serious costs that the original H. R. 8200 design entailed, I propose a two-tiered bankruptcy system that uses both Article I and Article III courts. The system is independent and at the same time integrated into the existing federal structure. Although the overall design is novel, each segment is drawn from older models.

The base of the structure is formed by the Article I bankruptcy courts, the judges of which serve in two different capacities, by reason of the bifurcated jurisdiction of those courts. The upper tier is composed of Article III courts, the judges of which also serve in two different capacities, trial and appellate, likewise based on the twin jurisdictional functions of those courts.

The organizational chart on the opposite page is a diagram of the system showing its functions and relationship to other courts in the federal hierarchy.

BANKRUPTCY COURTS ORGANIZATIONAL STRUCTURE



### B. Article I Tier

The Article I bankruptcy courts are the foundation of the system. (The Tax Court box on the organizational chart is inserted to show that the first level of the system is on a judicial hierarchical level with the Tax Court.) All of the jurisdiction conferred on H.R. 8200's Article III courts in this design is granted to the Article I courts, with two exceptions; contempt and injunctive powers. With respect to the latter, jurisdiction is conferred solely on the Article III tier, but the Article I judges can conduct both contempt and injunction proceedings, acting as masters for the Article III judges.<sup>1</sup>

The purpose of retaining sole jurisdiction in Article III judges to issue contempt orders and to issue injunctions is to avoid the more serious constitutional objections to using Article I judges in the bankruptcy courts having the expanded jurisdiction contemplated by H.R. 8200.<sup>2</sup>

There are two different bridges between the Article I bankruptcy courts and the Article III bankruptcy courts: (1) the "reference" line which relates to the use of the Article I judges as masters for the Article III judges in contempt and injunctions, and (2) direct appeal as of right from the Article I to the Article III bankruptcy courts in respect of all other appealable orders and judgments of the Article I court. (The same duality is preserved in the access lines from the Article III bankruptcy courts to the Courts of Appeals, later described.)

Thus, the base of the system would be composed of some 94 to 200 Article I judges, together with their administrative personnel, supporting staff, and the clerks' offices serving the independent Article I courts.

### C. Article III bankruptcy courts

The second tier is the Article III court. (The detached box, "U.S. District Courts" is added to show that these Article III judges are on a hierarchical level with the existing federal district judges, and the lack of connecting lines illustrates the independence of the bankruptcy courts from those federal district courts.)

The dotted vertical line indicates the division between the two jurisdictional functions of the Article III judges: (1) as appellate judges sitting in panels of three hearing appeals as a matter of right from the Article I bankruptcy courts,<sup>3</sup> and (2) as single judges exercising original jurisdiction in cases involving contempt and injunctive powers.

Article III bankruptcy courts should sit in regions, the boundaries of which should encompass one or more United States Circuits, depending on considerations of geography and caseload. I propose six such regions, and, pending a sophisticated study, I hypothesize 30 Article III bankruptcy judges, arranged as follows:

	<i>Number of Judges</i>
Region 1, 1st and 2d circuits.....	4
Region 2, 2d and 4th circuits.....	3
Region 3, 5th circuit (as now composed).....	6
Region 4, 6th and 7th circuits.....	6
Region 5, 8th and 10th circuits.....	4
Region 6, 9th circuit.....	7

### D. Courts of Appeals

Access to the courts of appeals is provided by two different routes, reflecting the dual functions of the Article III bankruptcy courts:

<sup>1</sup> For this limited purpose, the relationship between the Article I and Article III judges resembles that between federal district judges and special masters and between district judges and magistrates exercising the expanded authority given to them under pending legislation.

<sup>2</sup> I have serious doubts about the expansiveness of the jurisdictional grant to the bankruptcy courts as contemplated by H.R. 8200, no matter how those courts are structured, especially in respect of jurisdiction removed from the state courts and plunged into the federal system. The removal disturbs sensitive federal-state relationships, unnecessarily overloads the federal judicial system, and generates constitutional concerns. Moreover, some of this jurisdictional largesse, such as that concerned with state title questions, may require absorption of much more Article III judge-time than can be justified. Moreover, I do not believe that every kind of civil case that can be tried in the federal district court should automatically wind up in the bankruptcy courts simply because it is related to a bankruptcy case.

<sup>3</sup> The use of multiple district judges resembles the familiar 3-judge district courts (minus a circuit judge).

(1) Appeal as of right from appealable judgments and orders in contempt and injunction cases. (This route is identical to the existing system of appeals from federal district courts to the courts of appeals because the function of the Article III bankruptcy judge in these cases is the same as that of existing federal district judges.)

(2) Discretionary appeal by way of a petition for hearing in the courts of appeals. The form of review is in the nature of certiorari. With one appeal as a matter of right, further appellate review should be in the discretion of the courts of appeals.<sup>4</sup>

#### *E. Supreme Court*

Access to the Supreme Court in bankruptcy cases is undisturbed. As is true today, petitions to the Supreme Court for certiorari to the courts of appeals will lie from any final order or judgment of the courts of appeals within the Supreme Court's appellate jurisdiction.

The proposed Article I-Article III structure should nevertheless reduce the certiorari burdens of the Supreme Court in bankruptcy cases because the two-level appellate reviews available in all bankruptcy matters, other than contempts and injunctions, should satisfy all but the most fanatically disappointed litigants that the issues have been fully and fairly resolved. The degree of litigant satisfaction will surely be enhanced by reason of the expertise in bankruptcy cases developed in Article I and Article III bankruptcy courts and the available review by the generalist courts of appeals.

#### *F. Comparative Advantages*

The proposed design eliminates the had features of the district court-adjunct model and the initial Article III court model of H.R. 8200, while preserving the primary benefits which the draftsmen of both sought to achieve.

This two-tiered bankruptcy court is entirely independent of the district court, thus fulfilling the oft-repeated purposes of relieving the overtaxed federal district courts of bankruptcy jurisdiction to which they were not always hospitable and of providing first-class justice to the legions of consumer and business bankrupts. The proposal avoids the intolerable systemic costs of an unprecedented expansion of Article III courts with its concomitant adverse impacts on federal district courts and, even worse, on the beleaguered courts of appeals. The proposal permits a significant amount of elasticity to expand or to contract both tiers of the bankruptcy court over a reasonable period of time. Moreover, it has the added attractions, which none of the other designs embodies, of decreasing the appellate burdens of the courts of appeals and potentially diminishing some of the Supreme Court's load while not destroying access to any courts of the federal appellate system.

## II. UNITED STATES TRUSTEES

I do not address the merits of the provisions of H.R. 8200 creating United States Trustees because my views on this subject are too immature to deserve your attention. I assume for this discussion that United States Trustees will be created and that the only issue is the mechanism for selecting the trustees.

For reasons that others have expressed and that I share, the appointment of United States Trustees should reside in the judicial branch. I reject the proposal that the appointing authority should be delegated to the courts of appeals, acting through the judicial councils of each Circuit or otherwise, for two reasons: (1) the courts of appeals are not tied closely enough to the work of the bankruptcy courts and are not sufficiently familiar with the performance of potential trustees within each district to exercise informed judgment; and (2) the courts of appeals are hard pressed to perform the tasks that they are already assigned, without adding any more.

My suggestion is that the power of appointment be delegated to the United States Judicial Conference, with express authority to the Conference to sub-delegate the appointing authority to such district courts as the Conference shall select upon such terms as the Conference shall prescribe.

<sup>4</sup> No jurisdictional quibbling is engendered when a case involves issues appealable as of right and appealable within the discretion of the courts of appeals. The discretionary elements can be simply treated as if they were pendent claims and the appeal can combine both the appeal as of right and a petition for hearing of the pendent issues.

This resolution is a happy one if Congress were to adopt some version of the proposed Article I-Article III bankruptcy court structure because the district courts would be removed from any involvement with bankruptcy and thus selection of the trustees by these courts would not give the slightest appearance of conflict of interest or inappropriate connection with the appointees. Although the district courts have heavy workloads, the burdens of appointment can be spread among more judges than those available on the circuit courts and the district judges have greater opportunity than the circuit judges to observe the qualifications of potential trustee candidates.

### TESTIMONY OF HON. SHIRLEY M. HUFSTEDLER, NINTH CIRCUIT COURT OF APPEALS

Judge HUFSTEDLER. Thank you very much, Mr. Chairman.

Of course, as the chairman and the members of the subcommittee are aware, I speak only for myself, and not as a representative of my court or for any other institution with which I am associated.

I'm pleased to be able to respond to the request by the chairman to present my views on an appropriate structure for the bankruptcy court, and to respond to the question concerning the appointment of the U.S. trustees.

From my prepared testimony, you will see an organizational chart which may, I think, be of some degree of help in this.

On the right, you will see the U.S. district courts and the Tax Court, to which the bankruptcy structure is in no way bound; but, rather to indicate what the level of judicial hierarchy is in the structure which I propose.

The base of the structure is going to be occupied, on this plan, by the bankruptcy judges, or "referees," as they are sometimes known, of the number of 94 to somewhere in the area of 200, depending on the number actually needed.

I propose them to be article I judges, on a level with the Tax Court. And to have as the article III level above it, a bifurcated jurisdiction. So that the Article I judges hear all bankruptcy matters as article I judges, except the contempt power, and the injunction power, by which I refer primarily to—if not solely to—the power of a court to enjoin another court, the most sensitive area to be delegated to a nonjudiciary-article court.

Therefore, with respect to those matters, the article I judges sit as masters, not as article I judges.

The article III bankruptcy court—and I will go into more detail about that later, if you wish—serves two functions. Those article III judges sit in panels of three hearing appeals as a right in bankruptcy matters from the article I courts. They also sit as district judges in the bankruptcy "in contempt and injunction" matters.

All appeals, as of right, are concluded with the article III court, except in those two areas of jurisdiction. And in those two, the appeal as of right goes to the U.S. courts of appeal, just as it does today from the district courts.

On the other hand, appeals after determination of appeals as of right by the article III court, goes to the U.S. courts of appeals only by way of a petition for hearing. I describe that as being in the nature of certiorari, because I don't wish to call it certiorari for the reason that certiorari brings with it its own freight. Rather, I prefer to call

that a petition for hearing to indicate that there is discretionary review only from all appeals other than contempt and injunctions, from the article III bankruptcy court to the U.S. courts of appeal.

Now, why this particular design? I have some strong reasons for it. In the first place, it gives the manpower where it is needed, in the article I courts, without distorting the judicial hierarchy presently existing.

Second, it does create, as the 8200 sponsors wanted to have created, a bankruptcy court which is entirely independent of the district court.

Third, the insertion of the article III layer permits relief to the U.S. courts of appeals—which, as I've already indicated, are the most seriously overburdened courts in the Nation—at least, they're tied for first place. And, therefore, we must find a means to provide relief.

At the same time, in my view, we should not have bankruptcy courts wholly self-contained, so that there is no review by a generalist court. And we cannot have generalist review confined to the U.S. Supreme Court, because the Supreme Court itself cannot handle any more business.

While I suggested specifically and hypothetically that the article III court might have 30 judges, that number may be a bit high. But we cannot tell exactly how many will be needed until the decision is made about the extent of jurisdiction to be conveyed to the bankruptcy court.

In short, one can only find some guidance, statistically, from the existing bankruptcy figures; because everybody's proposal changes the jurisdiction in bankruptcy. All I can do now is to suggest that the proportion of judges from the existing figures in bankruptcy is substantially right, even though the numbers may not be.

Of course, there are some restraints upon this, in the sense that we cannot have for any region—and you will note that I have put together circuits into "regions," because it would be manifestly foolish, for instance, to have a full panel of judges serving only the first circuit, or only the District of Columbia Circuit, each of which has relatively few bankruptcy cases. One constraint is that you cannot have less than three judges, because you cannot put together an appellate panel with less than three; nor, when we're talking about the third and fourth regions, putting together two circuits—the fifth circuit potentially to be split has to have six, because if it's split, it needs three for each new region.

Taking into account not only the geography, but also the volume of bankruptcy work which is generated within those circuits, the ninth circuit, as usual, wins the sweepstakes in terms of having more bankruptcy than anybody else in the country—both business bankruptcy and, as Mr. Edwards knows very well indeed, consumer bankruptcies as well.

Therefore, while I do not attempt to verify the number, I do suggest that the concept is an appropriate one. And the proportion of judges among the regions is certainly within the area of statistical probability.

I will be glad, of course, to respond to any question about this particular design that the members of the committee may have. I point out that it does appear to be a compromise, and in some sense it is, because it gives both article III courts and article I courts—it creates an independent court—but a court that is also integrated within the Federal judicial system. But it is a compromise which is not a sellout. It is a

compromise, not with virtue, but a compromise functionally, because each portion of this design has its own purpose, as I'm sure the members of the committee appreciate.

I will not, at this time, turn to the matter of the U.S. trustees, unless the members of the committee wish to hear me on that topic. I limited my discussion to the question I thought that I was supposed to respond to, which was not the validity of the concept of the U.S. trustees, but rather the methodology which was appropriate for appointing the trustees—assuming, for this purpose, that the U.S. trustees would be appointed.

I will simply conclude, at this time, with the statement that: For the reasons I mentioned in my prepared statement, it is my view that the U.S. trustees should be appointed by the U.S. Judicial Conference, who would subdelegate that power to those U.S. district courts which the U.S. Judicial Conference would designate.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Judge. And thank you for your very innovative and thoughtful testimony, and interesting suggestions.

Without objection, your full statement will be made a part of the record, as will all of the full statements be made part of the record.

We will move, now, to the next witness. One of the bonuses—perhaps the greatest bonus—of being a member of the President's Commission on Reform of the Bankruptcy Laws was getting to know the chairman, Harold Marsh, of Los Angeles, who is not only a most distinguished lawyer, but a former professor, and certainly one of the country's most outstanding authorities on bankruptcy law.

Harold, we welcome you, and you may proceed.

[The prepared statement of Harold Marsh, Jr., Esq., follows:]

NOSSAMAN, KRUEGER & MARSH,  
Los Angeles, Calif., November 25, 1977.

Re H.R. S200.

Hon. DON EDWARDS,

*Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I appreciate your invitation to submit comments concerning the above mentioned Bill to enact a new bankruptcy law. I was the Chairman of the Commission on the Bankruptcy Laws of the United States created by Congress in 1970, which was composed of two Senators, two Congressmen, two Federal District Judges and three other persons appointed by the President. The Commission rendered its Report to Congress, the Chief Justice and the President in July, 1973, and reform of the bankruptcy law, as you know, has been the subject of ongoing consideration by committees of the Senate and the House since that time.

I believe that it is accurate to say that the Commission on the Bankruptcy Laws believed that there were three fundamental principles which should be observed in any revision of the bankruptcy laws: (1) That the Bankruptcy Court should be restructured as a separate and independent court to increase its status and prestige; (2) that the jurisdiction of the Bankruptcy Court should be enlarged to include litigation relating to the estate between the trustee and third parties which is now required to be tried in a plenary action in other courts, with all of the calendar and other delays associated with such litigation; but that both of these things should be done *only if* (3) the present combination of judicial and administrative functions in a single Bankruptcy Judge is eliminated, and the judge deciding contested matters is confined essentially to that function so that the appearance of the prejudice (and without question the actuality of prejudice in some cases) is eliminated.

All three of these objectives were attempted to be achieved in the two bills which were introduced in successive Congresses since 1973 (the bill drafted by the Bankruptcy Commission and that drafted by the National Conference of Bankruptcy Judges), although there was disagreement in the two bills over precisely what functions should be retained by the Bankruptcy Judges and the organization or institution to which those functions removed from the purview of the Bankruptcy Judge should be assigned.

H.R. 8200 differs in major respects from the approach taken by both of the prior bills with respect to these matters. I will discuss these differences with relation to each of the principles which have been set forth above. Since the third principle raises the most serious questions regarding H.R. 8200, it will be taken up first.

(3) The most serious criticism that has been levied against the existing system of bankruptcy administration over the years has been that the present system involves an inherent conflict of interests and the serious possibility of prejudice on the part of the official adjudicating controversies between the trustee (or debtor where no trustee is appointed) and third parties, and in any event the appearance of prejudice. The reasons for this criticism were twofold. In the first place, the judge (formerly called referee) frequently appointed the trustee whose controversies with third parties he subsequently adjudicated.

Second, the intimate involvement of the Judge in the day-to-day administration of the estate, and particularly the conduct of a business where a chapter proceeding is concerned, inevitably tends to make him appear to be the "partner" of the trustee in the attempt to work out a constructive solution to the various problems. The judge constantly receives information in a nonadvisory context which may influence his judgment in a subsequent controversy between a trustee and a third party, although it may have been wholly inadmissible in that adjudication and in any event was received entirely without the opportunity for cross-examination by the adverse party. The judge presides at the first meeting of creditors and bears all kinds of assertions, both sworn and unsworn, which may later be highly relevant in connection with some litigation. The judge must constantly authorize or approve actions by the trustee on an ex-parte basis concerning the day-to-day conduct of the proceeding. It is probably impossible for him to completely purge his mind of this mass of information, which he may have accumulated over a period of perhaps two or three years, when he is sitting on the trial of a case between the trustee and some third party.

It should be emphasized that this situation is a fault of the system and not because any Bankruptcy Judge is doing anything improper. On the contrary, these other activities are a part of his job, and he has no choice but to perform them. There is no one else to do so. Therefore, the only way in which this situation can be corrected is to change the system. Giving the occupants of the bench life tenure will do nothing to correct this problem unless the system is changed. It is my understanding that certain cases were transferred from the jurisdiction of the District Judge in charge of the Penn Central reorganization under Section 77 for this very reason—he could hardly be presumed to be an impartial adjudicator of disputes between the trustees and third parties when he had the responsibility for running the railroad.

The Bankruptcy Commission and the National Conference of Bankruptcy Judges agreed that it was imperative that the basis for this possibility of prejudice, and in any event the appearance of prejudice, be removed as a condition to any enlargement of the jurisdiction of the Bankruptcy Court, although there was disagreement over the details of what should be labeled "administrative" and therefore taken from the judge and assigned to some other person.

H.R. 8200 has removed the power to appoint trustees from the Bankruptcy Judge and vested this power in the newly created office of United States Trustee (Section 701(a), page 125, line 9—page 126, line 5; Section 1104(c), page 181, line 21—page 182, line 5).<sup>1</sup> However the Bill does absolutely nothing to change any of the other functions of the judge or to solve the problem of the combina-

<sup>1</sup> All of the citations in this letter are to sections of the Bill, H.R. 8200 as introduced, except those to Title I of the Bill which are to sections of the new Bankruptcy Act contained therein.

tion of administrative and adjudicatory functions, which in my judgment is a much more serious problem than the mere appointment of the trustee.

There are only two provisions in the entire Bill that could remotely be considered to change what the judge in the bankruptcy proceeding will do from what he now does. Section 704(8) (page 129, lines 12-14) provides that the trustee shall file a final account of the administration of the estate with the court "and with the United States Trustee". Section 224(a) (page 252, lines 4-6) provides that each United States Trustee shall establish, maintain, "and supervise" a panel of private trustees. No other provision of the Bill which I am able to find could even arguably be thought to vest in the United States Trustee any of the present functions of the judge.

Certainly, the fact that the trustee files a copy of his final report with the United States Trustee does not authorize the United States Trustee to perform any function which is not expressly conferred, and none is—not even to review or take any action respecting this copy of the report which he receives. Similarly, the power to "supervise" the "panel" does not confer upon the United States Trustee any power to issue orders to or approve action by or otherwise supervise the conduct of a particular trustee in an individual case, especially when under the terms of the Bill the functions and responsibility of the judge are not affected in the slightest in that respect.

Since the identical persons who are now running the system will be operating it for a period of five years after this Bill goes into effect, it is certain that they will not change in any respect the manner in which they have been operating unless such change is mandated by the legislation, nor, in my opinion, would they be authorized to do so. Nor will the lifetime judges who succeed them have any reason, or authority, to change a system which has been operating for five years.

If it is desired to effect such separation of functions, the manner in which it can be done is simply to include in the statute a provision that the functions of the judge shall be confined to the adjudication of adversary proceedings and such other matters (for example, the confirmation of plans and the approval of the fees of trustees and attorneys), specifically listed, as are considered to be essentially judicial in nature even though there may be no adverse party contesting what has been proposed. There should also be a specific provision in the statute requiring that adversary proceedings be assigned to the Bankruptcy Judges in multi-judge courts on a rotation basis so that one judge does not automatically adjudicate every one of a dozen or so contested matters relating to the same proceeding, where obviously the evidence heard in one case cannot be expelled from his mind when he hears the next one.

If certain functions are removed from the judge, then obviously they must be assigned to someone else or abolished as unnecessary. The question of who this other person shall be, and who shall appoint and supervise him, is much less important than that the separation be effected. The Bill proposes the creation of a United States Trustee, although it gives him no function specifically other than to create a panel of private trustees and appoint a member of that panel in individual cases, and vests the appointing and supervisory power over such United States Trustees in the Justice Department. However, I understand that the Justice Department does not want this responsibility, and it would certainly make no difference with respect to the principles being discussed if that appointive and supervisory function were lodged in the Supreme Court or the Administrative Office of the United States Courts or the Court of Appeals of each Circuit. Wherever it may be lodged, the Bill does propose the establishment of a new office to which there could be transferred the administrative functions that are removed from the responsibility of the Bankruptcy Judge, although the Bill in fact transfers nothing other than the appointment of trustees.

It is true that the considerations that have been discussed above are much more significant in a reorganization proceeding or an asset bankruptcy than in a no-asset bankruptcy or a wage earner proceeding under Chapter XIII of the present law, because the extent of the involvement of the judge in the administration of a particular proceeding is much greater in the former types of cases. The latter two categories comprise the vast bulk in number of bankruptcy proceedings, but the 27 billion dollars in scheduled assets in pending bankruptcy cases (referred to on page 5 of the Staff Report of the House Subcommittee) were all being administered in cases of the former type. By

definition, no-asset bankruptcy cases and wage earner plans involve no assets whatever. Even in those cases, however, a litigant has the right to an impartial tribunal.

It would be tragic if the controversy over whether the court should be an Article I court or an Article III court (discussed in Item 1 below), while undeniably important, but perhaps only to lawyers (and judges), were permitted to obscure this crucial issue which is posed by H.R. 8200. H.R. 8200 has acquired the label of the "Bankruptcy Reform Bill"; but as it stands, in my judgment, it is revision without reform. I regret to say, after the labor of seven years (a good deal of which was mine), that if no improvement is made in this regard in H.R. 8200, I would have to recommend that Congress disapprove the Bill.

(1) The bill drafted by the Bankruptcy Commission proposed the creation of a new Bankruptcy Court modeled primarily on the Tax Court, with the judges to be appointed by the President with the advice and consent of the Senate for a term of 15 years, rather than by the Federal District Judges as at present. However, the Commission recommended that appeals from the new Bankruptcy Court go initially to the Federal District Court as under the present law and only thereafter to the Circuit Court of Appeals. Judge Edward Weinfeld dissented from this recommendation of the Commission and preferred that the present method of appointment and the present tenure of the Bankruptcy Judges be retained.

H.R. 8200, in provisions which have elicited the opposition of the Judicial Conference, provides that the new Bankruptcy Court will be created as an Article III court, with the judges being appointed by the President with the advice and consent of the Senate and having tenure during good behavior and with appeals from this court going directly to the Circuit Court of Appeals.

The structure of the proposed new court was one of the most difficult questions debated by the Commission, and I think it is fair to say that the final recommendation of the Commission was a compromise designed to achieve the broadest support among the members of the Commission. The Commission initially voted to recommend the structure which now appears in H.R. 8200 by a sharply divided vote. Thereafter, it reconsidered this matter and recommended the structure indicated above, although, as also has been mentioned, Judge Weinfeld did not agree with the final recommendation.

I think that all of the members of the Commission recognized that this was a matter upon which reasonable men could and did differ and were trying to achieve a recommendation that would command wide-spread support. I personally favor the present provisions of H.R. 8200 giving the Bankruptcy Court Article III status, but I would certainly not object to the structure recommended by the Commission as I did not at the time its Report was submitted.

However, I recommend that, if your Subcommittee decides to return to something along the lines recommended by the Commission, the model of the Tax Court be followed entirely and that appeals go directly to the Circuit Court of Appeals. I believe that the evidence indicates, as stated in the Report of the Staff of the House Subcommittee, that appeals to the District Court are largely a waste of time unless it is intended to take the matter ultimately to the Circuit Court of Appeals.

However this issue may be resolved, it is urgently recommended that the provision in H.R. 8200 apparently restricting appeals to "final orders" (Section 238, page 260, line 12), which is incongruously placed in a section dealing with appeals of interlocutory orders, be reconsidered. Appeals have always been permitted from interlocutory orders in bankruptcy proceedings—for the very good reason that the proceeding may go on for two, five, ten or even fifteen years.

In considering the question of the appropriate structure for the Bankruptcy Court, it should be kept in mind that the question is not whether a "specialized court" is to be created. We have a specialized court now, the judgments of which are final unless appealed, even though the first appeal goes to another trial court. No one, so far as I know, is recommending that that specialized court be abolished; certainly, no one recommended that to the Bankruptcy Commission. The question is rather what is to be done with the specialized court we already have.

The Report of the Staff of the House Subcommittee argues that, with the expanded jurisdiction of the Bankruptcy Court, it will be exercising the judicial power of the United States and that it would be unconstitutional to give this

power to any court other than one created under Article III. I think that this is a strong argument, and it was a question which I raised in the deliberations of the Bankruptcy Commission. However, I am not as convinced as the Staff of the House Subcommittee that there is a clear answer to this issue.

Assuming that the argument is sound that the Constitution requires that the Bankruptcy Court must be constituted as an Article III court in order to exercise the expanded jurisdiction proposed to be given to it, there is a glaring inconsistency in H.R. 8200. The creation of the Article III court is to be delayed until October 1, 1983 (Section 402(b), page 292, lines 11-13), and in the meantime the present court will continue to exist, which is obviously not an Article III court and from whose judgments there is only a right of appeal and in no case any trial *de novo*. However, the expanded jurisdiction will be conferred immediately upon the present court with the same personnel (Section 405(b), page 297, lines 14-19). I know of no doctrine which would assert that it is all right to be unconstitutional for an interim period or transitionally.

(2) H.R. 8200 provides that the Bankruptcy Court shall have jurisdiction of all civil cases "arising under or related to" proceedings under the Bankruptcy Act (Section 243(a), page 261, line 17—page 262, line 3). This does not differ in substance from what was recommended by the Bankruptcy Commission, although it seems to me that the phraseology is too vague for a provision conferring jurisdiction on a court. It does not even require, for example, that the trustee be a party to the litigation, as long as it can be determined to be "related to" the bankruptcy proceeding. Even though he is not, either party could remove a pending case to the Bankruptcy Court if it is determined to be somehow "related to" the bankruptcy proceeding (Section 243(a), page 266, lines 8-15).

I do not believe that anyone has questioned this objective of consolidating in the Bankruptcy Court the litigation relating directly to the estate. The differences of opinion which exist relate to the question of whether this provision alone should be enacted, even though there is no change in the status or structure of the Bankruptcy Court and even though there is no elimination of the present combination of administrative and judicial functions in the Bankruptcy Judge. As I have indicated above, the Bankruptcy Commission was unanimously of the view that no increase of the jurisdiction of the court was justified unless the latter of these other objectives was simultaneously achieved. While Judge Weinfeld dissented from the proposal to change the method of appointment and tenure of the Bankruptcy Judges, he supported the provisions recommended to achieve this separation of functions. Those lawyers who specialize in representing trustees, and who are therefore deservedly recognized as the leading "bankruptcy experts" in the United States, have, I believe, generally supported these other two objectives; but they have also been generally willing to sacrifice both of them to obtain only the expansion of jurisdiction. If that should happen, it would in my opinion be a serious public disservice. I suggest that your Subcommittee should carefully consider the interrelationship of the three principles set forth above and should not approve any expansion of the jurisdiction of the Bankruptcy Court unless the other two problems are satisfactorily resolved.

There is one matter related to this expansion of jurisdiction upon which I would like to comment specifically. That deals with the venue of actions initiated by the trustee under his new ability to sue third parties in the Bankruptcy Court to collect money judgments. The Bankruptcy Commission recognized that, while the jurisdiction of the Bankruptcy Court should be expanded, the normal right of a defendant to be sued in the district of his residence should not be abridged merely because he is being sued by a trustee in bankruptcy. It therefore recommended that unless the Bankruptcy Court had jurisdiction based upon the possession of property as under the present laws, a suit against a third party should be subject to the same venue rules which would have prevailed had the bankrupt or debtor been suing the third party.

H.R. 8200, on the contrary, gives the trustee the right to bring suit against a third party in the Bankruptcy Court where the proceeding is pending in all cases, except where he is seeking to recover a money judgment of less than \$1,000 (or a consumer debt of less than \$5,000) (Section 243(a) page 263, lines 3-11). Furthermore, even where he is suing for less than \$1,000, if he in fact brings suit in the court where the proceeding is pending, although that may be in Los Angeles and the defendant may reside in New York, it is provided that the Bankruptcy Court may retain the action, even though it is filed in the wrong district, "in the interest of justice and for the convenience of the parties." (Section 243(a), page 265, line 23—page 266, line 3.) It, of course, will always

be for the convenience of the trustee, and for the convenience of the judge who is supervising the whole proceeding, to have all of the litigation heard there. These provisions, in my opinion, are unjust and should be revised to adopt the recommendation of the Bankruptcy Commission.

I appreciate the opportunity, Mr. Chairman, to submit these views to you and your Subcommittee.

Respectfully yours,

HAROLD MARSH, JR.

**TESTIMONY OF HAROLD MARSH, JR., ESQ., FORMER CHAIRMAN OF  
THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED  
STATES, LOS ANGELES, CALIF.**

Mr. MARSH. Thank you, Mr. Chairman.

I have, as you indicated, submitted a written statement, and I will confine my oral remarks merely to highlighting what seems to me to be the most crucial issue before the Congress, both in the House bill and in the Senate bill, in connection with reform legislation in the bankruptcy field.

I think we should start out by asking ourselves: Why do we need to change the present system? Unless there is some reason to change the present system, then it probably should be left alone. If there is a reason for changing it, then the changes must be tailored to accomplish the purpose of that reason for change.

Now, it seems to me that the main reason for changing the present system at all is the conflicts of interest inherent in the present structure. If we did not have those conflicts of interests in the present court structure, I would not see any particular reason to institute any change at the present time.

Therefore, I may be addressing myself only to the first level—or the lowest level—of Judge Hufstedler's proposed structure. But I think that has to be considered the most important. Because, obviously, only a tiny fraction of all decisions at the trial level are appealed; and however they may be appealed, and by whomever they may be heard, it is essential that we have confidence in the initial decision-making.

I think it is fairly obvious, and I think if anyone would simply walk the corridors in any State bar association meeting for a few hours and raise the issue of bankruptcy, it would be obvious to him that the bar in general does not have confidence in the present court structure.

Now, this may arise, in part, out of ignorance. I think it does. Certainly some of the extreme opinions that are heard from people who are not expert in the bankruptcy field are unjustified. But there must be a reason for that attitude to exist; and I think the reason that attitude exists is that the referee in bankruptcy—the bankruptcy judge, whatever you want to call the present judicial officer—is also charged with making decisions *ex parte*, in the same matter, without the benefit of any cross-examination on hearing.

These decisions are not the same thing upon which he is called to adjudicate, but they frequently involve the same factual matters.

I heard a very, very experienced bankruptcy lawyer in Los Angeles say that a bankruptcy judge there, after rendering a decision in an adversary proceeding, had said to him: I can't recall upon what

evidence I based that decision—whether I heard it in chambers, in the corridor, or in the proceeding.

Now, this kind of setup does not generate confidence in the court. And I think the most crucial issue is to separate the adjudicatory function from this administrative function, as it sometimes has been called, or “supervisory function”, over the liquidation of the estate, or the running of the business in a chapter proceeding, or whatever may be involved in the proceeding.

Now the question is: How has that been done—if it has been done at all. It is my view that it has not been done at all, in either H.R. 8200 or S. 2266. Obviously it has not been done at all in S. 2266, because there is not even created an office to which any of these functions could be transferred. And, if there is no one else to perform them, then clearly the bankruptcy judge must continue to perform them. They are necessary functions in a bankruptcy proceeding. They cannot simply be abolished.

As far as H.R. 8200 is concerned, I have outlined in my letter, with citations of specific sections as far as I could find any that were relevant to this issue, why I believe that there has been no separation of functions, with one exception.

H.R. 8200 provides that the trustees shall be appointed by a U.S. Trustee, so that the combination of functions in appointing a trustee for the estate, and later adjudicating controversies to which he is a party, has been eliminated.

That, however, in my opinion, is not by any means the most serious conflict of interest that arises in the bankruptcy judge’s function. It is this constant supervision of the activities of the trustee, the constant approval of various requested actions that he wants to take.

Now I have heard it said that H.R. 8200 solves this problem by providing, in effect, for a default judgment. In other words, whenever the trustee wants to do anything and no one objects, then he is entitled to it; and the judge should rubberstamp the order permitting him to do it, without reading it, or without considering it.

No. 1, I don’t think any judge would do that, without being told specifically in the statute to do that—which he is not.

Second, I think it would be a very, very bad idea if it were done. I don’t think you can solve the conflict of interest inherent in the official’s position and function by simply turning loose private trustees to do anything they want, just because no one objects. It is notorious that, in many, many proceedings, the creditors are totally uninterested. Rather than pursuing the matter in the bankruptcy proceeding to try to realize some return, they charge half of it to Uncle Sam and forget about it, and they figure that’s the best way to proceed.

But I think you’re creating—if that, indeed, were mandated by the statute, that the judicial officer, administrative officer, or whatever he may be called, shall not supervise the activities of the trustees in the sense of approving any extraordinary actions by him, whether or not there is any objection—I think you would create a situation where there would be a great potential for abuse, and for scandal.

I don’t believe the trustees themselves that are in this area want that kind of freedom. They’d like to have a court order approving a proposed action, as a protection for themselves, or an order of some

public official who has the authority to issue that order after reviewing the proposed action—perhaps modifying it, certainly in some cases refusing to approve it.

There is one word in H.R. 8200 that possibly might confide this function to the U.S. trustee, and that is: It says that the U.S. trustee shall, quote, “supervise,” unquote, the panel of private trustees.

In the light of 70 years of history, that is too much freight for one word to carry, Mr. Chairman. It simply will not result in any kind of action of that nature by the U.S. trustees, I don’t believe, unless his functions are elaborated and specifically defined in the statute as to that power of “supervision.”

Let me close, if I may, by referring to a proposal which I assume the subcommittee has received contained in the report of the Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference.

There is, in the Judicial Conference report, a proposal that there indeed be created an official with specifically defined powers to act in these ex parte matters, and a general provision that the Judicial Conference may extend the matters which this official is empowered to act upon.

This creates a mechanism, at least, whereby this separation of functions can be established. The proposal of the Ad Hoc Committee of the Judicial Conference suggests that the appointment of this individual—who is called an “administrator,” rather than the “U.S. trustee”—be made by the circuit courts of appeal.

What he is called, and by whom he is appointed, to me is not the crucial issue. The question is: What functions is he given? And what functions are removed specifically by statute from the purview of the judicial officer who must decide controversies arising from bankruptcies?

It was 30 years ago that the Administrative Procedure Act was passed that tried to separate this kind of combination of judicial and administrative function, even in administrative agencies, and yet we still have a court which has that same type of combination of functions existing. And unless that issue is solved, Mr. Chairman, I suggest that serious consideration should be given to leaving the present system alone.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, very much, Mr. Marsh.

Our next and last witness, is Mr. Louis Levit, of Chicago who will present the views of the Commercial Law League of America. Mr. Levit, we welcome you.

[The prepared statements of Robert B. Chatz, Esq., and Louis W. Levit, Esq., follow:]

STATEMENT BY ROBERT B. CHATZ, PRESIDENT, COMMERCIAL LAW LEAGUE OF AMERICA

Mr. Chairman and members of the Subcommittee, I am Robert Chatz, President of the Commercial Law League. Accompanying me is Mr. Louis Levit of Chicago, Chairman of the League’s Special Committee on the National Bankruptcy Act.

We want again to express our sincere thanks to the Committee and its counsel for the many courtesies they have extended to the League and its representatives, particularly for the invitation to appear and testify in connection with H.R. 8200, the proposed bill to establish a uniform law on bankruptcies.

The Commercial Law League of America is an organization founded in 1895, composed of almost 6,000 members, all of whom have an active professional interest in the area of debtor-creditor relations, including all phases of bankruptcy and insolvency proceedings. Approximately 85 percent of the members are practicing attorneys devoting a major portion of their time to commercial bankruptcy and related matters. The remainder of its membership consists of law professors, bankruptcy judges, and representatives of recognized commercial agencies and approved commercial law lists.

The detailed studies and recommendations on behalf of the League with respect to the various proposals during the past 4 years to revise the bankruptcy law have been prepared by the committee chaired by Louis Levit, and he will present the recommendations of the League on H.R. 8200, with particular reference to the need for an independent bankruptcy court.

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STATEMENT BY LOUIS W. LEVIT, CHAIRMAN, SPECIAL COMMITTEE ON THE NATIONAL BANKRUPTCY ACT, COMMERCIAL LAW LEAGUE OF AMERICA

The Commercial Law League of America has consistently held that meaningful revision of the Bankruptcy System can be accomplished only by the creation of a functionally independent court of bankruptcy. At a minimum, such an independent court must contain the following characteristics:

1. Fixed terms of sufficient length to insure independence of action, and to attract highly qualified members of the Bar.

2. Full and complete jurisdiction of all bankruptcy proceedings and all controversies arising out of or in connection with bankruptcy proceedings, with adequate provision for removal from non-bankruptcy courts.

3. Right of direct appeal to the United States Court of Appeals or in the alternative to a special Court of Bankruptcy Appeals having equal status to the Court of Appeals.

4. Adequate support staffs and library facilities.

5. Separation of administrative and investigative functions from the judicial.

H.R. 8200 as reported by the Judiciary Committee clearly complied with this standard and its proposed court structure was enthusiastically supported by the League. The Danielson-Railsback amendments, however, have substituted a so-called adjunct court with second-class status, and with jurisdiction even more severely restricted than under present law. In the opinion of the League, the adoption of H.R. 8200 with those amendments would be a step backward and would preclude the enactment of any meaningful improvement in the basic structure for years to come. The official position of the League in this regard was declared in a resolution adopted by its Board of Governors on November 21, 1977, copy of which is attached as Appendix 1.

The following arguments which have been advanced in opposition to an independent court do not, in our opinion, withstand analysis:

1. Cost. It has been contended that the institution of an independent court would involve an increase in costs of some \$25 to \$30 million per year. At current census figures this amounts to about 15 cents per person—hardly a prohibitive price for the overhaul of an archaic system designed to meet the economy of 1898. Furthermore, the bulk of this increase will go to provide the judges with law libraries, law clerks, and adequate support staffs—the need for which is generally recognized even by those who oppose an independent court.<sup>1</sup>

2. Fragmentation. It is argued that creation of a separate of bankruptcy would lead to "fragmentation" of the federal judicial system. The issue, however, is not whether there shall be a *specialized* bankruptcy court. We have a specialized court under the present Act, and would continue to have a specialized court under every proposal which has been put before the Congress, including the Danielson-Railsback amendment. The real issue is whether the specialized Court which hears bankruptcy cases shall be truly independent or shall continue to be a second class tribunal saddled with administrative and clerical duties and hampered by archaic and obscure jurisdictional limitations.

<sup>1</sup> See for example statement of Griffin B. Bell, Attorney General of the U.S. before the Subcommittee on Improvements in Judicial Machinery of the United States Senate Judiciary Committee, November 29, 1977, page 9.

Under the existing restrictions, which would be not only continued but, if anything, actually aggravated by the Danielson-Rallsback proposal, a trustee or debtor-in-possession is frequently forced to litigate some matters in the bankruptcy court, other matters in the U.S. District Court, and still other matters in State or local courts. More often than not, the delay and expense incident to litigation over jurisdictional issues has caused estates to forego substantial recoveries which would otherwise have benefited debtor and creditors alike. It is precisely to prevent this type of fragmentation that a truly functional independent court is an absolute necessity.

The League is particularly distressed with the provision found in the Danielson-Rallsback amendments which would preclude even the district court, in most instances, from entertaining those cases which today are clearly within its plenary jurisdiction. The result would be that most of the most technical and difficult questions of construction of the new Bankruptcy Law (U.S. Code Title 11) and particularly its fraudulent conveyance, preference, and "strong-arm provisions" would be submitted to the courts and juries of the 50 states. This would, in our opinion, be an intolerable form of fragmentation.

3. Priority. It has been suggested that Bankruptcy cases are no more important than other types of civil cases heard in the federal courts and therefore are not entitled to priority consideration. This argument also misses the real issue. The de facto specialized court now in existence was created in response to the special needs of bankruptcy administration—needs which a district court of general jurisdiction simply is not equipped to fill. Bankruptcy and reorganization, dealing as they do with distress situations, invariably require the type of prompt on-going attention, over a period of months and years, which is absolutely incompatible with the crowded schedule of our already overburdened U.S. District Judges.

4. Dilution of prestige of District Courts—With deference we submit that the prestige of a judicial body is measured by the integrity, fairness and dignity with which it administers justice, and not by the exclusivity of its membership.

We earnestly hope that H.R. 8200 can be again amended to restore the type of independent court which modern Bankruptcy Administration requires. Unless so amended, the Bill cannot be supported by the Commercial Law League of America.

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#### APPENDIX 1

#### RESOLUTION ON BANKRUPTCY LEGISLATION ADOPTED BY THE BOARD OF GOVERNORS OF THE COMMERCIAL LAW LEAGUE OF AMERICA, NOVEMBER 21, 1977

Whereas, there are presently pending before the United States Senate and House of Representatives two bills designed to revise and make uniform the Bankruptcy Laws of the United States, which bills have been designated S. 2266 and H.R. 8200, respectively; and

Whereas, these Bills are the latest in a series of proposals advanced for the revision of the Bankruptcy Laws; and

Whereas, the Commercial Law League of America (CLLA) has actively participated in submitting written and oral recommendations with respect to Bankruptcy Law Revision, the most recent being the resolution of July 7, 1977 dealing with the area of creditor control, which resolution is hereby reaffirmed; and

Whereas, prior to October 1, 1977 each of the various proposals introduced in the Congress provided for the creation of an independent bankruptcy court with complete jurisdiction over all issues arising in or related to a bankruptcy or reorganization proceedings and contained provisions for the separation of administrative and judicial functions; and

Whereas, every major organization, including the CLLA, experienced in the administration of bankruptcy and reorganization proceedings has viewed the establishment of such an independent bankruptcy court with full jurisdiction over all bankruptcy and bankruptcy related matters as an absolute prerequisite to any meaningful improvement in the administration of bankruptcy reorganization proceedings; and

Whereas, the proposed Danielson-Rallsback amendments to H.R. 8200 recently adopted by the Committee of the Whole of the House of Representatives and the present provisions of S. 2266 in the Senate have discarded the concept of

a functionally independent court of bankruptcy, and have submitted therefore a proposed corps of "bankruptcy judges" within the U.S. District Courts, whose powers and authority will be subject to virtually all of the archaic restrictions which impede administration under the present Bankruptcy Act; and

Whereas, the adoption of this legislation in its present form would not only fail to achieve any meaningful reform or improvement of Bankruptcy Administration, but, in addition would in all probability preclude the possibility of any such reform and improvement for many years to come: Now, therefore, be it

*Resolved*, That H.R. 8200 and S. 2266 should be adopted only if revised or amended so as to restore the concept of a functionally independent court with full jurisdiction over Bankruptcy proceedings and controversies arising out of or in connection with such proceedings and with provisions for separation of judicial and administrative functions.

**TESTIMONY OF LOUIS W. LEVIT, ESQ., CHAIRMAN, SPECIAL COMMITTEE ON THE NATIONAL BANKRUPTCY ACT OF THE COMMERCIAL LAW LEAGUE OF AMERICA, CHICAGO, ILL.**

Mr. LEVIT. Thank you, Mr. Chairman.

Two personal notes. First, I'd like to express the regrets of the president, Robert B. Chatz, that he could not be here this morning. It was only a rather serious illness in his immediate family that made it necessary for him to remain in Chicago.

Second, I want to express my personal thanks, and the thanks of the league, for the many courtesies that this committee, its chairman and staff, have shown me; and in particular, for the courtesy of inviting me to appear this morning, and giving me the opportunity to appear on the panel with two such distinguished witnesses as Judge Hufstедler and Mr. Marsh.

I would like to direct my remarks primarily, or exclusively, to the matter of court structure, and to the standards which the league has adopted and which we consider a minimum criterion for any meaningful improvement in the court structure.

I might say, it's the position of the league that, although we agree with Mr. Marsh that there is a need for change, we agree that there are many substantive provisions in the law which require change, it is our position that a complete rewriting of the Bankruptcy Act is neither necessary nor advisable unless that rewritten Bankruptcy Act creates a court structure which is a marked improvement over the present structure.

And, if we cannot have such a marked improvement, we would prefer to see the act left as it is, and to leave the matter of substantive amendments, or substantive changes to particular amendments in the statute dealing with the particular substantive areas.

Now in our prepared statement, and in the resolutions we've adopted, we've tried to define what we think are the minimum standards of what we describe as a "functionally independent court of bankruptcy."

We believe there must be fixed terms of at least sufficient length to insure independence of action that will attract highly qualified members of the bar. We supported enthusiastically the provision for article III courts with lifetime appointments, and we think that's ideal. We do not say that that's an absolute necessity, but certainly there must be terms of at least 15 years, or thereabouts.

We believe the court must have full and complete jurisdiction not only of bankruptcy proceedings, but of all controversies arising out of, or in connection with bankruptcy proceedings—the so-called “plenary proceedings”—and with adequate provision for removal from nonbankruptcy courts, as was provided not only in H.R. 8200, but if my memory serves me correctly, in every proposal which was submitted to the Congress up till at least 3 months ago, including the Commission proposal, and including the proposals submitted by the National Conference of Bankruptcy Judges.

We believe there must be a right of direct appeal from the trial court, either to the U.S. Court of Appeals or, the alternative, to a special court of bankruptcy appeals which would have equal status with the court of appeals.

We believe there should be adequate support staffs and library facilities so that bankruptcy judges can exercise their full potential, as can other judges in the Federal judicial system. And we've agreed—certainly in principle—with Mr. Marsh and the Commission that there must be separation of administrative and investigative functions from the judicial power and the judicial authority—although we do not, in every instance, agree either with Mr. Marsh's or with the Commission's original proposal as to the mechanics and the structure needed to create such separation.

I would want to make one comment. We did support the provisions for U.S. trustee as defined in H.R. 8200, as originally introduced. We're aware of the Attorney General's reservations—which are shared by others—of a possible conflict if the U.S. trustee who may, on occasion, be contesting the Government on a question of priority, and so forth, is an official within the executive branch.

In any event, however, it is the position of the league—and it is certainly my position—that I don't see much choice between having no U.S. trustee, as proposed by Senate bill 2266, and having a U.S. trustee, as proposed under the Danielson/Railsback amendments where, if my memory serves me correctly, the U.S. trustee would be appointed by the district court, and that he would be making the appointments of the individual trustees to serve in that court.

I think one has to presuppose a high degree of naivete to assume that, under such a structure, there would be a true separation of the judicial and the appointive authorities. I just frankly cannot buy it.

In our prepared statement we have tried to comment with regard to some of the objections that have been made to the independent court. The cost factor, in our opinion, the total costs, even as projected by the opponents, is really not too high a cost to pay for a truly independent court. And as we point out, many of the increases come not from the creation of an article III court, or an independent court, but from the supplying of support staffs and library facilities, which I think everybody agrees is essential, no matter what type of structure you have.

We tried to direct our remarks to the so-called fragmentation argument. I have to say—and I say it with respect to those distinguished persons, judges, and others who have advanced it—that the people who talk about—who oppose a specialized bankruptcy court, are at least 60 years behind the times.

The present, "bankruptcy court," is a specialized court in every sense of the word. It exercises what to me is clearly judicial power: It hears controversies, it enters judgments, it enters decrees—and those are final and enforceable unless somebody takes an appeal from them within a very short period of 10 days.

Now, I would say that that is the essence of judicial power. It can exercise that power in every area of the law—certainly with the possible exception of, perhaps, criminal law and domestic relations law—but certainly in every area of commercial law, including questions of title under State law, questions of exemptions, questions of financing, and every other area dealing with transactions among individuals involving property or money.

The bankruptcy courts deal with those questions. The jurisdiction of the courts is in no way circumscribed by the subject matter of the controversy.

The difficulty is that it's limited by archaic restrictions, going to questions of possession, going to questions of consent, going to questions of dealing with the court, which, themselves, have been the source of endless, extensive, and expensive litigation—which has been noted.

I would like to comment with regard to the argument that the creation of an independent bankruptcy court that might be on the level of a district court, would dilute the prestige and integrity of the district court.

I believe the prestige and integrity of the district court is measured by the quality and integrity and the manner in which they conduct the business of their courts and administer justice, and not by the number of members on that court, or the number of persons within the Federal Judiciary, or by the fact that there is an independent court administering an area of the law to which, for the past 80 years, the district courts have, with rare exceptions, paid little or no attention.

For all those reasons, we earnestly urge this committee and the Congress to adopt a proposal, or to adopt a bill which will provide for an independent bankruptcy court with those minimum characteristics to which I have referred.

Just this morning I had an opportunity to read Judge Hufstedler's statements and her suggested court. I found it very interesting.

I certainly have not had an opportunity to make an analysis of it. I certainly can't speak on behalf of the league with regard to some of the very interesting innovations which were proposed, but I do have some comments and will be glad to make them in response to any questions of the panel; and, of course, I'll respond to any other questions which the chairman or the members of the staff or of the committee may have.

Thank you.

Mr. EDWARDS. Thank you. Mr. Levit.

If you do have some observations fresh in your mind, you may proceed.

Mr. LEVIT. Well, first, I was pleased to hear Judge Hufstedler say that the limitation on the injunctive powers would be intended to refer primarily, if not solely, to the power to enjoin another court.

I would like to say that if I could accept it at all—it would be a limitation solely to the power to enjoin another court. If an article I court were created, I understand that there are serious constitutional ques-

tions about giving an article I Federal Court the power to enjoin another court.

It is, as we all know, extremely rare that such power is sought. It's even more rare that it's exercised by a district court today. So, I don't think that would be a serious interference with the operation of an independent court.

I would be very, very much hesitant about any provision which would in any way impose any other restrictions on the power of the bankruptcy trial court, if I may so so. Because the power to enjoin activities, to enjoin interference with the administration of the estate, with the officers or individual officers of the bankrupt or debtor corporation, or the individual bankrupt, that power is absolutely essential to a workable administration of the bankruptcy laws.

That virtually unlimited power is now given to the bankruptcy judges. I'm not talking about whether there should be restrictions on the extent of automatic stay, as a matter of substantive law; I think there should be. But certainly the court that is on the firing line, administering the bankruptcy case, deciding the issue. That court should have every power of injunction available under the bankruptcy laws, with the possible exception of the power to enjoin another court.

With regard to contempt, I have mixed feelings. I understand the constitutional problem, and yet I have to say—as a lawyer with no expertise in constitutional law—that it seems somewhat incongruous to me to say, as we say today: Mr. Bankruptcy Judge, you may hear a case involving \$10 million, and you may render a final adjudication; you may make a decision which will put hundreds of people out of work; you may make all kinds of decisions, and those are final decisions involving rights of many people, many thousands, millions, and even tens of millions of dollars; but, if somebody violates your order, or shows disrespect to your court, the most you can do is impose a fine of \$250, and anything more than that has to be referred to a judge who really has nothing to do with the administration of the case.

I would like to think that there's some way out of that dilemma. And I recognize that there is a constitutional problem.

I would have to disagree with Judge Hufstедler's comments that were made both orally and in her prepared statement with regard to imposing limitations on the jurisdiction of the bankruptcy court, as far as matters of substantive law, for the reasons I have stated.

All we're really doing is stating that, in all controversies involving trustees and receiverships, the new bankruptcy court must have the same subject matter jurisdiction that the present bankruptcy court now has in those areas where possession, or consent, or a statutory grant of authority is present. And I think that's absolutely essential.

I do find—I'm not comfortable with the idea of a four-tier appellate structure. It would seem to me that there really is need for only one appeal as of right, and then one discretionary appeal to the Supreme Court.

I would agree that perhaps, ideally, they should be heard by generalized appellate courts; and it would seem to me—I don't recall what the volume is of appeals from bankruptcy cases; I think it's a relatively small amount, compared to the volume of appeals generally.

If that is an imposition on the present courts of appeal, perhaps there ought to be more judges.

Perhaps the solution is 12 or 13 circuits, instead of 9 or 10. If there is to be a special court of bankruptcy appeals, then I would say that anybody dissatisfied with the decision of that particular court, his only remedy ought to be certiorari to the Supreme Court of the United States.

I do find I am more than a little disturbed by what I think is a conscious attempt to still keep the bankruptcy court on a lower level. Even the reference to a "hierarchy," I think—I think that word carries a great deal of freight, and it disturbs me.

It seems, perhaps, the bankruptcy court doesn't have to be on the same salary level as a district court; it doesn't have to have the same lifetime terms as the district court; but certainly persons litigating in the bankruptcy court are entitled to courts which are full-scale courts, and when they take appeals they're entitled to have that heard by a tribunal which has—if it's not the U.S. Court of Appeals itself—has equal status to the U.S. Court of Appeals.

And having said that, I come back and say that I think there's a great deal in Judge Hufstedler's suggestions which deserve careful thought.

Mr. EDWARDS. Thank you, Mr. Levit.

Would you like to comment, Judge?

Judge HUFSTEDLER. Yes; I would.

In the first place, the disturbance about the four levels of the court in this proposed design, reflects what is the fact today. There are presently four levels of appeal.

Mr. LEVIT. How well we know.

Judge HUFSTEDLER. And it seems to me that one cannot conscientiously pour all the appeals directly from the reorganized bankruptcy courts into the U.S. Courts of Appeals, without expanding the U.S. Courts of Appeals.

And that expansion creates its own problems. Because among other things, when you expand that tier, you also create, necessarily, the potential for even further intercourt conflicts, with no place to take those except the U.S. Supreme Court, which cannot handle them now.

Although many members of the committee are aware of the fact that I have supported the creation, for so many years, of a national court of appeals, that proposal is by no means dead a-borning. But it is not on the immediate horizon.

I also point out that this particular design has the merit of having specialized judges available through both levels, and I think that is an advantage.

On the other hand, I would not want to have the appeals go directly from the article III bankruptcy court to the United States Supreme Court, for two reasons:

First, I think there should be access to a generalized court for that. And I think so because it is by no means rare that bankruptcy cases involve serious constitutional problems.

Moreover, it is a fact that every specialized court developed so far has had a tendency—regrettable though it is—to be overspecialized

in the sense of being unaware of the impact of some of the decisions in other areas of the law.

But the overall problem still is the matter of overburden. Now, Mr. Levit explained that he did not know what the appeal rate was. Those figures are available from an administrative office of the courts.

Mr. EDWARDS. I believe it's 300 a year.

Judge HUFSTEDLER. Yes. But if—well, it depends upon whose figures you read. But, roughly, 300 a year in the existing structure, from the district courts to the courts of appeals. I cannot be sure, of course, depending upon the extent of the jurisdictional grant, how many appeals will be generated by a reorganized bankruptcy court, but I cannot believe that they will be trivial in number. And, indeed, my assumption is that, with expanded jurisdiction, that appeals of greater complexity will be generated than there are today.

And I simply do not believe that that group of appeals can appropriately be assimilated in the existing court of appeals' structure.

Now, on the matter of jurisdiction, I am not committed to a particular jurisdictional design. I simply express my concern that under the broad language of the existing statute and the existing draft of 8200, I am concerned that matters now litigable only in the State court system will be put into the bankruptcy courts.

Among other things, there is pending before Congress, as each of you is well aware, legislation to remove diversity jurisdiction, because there is increasing recognition that the Federal courts simply cannot handle the amount of litigation that's been poured into them. And it seems to me antithetical to that legislation to add via bankruptcy jurisdiction those cases that, in my view, belongs in the State system.

My second concern is that I simply do not want the bankruptcy tail to be wagging the antitrust dog, for example.

It is by no means rare that antitrust defenses are involved in bankruptcy cases, and I do not think it appropriate that a specialized court, designed very particularly to deal with the specialization of bankruptcy, should also be involved in antitrust litigation.

Now, there are devices by which that problem could be avoided, such as by having a removal power on petition of the person against whom the antitrust claim is made to remove that controversy to the Federal district court.

I mention that. There are other devices, as well. That is one.

While I certainly agree that the existing jurisdiction of the bankruptcy court should be expanded and to the extent possible we should avoid any kind of jurisdictional bickering, which is a terrible waste of time and money, at least some jurisdictional limitations cannot be avoided; because to me that is one of the burdens of having dual sovereignty. We should not fail to defer in the Federal system to State systems and State concerns.

In short, I don't believe that the extent of the jurisdictional grant is entirely defensible under the present draft.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Judge. Mr. Marsh?

Mr. MARSH. Mr. Chairman, could I comment briefly on this issue?

It seems to me that the matter of jurisdiction should be divided into two separate categories.

I don't believe there is any controversy that cases arising under the Bankruptcy Act should be heard in the bankruptcy court. And by those, for example, I mean a suit to recover a preference under section 60, which can now only be tried in the bankruptcy court if there is a claim filed, and that's filed as a counter claim, or if the court has possession or the trustee has possession of the property which was the alleged subject of the preference. Also, a suit you recover a fraudulent conveyance under section 67(d) of the Bankruptcy Act.

Again, present jurisdictional division is based upon either consent by the filing of the claim or otherwise or the possession of property, and that doesn't seem to make much sense, and I have really heard no one object to expansion of the jurisdiction of the bankruptcy court toruptcy court or, on the other hand, State court or Federal court.

Now, I think that would take care of 90 or 95 percent of the problem that people have been in this bifurcated jurisdiction between the bankruptcy court or, on the other hand, State court or Federal court.

When you get into cases involving simply a monetary claim against a third party by the estate or the trustee, if they are in possession, I think that the sweeping nature of the conferral of jurisdiction in H.R. 8200 is much too broad—any case “relating to” the bankruptcy proceeding. In my view, this could perhaps be solved, if not to the satisfaction of all, at least to the reasonable accommodation of most views by having a specific list of other types of cases that could be brought into bankruptcy court other than under the Bankruptcy Act.

And I'm thinking, for example—and this is another issue that is frequently raised as to the problems of the present division of jurisdiction—of the collection of an account receivable by the trustee or the debtor in possession.

At the present time this is very difficult because there is strictly no basis for jurisdiction in the bankruptcy court. Frequently the trustee will send out a summons, hoping that the debtor doesn't have proper advice or perhaps even his lawyer doesn't know when he gets this summons saying you are demanded to appear, that he can simply go down and say, “Forget it, I'm not going to appear; you sue me in the State court or in the Federal court if there's diversity jurisdiction to collect this \$1,000 debt, which I don't deny at all. But I'm not going to pay it,” because the debtor is in bankruptcy. And that's a frequent reaction of debtors of bankrupts—that that discharges their debts, too. Well, of course, that's not in the act. [Laughter.]

And I think that both Mr. Levit's objective and Judge Hufstедler's concern can be met by that kind of approach to the problem.

As to the court structure, I might also just add here that generally I agree with both the commendation of Judge Hufstедler in providing an imaginative solution to the problem and some concerns about it. I think this is a problem without a solution. I don't believe there is any satisfactory solution to it.

But I just make this comment. I think use of the figures of how many appeals there are to the district court is misleading, because people take an appeal to the district courts simply on the basis of, why not, it's not going to cost us anything. And while it may not get very serious consideration there, we might as well take a flyer at it. Whereas, they might never consider appealing to the circuit court of appeals, as if that was their only avenue of appeal.

Now, maybe that's bad, if you're suppressing a right of appeal, the sort of right of appeal that exists at the present time.

I think, among bankruptcy practitioners, it's generally felt that the district courts do not give very informed consideration to these appeals from the bankruptcy courts, generally.

Now, I know that my good friend, Judge Weinfeld says he does, and I know he does, because he gives informed and serious consideration to everything that comes before him, but I believe it is true that in many cases this present right of appeal to the district court is somewhat illusory, and I think in that sense this proposed structure would be an improvement, although I certainly share Judge Hufstедler's concern that there be a generalist court at some point in the structure short of the U.S. Supreme Court. I think that you would otherwise invite too much of an ingrowing of the system.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Marsh.

The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I want to welcome the panel, and I appreciate your contribution today.

I have a number of questions. As a matter of fact, my questions follow right along behind every comment now, so I may not catch up on all of them here before me.

But there is a question, before we get into your comments today; the House of Representatives, in its infinite wisdom, tentatively I hope, passed an amendment to H.R. 8200 sponsored by Mr. Danielson from California which would in effect impose an adjunct jurisdiction on the new bankruptcy court, accompanied by what I would describe as jurisdiction by detriment.

I wonder if any of the panel has familiarity with that. I would appreciate your comments on the wisdom of that, or lack of it.

Mr. LEVIT. Mr. Butler, I could say on behalf of the league that our resolution of November 21, which is appended to our prepared statement, was adopted primarily as a reaction to both the Danielson amendment and the somewhat corresponding provisions of Senate bill 2266.

And as far as we are concerned, your word "detriment," although we didn't use it, is exactly the conclusion we came to.

The league's position is that as H.R. 8200 as now constituted, as amended by the Danielson amendment, should not be adopted. We would rather go along with the present act and take our chances on submitting, or having the Congress consider specific amendments to the substantive law and try in some future time to improve the court system than to buy the Danielson amendment.

I am particularly concerned with the provision that's common to both bills—it's even a little stronger in the Danielson amendment—which appears to give the district court as a court of bankruptcy complete jurisdiction but then takes it away by saying that except where so provided by local rule, what we now consider primary jurisdiction shall not be exercised by district judges.

And if I am correct, in the House version he goes further and says that the district judges shall not accept that jurisdiction except where there is an overriding, compelling need to have the burden on a Federal court rather than a State court.

So the jurisdictional limitations under the Danielson amendment would be even worse and more severely restrictive than they are now.

But BUTLER. The language to which I refer is what you say,

Jurisdiction upon a showing of need to have the case heard in the district court to prevent a potential loss of assets or to avoid other adverse effects of the administration of the estate of the debtor.

That is the language.

Mr. LEVIT. When you combine that with the present criminal and civil dockets of the district court in general, I would think that the chances would be very rare that any case coming out of the bankruptcy proceeding would be heard by a Federal court.

Judge HURSTEDLER. As Mr. Butler is well aware, I am devotedly opposed to creating article III bankruptcy courts across the board for all the reasons with which the committee is only too familiar.

On the other hand, I simply do not support the adjunct concept in the amendment to which Mr. Butler has referred, because it makes bad problems worse without solving anything.

The difficulty is that it enhances the capacity to exhaust oneself in bankruptcy litigating about jurisdiction, and to me that is one of the more regrettable enterprises in which anybody should engage, even rich litigants. The idea of requiring poor litigants, bankrupt litigants, to litigate about jurisdiction, to me, is utterly unacceptable.

If I could think of a way, to avoid the constitutional difficulties altogether to which earlier comment was addressed, I would be happy to dismantle the portion of this proposed design which involves having the article III judges sit as district judges for certain jurisdictional purposes. But my ingenuity has not been able to carry me across the constitutional line, there are problems—not as gross as those to which some of the commentators referred—in the earlier article III proposal, I do not think that the constitutional concerns are by any means trivial in the areas which I mentioned.

Now, then, this proposal also has the advantage, jurisdictionally speaking, of providing a constitutional escape hatch in the event there is any further constitutional challenge to the powers given under this proposal to the article I bankruptcy courts.

It is true, there is not a perfect answer to this difficult set of problems. The best we can do is to create the least unsatisfactory answer while attempting to meet the major objectives of the proponents of this bill.

Mr. MARSH. Mr. Butler, if I might just comment, I am not familiar with the text of the Danielson amendment, but I am familiar with S. 2266. And what it proposes is to permit each separate Federal judicial district to decide to what extent these cases will be heard by Federal district judges and to what extent they will be heard by the bankruptcy courts, by rule or order.

To me, this would be an absolute disaster. It would create 94 different systems in bankruptcy administration, and I don't think it's compatible with the Constitution for the Congress, who are enjoined to enact a *uniform* law relating to bankruptcy, to adopt that kind of a provision. that would undermine 15 years of work by the Judicial Conference on the Bankruptcy Rules to attempt to end the preexisting diversity in procedures and so forth. It would really be regressing to 1898.

I don't think you can turn the clock back 80 years.

Mr. BUTLER. Thank you.

The Chairman, I will take my turn again.

I'd like to say to the panel, I appreciate your contribution. Where were you when we needed you? [Laughter.]

Mr. McCLORY. If the chairman would just yield—I'm obliged to leave.

The Attorney General has called me——

Mr. EDWARDS. The gentleman from Illinois is recognized.

Mr. McCLORY. I express my appreciation. I am a longtime friend of Bob Chatz. When I practiced law I used to have some very cooperative dealings with him. So I do want to specially welcome the gentleman from Chicago.

I might just say, Mr. Marsh has contributed so much to this whole subject. We'll give some very serious attention to the recommendations, the latter of which, I think, is really the crux of what our problem is now, and I certainly appreciate the recommendations and the views expressed by Judge Hufstедler this morning.

And we do have a serious problem here which I think we must give attention to, get this bill back on the floor and get it passed.

Mr. Chairman, thank you very much, and excuse me.

Mr. EDWARDS. Thank you, Mr. McClory.

The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I apologize to the people on the panel, that the flight was late from Massachusetts.

Judge Hufstедler, I read your paper, and I read what you said before. I have the most serious difficulties with your views.

As you know, your name was used on the floor in connection with the Danielson amendment and at other times. I just want to know your background in bankruptcy because you were quoted as, practically speaking, with all your great prestige, for the entire Federal judiciary system.

Just tell us, for the record your experience and background in bankruptcy.

Judge HUFSTEDLER. As a practitioner, I did a substantial amount of bankruptcy litigation in complex business cases during 11 years of practice.

When I was a judge in the State system, I had only experience in the backwash of the bankruptcies, because we didn't have regular bankruptcy cases in the State system.

As a judge of the U.S. court of appeals for a decade, I have heard dozens and dozens of bankruptcy appeals. I can't give an exact figure.

I also have attempted at all times to keep up with the literature in the bankruptcy field. In perhaps light terms, I am a bankruptcy buff.

Mr. BUTLER. If the gentleman will yield—I hope the witness won't be intimidated because our good friend, Father Drinan, does not feel that anybody should be limited in their field. I would remind you that he has just written a book about freeing Israel. [Laughter.]

So feel free to go beyond your assigned area.

Mr. DRINAN. As Mr. Butler says, where were you when we needed you?

Judge HUFSTEDLER. Well, Father Drinan, more specifically, you were suggesting, I think, a conflict between the views I'd earlier expressed and those I expressed today. And I assure you that that is not the fact.

In both my testimony before another committee and my letters, I at all times supported an article I bankruptcy court.

The more work I put into the subject, the more I became concerned about two problems to which I addressed myself earlier: one was the overburden potential of having all appeals go directly to the courts of appeals, and that was one of the reasons for the insertion of the article III bankruptcy court as an appellate court hearing bankruptcy appeals.

My second reason was my earlier expressed concern that at least in the areas of contempt and limited areas of injunctions the reservations constitutionally expressed to using an article I court for that purpose are sufficiently important that I felt compelled to build in that portion of jurisdiction into an article III court.

MR. DRINAN. What do you think of the contention made this morning that ultimately you want to keep the bankruptcy court as an inferior court, with less authority than the Federal district court?

Judge HUFSTEDLER. I don't see anything inferior about this design.

MR. DRINAN. Well, it's not an article III court, so per se it's inferior.

Judge HUFSTEDLER. It is a court lower in judicial hierarchy than an article III court.

MR. DRINAN. Why do you want to keep that? That's your major premise. Why do you want to insist on that? The gentleman here has made the case that it should be an article III court? And we came to that conclusion and published a study, and your major premise that you have to validate is that somehow the bankruptcy court has to be inferior and not the equivalent of a Federal district court.

Judge HUFSTEDLER. First, let us talk about the premise in terms of who has access presently to article III courts. There are vast numbers of litigants who do not have access today to article III courts, Father Drinan. The whole magistrate system, which processes tens of thousands of cases—really important cases, criminal cases—

MR. DRINAN. I think that's a bad development, but go on. You can't justify all of those things. Now you know better than I, Judge, that bankruptcy is a very complicated matter. You had these cases; they're very complex. Why are they inferior to the ordinary civil tort case?

Judge HUFSTEDLER. They aren't inferior.

MR. DRINAN. They get an inferior judge.

Judge HUFSTEDLER. They do not get an inferior judge. They get a first-class article I judge in this system, and there is nothing denigrating at all. I think we have to look at two things which justifies this: one you're dealing with a terribly high-volume court when you're talking about the bankruptcy court today. And in talking about the bankruptcy court of the future, you are as well. It is not that it is in any respect inferior.

My objections were twofold: first, that to build 200 article III bankruptcy courts would bend the Federal judicial pyramid out of shape. I expressed the reasons for that at length in letters to Chairman Edwards and others.

MR. DRINAN. We have those letters.

Judge HUFSTEDLER. Secondly—excuse me, Father Drinan.

MR. DRINAN. Go ahead.

Judge HUFSTEDLER. Secondly, my other objection was, that under the article III design, it is not that you have an equal quality court; you

gave bankruptcy litigants priority on article III time that is not shared by any other class of litigants. It is not that bankruptcy litigation is less important than other litigation. It is as important as other litigation, and I am treating it as important as other litigation.

In fact in this design, bankruptcy litigants get an added benefit that other litigants don't get: they get their own specialized appellate court with still another review potentially in the courts of appeals. Other litigants don't get that.

In short, I am building into this design benefits which other litigants don't get, but I structure it in a way to permit an expansion of the bankruptcy court to take on massive quantities of litigation which isn't possible if you make them all article III courts.

Mr. DRINAN. Well, Judge, you've come in at the 11th hour or the 13th hour. None of all the voluminous recommendations ever proposed this arrangement. I'm just at a loss. Where did this come from? Where did you get the estimate of 30 judges? And why do you refer to the "intolerable systemic cost of this unprecedented expansion" in article III? What are the intolerable costs? Have you any documents to suggest that this scheme which you are proposing is validated?

I'm still not satisfied with the major premise, but my time has elapsed. I'd like the option to come back and talk about it, because that's the major premise.

Mr. EDWARDS. The gentleman from Missouri.

Mr. VOLKMER. I yield to the gentleman from Massachusetts.

Mr. DRINAN. Isn't that nice?

[Laughter.]

Mr. DRINAN. How would you respond to what was powerfully suggested here by the representative of the Commercial Law League, that in a very complex case, the bankruptcy judge makes all types of decisions affecting thousands of people and millions of dollars, but doesn't have the power to cite for contempt if somebody defies that order? He has to say, "Well, go to another judge."

Judge HUFSTEDLER. I don't consider that an intolerable burden. It is a relatively rare event, and I have designed it to have an article III judge to have that particular chore for the reasons of the constitutional reservations, which have been appropriately expressed by many outstanding legal scholars, all of which of course you are familiar with.

Mr. DRINAN. Well, I am, and we've received these statements. We came to the conclusion that in the ordinary garden variety of bankruptcy court, the people who come into a Federal court should have a tenured judge. The only difficulty I hear is that there would then be too many Federal judges. There are 399 now, or whatever number it is, and it would be increased by 100. But it's a nice closed club, and it was suggested openly here this morning that this is a systematic desire to keep the club small. We have turned up solid arguments which you concede the substance of that this judge should be tenured, he shouldn't be appointed by other judges, and I don't hear the rational rebuttal to that. I've talked with any number of Federal judges about this, and they're not keen about having their numbers multiplied, especially by this lower caste of people called bankruptcy referees or

judges. There's a conscious attempt—and this was the contention this morning—quote unquote, “a conscious attempt” to keep the bankruptcy court on a lower level.

If that's the conscious attempt, as I think it is, then the bankruptcy judge has to be on a lower level. So I'm coming back to the same thing. I'm sorry if I'm repeating, but we were through all this. We came to the deliberate conclusion—and I assure you that we were born again; I didn't come into this with that preconception but came to the conclusion that article III judges should be appointed for the bankruptcy courts.

Judge HUFSTEDLER. Father Drinan, I can only tell you that I do not for a moment share notions of inferiority which have been suggested, nor do I believe that the Federal courts in any sense should be arrogantly closed shops. I don't share those views at all.

I am deeply concerned about the fact that judicial systems are relatively inelastic institutions: You cannot expand horizontally any level of a judicial system beyond the capacity of the level above it to absorb the added caseload. The problem is, if you virtually add 200 judges to the article III structure, you accomplish two things, as I've said: First, you pour all of the appeals from those courts into the existing courts of appeals. We cannot handle the load we have now.

What is going to happen to them is, they simply add themselves to an unacceptable, intractable backlog that our courts have now. Can it be tolerable to add to the burden which litigants have today in my court, which means waiting—unless you have statutory priority—2½ years in a civil case before you'll ever get heard?

Why, if you add those additional bankruptcy appeals onto it, the delay would be intolerable.

Mr. DRINAN. So your solution is and I quote: This two-tier bankruptcy court is entirely independent of the district court.”

Judge HUFSTEDLER. Yes.

Mr. DRINAN. A whole new animal?

Judge HUFSTEDLER. That's right. But that, I thought, was the major burden behind each one of the proposals on my right, your left, Father Drinan, for making an independent bankruptcy court. I think those arguments are sound.

This proposal does create an independent bankruptcy court.

Mr. DRINAN. All right, then, you go on and say: “Relieving the overtaxed Federal district courts of bankruptcy jurisdiction to which they were not always hospitable”—that's an understatement—“and providing first class justice to the legions of consumers.” But “first class,” now that's not substantiated. Why is it first class, if it's a second-class judge?

Judge HUFSTEDLER. I don't consider article I judges second-class citizens, Father Drinan.

Mr. DRINAN. Why don't you give them life tenure? Then they would be first class.

Judge HUFSTEDLER. You can give them life tenure if you want to, sir. I have said nothing about tenure in creating article I courts. You can appoint them for 30 years so far as I'm concerned. which, as a practical matter, is lifetime tenure for people of the quality that you seek.

Mr. DRINAN. What kind of people would be attracted to your article I judge? What kind of person is going to be a bankruptcy judge if the term is whatever it is? You know these arguments. Couldn't we give such judges life tenure by Presidential appointment, confirmed by the Senate.

Judge HUFSTEDLER. I do not think that is necessary to attract able people. I suggest to you, sir, that the tax court is a court of article I design, and the people in that court are people of outstanding quality, thoroughgoing excellence, who take enormous pride in being very effective judges.

Mr. DRINAN. But might they be more courageous judges if they had life tenure?

Judge HUFSTEDLER. I doubt it.

Mr. DRINAN. Well, that's the whole theory, Judge, and you keep skirting around the basic issue. We wanted to have bankruptcy judges who are just as fearless as you are. You have life tenure, and that's the essence of the system that the Founding Fathers devised. We still have it in Massachusetts. I know what it means when the judge has life tenure, and cannot be removed from that bench, no matter how he cites the cases and decides the issues.

That's the type of person we should have on the Federal bench in a bankruptcy court. That's the reasoning that we used, even though it is somewhat novel and new. I don't hear any rebuttal argument except to say that, well, bankruptcy is not really that important. We're still giving them first-class justice, although we don't give them a tenured judge.

I say the consumer interests and the interests of the poor should have the same type of first-class justice as they get from distinguished people like you.

Judge HUFSTEDLER. Well, I do not share your convictions, sir, and I doubt that we're going to persuade one another. But I do point out that the persons are receiving—so far as I'm concerned—first-class justice under the magistrates. The jurisdiction of the magistrates has been expanded, and appropriately expanded. They are fine people; they are doing a first-rate job. And it is in many respects the criminal problems, also shared widely by the poor as well as bankruptcy, that are being handled through the magistrate system, and very effectively.

Mr. DRINAN. Well, Mr. Volkmer's time is gone. Does anyone else want to yield? [Laughter.]

Thank you very much, Judge.

Judge HUFSTEDLER. Thank you, Father Drinan.

Mr. EDWARDS. I think we ought to bend the rules and recognize Mr. Volkmer. Do you have any questions?

Mr. VOLKMER. No; I don't have any questions, thank you.

Mr. EDWARDS. Did you want to ask him the question about the district judges? I'm interested in that.

Mr. VOLKMER. Well, I've read over the judge's statement there, and from listening to the discourse with Father Drinan, I don't know that I want to try. [Laughter.]

I don't know if it would be worth while. I don't want to take up a lot of the committee's time.

Assuming that we made all bankruptcy cases nonreferrable to referees, and did away with referees, which meant that the district judges would have to take care of bankruptcy cases as well as the civil rights, criminal, and antitrust cases and everything else, what would be your opinion on that?

Judge HUFSTEDLER. Well, I would have precisely the same problem as I earlier expressed: In order to have the existing district court undertake bankruptcy, one must expand the district court by somewhere between 94 up to 200 judges. Then, of course, because the paper load is overwhelming, you would have to create bankruptcy referees, and in fact, you're back where you started from. I don't think that's a wholesome thing, and you end up with the same kind of distortion, the pyramidal structure of the Federal courts to which I earlier referred.

Mr. VOLKMER. What about making the requirement, if they are referred, that the only thing that could be referred are administrative matters? They could be done by a clerk or a trustee. Plenary matters could only be heard before the district judge.

Judge HUFSTEDLER. As I say, you're still back to the same problem. You've still got to deal with the volume of complex cases.

Mr. VOLKMER. Well, those would all be heard—

Judge HUFSTEDLER. Yes; but how many judges are we talking about?

Mr. VOLKMER. Well, I'm not worried about that.

Judge HUFSTEDLER. Well, I am, because I'm concerned about the generation of appeals and the whole matter of processing those.

Mr. VOLKMER. Excuse me a minute: Are we worried, then, about how many appeals the court of appeals will be hearing more than we are to make sure that the persons before the district court—if there are bankruptcy referees before the district court—are really getting as good justice as the persons that are there for civil rights and antitrust and criminal cases? They're going to get appeals if they want to appeal to the court of appeals. They don't have to go through the district court.

Judge HUFSTEDLER. My design gives them appeals; two, in fact.

Mr. VOLKMER. How about one?

Judge HUFSTEDLER. You can do it by expanding the district court. But I have to remind you that what happens is, at the present time and for the foreseeable future, the rate of increase in district court business is enormous. We have districts all over the United States today that now are trying nothing but criminal cases. That means that if you expand the district court and give it total jurisdiction including bankruptcy cases, you're going to find that bankruptcy cases will have to take their turn waiting in line with all the other cases in the existing district courts.

You haven't created any plus, so far as the bankruptcy litigants are concerned.

Mr. MARSH. Mr. Volkmer, would you mind if I commented on that?

Mr. VOLKMER. I'm interested in your comments.

Mr. MARSH. I think the reason that it's really impractical to assign this jurisdiction to the district judges is simply a matter of the time element. The controversies arising in bankruptcies must be decided expeditiously, or the decision when it comes down relates to nothing because the asset has disappeared.

In most cases, if you delay putting a controversy on the calendar in the district court, and 2 or 3 years later you get a decision, it is more likely than not that whatever the parties are fighting over will be worth much less, if anything, by the time the decision is handed down.

You're dealing, really, with wasting assets in every bankruptcy proceeding.

MR. VOLKMER. I don't think anybody fails to recognize that. I think everyone here recognizes that. All you're telling me is that the judge has to recognize that.

MR. MARSH. No, sir, I'm not. I'm saying that if you take the typical calendar of the district court, unless you create a specialized set of Federal district judges who only hear these bankruptcy cases, you put them at the end of the calendar.

MR. VOLKMER. We don't have the judge for injunctive relief. That's specialized. That's a remedy that's done speedily, but maybe not to the extent, of course, that bankruptcy is.

MR. MARSH. If you're talking about a temporary restraining order, preliminary injunction, these are given priorities. Is Congress prepared to give priority to the bankruptcy cases that go before the district court? I doubt it very much.

MR. VOLKMER. I don't think you'd have to. I really think that the judges will recognize the necessity of taking up—

MR. MARSH. Whether they recognize it or not, they're commanded to entertain the criminal cases first that are pending before them, and other types of cases that are given statutory priority.

So if it were not given any priority they cannot of their own volition say, "I realize this bankruptcy we have to hear in a hurry, so I'm going to promote it on the calendar." I don't think they have that authority without a provision in the statute saying what their priorities are to be.

Certainly, preliminary injunctions will generally be given priority on the calendar, and therefore, certainly it is expeditious. But these are not matters that in most cases are simply decided on affidavits and oral arguments. They are decided on full-scale trials and presentation of evidence. And if a particular judge has an antitrust case that's going to occupy the next 6 months, he can't stop and have a 2-week trial taking evidence in some bankruptcy proceeding to decide that case, simply because he recognized that it had to be decided quickly.

So I think that is the basic reason why our present specialized court grew up in the first place. The Federal district courts have jurisdiction over all of these matters. In 1898, and until the rules came in commanding the general reference in every bankruptcy proceeding, for 60 years thereafter. But they did not decide them. And the reason they did not, they realized that it should be assigned, which they had power to do, to the person who was originally contemplated as being sent to their administrative assistant because they couldn't get to them soon enough. I think that was a more basic reason than the fact that they thought this was too complicated for them to understand.

It's not really all that complicated. I used to tell my students that at the outset of the course, that the lawyers generally have some kind of—I think their mothers were generally frightened by bankruptcy when they were pregnant, because lawyers generally are afraid to

death to go into bankruptcy court. There's absolutely nothing to that. It's no more complicated than any other field of law.

But I think that they recognized that you needed this specialized adjudication of these controversies. And I would certainly hate to see us go back and have to repeat that whole process over again.

Mr. LEVIT. May I also comment?

Mr. VOLKMER. My time is up. If the chairman will yield additional time?

Mr. EDWARDS. Certainly.

Mr. LEVIT. Parenthetically, in response to Mr. Butler's question as to where we were, that we were here in this room 2 years ago, before Chairman Marsh, and Mr. Edwards, and members of the Commission, 4 years ago expressing these same views as to the need for an independent court. So, it's not a new idea, as far as we're concerned, as well as many other organizations.

Mr. VOLKMER. I recognize that.

Mr. LEVIT. I would like to point out that, just in the typical garden-variety business case—business reorganization case—that comes into our courts now under present law, there are almost invariably certain very critical questions. It is a rare case in which you do not have a debtor all of whose assets, including the so-called soft collateral—that is, receivables, inventory, are collateralized, and you have two very conflicting interests: That of the debtor who must consume these assets if he's to continue operating; that of the secured creditor who is justifiably concerned about dissipation of collateral.

Frequently you have a conflict as to whether or not the present management should be retained, or a receiver or a trustee should be appointed.

Frequently you have serious questions as to rights given to other property, and they're all just the type of questions which Mr. Marsh referred to.

If you don't decide them right away, then you're going to decide them about a corpse a month from now, much less 2 years from now.

Mr. VOLKMER. OK, I'm the judge, and you've got the case—

Mr. LEVIT. And if you're the judge, as it is now—

Mr. VOLKMER. No, let's just say I'm a district judge. All right? You file, right?

Mr. LEVIT. That's right.

Mr. VOLKMER. You file. It gets assigned to me.

Mr. LEVIT. And I prepare a motion, and you're in the middle of an antitrust trial, and that's been squeezed in before three or four other criminal cases which you are mandated to give priority, and you don't particularly like to get involved in bankruptcy cases, anyway. And perhaps, about this time, a new judge takes office, and there is a process of assigning to the new judge those cases that are on your calendar—and this is one of them.

I just can't believe that it will not be the rule, rather than the exception, that Federal judges just will not find themselves either ready, willing, or able to give these cases that kind of attention—particularly if you, as a judge, say to me: Well, Mr. Levit, how long is this case going to take? An hour? Two hours? Well, it may take a week, your Honor.

And I'm just not going to get that week.

Mr. VOLKMER. Most of our districts, we have some where we have—or we will, if we get this new judgeship bill, we won't have any, at least statewide, that have only one judge. We will probably have some districts.

Now, assuming that there are at least three judges in this district, all three of them are going to be tied up right at the same time for a trial that is presently taking a prolonged time—1 week, 1 month, 6 months. Is that the present history of our district courts? Every judge is tied up all the time, every day?

Mr. LEVIT. I can only say this: That in our district—and I'm sure it's true in Mr. Marsh's district—certainly, most major metropolitan districts, that any civil case at all has a difficult time getting heard. And the relatively few bankruptcy appeals which are now being heard by our district judges—which is a matter of reading briefs and rendering a decision—I don't think any one judge has more than half a dozen bankruptcy appeals on his docket at any one time. I think that would be a lot.

I know, in the Northern District of Illinois, the average waiting time, from the filing of appeal to rendering of a decision, is anywhere from 8 months to 1½ years. And then, after all that's done, then you start all over again with the court of appeals, in most cases.

Now, to expect that judicial system to absorb the burden of administering bankruptcy cases at a trial level, is just impossible.

Now, if you took the same number of judges that were contemplated under H.R. 8200 and added them to the district courts, and then said, "all right, within each court there shall be a division of judges, and we suggest certain judges assigned to give priority to bankruptcy cases," that might solve the problem.

But I don't think, other than in name, it would be much different from the proposal that was envisioned by this committee.

Mr. VOLKMER. It might be easier to get it passed, though; that's the difference.

Mr. EDWARDS. What would you think about that, Judge?

Judge HUFSTEDLER. It has precisely the same problems that I addressed earlier, Mr. Edwards. Namely, what you've done is to expand horizontally the Federal district courts in which the workload on appeal, goes to the only available courts, the U.S. courts of appeals, that are intractably backlogged today.

The additional judge—if the omnibus bill finally gets through—is going to provide some relief, but what it will do in our court is to permit us to stop drawing constantly upon the services of visiting judges from all over the United States. But, it will not reduce, in any serious way, the backlog we already have.

In short, there are only two ways in which you can expand any judicial system. One is vertically; the other is horizontally. "Vertically" means, you add another step to the ladder. The proposal I am suggesting is a vertical, as well as a horizontal expansion. If you expand the district courts, then you must expand the courts of appeals.

The problem is, you've only got one Supreme Court. When you're dealing with a Federal system, you have got much more intractable problems than you have in State systems, because you've got 50

judicial pyramids to deal with in 50 States. You've got only one judicial pyramid in the Federal courts.

The Supreme Court cannot now properly supervise the entire structure of the Federal judiciary, because it simply doesn't have enough decisional capacity to do it. And that problem is exacerbated by the horizontal expansion.

Mr. MARSH. Mr. Chairman, it seems to me that Judge Hufstedler's primarily concerned—at least in her remarks—with the burden on the court of appeals. And I would suggest that this is a separate issue from the status of the trial court. You could have, without changing her system at all except by adding three roman numerals to the bottom, an article III court. That is, a trial court, and an intermediate appellate court, that would relieve the burden on the court of appeals.

And I would suggest that, if that were contemplated rather than a new court, consideration might be given to the type of review, or "appeal," if you want to call it that, that exists in the Tax Court, and in some other courts. And that is, after a single judge has rendered a decision, an entire panel of judges—at least in those districts or States that have a number of bankruptcy judges—reconsider that, and render a decision, as a type of appeal.

This, of course, goes way back to the Court of Queens Bench, and the Court of Common Pleas in England, where the individual judge decided a case on the circuit, and then it was heard by the entire court as a first appeal, in effect.

But, whether or not you think that would be superior to creating a new court in and of itself, I think the two issues should probably be separated—as to whether something should be done to avoid this burden that Judge Hufstedler foresees on the circuit courts of appeal, and the status of the trial court.

Judge HUFSTEDLER. If I may respond, Mr. Chairman, very briefly, I'm not only concerned with the burden on the courts of appeal. What I'm talking about is the burden on the litigants, not simply on the courts themselves. It's a question of getting the cases heard.

The second problem in the design which Mr. Marsh just addressed is that you then have made a congressional decision that you are going to give priority on article III time to bankruptcy litigants which no other class of litigants has, except the defendants in criminal cases.

Now, that's a decision for you to make, but that's the net product of what you do.

Mr. EDWARDS. There is a lot to be said for that decision. Hasn't it been recognized for a long time that there are circumstances in many, many bankruptcy cases that would encourage the court to give immediate attention to important business?

For instance, yesterday we had a very persuasive witness from New York who represented the Bohack Corp.—a huge chain of stores—with debts of over \$60 million, and the bankruptcy judge really met in the warehouse. That's how it practically started out. That's where his quarters were—his "courtroom."

And in one instance, the bankruptcy judge issued a restraining order to an auctioneer, ordered him not to sell certain items; and the auctioneer, knowing that the bankruptcy judge was limited by law to

‘assessing a fine of \$250, went right ahead and sold the goods, and said, “I’ve done this before and I haven’t gone to jail yet.”’

I think that your contribution here has been major, Judge. What we have run into is that most of the district judges, and certainly our esteemed Chief Justice and the Attorney General, are willing to let the present system continue, even though all the evidence has piled up that we are taking certain Americans, certain litigants, and saying that they’re really not good enough, as privileged as other litigants. So, therefore, they’re going to have their money, or their businesses, or their livelihoods handled in a second-class court.

And any way you look at it, the evidence piles up that it is a second-class court. That’s why we spent 6 years examining this. The horror stories are infinite. And I want to give you credit that you certainly have offered an innovative solution.

Then, I compliment Mr. Marsh as to what he just said then. It’s a big help to us.

Judge HUFSTEDLER. May I just add one final comment? I think there’s a great deal of concern with labels, which I do not think is appropriate. We have, technically speaking, nothing but inferior courts in the United States, under the Constitution, other than the Supreme Court of the United States in the Federal system.

In the State systems, we have multiple-level courts. Sometimes they’re called municipal courts, superior courts, and then the appellate structure. The names are not identical, but the structure is the same.

We do not believe that litigants in State courts are second-class citizens, or that they’re getting second-class judges. For example, in California courts are divided jurisdictionally, but that does not mean that we think that they’re going to get second-rate justice, or that they’re going to a second-rate court when jurisdictional limitations mean that the litigant goes to a municipal rather than a superior court. That’s not true.

In this design, I am by no means suggesting that they’re getting second-class judges, or that they’re going to second-class courts. They are going to different courts, because the jurisdiction is different. But in no respect are they getting second-class treatment.

Mr. EDWARDS. The evidence is different. They don’t even have clerks. They have no libraries—

Judge HUFSTEDLER. Mr. Edwards, I’m not defending the present system, at all. If I defended it, I wouldn’t have attempted to design a different system.

I think the present system is wrong. It’s a failure.

Mr. VOLKMER. Mr. Chairman?

Mr. EDWARDS. Mr. Volkmer.

Mr. VOLKMER. I’d like to ask the judge just one question. By sitting here and listening, maybe I’m wrong—if I am wrong, I want you to dispel my impression that I have received.

Is your main concern the overloading of the court of appeals?

Judge HUFSTEDLER. No. My main concern is that I want to see bankruptcy litigants get a full and fair, prompt hearing on all of their cases. And I want to do that at the trial level, and I also want to give them access to prompt disposition of their appeals.

It is not an overburden, as such, on the judges, although it is true that they are overburdened. But I don't know how to give prompt attention on each level to bankruptcy litigants unless we build a structure something along the design which I have suggested.

Mr. VOLKMER. Basically, a separate structure, then, for bankruptcy. Judge HUFSTEDLER. It is both separate and integrated. Just as the Tax Court is.

Mr. EDWARDS. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

If you're wondering what that chart is there, "Proposed Bankruptcy Court Structure," "proposed" is not the word I would use, but it is my handiwork, because I was trying to figure out if we were stuck with an adjunct system what would we like to add to it, in the course of the legislation, that would make it acceptable?

I do not like to use the word "proposed." I think that probably should be titled: If we're struck with the adjunct system, what do we want to put in it? And I won't ask you to comment on that, since the unanimous recommendation of that panel is getting away from the adjunct system.

I would appreciate your suggestions as to how you would improve that—recognizing that it is not my "proposal," but it's just a way out if we're in too deep into this thing.

I would like to turn, if I may, to the question of pervasive jurisdiction. Mr. Marsh—and I use "pervasive jurisdiction" as a broad grant of jurisdiction in H.R. 8200—I judge from your testimony, was the recommendation of the Bankruptcy Commission less pervasive than what is in H.R. 8200?

Mr. MARSH. I believe that it probably was, although there was a final clause in the proposed section that we suggested which could be interpreted as being as broad as what is in 8200.

I don't want, at this late date, to dissent from the report. [Laughter.]

But it was adopted over my arguments to the contrary. At least we had the list of things, which I think is a different proposition.

There is still the doctrine of *eiusdem generis*, which says if you list 10 things, then anything else must be of that general nature, that maybe you're not granting as broad a jurisdiction as if you say "anything related to the bankruptcy proceeding, period," without any suggestion of what you're thinking about.

I have said that under that, probably, a pending divorce proceeding could be removed to the bankruptcy court. Now, maybe the bankruptcy court wouldn't take it; I would certainly hope not; but theoretically the bankruptcy court has no power not to prevent the removal in the first place.

The litigant simply goes to the court where it's pending and says, "This case is removed." The bankruptcy court then has to say, "Wait a minute; we're going to send that back; we're not going to accept jurisdiction on that."

So, I was never in favor of that kind of approach, basically, to the grant of jurisdiction. I think it's possible to enumerate what we have in mind, and I think we allayed a lot of fear. And specifically, as

Judge Hufstedler says, if the question repeatedly comes up—What about an antitrust suit? The trustees said this business was wrecked by the violation of the Robinson-Patman Act by this competitor. So he sues the competitor in bankruptcy court, and the bankruptcy proceeding happens to be proceeding in Nome, Alaska. The competitor is located in South Carolina.

So, the competitor has to go to Nome, Alaska, to defend that lawsuit.

Mr. BUTLER. You're not suggesting that antitrust cases are always conveniently tried for the defendant?

Mr. MARSH. Not when brought by the Government, certainly. [Laughter.]

Mr. BUTLER. Well, really—

Mr. MARSH. I'm not suggesting that is has to be always convenient to the defendant, but I think there should be some venue provision other than simply wherever the bankruptcy proceeding is located.

Mr. BUTLER. The venue we have is protective of the smaller, not the larger defendant; that's true.

Well, I just wanted to get the benefit of your views on that. Does the Commercial Law League have any strong feeling in that area?

Mr. LEVIT. Yes, we do. First of all, it's always easy to conjure up the nightmare situation—the divorce case, the bitter divorce case that's going to be heard by the bankruptcy judge, or the antitrust case—

Mr. BUTLER. Do you think one bitter divorce case would cure the bankruptcy judges from getting involved in it any more? [Laughter.]

Mr. LEVIT. I have to say, Mr. Butler, fortunately it's been so long since I had anything to do with any, that I have absolutely no knowledge of the subject.

Let's talk about antitrust. The fact is, right now if you have the reverse situation, if you have a situation where an antitrust claim would be asserted against a bankrupt estate and threatened, if allowed, to consume all the assets, the court that will hear it—unless it declines to do so, under—I think it's 57 (i)—is the bankruptcy court.

Because, as we said before, the test isn't the subject matter. The test is the question of possession. If a domestic relations judgment is obtained, it can be proved in a bankruptcy proceeding today. It's true that in that case the bankruptcy courts would not go behind the merits.

There are many instances, however, in which the case is coming out of a bankruptcy, particularly cases of exemption, cases of relative rights of property, cases of transfers between spouses, which are very directly related to a bankruptcy proceeding and may also be directly related to a domestic relations problem.

I can't say that I would oppose the sort of suggestion made by Mr. Marsh. Namely, that you give complete jurisdiction, as everybody has agreed, to matters within the bankruptcy case, or to suits by a receiver, or trustee, under the Bankruptcy Act, and presumably under a related State statute providing for setting aside preference for fraudulent transfers, as well as a long shopping list of other cases, and excluding certain types. That wouldn't disturb me too much.

On the other hand, I would think I would prefer to have it handled by the manner you suggested. That is, giving the parties the right to

bring it into bankruptcy court. Giving the right of removal, but giving the bankruptcy court the right to decline—but having it couched in language—the reverse of the Danielson amendment.

In other words, that the bankruptcy court may decline, when there is a showing that it would be an undue burden on the bankruptcy court to hear and to determine that question.

Mr. BUTLER. That's in the present one, isn't it? H.R. 8200?

Mr. MARSH. Mr. Butler, just one comment. I think the illustration is a little bit unrealistic. If the bankrupt has successfully violated the antitrust laws, he wouldn't be in bankruptcy. [Laughter.]

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Judge HUFSTEDLER, one further point that you make. You assert that under the bill that we have proposed, that you would give priority on article III time to bankruptcy litigants, and you raise them to the status of criminal defendants. [Laughter.]

I suggest that that is not so, that there's a lot of people who, as you put it, have priority access to article III time such as in an anti-trust suit. They cannot be relegated to a magistrate or a master. They have a right under the law. So, I don't think that's really so, but even if it is so, bankruptcy cases, at least some of them, have a time element. There is an emergency situation, where they need an article III judge to decide cases and allow the litigants, if need be, to appeal.

Judge HUFSTEDLER. I have never doubted for a moment that bankruptcy cases are important and that they require urgent attention. The question is, jurisdictionally, where should that attention be first paid? I don't wish to be tautological, but it seems to me that the design I have suggested, using article I judges, provides them that kind of attention.

Mr. DRINAN. Why is article III time so precious? Couldn't we create more article III time? Why should anybody have preference? Let's create enough article III time so that everybody has access to it.

Judge HUFSTEDLER. Well—

Mr. DRINAN. That's what we're trying to do.

Judge HUFSTEDLER. We come back to the same problem. Father Drinan, which is, everybody wants to treat article III time as his or her personal homeplate. Everybody wants it. Everybody is contesting priorities.

There was a bill proposed to erase statutory priorities because it's become, by and large, meaningless in the civil area simply because the court calendars are so congested that, in effect, nobody can be heard first. And now the situation is that criminal cases occupy the entire calendar time of many of our courts, both State and Federal.

The question is: How much do you really want to pour into the Federal courts? And it isn't a question of bankruptcy litigants being less important, but I fail to see how they are more important than sex and race discrimination cases under title VII. Those cases are extremely important, and they are also being delayed, not simply months but in many instances years.

The problem is the relative inelasticity of the Federal structure.

Mr. DRINAN. Yes; but all those cases get an article III judge. They may have to wait a bit. All we're saying is that the bankruptcy litigants

should have equality, and if there is an emergency, there should be an article III judge there to decide things so that millions of dollars are not lost.

Judge HUFSTEDLER. I fail to see at the moment why an article III judge has become so critically important, instead of article I judges.

Mr. DRINAN. Let's give sex discrimination cases to article I judges. How about that? Get them out of the courts. Have a separate structure for sex discrimination cases and race discrimination. Get them off into a separate court.

Judge HUFSTEDLER. I think that is not correct, Father Drinan.

Mr. DRINAN. Why?

Judge HUFSTEDLER. Because we're not dealing with the same volume of litigation at all. We are dealing with a relative handful of cases in the overall load.

Mr. DRINAN. Suppose they increase—and they are increasing—and become very burdensome. Could we give those to an article I judge?

Judge HUFSTEDLER. I don't know why not, if Congress chose to.

Mr. DRINAN. Would you recommend it?

Judge HUFSTEDLER. No.

Mr. DRINAN. Why not?

Judge HUFSTEDLER. Well, if you hypothesized that they're going to reach the volume of bankruptcy cases and if they have same problems, then I might say sure. But they don't. The large volume of bankruptcy cases involve consumer bankrupts. They are people who need prompt, efficient attention. But they are primarily administrative problems that do not require lengthy trials that title VII cases do.

Mr. DRINAN. How about giving felony cases to article I judges?

Judge HUFSTEDLER. You have the same constitutional problem which I have identified in this structure and have given them the equivalent of Federal district courts.

Mr. DRINAN. Well, one specific question, Judge. Do you have any facts to support the conclusion that your proposal avoids the intolerable systemic costs of this expansion of article III courts? Article I judges are just as expensive.

Judge HUFSTEDLER. I'm not talking about the dollars-and-cents costs.

Mr. DRINAN. You're talking about systemic costs.

Judge HUFSTEDLER. Systemic costs. I am referring to the whole problem of the structural design of the courts. I am simply saying that a vertical elongation of the ladder is the only practical way I can perceive to maintain the pyramidal structure of the courts. And that is a matter of volume.

Mr. DRINAN. All right. So you have no cost. This is just speculation on your part?

Judge HUFSTEDLER. No, sir; I don't believe it's a speculation on my part. What I did is take the figures from the latest report of the Federal Administrative Office to determine the number of bankruptcy cases which are "appealed" today to the Federal district courts, and I also took into account, from the figures in the Federal Administrative Office, the number of bankruptcy appeals filed in the Federal courts of appeals, as identified by that office.

I then attempted to project those figures—guessing, to be sure—what amount of expansion of the jurisdictional grant which would ultimately be delivered under 8200 to the altered bankruptcy courts. And I made an estimate of the number of appeals that we were talking about, and it appeared to me, from those, that we would have a serious problem in attempting to absorb into the courts of appeals the entire “appellate” load of the existing district courts, together with the burden we already have.

Mr. VOLKMER. Would the gentleman yield?

Mr. DRINAN. I'd be happy to yield.

Mr. VOLKMER. On that point, I'd like to know if you believe that if the bankruptcy judges are article III judges, that there'd be the same number of appeals from those judges to the court of appeals as there are presently from the referees to the district courts.

Judge HUFSTEDLER. I cannot estimate that. I have no basis for knowing it.

Mr. VOLKMER. Well, when you figured it in, you figured it in there.

Judge HUFSTEDLER. I estimate that the appeal rate will not be less, and I have difficulty believing how it could when you add the contemplated jurisdictional expansion, which by and large I endorse. I don't see how it's going to be less.

Besides, the appeal rates have been going up constantly in the United States. The appeal of appealing has reached astronomical proportions, and I cannot believe that bankruptcy litigants are any less inclined to that particular addiction than other civil litigants are.

Mr. EDWARDS. The time of the gentleman from Massachusetts has expired, and we do want to give time to counsel.

Mr. VOLKMER. I'd just like to ask Mr. Marsh, would your answer be the same to the question—the number of appeals?

Mr. MARSH. I have no real basis for making that judgment. But my guess would be that they would be fewer than the present reviews or appeals to the district court, simply because it's more expensive, and the very delay discourages.

That's perhaps an unfortunate thing, that we have a court system where people don't want to appeal because it takes so long; they figure they'd better just forget it. But it's true. So, my guess would be, given the present system, that the additional costs and the additional delays would discourage a lot of the appeals that now go to the district courts.

Mr. LEVIT. I would think that under the type of structure proposed by H.R. 8200 that the number of appeals, taken from that independent court to the court of appeals would be slightly higher, but not much higher than the number of appeals that now go from the bankruptcy judges all the way to the court of appeals.

I think that those appeals that are now taken just to the district courts tend to be those appeals which are not that serious.

I know in my practice—I'm sure Mr. Marsh would say the same thing and just Judge Hufstедler would from the time when she was in private practice—when you're serious about a bankruptcy appeal, you advise your client that you'd better be prepared to go all the way to the court of appeals, regardless of what happens.

Mr. EDWARDS. Before we go to counsel, I want to assure Mr. Marsh that we are concerned with his observations on the conflict-of-interest contents of the legislation. Mr. Marsh thinks that the bill has a strong opinion that the bill does not separate the administrative functions and the judicial functions adequately; is that correct?

Mr. MARSH. Yes, sir.

Mr. EDWARDS. It was intended to substitute, in a way, the U.S. trustee for the Administrator that was established by the Commission's bill. We do want to consult with you on that subject, and we appreciate your observation, Mr. Marsh.

Mr. LEVIN?

Mr. LEVIN. Following up that question, Mr. Chairman, the question directed to Mr. Marsh, does placement of the U.S. trustee or a bankruptcy administrator, as the Judicial Conference proposes, in the judiciary, with the power to enter orders as the Commission and the Judicial Conference proposed, lay the groundwork for another referee in bankruptcy system as the system develops over the next few years, with the bankruptcy judges, whatever they be, delegating more and more disputed matters to the administrators to be decided in the first instance?

Mr. MARSH. Not substantially, if they have no such power to delegate in the first place. That can hardly develop if they cannot delegate to the administrator the decision of disputed adversary proceedings or other controversies arising in bankruptcy.

I would urge that the statute say exactly that. So, you say, this may develop; it only develops if you permit it to develop, and it should not be permitted.

Mr. LEVIN. I think the development of the referee system over the last 80 years has been aided by pressures from the judges charged with hearing the cases to amend the statute, and the statute has been amended periodically to permit that.

Mr. MARSH. It's true, because they had other matters they perhaps considered more important, or at least they enjoyed handling better. These bankruptcy judges will have only bankruptcy adjudications to take care of, and there will certainly not be the same inclination, unless they just want to go fishing, to assign those functions to somebody else that they are given by statute.

Mr. LEVIN. One other question I'd like to direct to all the members of the panel. The basic difference, it seems, between the article I proposal there and the H.R. 8200 proposal, leaving out for a moment the intermediate court of appeals which could easily be added to H.R. 8200, is the issue of tenure of the judges.

The Constitution states in article III that the judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior.

The question I have of the panel is how do you interpret that, and has there ever been a nationwide system of article I or non-article III courts created to hear cases within the States not concerning litigation involving the Government, or would this set a unique precedent?

Judge HUFSTEDLER. It sets a unique precedent, in a sense, although we have had a number of specialized courts—the Court of Claims, the

Court of Customs and Patent Appeals—which, if memory serves me right, did not start as an article III court in the first instance.

But it is true that, as far as I know, the design that I have proposed is unique, although it has elements that are drawn from older systems, and it is not wildly different, if you will; from a structure of existing courts using magistrates, which do not have the status of even article I judges.

But this gives bankruptcy article I judges who are provided with the degree of security that Tax Court judges have.

With respect to your first question, there's been a great deal of writing and discussion about what that means. But primarily it has been interpreted to mean, reinforced by the provisions of impeachment, that one cannot remove an article III judge without impeachment; good behavior has been interpreted primarily by circuit counsels to date in trying to encourage people who were no longer able adequately to fulfill their offices due to senility and things of this kind, to retire.

Mr. LEVIN. My question is more directed to what it means as to what Congress may do when it establishes inferior courts.

Judge HUFSTEDLER. Are we really addressing article I or article III?

Mr. LEVIN. I'm asking whether that injunction in the Constitution, that the judges of the inferior courts shall hold office during good behavior, in any way restricts Congress' power to create a court with other than good behavior tenure.

Judge HUFSTEDLER. I don't see that there's a problem here, because Congress has also got the power to create article I courts. If you're going to create article III courts, of course, you have all of the constraints which article III builds in. If you don't create an article III court, you obviously don't have those constraints.

Mr. LEVIN. Mr. Marsh?

Mr. MARSH. I would say there is a precedent for—you ask whether there is a precedent for this type of court. There is a precedent—the bankruptcy courts today. They are obviously not article III courts. They are separate courts. There is no one who can try de novo a decision they have made. True, if there is an appeal, it goes to another district court.

Now, if you say that that is really sort of part of a district court, the only way you can derive that conclusion is to say, by virtue of their appointment by a district judge they somehow draw virtue from him and are able to exercise the judicial power merely because he appoints them.

I find that hard to accept. Whether or not, constitutionally, you can have an article I court exercising this type of jurisdiction is, to me, an unanswered question. I find the argument in the House report very persuasive, that you cannot, because it does not follow the pattern, as you suggested, of either a controversy where the Government is a party or some regulation or imposition upon a citizen which is the subject matter of the controversy, such as the tax court, court of customs, and patent appeals, et cetera.

And I think it's a very serious constitutional question. The answer, perhaps, to that is, why doesn't it apply to the present bankruptcy courts? And my only reply would be, perhaps it does.

Mr. LEVIN. Mr. Levit?

Mr. LEVIT. Mr. Marsh virtually stole my answer, because that was precisely the observation I was going to make.

I think it's interesting that, when you look at the present bankruptcy rules promulgated by the Supreme Court and approved at least by an action of Congress, in talking about appeals it talks about appeals from the referee to the district court. That is certainly de facto recognition of the separate nature of the bankruptcy court as it now exists. And I can't state one argument against an article I court other than, perhaps, the references to enjoining other courts, which would not apply with equal force to the court that we have today.

Mr. LEVIN. One quick question for all the members of the panel, also. If the Congress ultimately did create an article I court or perpetuated in some form an adjunct system along the lines of the bankruptcy court structure on the chart, would there be—whatever you think of the ultimate outcome of the litigation—would there be litigation over the constitutionality of either of those systems? And what effect would it have on processing bankruptcy cases for the 3 to 5 years it would take to settle that litigation?

Mr. MARSH. My response would be that anytime I represented a defendant in that court, one of the defenses would be that the court itself is unconstitutional and has no power to adjudicate the controversy. And I imagine that all other cases would have that defense in them until such time as the Supreme Court said yes or no to that proposition.

As to what effect it would have on the bankruptcy proceedings, it would depend on how soon you could get a decision from the Supreme Court. It could conceivably be obtained within a time frame that the bankruptcy proceedings would not have been concluded anyway. But some of them, obviously, might be held up for a period of time until that issue is resolved.

Mr. LEVIN. Mr. Levit?

Mr. LEVIT. I'm sure there would be such litigation, with the results Mr. Marsh has indicated.

Judge HUFSTEDLER. I have no doubt that ingenuity of counsel would not be absent in raising constitutional issues. I can also say that I would have not the slightest doubt that an attack upon the constitutional jurisdiction would be put on the fast track for expedited appeal all the way to the top. This was true with respect to the constitutionality of the reorganization of the courts in the territory of Guam.

Second, I don't perceive that it would require any serious problems on an interim basis if the structure were designed the way I have suggested it. In the interim, while the appeals were pending, the article III courts could simply put on their district judge hats and refer all interim business to the article I courts as masters, pending the adjudication of constitutionality. There need be no interruption at all.

Mr. EDWARDS. Mr. Klee?

Mr. KLEE. Thank you, Mr. Chairman.

Mr. Levit, it seems that we have two jurisdictional alternatives offered here this morning.

One is to have Congress or some other body in its wisdom draft a laundry list of what jurisdiction bankruptcy courts should have and

leave it to the lawyers to argue what is and what isn't ejusdem generis with respect to that list.

The other is to have the bankruptcy court have pervasive jurisdiction and have the lawyers come in and argue for abstention and to possibly have a decision not to abstain appealable.

From the standpoint of judicial administration and concerning the time of the bankruptcy courts, which of those two models do you find preferable?

Mr. LEVIT. Let me start out, Mr. Klee, by saying, I only—

Mr. MARSH. Might I interrupt by saying, you misstated my position. The final clause in the Bankruptcy Commission's proposal I would delete, so it would not be a question of somebody arguing about what is or is not ejusdem generis with the list; it would be whether it was on the list.

Mr. KLEE. Mr. Levit, then, I don't want to have you answer a question that hasn't been posed.

Take the alternative with a pervasive jurisdiction with abstention versus a specific jurisdictional list that is drafted by mortals.

Mr. LEVIT. Mr. Klee, I only hope that within the foreseeable future, that we get to the point where that's the main issue with regard to the pending bankruptcy bill, because I would have to say, although I would prefer the pervasive jurisdiction with the right to abstain, I personally—and I think I can speak, well, for the League as a body—would be more than happy with a court that conformed in all other respects to our specifications and had the so-called shopping list.

Mr. KLEE. Take Mr. Marsh—and I should address this to him. As the former chairman of the Commission he has proposed an alternative jurisdictional standard. In his testimony he has supplemented that by saying that we have to add a list for things like collections of accounts receivable.

Yet I would ask Mr. Marsh what effect his proposed jurisdiction would have on the 1970 dischargeability amendments, actions to move against the debtor on discharged debts, actions to move against the debtor's exempt property, things of that nature.

It would appear the the bankruptcy court would not have jurisdiction under your proposal, as drafted.

Mr. MARSH. Initially, I should say that I didn't make this suggestion as chairman of the Commission; I ceased being that in 1973. I made it purely on my own.

But I am not prepared to debate with you whether one or two matters that should have been included was left out of the list that was included in the Bankruptcy Commission's draft statute.

We never considered that that was not going to be amended by Congress, although we in our wildest dreams never thought that what has happened to it would happen.

Mr. LEVIT. Certainly, Mr. Klee, in my answer I presupposed that such matter as you refer to which are now clearly within the exclusive summary jurisdiction of the bankruptcy court would remain in that jurisdiction, and I so understood Mr. Marsh.

Mr. KLEE. Thank you.

Mr. Marsh, there has been some question raised this morning about the separation of administrative and judicial functions. The chairman

has indicated a desire to have H.R. 8200 amended to make things more clear in that respect.

Is the problem that there are specific administrative functions in H.R. 8200 that are vested in the bankruptcy judge, or is it a problem that the administrative functions are not clearly vested anywhere?

Mr. MARSH. I think the problem is both.

I think there are clearly items, such as presiding at the first meeting of creditors, specifically vested in the judge which should not be vested in the judge.

On the other hand, I think it is also a problem that there is not specified that duties this trustee has. I don't think you can create a public official and expect him to assume duties that are not specified more than simply saying he is to supervise somebody else. But that's all I can find in the bill that says what the trustee should do, and appoint trustees in individual cases, which is a specific function.

Mr. KLEE. Well, taking it for granted that the bill does not say that the judge presides at the first meeting of creditors but rather leaves that vague, are there any functions vested in the judge in the bill that you would want specifically removed to the U.S. trustee?

Mr. MARSH. My basic proposition, if you want to call it that, what I think is necessary to accomplish this separation of functions is that all uncontested matters, with specified exceptions, be vested in the administrator or trustee, whatever you want to call him, by whomever he is appointed.

The specified exceptions would, for example, be perhaps—and these were included in the Commission's bill—the approval of fee applications by attorneys, the confirmation of plans of reorganization even though no one has appeared to contest them.

I certainly would not object to including in the judge's function certain uncontested matters. But I think that the starting point ought to be that an uncontested matter is not a matter to be considered by the judge but should be handled by somebody else, and then to make exceptions to that proposition to whatever extent it is thought to be necessary or wise.

Mr. KLEE. Mr. Marsh, I think there would be concurrence with that. My fear is that the administrator or the trustee will start resolving disputes that the judge considers unimportant, and in fact paragraph 4 of the judicial conference proposal that you endorsed envisions the allowance and disallowance of claims or exemptions or discharges for determining the priority of claims, all these bonafide legal disputes to be resolved in the first instance by the U.S. trustee. Why should those disputes not be resolved by the court?

And if some disputes are going to be resolved by the trustee, then don't you share Mr. Levit's fear that more disputes of a less important nature will be delegated?

Mr. MARSH. As I read their proposal, this action by the administrator is not and cannot be the resolution of a dispute.

He makes the preliminary determination, gives notice of it, and then anyone who wants to dispute that action has the right to, as they say in their draft, trial de novo before the judge.

So that how you bring up the issue or the question as to whether there is a dispute or there isn't a dispute is a matter of mechanics. You

can have a preliminary determination made, and if anybody who wants to dispute it—then you would go to the court.

If you want to give notice before anybody makes any kind of determination and say, if there is any dispute, it will go to the court without any preliminary determination by the administrator, I would have no problem with that. I think it might be better to do it that way.

Mr. KLEE. Judge Hufstedler, it seems to me that we have established certain things with respect to the court structure this morning.

Let's assume that the 300 bankruptcy appeals are tripled to 900—that's about three three-judge panels for the entire country—or if you think it's going to be more because of the expanded jurisdiction, let's assume that there is an intermediate court of bankruptcy appeals so that in one way or another bankruptcy appeals will be solved, whether it's intermediate between the bankruptcy court and the circuit court or whether it goes from the court of appeals to the Supreme Court.

Let's just assume away that problem.

It seems to me, then, we're left with the proposition that bankruptcy disputes in the new court which will not be the administrative matters under present law but will be bona fide legal disputes on a par with civil rights disputes, antitrust disputes, securities disputes, ought to be heard by a judge of equal stature as an article III judge.

Now, you yourself this morning have referred to a judicial hierarchy. You have referred to article III time.

Why are you reluctant to create more article III time by creating more article III judges either in the district courts with a priority for bankruptcy cases so they can be processed within the existing structure or in a separate article III court, if that's necessary?

Judge HUFSTEDLER. What we have done in this hypothesis is to erase the problem, because you have assumed that we don't need to worry about anything other than the basic trial level. If that's all you have to worry about, there isn't any problem about expanding the basic trial level in any judicial system in the country.

Mr. KLEE. Fine. Assuming you approve article III judges at the trial level, if the appeals problem can be solved—let's turn to the appeals problem.

Would an article III court of bankruptcy appeals between the bankruptcy court, the independent article III bankruptcy trial court, and the court of appeals solve the appeals problem; and if not, why not?

Judge HUFSTEDLER. It might.

Now, of course, you still have the same difficulty I mentioned earlier; that is to say that either you create a specialized article III court or you add to the existing district judges enough judges to undertake that load.

Those are the two options on article III. There aren't any others.

If you create a specialized court which is a specialized district court, you then do create the situation I earlier criticized, that is to say, unlike any other civil litigant you have given total priority to Federal district court time that no other litigant has. And I say I don't see how that can be justified.

Mr. KLEE. To the contrary. I think it depends upon the approach from which we're looking at the problem.

All other Federal litigants with important litigation have their disputes resolved by Article III judges. Your analysis should presuppose

a new bankruptcy court where the predominant judicial function will be the resolution of disputes of a complicated nature. These aren't traffic cases. These are every bit as complicated as antitrust cases or civil rights cases. Bankruptcy cases going to have litigants that are entitled to have those disputes resolved by judges of equal stature as hear all those other cases.

The only way they are going to be of equal stature is if they are given life tenure, because I don't think you're stating the proposition here this morning, that the article I judges or the bankruptcy referees have the same stature and prestige and regard by the bar as the district judges.

Judge HUFSTEDLER. I don't think you can say that with respect to the Tax Court, for example.

To say that the regard is not there for the existing system of referees is certainly true. I have never endorsed that system. I do not endorse it now. But it is true that every other civil litigant in the structure you have just stated, every other civil litigant, must take his or her place in line.

Mr. KLEE. Except where time is of the essence, and bankruptcy is one of those cases.

Judge HUFSTEDLER. Even when time is of the essence they still have to wait. We have Federal district courts in the ninth circuit that haven't heard a single civil case, not a single one, for months.

Mr. KLEE. Mr. Chairman, may I yield to Mr. Levin.

Mr. BUTLER [presiding]. If Mr. Levin has a question.

Mr. LEVIN. Judge Hufstedler, it seems to me what you are saying—and please correct me if I am misinterpreting this—is that you are willing to grant the bankruptcy cases a separate court—

Judge HUFSTEDLER. Yes.

Mr. LEVIN. Would you wish to compensate in some way by not granting article III status? Therefore, bankruptcy litigants would have the priority that other litigants have who would have a different status, and I'm not going to say lower or higher, but a different status judge than other litigants have.

Judge HUFSTEDLER. They have different status from some other litigants but not all other litigants. All kinds of other litigants have access not to article III judges at all, whether we're talking about the enormous system of quasi adjudicatory powers given to the Federal administrative agencies or whether we're talking about all of the litigation which has poured now into the magistrates laps.

It isn't that. What I'm saying is, in order to preserve the pyramidal system that we have and to preserve the hope of a prompt and speedy appeal to every litigant who seeks one, that the only way I can seek to accomplish that and still create an independent court is to have a vertical elongation of the ladder.

Mr. LEVIN. I was assuming that.

Judge HUFSTEDLER. Yes. And that's precisely the reason for it.

Now, of course, if you were able to resolve the matter of the appeals without bending the rest of the structure out of shape, fine.

I am not saying this is an ideal resolution. I agree that there isn't an ideal resolution. But it seems to me that it permits horizontal elongation by adding to the vertical structure without pressing out of shape the rest of the Federal design.

But it is not because it's second-class litigation. It isn't second-class litigation. Neither is the processing of Federal habeas petitions by magistrates, in my view, second-class litigation. Of course, it isn't second-class litigation. There are constitutional rights of people who are in prison. I don't treat that as trivial.

Mr. LEVIN. Thank you, Judge Hufstedler.

Mr. BUTLER. Mr. Klee.

Mr. KLEE. Judge Hufstedler, I have one last question for you. It has to do with a proposal that has been advanced by other parties advocating appointment of judges by the judicial councils rather than by the courts of appeals.

I think it's well established that judges are inferior officers of the United States—certainly, bankruptcy judges are if clerks of court are, and the Supreme Court has decided that clerks of a court are.

Do you think there is any significance to judicial councils appointing bankruptcy judges rather than courts of appeals sitting as a court of law doing that for constitutional purposes?

Judge HUFSTEDLER. No; I don't.

But I don't agree with the proposal, and I have indicated that I do not agree with it.

I don't agree with it for two reasons that have nothing to do with constitutionality. As a matter of fact, in our court we sit simultaneously as court and council, so I think the distinction is a distinction without a difference.

Mr. KLEE. Certainly, though, if the judges were meeting at the country club and they were making appointments not as a judicial council but just as a body of judges, do you think when the Constitution says inferior officers may be appointed by courts of law, it means the members of that court of law in any context?

Judge HUFSTEDLER. No; I cannot imagine a situation in which we would be appointing anybody at a country club.

But, in any event, I don't believe that there is a constitutional problem there. I think it's a distinction without a true difference.

But I don't agree with having the court of appeals, whether they sit en banc in a courtroom to do it or whether they sit in a conference room bearing the label "circuit council" and perform that task. I don't agree that they should do it in either event.

In the first place, the problem is again overburden. We have more work that we can possibly do now, and the addition of another duty is not a welcome task.

But, more important, we don't have any particular reason to do a good job at it. We cover an enormous geographical territory. We simply don't have access, nor staff, to acquire enough information to enable us to do a good job.

So that, again, in my design, if you're going to do any appointing, if you separate the whole structure from the district court, giving that power by delegation to the district court seems to me to be a good idea. They are on the scene, and I think they can do a much better job than we can.

So in either event, I don't agree with the fundamental premise that the courts of appeal should be doing it at all.

Mr. KLEE. What about giving it to the President?

Judge HUFSTEDLER. I don't think the President welcomes any further responsibilities, either.

He would have to delegate it, and I'm not convinced that the additional duties of appointing hundreds more judges is a particularly welcome one. Of course, if they are article III judges, there isn't any choice. There's a constitutional dictate.

Mr. KLEE. You state that there is no difference between the judicial council and the courts of appeals, or it's a distinction without a difference.

Judge HUFSTEDLER. It's a distinction without a constitutional difference.

Mr. KLEE. On what basis do you draw that conclusion?

When circuit judges are out of the court setting, when do they cease to be a court of law, for constitutional purposes?

Judge HUFSTEDLER. I have never thought that we were really talking about geography. What I'm talking about in terms of circuit council is a meeting attended by all of the judges of my court when we sit as circuit council. During the same meeting, in fact, in the same place precisely we also take votes on matters with respect to hearings en banc.

In short, we don't move an inch physically, and we're doing precisely the same thing.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. BUTLER. I thank the panel for a productive session. You have been very helpful in our problem of the organizational structure of the courts and related problems, and we thank you very much for your time.

We will return at 2 o'clock.

[Whereupon, at 12:06, the subcommittee recessed for lunch.]

#### AFTERNOON SESSION

Mr. EDWARDS. The subcommittee will come to order. This afternoon we are continuing consideration of the bankruptcy bill, and we have the honor and pleasure of welcoming the representatives from the Judicial Conference of the United States, the Honorable Wesley E. Brown, Chairman, Judicial Conference Ad Hoc Committee on H.R. 6; my good friend and former colleague on the Commission, the Honorable Edward Weinfeld, who is a district judge in New York City, and Chairman of the Judicial Conference Committee on Bankruptcy Administration; and the Honorable Ruggero Aldisert, Judge of the United States Court of Appeals for the Third Circuit.

Am I right, sir?

Judge ALDISERT. Yes.

Mr. EDWARDS. We're certainly all delighted and honored to have you here. Without objection, the written statements will be made a part of the record, and you may proceed.

[The prepared statement of Judge Wesley E. Brown follows:]

#### STATEMENT OF JUDGE WESLEY E. BROWN, CHAIRMAN, JUDICIAL CONFERENCE AD HOC COMMITTEE ON BANKRUPTCY LEGISLATION

Mr. Chairman. I greatly appreciate your kind invitation to appear today to present the views of the Judicial Conference of the United States on the court

organizational and structural provisions of H.R. 8200, the bill to revise the bankruptcy laws of the United States. I would like, first of all, to extend our compliments to the Subcommittee for the magnificent effort it is making to modernize the substantive law of bankruptcy and to improve bankruptcy administration. Most statutory provisions relating to the law of bankruptcy date back to the Bankruptcy Act of 1898; others date from the extensive revisions made by the Chandler Act in 1938. Although those venerable laws have served us well, circumstances have changed. A complete revision of the bankruptcy laws is long overdue. I know that I speak for all federal judges in commending you, Mr. Chairman, and all the members of the Subcommittee, for the time and effort you have devoted to this work.

The Judicial Conference, as you know, has taken no position regarding the changes in substantive law proposed in Title I of H.R. 8200, since they involve matters of policy for the determination of the Congress. Last March, however, the Conference did consider the changes in court structure and jurisdiction contained in Title II of H.R. 6 and voted to recommend against their enactment. A special Ad Hoc Committee, of which I was named Chairman, was appointed to develop an alternative to Title II, consistent with the objectives of H.R. 6 and the recommendations of the Commission on the Bankruptcy Laws, to be presented to the Congress for its consideration. The report of the Ad Hoc Committee setting forth its recommendations for changes in Title II was approved in principle by a mail vote of the Judicial Conference last month. That report is attached to this statement as Appendix A. If I may, Mr. Chairman, I would like to request that it be so incorporated in the record and then proceed to a discussion of the basic recommendations contained therein.

#### I.

Mr. Chairman, the basic issue is whether the creation of a separate court system for bankruptcy cases is really necessary to provide the citizens of this nation with as responsive a system of justice as they expect and deserve. Proponents of a separate court maintain that bankruptcy is a specialized field of law, that district court dockets are backlogged and cannot accept additional jurisdiction in bankruptcy matters, and that centralized control in one court of all cases and proceedings in bankruptcy is required for efficient administration. In our view those arguments are not sound.

First of all, bankruptcy cases are unique only in their administrative and procedural aspects. Except for procedural questions, questions relating to discharges and the effect of discharges, and questions of statutory interpretation involving the Bankruptcy Act itself, any questions which might arise in bankruptcy cases or proceedings might also arise in other cases brought under the existing jurisdiction of the district courts. The exceptional issues are both limited in number and not difficult to handle. Furthermore, if there is to be a separation of judicial and administrative functions, as provided in H.R. 8200, the judges of the new court will be removed from the day-to-day administration of bankruptcy proceedings and the greatest need for expertise in procedure and administration will be experienced by an administrator, subject only to judicial review.

Secondly, the expanded jurisdiction authorized by H.R. 8200 relates most significantly to the transfer into the new court system of "plenary suits", now handled in the district courts and state trial courts. Plenary suits are common law suits, the daily work of state and federal trial courts. They involve no issues of bankruptcy law. The only distinguishing characteristic is that one of the parties is a representative of an estate in bankruptcy. H.R. 8200 authorizes the removal of any type of case "related to" a bankruptcy proceeding to the new court. A securities case, a patent case, or a civil rights proceeding, pending on the docket of a district court, could be transferred to the new court system. The practical effect, therefore, would be to give the new court jurisdiction over any type of civil action now within the jurisdiction of any state or federal court, if the case were related to the bankruptcy proceeding. Rather than being "specialized" judges in a specialized field of law, the judges of the new court would have to be "generalized" judges in the full field of general jurisdiction.

Thirdly, a new court structure per se will not obviate or eliminate delays in administering bankrupt estates; expedition of cases depends on the availability of judicial resources. If these resources can be provided for a new court system, they can just as easily—and far more expeditiously—be provided for the existing court system, at substantially less expense to the taxpaying public.

## II.

As I previously indicated, we do not believe the reasons advanced on behalf of a separate court are sound. We believe the existing district courts can—and should—assume additional jurisdiction over “plenary suits” in bankruptcy. The Judicial Conference so recommends. The undesirable consequences to good judicial administration of having two separate trial courts in each district are readily apparent. Almost two of everything would be required; two clerks’ offices, with two separate sets of records; two jury systems; two financial accounting systems for fees and registry funds; and perhaps even two court-houses. All of this would be extremely costly. Furthermore there would be an overlapping jurisdiction, which would inevitably lead to disputes and forum shopping.

Less than four years ago the American Bar Association Commission on Standards of Judicial Administration sought to avoid or overcome precisely those problems in its recommendations relating to court organization. The Standards relating to Court Organization, which were approved by the House of Delegates of the American Bar Association in February of 1974 contain these provisions:

“Standard 1.10. Unified Court System: General Principle. The aims of court organization can be most fully realized in a court system that is unified in its structure and administration, staffed by competent judges, judicial officers, and other personnel . . .”

“Standard 1.12. Court of Original Proceedings. The court of original proceedings should be organized as a single court.

• • • • •  
 “(b) Judges and judicial officers. The court of original proceedings should have a single class of judges . . . To assist the judges, the court should have a convenient number of judicial officers performing such functions as committing magistrate, court commissioner, hearing officer, and full-time referee.”

## III.

Mr. Chairman, if I may, I would now like to turn to the jurisdiction, venue and removal provisions recommended by the Judicial Conference. Let me point out that the language we have used is based upon similar language in H.R. 8200 with respect to a separate court.

In regard to jurisdiction over plenary suits, we have used the term suits “by or against” a representative of the debtor’s estate, rather than suits “arising under or related to” the pending bankruptcy proceeding. We believe the suggested language is more precise in defining the scope of jurisdiction and should avoid litigation over the meaning of the term used in the bill. We could not conceive of a suit “arising under or related to” the pending bankruptcy proceeding to which a representative of the estate was not a party. If there were a case relating to bankruptcy in which the estate was not a party, we do not see why the parties would want to bring the case into a bankruptcy court, unless they were seeking to obtain some personal advantage unrelated to the bankruptcy case.

The venue provisions we suggest are also similar to those in H.R. 8200. Minor changes in language, however, are suggested to adapt these provisions to those presently contained in the general venue statute.

The removal provisions of H.R. 8200 would permit removal by any party. We have suggested provisions permitting removal only by the trustee or representatives of the bankruptcy estate. Thus, if the trustee elects to file a plenary suit in a state court, the defendant could not remove from that state court.

## IV.

Mr. Chairman, the Judicial Conference recommends most emphatically that the system of referees, or bankruptcy judges, be retained as an adjunct of the district court. The existing system has, overall, worked well. As you personally have noted, Mr. Chairman, the existing system “is basically sound”, and the record shows that the increased volume of bankruptcy litigation in recent years has been handled competently by the judicial officers charged with the responsibility for bankruptcy administration. While we believe that record fully evidences the need not to enact a complete restructuring of the court system, we

also believe that several changes in existing law would be wise. In 1960 the Judicial Conference first asked that the term of office for bankruptcy referees be increased from 6 to 12 years, and that retirement benefits also be increased. Those recommendations were, for years, reiterated, were presented to the Commission, and are now renewed in the Ad Hoc Committee's report which we file here today.

Additionally, the Conference recommends that appointment of bankruptcy judges be made by the judicial councils of the circuits. The bill submitted on behalf of the National Conference of Bankruptcy Judges, and introduced in the 93rd and 94th Congresses, contained a similar provision. The Bankruptcy Commission believed there was an appearance of a conflict of interest when the decision of an appointed judicial officer was made reviewable by the appointing authority. While we know of no case where this was so, the Judicial Conference, nonetheless, recommends appointment of bankruptcy judges by the judicial councils of the circuits.

#### VI.

The Bankruptcy Commission, as you know, Mr. Chairman, strongly recommended a separation of the judicial and administrative functions of bankruptcy judges. To accomplish a separation the Commission recommended the creation of a separate bankruptcy administration. H.R. 8200 provides for a separate United States trustee system under the Attorney General Mr. Danielson's amendment to H.R. 8200 retains the United States trustee system, but places it under the Judiciary S. 2266 upgrades the method of appointing trustees, but a bankruptcy judge would continue to make appointments of trustees.

Consistent with the concept of separation, the Judicial Conference recommends the creation of the office of "bankruptcy administrator" in each district court. The bankruptcy administrator would take over the administrative duties of bankruptcy judges, including the appointment of trustees when required. The bankruptcy judge would then be free, as a judicial officer, to concentrate on the resolution of controversies arising in the administration of bankruptcy estates. The Conference also recommends that bankruptcy administrators be appointed by the judicial councils of the circuits for terms of five years. Thus, the bankruptcy judge would not be in the position of reviewing administrative decisions of a bankruptcy administrator whom he appoints, and the bankruptcy judge would not appoint trustees in a liquidation or debtor relief proceeding under Chapters 7 and 13. The language of the proposal contained in the Ad Hoc Committee report defines in general terms the duties to be performed by a bankruptcy administrator.

#### VII.

Those, Mr. Chairman, are the Judicial Conference's basic recommendations relating to the structure and organization of the federal courts to more efficiently administer bankruptcy cases, which we understand to be the subject of these hearings. If there are questions pertaining to these suggestions, or any other suggestions contained in the report we have submitted, we shall be pleased to comment upon them.

Again, I would like to express our appreciation for your courtesy in permitting us to present our recommendations.

#### REPORT OF THE AD HOC COMMITTEE ON BANKRUPTCY LEGISLATION

To the Chief Justice of the United States, Chairman, and Members of the Judicial Conference of the United States:

Your Ad Hoc Committee on Bankruptcy Legislation met in Washington, D.C. on November 11 and 12, 1977 to continue its review of bankruptcy legislation pending in the Congress. All members of the Committee were in attendance except Circuit Judge Ruggero Aldisert and District Judges Thomas MacBride, Joseph Lord, and Raymond Pettine, all of whom were unable to be present.

#### STATUS OF PENDING LEGISLATION

During the two-month interval since the last session of the Conference there have been two important developments. First, the bankruptcy bill, H.R. 8200, as reported by the House Judiciary Committee, was brought to the floor of the House of Representatives on October 27 for two hours of debate before

the Committee of the Whole House on the State of the Union. On the following day an amendment to the bill, offered by Mr. Danielson of California, and strongly supported by Mr. Rallsback of Illinois, was adopted by the Committee of the Whole by vote of 183 to 158 with one member voting present. This amendment retains jurisdiction of bankruptcy cases in the district courts, increases the jurisdiction of the district courts over plenary suits, and provides for salaried trustees in bankruptcy under the judiciary rather than the Attorney General. In most respects it is consistent with the principles set forth in the Third Preliminary Report of your Committee approved by the Conference in September. After this amendment was adopted in the Committee of the Whole consideration of the bill was halted on motion of Mr. Edwards; however, the bill remains on the House calendar and can be called up for further consideration in the next session. At that time the Danielson-Rallsback amendment is subject to a further vote before the full House of Representatives on the amendment adopted by the Committee of the Whole.

Secondly, on October 31st Senator DeConcini (for himself and Senator Wallop) introduced in the Senate S. 2266, a bill which is similar to H.R. 8200 in regard to amendments to the substantive law of bankruptcy, but which follows the provisions of the Danielson-Rallsback amendment with respect to retaining bankruptcy jurisdiction in the district courts. S. 2266, however, contains no provision for "United States trustees", as would the House bill, as amended. Instead S. 2266 provides for the creation of panels of private trustees to be established under regulations of the Director of the Administrative Office.

Hearings on S. 2266 are scheduled for November 28-30 and representatives of the judiciary have been invited to appear and testify. Additionally, hearings have been reopened in the House of Representatives and various judges are being asked to appear and testify on December 12 and 13 on the question of "the status of bankruptcy judges."

#### REPORT OF THE DRAFTING SUBCOMMITTEE

Prior to November 10 the drafting subcommittee submitted to the full Ad Hoc Committee specific amendments to Title II of H.R. 8200, the title which deals primarily with the organization and jurisdiction of courts sitting in bankruptcy. The drafting subcommittee also submitted suggested amendments to the transitional provisions contained in Title IV of H.R. 8200.

In view of the legislative posture of H.R. 8200, the Committee decided to cast proposed changes in Titles II and IV of the legislation in terms of amendments to the Senate bill, S. 2266. The Committee felt that this approach would be appropriate since the provisions of Title II of the Senate bill with respect to court organization and jurisdiction are similar to the Danielson-Rallsback amendment to H.R. 8200. The draft amendments to S. 2266, recommended by the Committee, are set out in Appendix A. A copy of S. 2266 has been previously sent to every member of the Conference.

#### SUMMARY OF TITLES II AND IV OF S. 2266 AND PROPOSED AMENDMENTS

##### *A. Title II—Amendments to Title 28 of the United States Code and to the Federal Rules of Evidence*

Sec. 201 of Title II of S. 2266 adds a new chapter 50 of Title 28 which creates the office of "bankruptcy judge"; provides for appointment of bankruptcy judges by the judicial councils of the circuits for terms of 12 years; authorizes the Judicial Conference to determine the number of positions to be created; grants bankruptcy judges the power to conduct all proceedings in bankruptcy cases and, to the extent authorized by the district court, the power to conduct trials and other proceedings of "plenary" suits; provides authority for facilities and the payment of expenses, and for the temporary assignment of bankruptcy judges to sit in other districts; and fixes the compensation of bankruptcy judges at the rates currently fixed for referees in bankruptcy. This section is similar to a corresponding provision in the Danielson-Rallsback amendment to H.R. 8200.

Your Ad Hoc Committee recommends only minor changes in Sec. 201 of Title II of S. 2266:

1. That the term "referee in bankruptcy" be substituted for the term "bankruptcy judge" as the preferred title for the judicial officer authorized to conduct proceedings in bankruptcy cases;

2. That provision be made in § 771(e) for the termination of a position which is no longer needed;

3. That the language of § 775(d) pertaining to contempt of court be clarified;

4. That § 777 pertaining to employees be stricken since it is covered generally in the following section. See also the proposed new provision for a bankruptcy administrator discussed below; and

5. The insertion of § 778 and § 779 pertaining to training and dockets.

Sections 202 to 204 of Title II of S. 2266 would amend the basic jurisdiction, venue, and removal sections of Title 28 to cover proceedings under title 11 and plenary suits to which the trustee or representative of the debtor's estate is a party. The Committee recommends approval of these provisions of the Senate bill with the insertion of the phrase "case or" in § 1391(h).

Section 205 of Title II of S. 2266 would amend 28 U.S.C. 455 to substitute "bankruptcy judge" for "referee in bankruptcy". The Committee recommends deletion of this section.

Sections 206 to 208 of Title II of S. 2266 are technical amendments.

Section 209 of Title II of S. 2266 would provide for the creation of a panel of private trustees in each district under regulations to be adopted by the Director of the Administrative Office. The Committee is recommending in lieu thereof the appointment of a Bankruptcy Administrator in each district court by the circuit council for a term of five years. The bankruptcy administrator would oversee the administration of bankruptcy cases and relieve the referee of many administrative duties. This proposal is consistent with the concept of separating the judicial and administrative functions of referees in bankruptcy advocated in the reports of the Commission on the Bankruptcy Laws. The powers and duties of the bankruptcy administrator are set out in a proposed new § 906 to Title 28. The principal function of the bankruptcy administrator would be the supervision of trustees whom he would appoint (rather than the referee). Determinations made by the administrator would be subject to review by the court, either by the referee or the district judge.

Sections 210 to 213 of Title II of S. 2266 would add a referee (bankruptcy judge) and a United States magistrate to membership on the Board of the Federal Judicial Center. The Conference previously disapproved the proposal contained in H.R. S200 to place two bankruptcy judges on the Center's Board. Your Committee recommends that these sections be deleted from S. 2266.

Sections 214 to 218 of Title II of S. 2266 are technical amendments.

Section 218 of Title II of S. 2266 would amend chapter 123 of Title 28 to add a new section relating to fees to be charged in bankruptcy cases.

Section 220 of Title II of S. 2266 would increase the retirement benefits for referees, but would also increase the payment to be made into the Civil Service Retirement fund.

The Ad Hoc Committee also recommends a new § 210 to Title II to amend 28 U.S.C. 634(a) pertaining to the salaries of magistrates to clarify the reference to the Bankruptcy Act.

#### *B. Title IV—Transition*

Section 402 of Title IV of S. 2266 provides that the effective date of the Act shall be July 1, 1979. To assure an appropriate interval between the date of enactment and the effective date the Committee is recommending an amendment to assure a minimum interval of 180 days and is further recommending that the effective date commence at the beginning of the government's fiscal year.

#### RECOMMENDATIONS OF THE COMMITTEE

The Committee recommends as follows:

1. That the Judicial Conference approve in principle Titles II and IV of S. 2266 with the amendments set forth in the attached Appendix A;

2. That the Committee be authorized, consistent with this report, to make other suggestions to the Congress of any needed changes in the bill which may come to the attention of the Committee; and

3. That the Committee be authorized to release this report to the Congress and other interested persons.

Respectfully submitted,

WESLEY E. BROWN, *Chairman.*

## APPENDIX A

PROPOSED AMENDMENTS TO TITLES II AND IV OF S. 2266, 95TH CONGRESS, A  
BILL TO ESTABLISH A UNIFORM LAW ON THE SUBJECT OF BANKRUPTCIES

**TITLE II—AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE AND TO THE FEDERAL RULES OF EVIDENCE**

SEC. 201. Title 28, United States Code, is amended by inserting immediately after chapter 49 thereof the following new chapter :

**“Chapter 50.—REFEREES IN BANKRUPTCY**

“Sec.

“771. Appointment; qualifications; tenure; oath; removal.

“772. Practice of law.

“773. Numbers and locations of referees in bankruptcy.

“774. Compensation; benefits.

“775. Powers of referees in bankruptcy.

“776. Temporary assignment of referees in bankruptcy.

“777. Expenses; facilities.

“778. Training.

“779. Dockets.

**“§ 771. Appointment; qualifications; tenure; oath; removal**

“(a) **APPOINTMENT.**—The Judicial Council of each circuit shall appoint referees in bankruptcy to serve in each district court of the circuit, including territorial district courts, in such numbers and at such locations within each district as the Judicial Conference of the United States may determine pursuant to this chapter. The appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of the Judicial Council. If there is no majority, appointment shall be made by the chief judge of the circuit. Where the Conference deems it desirable for the expeditious and effective administration of the bankruptcy laws, a referee in bankruptcy may be appointed to serve in more than one judicial district within the circuit or in more than one judicial district situated in different circuits. An appointment of a referee in bankruptcy to serve in two or more circuits shall be made by a majority vote of the judges of the Judicial Council of each circuit in which the referee in bankruptcy is appointed to serve.

“(b) **QUALIFICATIONS.**—No individual may be appointed or reappointed to serve as a referee in bankruptcy unless—

“(1) he has been a member of the bar for at least five years and is currently a member in good standing of the bar of the highest court of the State in which he is to serve, or, in the case of an individual appointed to serve—

“(A) in the District of Columbia, a member in good standing of the bar of the United States District Court for the District of Columbia;

“(B) in the Commonwealth of Puerto Rico, a member in good standing of the bar of the Supreme Court of Puerto Rico, and in territorial district courts, a member in good standing of the bar of the district court of the territory; or

“(C) in two or more districts extending into two or more States, a member in good standing of the bar of the highest court of one of those States;

“(2) he is determined by the judicial council of the circuit to be competent to perform the duties of the office;

“(3) he is not related by blood or marriage at the time of original appointment to a judge of the court of appeals of the circuit, or to a judge of the district court in which he is appointed to serve; and

“(4) he meets such other qualification standards as may be prescribed from time to time by the Judicial Conference of the United States.

“(c) **TENURE.**—Each individual appointed as a referee in bankruptcy under this chapter shall serve for a term of twelve years and may hold no other civil or military office or employment under the United States: *Provided, however,* That retired officers and retired enlisted personnel of the Regular and Reserve components of the Army, Navy, Air Force, Marine Corps, and Coast Guard, members of the Army National Guard of the United States, the Air National Guard of the United States, and the Naval Militia and of the National Guard

of a State, territory, or the District of Columbia, except the National Guard disbursing officers who are on a full-time salary basis, may be appointed and serve as referees in bankruptcy. An individual appointed as a referee in bankruptcy may not serve under this chapter after having attained the age of seventy years: *Provided, however,* That upon the unanimous vote of all the judges of the judicial council of the circuit, a referee in bankruptcy who has attained the age of seventy may continue to serve for the remainder of his term, or for such portion thereof as the council may deem appropriate, and may be reappointed under this chapter.

“(d) OATH OF OFFICE.—Each individual appointed as a referee in bankruptcy under this section shall before performing the duties of his office take the same oath of office as a district court judge. The appointment shall be entered of record in the district court, and notice of the appointment shall be given to the Director of the Administrative Office of the United States Courts by the clerk of that court.

“(e) REMOVAL OF A REFEREE IN BANKRUPTCY.—Removal of a referee in bankruptcy during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability; but a referee's office may be terminated if the Conference determines that the services performed by his office are no longer needed. Removal shall be by the judicial council of the circuit in which the referee in bankruptcy serves, but removal shall not occur unless a majority of all the judges of such circuit council concur in the order of removal. Before any order of removal shall be entered, a full specification of the charges shall be furnished to the referee in bankruptcy, and he shall be accorded an opportunity to be heard on the charges. Any cause for removal of any referee in bankruptcy coming to the knowledge of the Director shall be reported by him to the chief judge of the circuit in which he serves, and a copy of the report shall at the same time be transmitted to the circuit council, to the judges of the district court concerned and to the referee in bankruptcy.

#### “§ 772. Practice of law

“A referee in bankruptcy may not engage in the practice of law and may not engage in any other business, occupation, or employment inconsistent with the expeditious, proper, and impartial performance of the duties of the office.

#### “§ 773. Numbers and locations of referees in bankruptcy

##### “(a) SURVEYS BY THE DIRECTOR.—

“(1) The Director of the Administrative Office of the United States Courts shall make continuing studies and surveys of conditions in the judicial districts to determine—

“(A) the number of appointments of referees in bankruptcy required to be made under this chapter to provide for the expeditious and effective administration of justice, and

“(B) the locations at which such officers shall serve.

“(2) In the course of any survey, the Director shall take into account local conditions in each judicial district, including the areas and the population to be served, the transportation and communications facilities available, the numbers and types of bankruptcy cases filed, and any other material factors. The Director shall give consideration to suggestions from any interested parties.

“(b) DETERMINATION BY THE CONFERENCE.—Upon the completion of the surveys required by subsection (a) of this section, the Director shall report to the district courts, the judicial councils, and the Judicial Conference of the United States his recommendations concerning the number of referees in bankruptcy and their respective locations. The district courts shall advise their respective judicial councils, stating their recommendations and the reasons therefor; the judicial councils shall advise the Conference, stating their recommendations and the reasons therefor, and shall also report to the Conference the recommendations of the district courts. The Conference shall determine, in the light of the recommendations of the Director, the district courts, and the judicial councils, the number of referees in bankruptcy to be appointed in each district court and the locations at which they shall serve.

“(c) CHANGES IN NUMBER AND LOCATIONS.—Except as otherwise provided in this chapter, the Conference may, from time to time, in the light of the recommendations of the Director, the district courts, and the judicial councils,

change the numbers and locations of referees in bankruptcy as the expeditious administration of justice may require.

"(d) VACANCIES.—A vacancy in the office of referee in bankruptcy may be filled by the circuit council after approval of the position by the Judicial Conference or a recommendation by the Director that the position be continued.

#### § 774. Compensation; benefits

"(a) COMPENSATION.—Each referee in bankruptcy shall receive as full compensation for his services a salary of \$48,500 per annum, subject to adjustment in accordance with section 225 of the Federal Employees Salary Act of 1967 and section 461 of this title.

"(b) BENEFITS.—All referees in bankruptcy, and all clerical and secretarial assistants employed in the office of a referee in bankruptcy, shall be deemed to be officers and employees in the judicial branch of the United States Government within the meaning of subchapter III (relating to civil service retirement) of chapter 83, chapter 87 (relating to Federal employee's group life insurance), and chapter 89 (relating to Federal employee's health benefits program) of title 5.

#### § 775. Powers of referees in bankruptcy

"(a) POWERS.—Each referee in bankruptcy serving under this chapter shall have—

"(1) the power to conduct all proceedings under title 11;

"(2) to the extent authorized by rule or order of the district court, the power to conduct trials and other proceedings in actions under section 1334(b) of this title; and

"(3) the power to administer oaths and affirmations.

"(b) APPEALS.—A person aggrieved by an order or judgment of a referee in bankruptcy in a case or proceeding under title 11 of aggrieved by a judgment entered in a case heard by a referee in bankruptcy under subsection (a) (2) of this section, may, within ten days after the entry thereof or within such extended time as the court may allow for good cause shown upon petition filed within such ten-day period, file with the referee in bankruptcy a petition for review or appeal such order or judgment by a judge of the district court and serve a copy of such petition upon the adverse parties who were represented at the hearing or trial. Such petition shall set forth the order or judgment complained of and the alleged errors in respect thereto. Unless the person aggrieved shall petition for review of such order or judgment within such ten-day period, or any extension thereof, the order of the referee in bankruptcy shall become final. Upon application of any party in interest, the execution or enforcement of the order or judgment complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.

"(c) INJUNCTIONS.—Notwithstanding any other provision of law to the contrary, a referee in bankruptcy may not enjoin a court.

"(d) CONTEMPT.—In a proceeding before a referee in bankruptcy, any of the following acts or conduct shall constitute a contempt of a district court for the district in which the referee in bankruptcy is sitting:

"(1) disobedience or resistance to any lawful order, process, or writ;

"(2) misbehavior at a hearing or other proceeding or so near the place thereof as to obstruct the same;

"(3) failure to produce, after having been ordered to do so, any pertinent document;

"(4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or

"(5) any other act or conduct which if committed before a judge of the district court would constitute contempt of the court.

A referee in bankruptcy may impose a fine for contempt of court not in excess of \$250. Upon the commission of any act warranting imprisonment or a fine in excess of \$250, the referee in bankruptcy shall forthwith certify the facts to a judge of a district court. Any person whose behavior is brought into question under this subsection shall be served with an order to appear before a judge of that court to show cause why he should not be judged in contempt by reason of the facts so certified. A judge of the district court shall thereupon hear the evidence of the act or conduct complained of and, if warranted, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the

case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

**“§ 776. Temporary assignment of referees in bankruptcy**

“(a) **INTRACIRCUIT.**—The chief judge of a circuit may temporarily assign a referee in bankruptcy appointed to serve in a district court within the circuit to perform duties in any other district within the circuit. The assignment shall be entered of record in the office of the clerk of the district court to which the referee in bankruptcy is assigned.

“(b) **INTERCIRCUIT.**—The chief judge of a circuit may, with the consent of the chief judge of another circuit, temporarily assign a referee in bankruptcy appointed in the other circuit to perform duties in any district court within the circuit. The assignment shall be entered of record in the office of the clerk of the district court to which the referee in bankruptcy is assigned.

“(c) **ASSIGNMENT OF A RETIRED REFEREE IN BANKRUPTCY.**—The chief judge of a circuit, with the approval of the Director, may temporarily assign a retired referee in bankruptcy to perform the duties of referee in bankruptcy in any judicial district when there is a vacancy in the office of a referee in bankruptcy, a referee in bankruptcy is absent, or when the expeditious transaction of the business of the court may require. The retired referee in bankruptcy shall be considered a reemployed annuitant within the meaning of the civil service laws and during the period of his service shall not engage in any other activity inconsistent with the performance of the duties of the office.

“(d) A referee in bankruptcy shall discharge all judicial duties for which he is designated and assigned under this section. He shall have all the powers of a referee in bankruptcy for the district to which he is assigned for the period of such assignment.

**“§ 777. Expenses; facilities**

“Referees in bankruptcy serving under this chapter shall be allowed their actual and necessary expenses incurred in the performance of their duties, including the compensation for necessary secretarial and other necessary supporting personnel. Such expenses and compensation shall be determined and paid by the Director under such regulations as the Director shall prescribe with the approval of the Judicial Conference. The Administrator of General Services shall provide referees in bankruptcy with necessary courtrooms, office space, furniture, and facilities in buildings owned or occupied by departments and agencies of the United States, or should suitable courtroom and office space not be available, the Administrator of General Services, at the request of the Director, shall procure and pay for suitable courtroom and office space, furniture, and facilities in another building, but only if such request has been approved as necessary by the Judicial Council of the appropriate circuit.

**“§ 778. Training**

“The Federal Judicial Center shall conduct periodic training programs and seminars for referees in bankruptcy, including an introductory training program for new referees.

“The Director shall furnish referees in bankruptcy adequate docket books and forms prescribed by the Director.

SEC. 202. The table of chapters of part III of title 28 of the United States Code is amended by inserting immediately after the item relating to chapter 49 the following:

“50. Referees in Bankruptcy----- 771.

SEC. 203. Section 1334 of title 28, United States Code, is amended to read as follows:

**“§ 1334. Cases and proceedings under title 11; related civil proceedings**

“(a) The district courts shall have original jurisdiction, exclusive of the courts of the States, of all cases and proceedings under title 11.

“(h) The district courts shall have original, but not exclusive, jurisdiction of all civil proceedings by or against a debtor in possession, a trustee, or other representative of the estate of a debtor appointed under title 11 to administer the debtor's estate.”.

**VENUE**

SEC. 204. Section 1391 of title 28, United States Code, is amended by inserting immediately after subsection (f) thereof the following new subsections:

"(g) Except as provided in subsection (i) of this section—

"(1) (A) a case under section 1334(a) of this title may be brought only in the judicial district in which the debtor has resided or has had his domicile, or principal place of business, or in which his principal assets have been located, for the longest portion of the one hundred and eighty-day period immediately preceding the commencement of the case; or

"(B) in which there is pending a case under title 11 concerning such debtor's affiliate, general partner, or partnership.

"(2) a proceeding under 1334(a) of this title may be brought in the judicial district in which the case is pending, or if the case is closed, the judicial district in which the case was pending when closed.

"(h) A case or proceeding under section 1334(b) of this title may be brought only in accordance with the provisions of subsections (b) through (f) of this section.

"(i) A case under section 304 of title 11 may be brought only in the judicial district in which the principal place of business of the debtor in the United States is located, or the principal assets of the estate in the United States are found, except that—

"(1) a case to enjoin the commencement or continuation of an action or proceeding in a State court, or the enforcement of a judgment, may be brought only in the judicial district embracing the court in which is pending the action against which the injunction is sought; and

"(2) a case to enjoin the enforcement of a lien against property or to require the turnover of property of the estate, may be brought only in the judicial district in which such property is found."

#### REMOVAL

SEC. 205. Section 1441 of title 28, United States Code, is amended by inserting immediately after subsection (d) thereof the following new subsection:

"(c) A debtor in possession, trustee, or other representative of the estate of the debtor, appointed in a proceeding under title 11, may in accordance with subsection (b) of this section remove a civil action of which the district courts have original jurisdiction under subsection 1334(b) of this title brought in a State court to the district court embracing the place where such action is pending upon a showing that removal would prevent a potential loss of assets or avoid other adverse effects on the administration of the estate of the debtor: *Provided*, That the petition for removal is filed in accordance with the requirements of section 1446(b) of this title, and *provided further*, that no civil action by a governmental unit to enforce such governmental unit's police or regulatory power may be removed under this subsection. A decision to authorize or not authorize removal is not reviewable."

SEC. 206. (a) The heading for section 460 of title 28 of the United States Code is amended by striking out "Alaska,".

(b) The item relating to section 460 in the table of sections of chapter 21 of title 28 of the United States Code is amended by striking out "Alaska,".

SEC. 207. Section 526(a)(2) of title 28 of the United States Code is amended— by striking out "and receivers in bankruptcy" and inserting in lieu thereof "in cases under title 11".

SEC. 208. Section 604(a) of title 28 of the United States Code is amended—

(1) by redesignating paragraph (13) as paragraph (14); and

(2) by inserting immediately after paragraph (12) the following:

"(13) Lay before Congress, annually, statistical tables that will accurately reflect the business transacted in cases and proceedings under title 11 or actions related thereto;"

SEC. 209. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 55 thereof the following new chapter:

#### "Chapter 56.—BANKRUPTCY ADMINISTRATORS

"Sec.

"901. Bankruptcy administrators.

"902. Assistant bankruptcy administrators.

"903. Oath of office.

"904. Official stations.

"905. Vacancies.

"906. Powers and duties.

"907. Salaries.

"908. Staff and expenses.

**“§ 901. Bankruptcy administrators**

“(a) There is created in each judicial district the office bankruptcy administrator.

“(b) The judicial council in each circuit by the concurrence of the majority of all the judges thereof shall appoint in each judicial district a bankruptcy administrator. When there is no such concurrence, the appointment shall be by the chief judge of the circuit. A bankruptcy administrator so appointed may, at the direction of the circuit council, serve as bankruptcy administrator for more than one judicial district.

“(c) Each bankruptcy administrator shall be appointed for a term of five years. Upon expiration of such term, the bankruptcy administrator shall continue to perform the duties of the office until a successor is appointed and qualifies.

“(d) Each bankruptcy administrator is subject to removal for cause upon the concurrence of a majority of the judges of the judicial council of the circuit in which the bankruptcy administrator is serving.

**“§ 902. Assistants to the bankruptcy administrator**

“(a) The Judicial Conference shall determine the number of assistants required by the bankruptcy administrator to carry out the duties prescribed under title 11 and under rules promulgated by the Conference. Such assistants to the bankruptcy administrator shall be appointed by him.

**“§ 903. Oath of office**

“Each bankruptcy administrator before taking office, shall take an oath to execute faithfully the duties prescribed for such office.

**“§ 904. Official stations**

“The Judicial Conference shall determine the official stations of the bankruptcy administrator within the judicial districts for which they are appointed.

**“§ 905. Vacancies**

“The chief judge of each circuit may appoint an acting bankruptcy administrator whenever a vacancy exists in such office in any district within the circuit. The individual so appointed may serve until the earlier of 90 days after such appointment, or the date on which the vacancy is filled by appointment under § 901 (b) of this title.

**“§ 906. Powers and duties**

“(a) Each bankruptcy administrator, within his district, shall—

“(1) Establish, maintain, and supervise a panel of private trustees composed of individuals in the various communities in the district who meet qualification standards prescribed by the Judicial Conference of the United States to serve as trustees in cases under chapter 7 of title 11 and select from such panels trustees to perform the functions required under chapter 7 of title 11;

“(2) Establish, maintain, and supervise a panel of trustees who meet the qualification standards prescribed by the Judicial Conference of the United States to serve as trustees in cases filed under the reorganization chapters of title 11;

“(3) Audit, or cause to be audited, the accounts of trustees appointed to serve in cases under title II and supervise the deposit and investment of all moneys received by such trustees in the performance of their duties;

“(4) Allow or disallow any claims filed or exemptions claimed, grant or withhold discharges, and determine the priority of claims, provided that prompt notice shall be given to all interested parties of any such determinations made by the bankruptcy administrator. Any such determination is subject to review *de novo* by the court upon petition filed within ten days by an interested party, or within any extension thereof granted by the court upon cause shown within such ten-day period. The bankruptcy administrator may, upon notice to the parties, refer any issue to the court for its determination;

“(5) Conduct the first meeting of creditors in cases filed under title II, provided that upon the request of any affected party the first meeting of creditors shall be conducted by the court; and

"(6) Perform such other administrative duties in cases under title 11 as may be prescribed under rules and regulations adopted by the Judicial Conference.

"(b) If the number of cases under chapter 13 of title 11 commenced in a particular judicial district so warrants, the bankruptcy administrator for such district may, subject to the approval of the Judicial Conference, appoint one or more individuals to serve as standing chapter 13 trustees. The bankruptcy administrator shall supervise any individual appointed as a standing chapter 13 trustee in the performance of the duties of the office.

"(c) The Judicial Conference shall prescribe by rule the qualifications for membership on the panels established by the bankruptcy administrator pursuant to subsection (a) (1) of this section, and the qualifications for appointment under subsection (b) of this section to serve as standing chapter 13 trustee. The Judicial Conference may not require that an individual be an attorney in order to qualify for appointment under subsection (b) of this section to serve as a chapter 13 trustee.

"(d) (1) A standing trustee appointed to administer cases filed under chapter 13 of title 11 shall, in accordance with rules and regulations adopted by the Judicial Conference of the United States, receive from the debtor's estate personal compensation and reimbursement for actual and necessary expenses as may be fixed by the court which together shall not exceed 10 percent of the total amount of funds disbursed under the plan: *Provided, however,* That the compensation of a trustee may not exceed five percent of the funds disbursed under the plan. No trustee appointed under subsection (b) of this section may receive total compensation in any one year which exceeds the lowest annual rate of basic pay in effect for grade GS-16 of the General Schedule prescribed by section 5332 of title 5.

"(2) Any funds collected by a trustee appointed under subsection (b) of this section which exceed the percentage limitations set forth in subsection (1) shall be paid by him to the clerk of the court for deposit in the Treasury.

#### "§ 907. Salaries

"The Judicial Conference shall fix the salaries of bankruptcy administrators at rates of compensation not to exceed the lowest annual rate of basic pay in effect for grade GS-16 of the General Schedule prescribed under section 5332 of title 5.

#### "§ 908. Staff and expenses

"Each bankruptcy administrator serving under this chapter shall be allowed actual and necessary expenses incurred in the performance of his duties, including compensation for necessary secretarial and other necessary supporting personnel. Such expenses and compensation shall be determined and paid by the Director of the Administrative Office of the United States Courts under such regulations as he shall prescribe with the approval of the Judicial Conference. The Administrator of General Services shall provide bankruptcy administrators with necessary office space, furniture, and facilities in buildings occupied by United States district courts. If suitable space is not available in such buildings, the Administrator of General Services, at the request of the Director of the Administrative Office, shall procure and pay for suitable office space, furniture, and facilities in other buildings."

"(b) The table of chapters of part III of title 28 of the United States Code is amended by inserting immediately after the item relating to chapter 55 the following:

"56. Bankruptcy administrators..... 901"

SEC. 210. Section 631 (c) of title 28 of the United States Code is amended—

(1) by striking out "of the conference, a part-time referee in bankruptcy, or" and inserting in lieu thereof "of the conference"; and

(2) by striking out "magistrate and part-time referee in bankruptcy" and inserting in lieu thereof "magistrate and".

SEC. 211. Section 634 (a) of title 28 of the United States Code is amended by striking out "for full-time and part-time United States magistrates not to exceed the rates now or hereafter provided for full-time referees in bankruptcy, respectively, referred to in section 40a of the Bankruptcy Act (11 U.S.C. 68(a)), as amended" and inserting in lieu thereof "not to exceed \$48,500 per annum, subject to adjustment in accordance with section 225 of the Federal Salary Act of 1967 and section 461 of this title."

SEC. 212. Section 959(b) of title 28 of the United States Code is amended by striking out "A" and inserting in lieu thereof "Except as provided in section 1165 of title 11, a".

SEC. 213. Section 1360(a) of title 28 of the United States Code is amended by striking out "within the Territory" and inserting in lieu thereof "within the State".

SEC. 214. Section 2075 of title 28 of the United States Code is amended by striking out "under the Bankruptcy Act" and inserting in lieu thereof "in cases under title 11".

SEC. 215. Section 2201 of title 28 of the United States Code is amended by inserting "or a proceeding under section 505(c) or 1146(d) of title 11" immediately after "the Internal Revenue Code of 1954".

SEC. 216. Rule 1101(b) of the Federal Rules of Evidence is amended by striking out "the Bankruptcy Act" and inserting in lieu thereof "title 11, United States Code".

SEC. 217. (a) Chapter 123 of title 28 of the United States Code is amended by inserting immediately after section 1929 the following:

**"§ 1930. Bankruptcy fees**

"(a) The parties instituting a case under title 11 shall pay to the clerk of the court a filing fee of \$60. An individual instituting a voluntary case or a joint case under title 11 may pay such fee in installments.

"(b) The Director of the Administrative Office, with the approval of the Judicial Conference, may prescribe additional fees to be assessed under title 11, including fees computed upon estates in cases under chapter 7 or upon moneys and other consideration paid or to be paid to creditors or other claimants (other than for costs of administration) in cases under chapters 11 and 13: *Provided*, That such fees shall not exceed \$100,000 in any one case. The Director, with the approval of the Conference, may make, and from time to time amend, rules and regulations prescribing the procedures for assessing these additional fees.

"(c) Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or a writ of certiorari \$5 shall be paid to the clerk of the court, by the appellant or petitioner.

"(d) Whenever any bankruptcy case or proceeding is dismissed in any court for want of jurisdiction, such court may order the payment of just costs.

"(e) The clerk of the court may collect only the fees prescribed under this section."

(b) The table of sections of chapter 123 of title 28 of the United States Code is amended by adding at the end thereof the following:

**"1930. Bankruptcy fees".**

SEC. 218. (a) Section 8339 of title 5, United States Code, is amended—

(1) by inserting in subsection (f), immediately after "subsections (a)-(e)", the following: "and (n)";

(2) by inserting in subsection (i), immediately after "subsections (a)-(b)", the following: "and (n)";

(3) by inserting in subsections (j) and (k)(1), immediately after "subsections (a)-(i)", each time it appears, the following: "and (n)";

(4) by inserting in subsection (l), immediately after "subsections (a)-(k)", the following: "and (n)";

(5) by inserting in subsection (m), immediately after "subsection (a)-(e)", the following: "and (n)"; and

(6) by adding at the end thereof the following:

"(n) The annuity of an employee who is a referee in bankruptcy is computed with respect to service as a referee in bankruptcy by multiplying 2½ percent of his average annual pay by the years of that service."

(b) The first sentence of section 8334(c) of title 5, United States Code, is amended by adding at the end thereof the following new schedule:

**"Referee in bankruptcy**

2½	-----	August 1, 1920, to June 30, 1926.
3½	-----	July 1, 1926, to June 30, 1942.
5	-----	July 1, 1942, to June 30, 1948.
6	-----	July 1, 1948, to October 31, 1956.
6½	-----	November 1, 1956, to December 31, 1969.
7	-----	January 1, 1970, to June 30, 1979.
8	-----	After June 30, 1979.

(c) Section 8341 of title 5, United States Code, is amended—

(1) by inserting in subsection (b) (1), immediately after “section 8339

(a)-(i)”, the following: “and (n)”: and

(2) by striking out of subsection (d) “section 8339(a)-(f) and (i)” and insert in lieu thereof the following: “section 8339(a)-(f), (i), and (n)”.

(d) Section 8344(a) (A) of title 5, United States Code, is amended by striking out “and (i)” and inserting in lieu thereof “(i), and (n)”.

(e) Section 8331 of title 5, United States Code, is amended—

(1) by striking out “and” at the end of paragraph (20):

(2) by striking out the period at the end of paragraph (21) and inserting in lieu thereof “; and”: and

(3) by adding at the end thereof the following new paragraph:

“(22) ‘referee in bankruptcy’ means a referee appointed under chapter 50 of title 28, United States Code.”.

## TITLE IV—TRANSITION

### REPEALER

SEC. 401. (a) The Bankruptcy Act is repealed.

(b) Section 3 of the Act entitled “An Act to amend an Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, and Acts amendatory thereof and supplementary thereto”, approved March 3, 1933 (47 Stat. 1482; 11 U.S.C. 101a), is repealed.

(c) Sections 3, 6, and 7 of the Act entitled “An Act to amend an Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, and Acts amendatory thereof and supplementary thereto”, approved June 7, 1934 (48 Stat. 923, 924; 11 U.S.C. 76a, 203a, 205a), are repealed.

(d) The sentence beginning “Said section 74” in section 2 of the Act entitled “An Act to amend an Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, and Acts amendatory thereof and supplementary thereto”, approved June 7, 1934 (48 Stat. 922; 11 U.S.C. 202a), is repealed.

(e) Subsection (b) of section 4 of the Act entitled “An Act to amend an Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, and Acts amendatory thereof and supplementary thereto”, approved June 7, 1934 (48 Stat. 924; 11 U.S.C. 103a), is repealed.

(f) Section 2 of the Act entitled “An Act to amend the Act entitled ‘An Act to establish a uniform system of bankruptcy throughout the United States’, approved July 1, 1898, as amended and supplemented”, approved June 5, 1936 (49 Stat. 1476; 11 U.S.C. 93a), is repealed.

(g) Section 3 of the Act entitled “An Act to amend the Interstate Commerce Act, as amended, and for other purposes”, approved April 9, 1948 (62 Stat. 167; 11 U.S.C. 208), is repealed.

### EFFECTIVE DATES

SEC. 402. (a) Except as otherwise provided in this section, this Act shall take effect either 180 days after enactment or upon commencement of the first day of the fiscal year following 180 days after enactment, whichever is later.

(b) Referees in bankruptcy in office on the date of enactment of this Act shall continue to serve in office for the term for which they were appointed: *Provided*, That if the term for which they were appointed would expire prior to July 1, 1951.

### SAVINGS PROVISIONS

SEC. 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter or proceeding as if this Act had not been enacted.

(b) The repeal made by section 401(a) of this Act does not affect any right of a referee in bankruptcy, or survivor of a referee in bankruptcy to receive any annuity or other payment under the civil service retirement laws.

(c) The amendments made by section 312 of this Act do not affect the application of chapter 9, chapter 96, section 2516, section 3057, or section 3284 of title 18 of the United States Code to any act of any person—

SEC. 404 (a) The rules prescribed under section 2075 of title 28 of the United States Code and in effect on June 30, 1979, shall apply to cases under title 11 of the United States Code to the extent not inconsistent with such title 11, with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 215 of this Act.

(b) Pending the promulgation of new fees and charges by the Director pursuant to section 1930 of title 28 of the United States Code, the additional fees and charges in effect on the effective date of this Act shall continue to apply in cases filed thereafter, except that in cases under chapter 11 of title 11 the percentage rate prescribed pursuant to section 40 of the Bankruptcy Act for cases under chapter 11 of the Bankruptcy Act shall be applicable to all cases under chapter 11 of title 11 and shall be computed upon money or other consideration paid or to be paid to all creditors and other claimants (other than for costs of administration) in confirmed plans: *Provided*, That such fees shall not exceed \$100,000 in any one case.

#### TRANSITION STUDY

SEC. 405. The Director of the Administrative Office of the United States courts shall conduct and complete a study to determine the number of bankruptcy judges that will be needed after July 1, 1981.

#### TESTIMONY OF HON. WESLEY E. BROWN, CHAIRMAN, JUDICIAL CONFERENCE AD HOC COMMITTEE ON BANKRUPTCY LEGISLATION

Judge BROWN. Mr. Chairman, I'm Wesley E. Brown, U.S. district judge in the district of Kansas.

I appreciate the opportunity to appear before you today with my colleagues, Judge Aldisert and Judge Weinfeld, to discuss with you H.R. 8200, a bill to revise the bankruptcy laws of the United States.

I would like, first of all, to extend our compliments to the subcommittee for the work which you have put into this bill, and the magnificent effort you are making to modernize the substantive law of bankruptcy, and indeed to improve bankruptcy administration.

In addition to our prepared statement, we have furnished the committee with a copy of our report to the Judicial Conference.

If I may, Mr. Chairman, I would like to have that report included, as you said it would be, in the record of these hearings, and I'd like the report to be made a part of my statement.

Mr. EDWARDS. Without objection, so ordered.

Judge BROWN. I would like to summarize briefly the recommendations contained in the report.

As you well know, Mr. Chairman, we're opposed to the creation of a separate court for the administration of bankruptcy cases, believing that the establishment of a separate court is unnecessary, and will be very costly, and that the district courts can and should continue to handle bankruptcy cases.

The report, nevertheless, attempts to meet some of the criticisms of the existing arrangement, as pointed out by the Commission on Bankruptcy Laws of the United States, and by the witnesses before your committee.

We've agreed to the expansion of jurisdiction of the district courts in bankruptcy cases to include all plenary suits, and the jurisdictional provisions we are proposing still provide for plenary suits.

Our jurisdictional proposals are based, in large part, on the jurisdictional provisions of H.R. 8200 which, under the bill, would have been made applicable to a separate court.

We've also proposed a separation of the judicial and administrative functions of the referees, or bankruptcy judges, which was strongly recommended by the Bankruptcy Commission.

We propose to accomplish this—agreeable, of course, to the Congress—by the creation of separate offices of bankruptcy administration.

We've met the problem of having the appointing authority also acting as a reviewing authority by placing the appointing power of the bankruptcy administrators in the judicial council of the circuit. Similarly, the bankruptcy judges now, of course, appointed by the district courts, would be appointed by a circuit council, so that the reviewing authority of district courts would not be the appointing authority.

In short, Mr. Chairman, we believe that the suggested amendments to S. 2266 contained in the committee report, satisfactorily met, the objections made to the existing system.

Again, we would like to compliment your committee for the effort it has made to revise and improve the bankruptcy law and bankruptcy administration, and we ask, of course, that our suggestions be given your consideration.

That, briefly, is my report. If there are any questions, I'll do my best to answer them, together with my colleagues, Judge Aldisert and Judge Weinfeld, and hopefully assist you in any way we can in your efforts to improve and facilitate the administration of the bankruptcy laws of the United States for the people of the United States, which I'm sure is your purpose and certainly is ours.

Mr. EDWARDS. Thank you, judge.

Judge Weinfeld?

[The prepared statement of Judge Edward Weinfeld follows:]

STATEMENT OF JUDGE EDWARD WEINFELD, CHAIRMAN, COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman, I was indeed pleased to receive your invitation to testify today on the provisions of H.R. 8200 relating to both the structure and organization of the federal courts and the processing of proceedings arising under the bankruptcy laws.

My name is Edward Weinfeld. I am now in my 28th year as an active United States District Judge for the Southern District of New York, having been appointed in 1950. For the last 21 years I have been a member of the Committee on Bankruptcy Administration of the Judicial Conference of the United States and have served as its chairman since 1967. In 1971 I was appointed a member of the Commission on the Bankruptcy Laws of the United States and, in participating in the deliberations of that Commission, had the rewarding experience of working with you, Mr. Chairman, your colleague, Mr. Wiggins, and the other Commission members on many of the problems which H.R. 8200 is now designed to remedy. In March of this year I was asked to serve as a member of the Judicial Conference's Ad Hoc Committee on Bankruptcy Legislation of which Judge Wesley E. Brown, who is here today, is chairman.

You will recall, Mr. Chairman, that, as a member of the Commission, I dissented from the Commission's recommendation for the creation of a separate Article I court for bankruptcy cases. I believed then, as I do now, that there is no need to establish a separate court system. I stated in the Commission Report my genuine belief that: "the referee system has worked well and efficiently through the years and I find no justifiable reason for change which would add another tier of judges to the federal judicial system." I also observed that the

reasons advanced for the establishment of a separate bankruptcy court were based upon erroneous assumptions which were contrary to my experience as a United States District Judge. At that time my experience as a judge had spanned almost a quarter century. The detailed reasons for my views were carefully presented in my dissenting opinion. I am firmly convinced that the views then expressed were sound and I fully adhere to them. A copy of that opinion is attached to this statement for the convenience of the members of your Subcommittee, and I would request that it be included as an appendix to my remarks in the record.

It should be emphasized that my opposition was directed to a legislative or Article I court which the Commission in effect recommended. It did not propose, and the bills introduced in the 93rd and 94th Congresses, did not contemplate, an Article III bankruptcy court.

I might add that since that time the vast majority of all federal judges in their councils and conferences have expressed strong opposition to the concept of a separate court either under Article I or Article III of the Constitution. The circuit and district judges in nine of the eleven judicial circuits, after having considered the question in meetings of the judicial conferences for their particular circuits, have all adopted resolutions opposing the concept of a separate court. As you also know, Mr. Chairman, the Judicial Conference last March adopted a unanimous resolution in opposition to the creation of a special court.

The Conference-approved Ad Hoc Committee report which we file with you today contains an alternate proposal which I believe meets the problems which were identified by the Commission. The recommendations contained in our report would retain jurisdiction over bankruptcy matters in the district courts, increase the jurisdiction of the district courts over plenary suits, separate the judicial and administrative functions of bankruptcy judges, and authorize the appointment of judicial officers and bankruptcy officials by someone other than the direct reviewing authority. In my view this approach, although some may differ on the details of implementation, is eminently sound and workable and meets the criticisms of the existing system in a fully satisfactory manner.

If I may I would like to say a word about the functioning of the Judicial Conference's Committee on Bankruptcy Administration in relation to past proposals for a new bankruptcy law. We of course monitored developments in Congress so that, at the appropriate time, we would be in a position to make recommendations to the Judicial Conference on the legislation. As a small committee of judges, however, with other pressing duties to perform, we were in no position to draft our own legislation. Nor did we then believe it necessary—or wise—for us to comment upon the several proposals then being considered by Congress. Until this year, there were at least two bills under consideration in each house of Congress. Early on I took the position as Chairman of the Committee, that we should await the consolidation of views into one draft bill, anticipating that when it was decided which version of which bill would be pursued, we would have an opportunity to comment appropriately thereon. The fact is that, expecting the introduction of a single bill, I appointed a subcommittee chaired by Judge David Dyer of the Fifth Circuit, so that the committee would be in a position to act promptly on any request by either the House or the Senate committee. I believed then, and I now believe, that this was the proper and only course we could follow. Any other course would have been a wasteful and futile effort and a drain on judicial manpower. Time has proved that judgment correct. I offer this explanation so that you may be aware of the thinking in my Committee.

The solidification of ideas into one draft bill did occur with the introduction of H.R. 6 in the Congress last January. It contains, as you know Mr. Chairman, one provision that is substantially different from any proposals contained in the bills in the House and Senate in the 93rd and 94th Congresses, i.e., for the creation of an Article III bankruptcy court. The Judicial Conference was advised concerning the bill and its provisions at its March session. Having been informed that mark-up sessions on the bill were imminent, the Conference authorized the appointment of an Ad Hoc Committee, having the sole responsibility for considering the legislation. Judge Robert DeMascio of Detroit and I, who are members of the Committee on Bankruptcy Administration, were asked to serve on the Ad Hoc Committee as liaison between the two committees.

In the consideration of this legislation, both in the House of Representatives and the Senate, questions have arisen regarding the administrative support presently given to bankruptcy judges and which should be provided for them in the future. This matter also requires an explanation.

Under existing provisions of law, the bankruptcy system is self-supporting from filing fees and administrative charges levied against bankrupt estates. Deficits however can be made up out of the general funds of the Treasury. In the early years following passage of the Referees Salary and Expense Act of 1946 the revenues from bankrupt estates were insufficient to cover expenses and, at the outset, deficits were incurred. As the volume of bankruptcy cases increased these deficits were overcome to the extent that, by 1965, a surplus exceeding \$10 million was built up in the special account in the Treasury. Since then revenues have been insufficient to meet expenses. By 1971 the surplus was exhausted, and thereafter the system has operated at a deficit of from \$3 to \$5 million a year. The reasons are runaway inflation, increased salaries for bankruptcy judges and supporting staff, and no increase in the portion of the filing fee paid into the fund since it was set in 1946. Realizing how difficult it would be to increase the statutory filing fee, and recognizing that an increase in "additional fees," i.e., percentage charges, would place an inordinate burden upon bankrupts and the assets of bankrupt estates, the Judicial Conference, in 1969, recommended the abolition of the Referees Salary and Expense Fund.

In the meantime, however, the Bankruptcy Committee and the Judicial Conference have been operating under a statutory mandate to administer bankruptcy on a self-sustaining basis, without incurring deficits. As I indicated previously, this has not been possible in recent years, and the result has been that it has been simply impossible to provide everything that may be desired in the way of services. Bankruptcy judges, for example, have used central libraries in those courthouses in which central libraries have been established, and have shared lawbooks otherwise available to district and circuit judges. Nevertheless a recent inventory of the books in the possession of 180 of the 225 bankruptcy judges disclosed that there were over 48,000 volumes in the custody of 180 bankruptcy judges, and that those volumes were fully serviced with updating materials as required. In recent years referees have asked that provision be made for law clerks. The number of adversary proceedings conducted by bankruptcy judges has, of course, increased, particularly with the expansion of jurisdiction in summary proceedings provided for in the Act passed in 1970. Until recently the offices of bankruptcy judges operated efficiently and well without the need of law clerks. In view of the anticipated revision in the bankruptcy laws, and the requirement of a self-sustaining system, no funds have been requested for law clerks for bankruptcy judges.

I will not attempt to discuss all the problems which have come to my Committee from time to time. But I would like to point out that in the years I have been a member of the Bankruptcy Committee of the Judicial Conference, the number of full-time referee positions has increased from 77 to 214 and that the cost of operating the system has increased from \$1,227,829 to \$31,660,000. We have tried through the years to meet the needs of operating the bankruptcy system within the constraints of existing law, and I believe our success is evidenced by the fact that hundreds of thousands of bankruptcy cases have been processed through the system without major difficulty. We believe we have done a competent job. This, of course, would not have been possible without the competent help of the fine men and women who have been selected by the district courts to serve as bankruptcy judges. We hope that the enactment of a new bankruptcy bill will enable us to improve bankruptcy administration.

I would like, Mr. Chairman, to express my gratitude to you and other members of the Subcommittee for your gracious invitation to appear here today. Yours has been a difficult task and I hope that my testimony has been helpful. Thank you.

#### APPENDIX

##### SEPARATE STATEMENT OF JUDGE EDWARD WEINFELD

I am in agreement with the substance of the Commission's report which recommends that the administrative and judicial functions now performed by referees in bankruptcy be separated and that the administrative functions be transferred to an administrative agency. I dissent, however, from the proposal that as to the judicial functions a separate bankruptcy court be established with judges to be appointed by the President, with the advice and consent of the Senate, for terms of fifteen years. I would retain the present referee system for the performance of the judicial functions required under the proposed new Act. The referee system has worked well and efficiently through the years and I find no justifiable reason for a change which would add another tier of judges to the federal judicial system.

It is not without interest that the majority notes: "In light of the dramatic increase of personal bankruptcies and wage-earner cases since World War II, without any commensurate increase in personnel, the referees in bankruptcy and their clerical staffs have made commendable efforts to cope with the demands made on them to handle the huge caseload of the last 25 years. The backlog of cases awaiting trial that is the bane of both federal and state courts in most of the country's metropolitan centers does not embarrass the bankruptcy system."<sup>1</sup>

The reasons advanced by the majority for the establishment of a separate bankruptcy court and for the appointment of judges by the President in lieu of the present referee system are based upon erroneous assumptions which are contrary to my experience as a United States District Court Judge for almost a quarter of a century. A principal reason advanced for establishing an independent court structure is that it will correct alleged deficiencies in the present system. Generally, the majority accepts the view that attorneys who specialize in bankruptcy law and appear regularly before referees, as well as trustees who receive their appointments from referees, refrain from filing petitions for review from referees' orders because of fear of reprisal by referees. This assumption is without factual support. The majority also accepts the view that the relationship between the referee and a reviewing district court judge tends to undermine the integrity of the judicial process; that a district court judge is unlikely to reverse an appointee and so reviews or appeals are discouraged. This premise, based upon "impression or belief,"<sup>2</sup> again is groundless and improperly gives credibility to an argument that a United States District Judge will render decisions on review based on his relationship to the referee whose decision is under review rather than on the merits of the issues before him. The assumption has as little force to it as would a claim that the court of appeals would hesitate to reverse a district court judge because he was known to the members of the panel.

The suggestion advanced by the majority that the current low volume of appeals is the result of reluctance of counsel to risk offending the referee by seeking reversal of his rulings—that counsel are deterred from seeking review because of concern that any challenge to a referee's decision may adversely affect their own professional effectiveness and compensation in future cases dissolves upon analysis. The slight number of appeals is readily accounted for. The report indicates that over a two-year period there was an annual average of approximately 688 reviews from referees' orders and relates the reviews to an annual average of approximately 192,000 bankruptcy filings to show a very low volume of reviews from referees' determinations. This reference does not tell the true story and is somewhat misleading.

Based on the latest statistics of bankruptcy cases closed (i.e., fiscal year 1969), 56.3% of these cases were *no asset* proceedings in which the very lack of assets suggests that a review of a referee's order would be an exercise in futility. Another 12.5% are nominal-asset cases (with an average realization of only \$122) in which a decision to incur attorneys' fees to review a referee's order would be questionable.

Thus in 68.8% of the cases (which do not include 15.3% of wage-earner proceedings) it is extremely unlikely that reviews would be filed, since there would be little or no money involved in the case to warrant the expense of review.

I do not believe, based on my experience in my own busy metropolitan district, which has seen full-time referees, that attorneys are supine or that any reputable attorney would forbear to file what he considered a meritorious review of a referee's order for fear of incurring a referee's displeasure. Equally groundless are the assumptions which attribute to referees and judges lack of impartiality based on the present method of appointment.

A basic erroneous assumption is that the referee is appointed by the judge. Under section 34 of the Bankruptcy Act appointments of referees are made by concurrence of a majority of the judges of the court or, if no concurrence, by the chief judge. Thus, in the greatest number of judicial districts the selection of the referee is *not* solely by a judge who may sit in review, but by the court—and it is incorrect to state that a referee is a personal appointee of any one judge in a majority of the district courts—he is the appointee of the court.

Unquestionably the judges of the district court appoint referees on the basis of their competency, merit and fitness for the position. And while judges are

<sup>1</sup> Commission Report, Chapter IV, at 7-8.

<sup>2</sup> See Commission Report, Chapter IV, at 28.

aware of the competency of individual referees when reviewing their orders, this circumstance would appear to be no more a factor in making their decisions on review than the regard for the competency of district judges by the circuit courts on appeal from decisions of district court judges.

Finally if we are to be guided by experience, appointment of the bankruptcy judge by the President, with the advice and consent of the Senate, would result in undue delay in refilling positions when vacancies occur. Appointments of United States District Court Judges take much longer to complete than the procedure now in effect for the appointment of referees—that is, by the district court followed by a four to six-week pre-appointment investigation by the Federal Bureau of Investigation.

Statistics in the Administrative Office of the United States Courts reflect that on the average it takes 10.9 months to fill a district court vacancy. When here is senatorial disagreement, the period before a vacant judgeship is filled often runs beyond several years. Referee vacancies, on the other hand, are filled promptly, frequently within as little as two months of the date the vacancy occurred under the present system.

The present system has worked and it has worked well and efficiently. It can readily be geared into the proposed new Act with complaints initiating proceedings filed with the Clerk of the United States District Court as district court cases and automatic referral to the bankruptcy referee. This would keep the structure entirely within the existing system without the need for another court in the federal judicial system.

I would, of course, favor, as the Bankruptcy Committee recommended to the Judicial Conference of the United States and as the Conference has advocated for more than ten years, a twelve-year term for full-time referees with a retirement system similar to that proposed by the Commission.

**TESTIMONY OF HON. EDWARD WEINFELD, CHAIRMAN, COMMITTEE  
ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM, JUDICIAL  
CONFERENCE OF THE UNITED STATES**

Judge WEINFELD. Mr. Chairman, I was indeed pleased to receive your invitation to testify today on the provisions of H.R. 8200 relating to both the structure and organization of bankruptcy courts, and the processing of the proceedings arising under bankruptcy laws.

My name is Edward Weinfeld. I am now in my 28th year as an active U.S. district judge for the southern district of New York, having been appointed in 1950.

For the last 21 years I have been a member of the Committee on Bankruptcy Administration of the Judicial Conference of the United States, and have served as its chairman since 1967.

In 1971 I was appointed a member of the Commission on the Bankruptcy Laws of the United States and, in participating in the deliberations of that Commission, had, I must say, a most rewarding experience of working with you, Mr. Chairman, and also your colleague, Mr. Charles Wiggins, and the other Commission members, on many of the problems which H.R. 8200 is now designed to remedy.

In March of this year I was asked to serve as a member of the Judicial Conference's Ad Hoc Committee on Bankruptcy Legislation, of which Judge Wesley E. Brown—who has just addressed you—is the chairman.

You will recall, Mr. Chairman, that as a member of that Commission I dissented from the Commission's recommendation for the creation of a separate article I court for bankruptcy cases.

I believed then, as I do now, that there is no need to establish a separate court system. I stated in the Commission report my genuine belief that—and I'm quoting:

The referee system has worked well and efficiently through the years and I find no justifiable reason for change which would add another tier of judges to the Federal judicial system.

On that occasion, I also observed—and stated at length in the report—that the reasons advanced for the establishment of a separate bankruptcy court were based upon erroneous assumptions which were contrary to my experience as a U.S. district judge.

At that time, my experience as a judge had spanned almost a quarter of a century. The detailed reasons for my views were carefully presented in my dissenting opinion. I am firmly convinced, as the years have gone by since that dissent was filed, that the views then expressed were sound, and I fully adhere to them. A copy of that opinion is attached to this statement, for the convenience of the members of your subcommittee, and I respectfully request it be included as an appendix to my remarks in the record.

Mr. EDWARDS. Without objection, it will be made a part.

Judge WEINFELD. I would like to emphasize, at this time, that my opposition was directed to a legislative, or article I court, which the Commission in effect recommended. It did not propose—and the bills introduced in the 93d and 94th Congresses did not contemplate—an article III bankruptcy court.

I might add that since that time, the vast majority of all Federal judges, in their circuit councils and conferences, have expressed strong opposition to the concept of a separate court either, under article I or article III of the Constitution.

The circuit and district judges in 9 of the 11 judicial circuits, after having considered the question carefully in meetings of the judicial conferences for their particular circuits, have all adopted resolutions opposing the concept of a separate court.

And as you also know, Mr. Chairman, the Judicial Conference last March adopted a unanimous resolution in opposition to the creation of a special court, to which reference has been made, and the staff reports have been filed with you.

The conference-approved ad hoc committee report, which we file with you today, contains an alternate proposal which I believe meets the problems which were identified by the Commission.

The recommendations contained in our report—which Judge Brown has just referred to—would retain jurisdiction over bankruptcy matters in the district courts, increase the jurisdiction of the district courts over plenary suits, separate the judicial and administrative functions of the bankruptcy judges, and authorize the appointment of judicial officers and bankruptcy officials by someone other than the direct reviewing authority.

In my view, this approach—although some may differ on the details of implementation—is eminently sound and workable, and meets the criticisms of the existing system in a fully satisfactory manner.

If I may, I would like to say a word about the functioning of the Judicial Conference's Committee on Bankruptcy Administration in relationship to past proposals for a new bankruptcy law. I address this remark, because at several places in the staff report the Conference and the committee of the Conference appear to be chided because they did not submit reports with respect to legislation pending

in the 93d and 94th Congresses. I think a word is justified in explanation of that.

We, of course—that is, the committee—monitored the developments in Congress so that, at the appropriate time, we would be in a position to make recommendations to the Judicial Conference on the legislation.

As a small committee of judges, however, with other pressing duties to perform, we were in no position to draft our own legislation. Nor did we then believe it necessary, or wise, for us to comment upon the several proposals then being considered by Congress.

Until this year, there were at least two bills under consideration in each House of the Congress. Early on, I took the position, as chairman of the committee, that we should await the consolidation of views into one draft bill, anticipating that, when it was decided which version of which bill would be pursued, we would have an opportunity to comment appropriately thereon.

The fact of the matter is that, when the separate bills were introduced, there were efforts afoot—of which I was fully aware—of an attempt to accommodate the different versions of the different bills, and get the best provisions of each into a single unified bill.

The fact is that, expecting the introduction of a single bill, I appointed a subcommittee chaired by Judge David Dyer of the fifth circuit court of appeals; so that the committee would be in a position to act promptly on any request by either the House or the Senate committee.

I believed then, and I now believe, that this was the proper and only course we could follow. Any other course would have been a wasteful and futile effort and a drain on judicial manpower. Time has proven that judgment correct, and I offer this explanation so that you may be aware of the thinking in my committee.

The fact of the matter is there is a reference in the staff's report to a letter sent by Mr. Berkley Wright, of the Administrative Office, to Mr. Westphal, of the Senate committee, pointing out that there really would be no purpose in considering a bill which had not actually been formulated and presented for serious consideration before either House. The subcommittee of the Bankruptcy Administration Committee was prepared to act promptly upon the submission of a single bill.

Now, the consolidation of ideas into a single draft bill did occur when you, Mr. Chairman, introduced H.R. 6 in the Congress last January. However, that bill contained one provision that is substantially different from any proposal contained in the bills in the House and Senate in the 93d and 94th Congresses—that is, the creation of an article III bankruptcy court.

The Judicial Conference was advised concerning the bill and its provision at its March session. Having been informed that markup sessions on the bill were eminent, the Conference authorized the appointment of an ad hoc committee having the sole responsibility for considering the legislation. Judge Robert DeMascio, of Detroit, and I, who are members of the Committee on Bankruptcy Administration, were asked to serve on the ad hoc committee as liaison between the two committees.

In the consideration of this legislation, both in the House of Representatives and in the Senate, questions have arisen regarding the administrative support presently given to bankruptcy judges, and the support which should be provided for them in the future. I must say, while some of these matters, in my own individual, respectful judgment, do not go to the essence of the substance of the basic proposal presented by your committee, nonetheless they require an explanation—and I am prepared to provide it.

Under existing provisions of law, the bankruptcy system is self-supporting from filing fees and administrative charges levied against bankruptcy estates. Deficits, however, can be made up out of the general funds of the Treasury.

In the early years following passage of the Referees Salary and Expense Act of 1946, the revenues from bankrupt estates were insufficient to cover expenses; and, at the outset, deficits were incurred.

As the volume of bankruptcy cases increased, these deficits were overcome to the extent that, by 1965, a surplus exceeding \$10 million was built up in the special account of the Treasury.

Since then, the revenues have been insufficient to meet expenses. By 1971, the surplus was exhausted. And thereafter, the system has operated at a deficit of from \$3 to \$5 million a year.

The reasons are runaway inflation, increased salaries for bankruptcy judges and supporting staff, and no increase in the portion of the filing fee paid into the fund since it was set in 1946.

Realizing how difficult it would be to increase the statutory filing fee, and recognizing that an increase in "additional fees"—that is, percentage charges—would place an inordinate burden upon bankrupts and the assets of bankrupt estates, the Judicial Conference in 1969 recommended the abolition of the referees salary and expense fund.

In the meantime, however, the Bankruptcy Committee and the Judicial Conference have been operating under a statutory mandate to administer bankruptcy on a self-sustaining basis, without incurring deficits.

As I indicated previously, this has not been possible in recent years, and the result has been that it has been simply impossible to provide everything that may be desired by way of services.

Bankruptcy judges, for example—and I make reference to this because, as I say, while I consider many of these items irrelevant, they have been raised by others—have used central libraries in those court-houses in which central libraries have been established, and have shared lawbooks otherwise available to district and circuit judges.

Nevertheless, a recent inventory of the books in the possession of 180 of the 225 bankruptcy judges disclosed that there were over 48,000 volumes in the custody of 180 bankruptcy judges, and that those volumes were fully serviced with updating materials as required.

In recent years, referees have asked that provision be made for law clerks. The number of adversary proceedings conducted by bankruptcy judges has, of course, increased, particularly with the expansion of jurisdiction in summary proceedings provided for in the act passed in 1970.

Until recently, the offices of bankruptcy judges operated efficiently and well without the need of law clerks. In view of the anticipated

revision in the bankruptcy laws, and the requirement of a self-sustaining system, no funds have been requested for law clerks for bankruptcy judges.

And let me add that serving in a district which has a number of referees, some of whom I'm prepared to say, without contradiction are among the most outstanding in the country, I have yet to hear one of them ever express the need for a law clerk. But, if there is demonstrated need, of course that presents another problem, and there is no reason why they should not be supplied if the need does in fact exist.

I will not attempt to discuss all the problems which have come to my committee from time to time. But I would like to point out that, in the years I have been a member of the Bankruptcy Committee of the Judicial Conference, the number of full-time referee positions has increased from 77 to 214, and that the cost of operating the system has increased from \$1,227,829 to \$31,660,000.

We have tried, through the years, to meet the needs of operating the bankruptcy system within the constraints of existing law, and I believe our success is evidenced by the fact that hundreds of thousands of bankruptcy cases have been processed through the system without major difficulty.

We believe we have done a competent job. This, of course, would not have been possible without the competent help of the fine men and women who have been selected by the district courts to serve as bankruptcy judges. We hope that the enactment of a new bankruptcy bill will enable us to improve bankruptcy administration.

Mr. Chairman, together with my colleagues here, I would like to express my gratitude to you and other members of the subcommittee for your gracious invitation to appear here today. I am fully aware of the difficult task you have, and I hope that my testimony will be helpful. Thank you.

Mr. EDWARDS. Thank you, Judge Weinfeld.

Judge Aldisert.

Judge ALDISERT. Mr. Chairman, I am Ruggero J. Aldisert, a U.S. Circuit Judge from Pittsburgh, Pa.

I have no formal statement to make. I accepted the invitation to appear here today under the assumption that the subcommittee might have questions to ask of a circuit judge member of the ad hoc committee.

Rather than take up the committee's time with any statement of my own, I'm just here to answer any questions that may be put to us.

Mr. EDWARDS. The gentleman from Illinois, Mr. McClory.

Mr. McCLORY. Thank you very much, Mr. Chairman.

Are you, Judge Aldisert, supporting the statement here of Conrad Cyr?

Judge ALDISERT. Mr. Congressman, I am a member of the ad hoc committee, and I'm supporting the statements made by our chairman, Judge Brown.

Mr. McCLORY. I see. Let me ask you a couple of questions then.

You have taken a position as members of the Judicial Conference—before the Congress regarding the constitutionality of the various proposals—wouldn't you feel inclined to disqualify yourself if the question ever arose in your court, or would you feel that you would

be able to give a fair hearing to both sides in that kind of a dispute where the question of constitutionality arose, since you question the constitutionality, do you not?

Judge BROWN. I don't understand your question, if it's directed to me, Mr. Congressman.

Mr. McCLORY. The question is whether or not a separate bankruptcy court could constitutionally carry on all of the functions which H.R. 8200 would invest in it, unless it's an article III court.

I think you take the position, do you not, that you question the constitutionality of some of those functions? You certainly don't feel that all of the functions could be vested in an article I type of separate bankruptcy court, do you?

Judge BROWN. I'll let Judge Aldisert answer the question for you with respect to our views. It's directed to the plenary jurisdiction which you expect to assign to the district courts under the bill, as distinct from summary jurisdiction, and I'll give this to Judge Aldisert in just a minute. Our conclusion was that there was no reason why we can't dispose of summary jurisdiction under our present system of district judges and bankruptcy judges or referees in bankruptcy. I'll ask Judge Aldisert, if he wishes, to comment on that if he would, please.

Judge ALDISERT. Mr. McClory, I will state our position. Our position is that we accept as needed the increase in jurisdiction as reflected by your subcommittee's report. We believe, however, that the bankruptcy judge need not be an article III judge to perform those functions. And I'll tell you why I feel that way.

As I indicated, I'm a judge in the U.S. Court of Appeals for the Third Circuit. Our circuit includes the States of Pennsylvania, Delaware, and New Jersey and the U.S. Virgin Islands. The judges in the U.S. Virgin Islands are article I judges. They hear jury trials, they issue writs of injunction, they issue writs of execution, and they exercise, in my view, powers that are broader than those that are being vested in the bankruptcy judges under the Bankruptcy Act.

Mr. McCLORY. Of course there are article I judges in the District of Columbia, but you don't take the position, do you, that we could create article I judges with authority to grant injunctions, say for instance, injunctions of a State court proceedings or other district court proceedings, or to hold parties in contempt and sentence them, do you?

Judge ALDISERT. Let me say this: I would say that, on that point, the officials position of our committee was that since the subcommittee is so concerned about that, our recommendation to this subcommittee was that the bankruptcy judge not be given powers to enjoin another court. If that be necessary, it could be referred to the district judge. We would recommend that, the bankruptcy judge not be given power to punish for criminal contempt not committed in his actual presence; that too could be referred to the district judge. And, finally, we would recommend that the bankruptcy judge not be given power to punish for criminal contempt warranting a punishment of imprisonment or a fine of more than \$250. You will see that the recommendations of our committee track exactly those powers which, under the present bill, your committee felt should not be given to the bankruptcy judge until article III status is given.

Mr. McCLORY. You're in general supportive of the Danielson-Railsback amendment then, are you?

Judge ALDISERT. I would think so, yes, sir.

Mr. McCLORY. Could I just ask one question of you, Judge, as Chairman of the Judicial Conference Ad Hoc Committee?

Did you have a vote on that, among the members of the Judicial Conference? If so, what was the vote in support of the proposition opposing 8200?

Judge BROWN. The recommendation of the ad hoc committee, which was approved by the entire Judicial Conference by a vote of that conference, was to approve in principle titles II and IV of S. 2266, with amendments which were set forth in attachment A, and that the ad hoc committee be authorized, consistent with its report, to make other suggestions, if Congress felt they needed changes in the bill which may come to the attention of the committee, and the committee be authorized to release the report to you. That's what we've done.

We have had a mail vote, and have written confirmation of it, except for the 10th circuit, which I represent on that committee. I am also a member of the Judicial Conference of the United States—as is the chief judge of that circuit, who advised me over the phone that they approved that report, and asked that it be submitted to this subcommittee, to your subcommittee, if it could be.

Mr. McCLORY. Mr. Chairman, I thank you for yielding to me, knowing that I have another commitment.

Mr. BUTLER. Would you yield for just a moment.

Mr. McCLORY. I yield to the gentleman from Virginia.

Mr. BUTLER. Judge Brown, your statement says, the report of an ad hoc committee was approved in principle by mail vote. Do you have minutes? Do you keep minutes of the ad hoc committee?

Judge BROWN. No; we have really no formal minutes of that, if you want to know; but we do have the letters now from all of the members of the Judicial Conference, except the 10th circuit which I mentioned to you, and they're available to you if you need them.

Mr. BUTLER. Did your ad hoc committee ever meet?

Judge ALDISERT. Perhaps, Congressman Butler—

Mr. BUTLER. Let me rephrase the question. To be sure, I want to find out what your views are. But you're representing the views of an ad hoc committee.

Judge BROWN. That's correct.

Mr. BUTLER. And I want to know, just for sort of my own information, did you have deliberations like Congress does and sit down and talk about these things? Did you meet and did you keep minutes of it?

Judge ALDISERT. Of course.

Mr. BUTLER. Did you keep minutes of it?

Judge ALDISERT. Of course. Although we did not have a reporter, we prepared a report of each meeting; and sir, when the reference is made to the mail vote, that is not a vote of the ad hoc committee, but of the Judicial Conference. The question was the acceptance of the report of the ad hoc committee by the Judicial Conference of the United States. And, sir, because they were not in session—they only meet twice a year—the report was mailed out to each member of the Conference with instructions to report to Mr. Spaniol by telephone or by letter.

Mr. BUTLER. All right, gentlemen, I thank you very much. But you don't have any minutes of the ad hoc committee meeting for us?

Judge BROWN. We have the report.

Mr. BUTLER. All we know is the conclusions you reached you put in the report.

Judge BROWN. Three reports, if you want them. We had a first preliminary report, a second preliminary report, a separate report, and a third preliminary report, all of which were circulated. I think all of them are available to you.

Mr. BUTLER. We got them from time to time; yes, sir.

Judge BROWN. I hope you did. We wanted to be of such help as we could.

Mr. BUTLER. Since this is not my time, I can't pursue this issue.

Mr. EDWARDS. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. I thank the three witnesses.

I'd ask Judge Brown this question: The Judicial Conference says that it wants to retain the bankruptcy function as an adjunct of the district court. It is contended that we have made it into a separate court.

I'm not entirely certain that that is so. This is a difficult play with words here, but we have made it a coequal court with the district court itself. The bankruptcy judge is to be fungible with the Federal district court judge. And if there are no bankruptcy cases around, he can try criminal cases. He is of the same caliber.

So we really have integrated it more than it is now. You say that you want to keep it as an adjunct. We say that that is undesirable for several features. But we have not made it a separate court, as you suggest.

Now I wonder, Judge Brown, would you feel that judges in bankruptcy cases should be just as qualified as Federal district court judges?

Judge BROWN. Well, having appointed all of the bankruptcy judges in the district of Kansas, that is, as the chief judge with the concurrence of my other judges, I can certainly tell you that we have picked the most competent men we know.

Mr. DRINAN. And you do that because you know that they're going to be discussing and deciding the full range of issues that come before a Federal district court judge?

Judge BROWN. No; they're going to discuss the full range of those matters which can occur in a bankruptcy issue which is presented to them.

Mr. DRINAN. If you want them to be as qualified and as competent and as independent as Federal district court judges, how can that be done when they get only a period of 6 years or more to serve?

Judge BROWN. Well, since 1960, Congress has recommended that they be appointed for 12 years.

Mr. DRINAN. Even 12 years is a period of time that they live really by sufferance of this district court. But that means that people who are older might aspire to be a Federal bankruptcy judge or a referee. And all of us know the pattern: an individual who is 30 or 35 is not going to give up private practice and take a 12-year or 6-year appointment, knowing that that is not renewable. If it is renewable, he will have to do what the district court judges say.

We have striven in this bill to make the judge independent. And that is the essence of the recommendations that came to us from all of the studies that preceded us and from all of the hearings.

And under the situation where, as you put it, the bankruptcy system is adjunct, how can that in any sense be an independent court?

Judge BROWN. Go ahead.

Judge WEINFELD. Congressman, I may have misunderstood the entire thrust of this bill, H.R. 8200. The underlying rationale of it, it seems to me—in the committee report, and also from the Commission report—was the creation of a specialized court. And this is emphasized in the report.

May I call your attention to one item.

Mr. DRINAN. Specialized but not separate.

Judge WEINFELD. Well, it's a separate court.

Mr. DRINAN. But the judges can do anything. The judges are not assigned to the bankruptcy court forever.

Judge WEINFELD. Well, there is a provision which suggests that they can be available in other areas of law. But if the underlying rationale of this proposal is to draw upon the specialized technique of these men, if that is the purpose are you not creating a specialized court?

Mr. DRINAN. It's a specialized court now, Judge, without any of the indices of independence.

Judge WEINFELD. It operates under the jurisdiction of the district court.

Mr. DRINAN. If you want to make it an adjunct, the Federal district judges will do that. But you need 200 judges right away.

Judge WEINFELD. Congressman, I was just suggesting this: in everything I have seen about this proposal, the emphasis has always been that this is a specialized area of law needing specialists.

Now, may I just read this to you for a moment.

Mr. DRINAN. I don't think that we're differing, Judge. We want to make the specialized court independent. My suggestion to the Judicial Conference—not to you—that they have failed to appreciate what we have tried to do, and what all the experts have recommended.

Judge WEINFELD. Congressman, if you are intent on appointing people who are not specialists in bankruptcy law, then if there is this expanded jurisdiction, all you need do is to create the additional places that are referred to in the pending bills before the Judiciary Committee now.

I just wanted to read this one item from the staff report to you.  
[Reading:]

As the system has evolved district judges have removed themselves further and further from the consideration of bankruptcy matters. The area has become too specialized and requires too much expertise to be handled on an ad hoc basis by a generalist.

Now, I don't agree with that statement at all. But that is the basic theory on which this separate court is being advocated.

May I say this one word, and I think we ought to meet it head on, because it's been implicit in so many items that I've seen—I've read some of the debates on this thing.

There has been the suggestion that the opposition of the judges is sort of an ego trip on the part of the judges; that they're holding on to their power—a jealousy of their power.

I mentioned before that I'm rounding out 28 years on this court, and it's clear that I don't have many more years to go. By a curious coincidence, my professional life has been divided equally between my practice as a lawyer—28 years as a lawyer—and 28 years as a judge.

I have always felt—and I'm measuring my words now—that the greatest court in the United States of America, is the district court, the Federal district court. And what I've just said, I said publicly in the presence of two men—whom I was privileged to call close friends, and probably two of the most respected members of the Federal judiciary—on an occasion when different lawyers of the Federal judiciary were called upon to speak.

I'm speaking of Judge Learned Hand and Mr. Justice John Harlan.

The reason I felt, as a lawyer—and my feelings were confirmed by my years of service on the bench—that the U.S. district court is the greatest court in the country, bar none, is because it is a general court which, within the embrace of its jurisdiction, handles every conceivable type of matter that Congress delegates to it.

And all these items are specialist items. Take for example, first; the general jurisdiction civil and criminal. Then you take the civil field, you have antitrust cases, patent cases, and copyright cases.

In recent decades; you have the cases under the securities law, and in recent years, the varied and complex problems that come before the courts—under the environmental program that Congress has passed, but where judges are called upon to act.

This has been the greatness of the court, that these men and women are called upon to perform these services. This is not a matter of an ego trip; it's a jealousy of a court that has stood the test of time.

And I'm suggesting to you that a fragmentation of this court, by creating a separate court, does a disservice to the greatest court in the country.

Mr. DRINAN. Judge, we agree with you. It's not a fragmentation or a separation. It's an integration.

If I may come back to my question to the Judicial Conference: you state here, in your testimony, Judge Brown, that we're creating two of everything. But if you'll read the bill carefully, we're consolidating the clerks' offices, so that there won't be a separate bankruptcy court and a district court. These are going to be consolidated insofar as possible.

That's why it's necessary and most appropriate to have all the judges be the same. We don't feel that it's appropriate for a bankruptcy division, so to speak, to be continued as a lesser court than the Federal district court, as you put it, an adjunct. We have equalized them; we have elevated bankruptcy, looking back through all of the years that the Federal courts simply couldn't handle the bankruptcy work. They gave it a second-rate status; they appointed referees. We want to give the bankruptcy work, involving billions of dollars every year, equal status with all of the other work that the Federal

courts do. We are not subdividing it, creating two of everything. We are trying to rectify what the Federal courts understandably did years ago. We feel like article I judges are not appropriate there, and that article III judges should be increased.

Would you want to react to the philosophy behind H.R. 8200?

Judge BROWN. Perhaps we don't understand your philosophy as being in H.R. 8200. We, of course, do approve of a combination of the clerks' offices, and our recommendations go to that.

I think our only difference comes to this: if you want to create article III judges out of bankruptcy judges and referees, instead of retaining their general status as assistants to us, as district judges in administering the bankruptcy law, which was assigned to us by Congress under section 1334, why then, there's nothing we can say about it.

We just think that if you do that—I'll say this advisedly—it would be fine. And the President can appoint them, the Senate can approve them—

Mr. DRINAN. You'll be grateful, I assure you.

Judge BROWN. Well—do you want to be called Mr. Drinan, or Father?

Mr. DRINAN. I'm like the lawyer who says, I don't care what they call me as long as they call me.

[Laughter.]

Judge BROWN. When you wear that collar I'm inclined to call you Father, if you don't object to it.

Mr. DRINAN. Let me just conclude: I'm certain that my time has expired. Judge Aldisert, you reminded me of one of the great dreams and fantasies that I've had all my life, being on the first circuit. I would settle to be an article I judge in the Virgin Islands, I think.

[Laughter.]

Judge ALDISERT. You know, Father Drinan, sometimes the dictates of public service require circuit judges to go down to the Virgin Islands and sit in January.

[Laughter.]

Mr. DRINAN. And February and March.

Mr. EDWARDS. The gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

Judge WEINFELD, I'm a little stunned by the comments that we've received from time to time which indicate—and I have one of the reports here—one of the preliminary reports the special committee for the Judicial Conference—that the Judicial Conference wasn't given an opportunity to study adequately this legislation.

Now, Judge, from what you said this morning, you kept yourself pretty well advised as to what we were doing, but you waited until we got through with all of our work, and then you were ready to let us know your view. Was that a fair statement?

Judge WEINFELD. Yes, Congressman Butler. I was fully aware that after the Commission bill had been introduced—I believe Congressman Edwards introduced the bill shortly after the Commission ended its labors—both he and Chuck Wiggins had very optimistic expectations that this bill, because of their service on the committee, would move along more expeditiously than most bills would.

Well, of course, certain national events were not foreseen, and the bill was in the 93d Congress, and at the same time the National Con-

ference of Bankruptcy Referees—or bankruptcy judges, whichever you prefer—introduced their own bill.

Now, there were two bills with differing provisions; and then, of course, there was the National Bankruptcy Conference that had views differing on both. Now, I was fully aware that there were discussion going on in an effort to reach an accommodation, under which the best provisions—the so-called best provisions—of each bill would be drawn and a single bill presented. It didn't seem useful to work on—well—the two separate bills in each house, not knowing which one would really come out as the one being sponsored for passage.

And just this one word; in anticipation that we would be called upon—and recognizing that this was a burden to—I recognize the time that was spent on this Commission—I appointed a subcommittee, headed by Judge Dyer, in readiness to go forward. I should add parenthetically—and I don't think it's of much importance—that I disqualified myself from sitting on the committee because I filed a dissent in this report.

Mr. BUTLER. Well, I thank you for that. But then, it would be fair to say that the criticism which the Judicial Conference seems to have leveled at this committee for not consulting the Judicial Conference is unfairly placed.

Judge WEINFELD. No; you must excuse me, Congressman, it's in reverse. I say that the committee—your staff—has criticized the Conference, and that's what I'm objecting to.

I'm saying that's an unfair criticism. I haven't criticized the congressional committees at all.

Mr. BUTLER. That's what I read, that:

Neither the judicial conference nor any of its committee has had an opportunity to study adequately the organizational and operational features of the bill, nor has the conference or any of its committees dealing with the court or administration been afforded an opportunity to be heard on this most comprehensive legislation.

Now, that, sir, is just not a fair statement, and I'm pleased to know that you are not identifying yourself with it.

Judge WEINFELD. But what I am saying to you is, as long as these bills were going through the congressional gristmill—and that's in the letter that was sent to Mr. Westphal, saying that I saw no purpose in presenting views until we knew what bills were being presented.

Mr. BUTLER. I guess what you're saying is that when the committee finally makes up its mind, then you'll let us know how we feel about it.

I'm going to go on to another point.

I feel like we've cooperated with everybody. I don't know of any committee in Congress that has ever made a real greater effort to contact all areas involved, to get input into legislation, as we did on the bankruptcy bill.

So, there's no use continuing this dialog, because we have limited time, and we want to know what you know, because that's our real problem.

Judge Brown, one other question I want to ask you. You refrained from commenting on some aspects of the bill because they involved matters of policy for the determination of the Congress, yet you have commented on other aspects of it.

I wonder if you'd tell me what limitations you think there are on the Judicial Conference or its members getting involved in the details of the legislative process, as a matter. What are the limitations on what you should or should not do?

Judge BROWN. Well, for instance, we talk about procedural matters as distinct from the matters of what the Congress wants to do substantively. I can't really speak completely on what we should or should not do.

What we should do and what we hope you'll let us do is call upon the Judicial Conference to have its committees review matters which you want us—

Mr. BUTLER. I think that's an appropriate function. I just wonder if there's any limitation in your mind on individual judges providing for legislation once the judicial conference takes a view on it.

Judge BROWN. Well, individual judges, I suspect, are like individual Congressmen: they don't always agree on everything.

Mr. BUTLER. Well, we don't have life tenure. That's one of the problems.

Judge BROWN. No. And I'm, of course, grateful that Congress saw fit to give us life tenure.

Mr. BUTLER. You're sort of grateful we don't have it? [Laughter.]

Judge BROWN. There are little things, for instance, such as whether the term of referee of bankruptcy or bankruptcy judges should be 12 or 15 years. This is a congressional matter. The matter of their pay, the matter of the benefits that they get—we've recommended that the benefits of the referee or bankruptcy judge be increased. We're here to carry on through the district courts as best we can the assignments which Congress has given us. They gave us 41 new areas to dispose of in the last decade.

We are perfectly able to do it. We will do it. We have done it. And we've done it, I think, with tremendous credit to the Congress which has created the district courts.

Mr. BUTLER. Am I out of line in being critical of judges outside the Judicial Conference who have called the members of Congress to complain about this particular piece of legislation?

Judge BROWN. I don't know that you are. You certainly can't get me to tell you that the first amendment rights of a Federal judge can't exist. Although a difficult problem that we have is that we like to go through the entire process of getting, as near as we can, a cooperative view.

One reason you have district courts in the powers vested by their localities; then they can adjust to the problems which are faced by them in each district.

If you're just asking me, can a Federal judge comment to his Congressman about legislation—if the Congressman asks him, he certainly can.

Mr. BUTLER. Congressmen don't make that mistake very often outside the judicial process.

Judge BROWN. You're awfully courteous to us, and we're very grateful. I frankly have appeared before committees like this one only once before. If it's any help to you, I have always been scared to death when I've been here. But I want to tell you what I can and do whatever I

can to help you get a bill which will expedite the resolution of the problems which are placed in the courts by the Constitution and the bankruptcy law. That's what we're here for.

Mr. BUTLER. All right, sir.

Judge BROWN. At the least expense possible.

Mr. BUTLER. Perhaps you can stay for dinner. [Laughter.]

We have here—I'm working, trying to figure out what's the best—what the people who don't see the light as clearly as I do, for the need for the article III judges, what we can do to satisfy them. And I've tried to pull together some of the aspects of it, and I would invite your attention to this list.

If I may take a few minutes, Mr. Chairman?

Mr. EDWARDS. Yes.

Mr. BUTLER. For example, maybe the independence of the bankruptcy courts would be strengthened if they were adjuncts to the courts of appeals, as opposed to the district court. Do you have any view of that, Judge?

Judge BROWN. Yes; my view is that they are not appellate courts. We've provided that the judicial council of the circuits can appoint them now to get away from any question of the appearance of any evil, which I don't think exists. But we've provided for that and recommend it.

Mr. BUTLER. Do you have any strong feeling? I mean, that is your recommendation. Do you think that's essential, that it be an adjunct to the district court, or can you see some virtue in that approach?

Judge BROWN. Creating—

Mr. BUTLER. Making the courts adjunct to the courts of appeals. We have a school of thought that says derivative powers from an article III court are pretty strong in the referee and that he's got a lot of things that he can do—derivative powers. Now, if they derived those powers from the courts of appeals instead of from the district courts, as they do presently, certainly it would strengthen their independence from the district courts.

Do you have any views—do you have any strong objections to that?

Judge BROWN. I haven't studied the theory that you're talking about, but if Judge Aldisert wishes to comment on it, I'd be glad to have him.

Judge ALDISERT. I haven't thought about it, Congressman Butler, but I would say my visceral reaction is that a district judge has much more power than a circuit judge and that if you would put a proposed bankruptcy judge as an adjunct to the power of a circuit judge, you would be diminishing his power. A district judge is the most powerful Federal judge. An individual district judge has more power than a Justice of the U.S. Supreme Court.

Mr. BUTLER. That's why it concerns me when they start lobbying. Well, have you any views on this?

Judge BROWN. I don't know who's lobbying, but I don't want to be in that position.

Mr. BUTLER. No, sir; you're not.

Judge BROWN. I want to be in the position of helping when we can.

Mr. BUTLER. Yes; I'm not critical of you, sir. But we have that experience, and other members of the committee, and that's one of the reasons why I wonder how deeply involved you want to get in making legislative suggestions.

Now, coming to the terms of the judges, judging from what you said, that you have no strong feeling about how long the bankruptcy judges would be appointed, adjunct judges—

Judge WEINFELD. As a matter of fact, it was a committee of the bankruptcy conference as far back as 1959—and Father Drinan may be interested in this—Judge Bailey Aldrich who was then a district court judge before he became the chief judge of the court of appeals, and Judge Albert Bryan, who then was a senior judge in Virginia, who was also a district court judge before he became a judge of the court of appeals, and this speaker were a subcommittee of three. It was our subcommittee that recommended at that time, in 1959, that the terms of the bankruptcy referees be extended to 12 years, with the idea of attracting more qualified people to the court.

And also we had recommended increased annuity benefits at the time, and an increase in salary. Now, that goes back a long time. Now, the opposition to the bills that were then introduced came principally, as I remember, from the Civil Service Commission, for some reason.

But, as I say, we made a recommendation 12 years ago, going back quite a number of years. So, that's the answer, and the Conference is on record repeatedly as passing that resolution.

Mr. BUTLER. I understood that.

Turning now to item No. 9 there, the administrative control over the bankruptcy courts by the bankruptcy judges. That is a matter of concern. Was that an area in which we would have disagreement on putting in the legislation complete administrative control of the bankruptcy judges over their courts?

Judge BROWN. We have tried to separate the administrative and judicial functions of the referees—and when I use the term “referee” I always refer to our referees—I appointed them as referees but I always refer to them as judges. When I do it individually, I do that. I'm just trying to keep the record straight.

Mr. EDWARDS. Judge, I believe the resolution that you sent recommended very emphatically that they be called “referees.”

Judge BROWN. The bill that we recommended did recommend that they be called “referees”—but we were given some latitude in this committee, and I'm not trying to make that an issue in this case.

Mr. BUTLER. No, judge. The thing that concerns me is, I think, that that's reflective of some sort of a second-class status that we accord referees in the existing systems.

Judge BROWN. Of course, I was a referee for 4 years, and I don't think I was a second-class citizen when I was a referee. I was there from 1958 to 1962 before I became a Federal judge.

Mr. BUTLER. Was promoted. [Laughter.]

Judge ALDISERT. May I respond to your observation, Mr. Chairman? Mr. Chairman, our committee has been in constant sessions, and we have changed our positions since our original position recommending that the name be preserved as in the statute—“bankruptcy referee.”

We have moved away from that position. We have taken positions along the line of Mr. Butler. We do not believe that Federal judges should advise Congress what title should be given to these offices. That's entirely inappropriate, and we withdraw entirely from any positive or negative reference.

Judge BROWN. I hope I'm answering your question, with Judge Aldisert and Judge Weinfeld's help, specifically enough, because we want to do that. That's why we're here, Congressman Butler.

Mr. BUTLER. Yes; I understand, I'm just trying to find out what we can do.

Judge BROWN. You're talking about administrative control over bankruptcy courts by bankruptcy judges. We got off on a tangent a little bit because of me. I'm sorry.

Let me say to you that, under our present system, generally speaking the judicial conference has the responsibility for the operation of the court system. This was done because Congress gave it that responsibility. The judicial officers and supporting personnel don't have that responsibility. Those decisions giving administrative responsibility to the Conference and to the circuit councils were made by this body.

In the district courts, the conference committees are the ones that are to supervise. And I really think we've done a pretty good job with it. I hope we have. We've tried awfully hard.

Mr. BUTLER. To the extent, then, with reference to what a bankruptcy judge can do in his own court, turning then to the items I have as 10 and 11, the power to appoint and remove his own court clerks—does that disturb you?

Judge BROWN. It disturbs me only insofar as district judges don't remove their own court clerks. The clerk of the court does it.

We're for them getting all the help that's necessary to operate their courts, and this is a matter of pure administration. I think that we, under our recommendations—we have proposed a bankruptcy administrator, and the bankruptcy judge would have a secretary and clerical help—

Mr. BUTLER. A law clerk?

Judge BROWN. It's a good question. Let's let Judge Weinfeld go to that.

Judge WEINFELD. I've already indicated, if there was a demonstrated need—and I haven't been satisfied up to now that there is a demonstrated need—and I related to you the fact that the referees we have in our court, the bankruptcy judges, carry as heavy a caseload, both in terms of the nature and complexity of cases, that one can imagine. Yet, never a one of them has suggested that there was a need for a law clerk.

But Mr. Butler, I would say, if they are needed, one couldn't quarrel with it.

Mr. BUTLER. Accepting the need is our hurdle here.

Judge WEINFELD. Some of these items, I must say in all candor, I have some difficulty in understanding how they come up in connection with this bill, which has its major thrust with respect to the creation of a different type of court. These are administrative problems, and I think in a sense they're a digression from the basic issue which the Congress has to face with respect to this measure here.

Mr. BUTLER. Well, the basic policy decision before the Congress was, how do we improve the status of the bankruptcy courts and the justice they administer, the problems they meet, and much of the testimony—all of the testimony indicated a need for an independence, a need for broadening of the jurisdiction, and as an incident to that,

of course, you've got a step-up in quality of those who accompany the judgeship: the law clerks, the court reporters, the law libraries, access to other libraries. All these things seem to me to be part and parcel of the same package, the same policy decision which the Congress wants to make, and that is to improve the quality of the justice as administered in the bankruptcy area.

But I guess I've taken too much of my time, but let me ask one more question. With reference to the pervasive jurisdiction, which was recommended in H.R. 8200, which was pretty broad as to all matters related to a bankruptcy case—and I'm sure that you're quite familiar with that—is it your view that this is not a necessary step, a necessary advancement, or that this is not necessary?

Judge BROWN. No; we agree that you can give that to the district courts, and we can handle it. We can take care of it. We will, through the district courts. And we think that the plenary and summary jurisdiction aspects of it, we can do it under the powers which we now have.

Judge ALDISERT. I think that when Judge Brown is saying "we"—he is talking about the bankruptcy judges. I think that's the question. The question as to the increased jurisdiction, of course, is a policy matter for Congress, and we believe that if we had our druthers, we would like to see the bankruptcy judge get these increased jurisdictional features.

Mr. BUTLER. That's why it's in the proposal of the ad hoc committee, I suspect, to increase the jurisdiction of the courts over plenary suits, and that's the jurisdiction by detriment that we talked about.

That's what you're referring to in your statement, Judge Weinfeld?

Judge WEINFELD. Yes.

Mr. BUTLER. Now, where did that come from? I know it came from the judicial conference, but did it spring fullblown?

Judge ALDISERT. May I respond to that, Mr. Butler, because again this is another situation where the ad hoc committee has refined its views.

We had a concern about the number of State cases that might enter the federal system, simply because a trustee was a party. We were concerned that, for example, in a negligence case, at any time a trustee could elect to stop the State proceedings and come into Federal court. And so we made the recommendation simply because we believe that it's appropriate for the Federal judiciary to report to the Congress our views on the impact of legislation on the Federal courts as distinguished from the substantive matters of policy.

We were concerned, so we suggested a restriction that, in order to remove—in order to remove from the State courts, the person desiring to remove had to show—to give a reason why the estate of the debtor or the bankrupt was being prejudiced, and also that the motion for removal be timely made.

And, Mr. Butler, we had also earlier made a recommendation which we have since withdrawn, as to original cases, plenary cases. If we use that expression "detriment," to mean a showing of detriment to the estate of the debtor or bankrupt, we would not require that for an original case in the Federal court but only where a case is to be re-

moved from the State court system would there have to be a showing of detriment and a showing that the request was timely made.

Judge BROWN. It has a great deal to do, also, with our Federal-State comity. You don't want to remove a case from a State court to have it dealt with effectively. The way we presented it to the trustees involved, if it's timely removed, why, it can come in before the district courts and we can dispose of it, and we will.

Judge ALDISERT. And Mr. Butler, one of the reasons why we changed our position is that we made a detailed study. We developed information that last year there were approximately 541 plenary suits, and we believe that the present system could absorb that increased easeload without requiring any special showing to get it into the Federal courts under this increased jurisdiction.

Mr. BUTLER. Are the refinements which you suggested today, are they reflected in this report dated November 1977?

Judge BROWN. Yes; that's the last report which we filed, to which we attached a copy of amendments to the Senate bill.

Mr. BUTLER. Yes, sir.

Judge BROWN. Yes; it is there, and we have it there for you.

Mr. BUTLER. Is that a change that was adopted because of the Danielson amendment? Is that suggestion reflected in the Danielson amendment?

Judge BROWN. Well, as I read the Danielson amendment, I think what we said follows somewhat the Danielson amendment, but we have had some minor changes in it, I guess.

Mr. BUTLER. This legislative proposal was written up after the Danielson amendment was considered?

Judge BROWN. That's right. I don't remember the exact time.

Judge WEINFELD. It's a refinement.

Judge BROWN. That's a good word—refinement.

Mr. BUTLER. Well, now—

Mr. EDWARDS. The Judicial Conference thinks the Danielson amendment is really pretty good?

Judge WEINFELD. I don't have any idea what the Judicial Conference thinks about the Danielson amendment, but this report reflects the Judicial Conference view, that is the ad hoc committee's report.

Mr. BUTLER. How about the question on loss—I'll see if I can find it. The jurisdiction by delegation—yes, the seven powers of referees in bankruptcy. Each referee in bankruptcy—that's been changed. Each—whatever it is in bankruptcy—serving under this chapter shall have—on page 261—“to the extent authorized by rule or order of the district court, the power to conduct trials and other proceedings in bankruptcy.” Each referee in bankruptcy—that's been changed by your testimony here this afternoon. It was suggested that the effect of this was to create jurisdiction according to the rule of each of the some 94 districts. And then, instead of having a uniform law of bankruptcy, we would have 94 rules of bankruptcy.

Would you all like to respond to that criticism?

Judge ALDISERT. I think that it's a very important point, Congressman, and I confess that I don't know the answer. Again, this is a policy judgment that your committee has to make.

The question of whether the power should be delegated to existing bankruptcy judges depends on the quality of those judges. It was felt that there might be some question about the quality of the holders of some of those offices. It was felt that until there has been some experience with the present personnel under the new structure, that the delegation of official jurisdiction should be by local rule, and then some experience recorded. If it were found that, in general, there was sufficient satisfactory experience, then a rule could be made uniform in nature. That was just a suggestion until the increased jurisdiction would have some experience.

Judge BROWN. It also gives some flexibility.

Judge ALDISERT. Flexibility, of course.

Judge BROWN. Flexibility in the event there is a ruling that would create a problem in what work is transferred to the bankruptcy judge by the district court, in his capacity as a judicial officer of the court.

Mr. BUTLER. Well, I guess I'm too much of a gentleman to say that the basis of what you're suggesting supports the argument that the quality of the referees in bankruptcy is not always the highest in this country.

Judge BROWN. I can't agree with that, Mr. Chairman.

The referees that we have, or the bankruptcy judges, are fine, capable people.

Mr. BUTLER. That's been my experience, but not our testimony.

Judge BROWN. I don't know whose testimony you're getting that from, but if they want to challenge any referee that I've had, I'm perfectly willing to meet that challenge any time on their honesty, integrity, and capability of performing the functions that were given to them.

Judge WEINFELD. Mr. Chairman, if I may add a word on that—I really don't understand the basis of it anyway, attacking the referees in terms of their performance or their abilities. I'm speaking again from personal experience. I was the chairman of the district court committee, my southern district court committee, that was in charge of appointing referees. I can say to you, without any fear of contradiction, that every appointment that was made was made on the basis of fitness, merit, and qualification. Two outstanding referees in the country—maybe this isn't wise to say—I'll mention their names—were personally persuaded by me to come to the court. One was Referee Asa Herzog. Another was a man by the name of Roy Babbitt, whom I persuaded to leave another important Government post to undertake a referee's position.

Interestingly enough, when we talk about expertise in this area, one of the arguments that he advanced to me against giving up his Government post was that he had no experience at all in bankruptcy. I took the position with him then that I've always taken in respect to his position in our courts: You get a good, sound general lawyer who will apply himself to his work, and he will bring to bear the best qualities that a man can in the discharge of his duties.

Roy Babbitt is an outstanding referee. There are referees here today, and I don't think one of them would dare challenge my statement with respect to either of these two men. There's been some talk about the difficulty of persuading men to come to these jobs. We have

never had any difficulty. Whenever there's been a vacancy, there are more applications of outstanding men applying for these positions than you can imagine.

One man, several years ago, gave up a practice of \$100,000 to come to our court, and I don't understand these references when they talk of these men as second-class citizens, which I hear every now and then. It just isn't a fact.

Mr. BUTLER. Thank you, Mr. Chairman. My time has expired.

Mr. EDWARDS. We must move along. We have two more witnesses today. We are in a quandary, of course, because for the last 5 or 6 years we have been hearing witnesses—banks, commercial law representatives, merchants, business people, and the general public—complaining about the referee system. Actually, we have not had one witness, except you gentlemen, except the district judges, who have said that it's working well and that we should be proud of it. I include the bankruptcy judges in there—we haven't had a single bankruptcy judge that's ever told this committee or the commission, Judge Weinfeld, that the changes as contemplated in H.R. 8200 would not be the best that could happen to the bankruptcy situation in the United States now.

The conflict of interest, where the bankruptcy judge is doing administrative work and the judicial functions at the same time, where they are mixed up—now, how do we answer that?

Judge ALDISERT. I think that we subscribe to the division suggested by your bill. We subscribe to that division.

Judge BROWN. We also have—

Judge ALDISERT. We believe that that's very important, and we certainly endorse it.

Judge BROWN [continuing]. We have recommended a bankruptcy administrator who we suggest be appointed by the circuit council, and this would take away much of that and would keep the bankruptcy judge from being involved in the clerical work or being his own clerk of the court.

Mr. EDWARDS. But he still is working—he is still an assistant judge to a district judge, taking his appeals to the person who appointed him.

Judge BROWN. Not under our new provisions. His appeal would not come to us.

Judge ALDISERT. He would not be appointed by the district judge.

Mr. EDWARDS. No. But it's the same system of judicial council in a particular judicial district, the same circuit, the same area of circuit judges and district judges. They're very closely connected because of the chief judge of the circuit making all the rules and so forth; isn't that correct?

Judge ALDISERT. With great respect, I would wish to differ with you, Mr. Chairman.

For example, I'm a member of the third circuit. The chief judge makes no rules in our circuit. That is, the rules are made by the members of the council. That's every active circuit judge. And I would say that, as a circuit judge stationed in Pittsburgh, I know very little about the bankruptcy judge down in Delaware.

Mr. EDWARDS. How would you be qualified, or how would your council be qualified to select a bankruptcy judge?

Judge ALDISERT. I suppose the suggestion came from meeting the objection of having the district courts name the bankruptcy judge, to go to one layer beyond. Now, whether that person be appointed by the court of appeals as an entity, or the circuit council, it's the same personnel. I won't get into that.

But I suppose the idea was adopted because the circuit council appoints the circuit executive who serves all over the circuit and the circuit council appoints the Federal public defender in a given district. Congress has created that method upon recommendation of the district court. Then, it was felt that if you were going to have an appointing power, removed from the district judge, that would be one layer removed because it does remove the immediacy, the close relationships.

Mr. EDWARDS. Thank you.

Judge BROWN. Mr. Chairman, in the last 10 years, have there been any real appeals? We have a system whereby if anyone objects to the ruling of the bankruptcy judge, the district judge reviews it. If they think that it's wrong there, they can go to the circuit court of appeals.

I know of no challenge that's ever been made to the integrity of the judicial process in this country in the last 10 years. If there has, it would be in ruins.

Mr. EDWARDS. Mr. Levin.

Mr. LEVIN. Thank you, Mr. Chairman.

Judge BROWN. I have a question. In the interest of time, I have a question of Judge Weinfeld, but while I'm asking that question, I would ask you to look at that chart, because I'd like to ask you a question about that chart while I'm asking Judge Weinfeld a question, because we are running a little late.

Judge Weinfeld, following up on something you brought up earlier, I'd like to read a very brief passage from the testimony of Judge Simon Rifkind of New York on behalf of the American College of Trial Lawyers, and the testimony submitted by the Attorney General of the United States, who will be appearing here tomorrow morning.

Judge Rifkind said:

The first practical consideration, that is, the problem of creating a specialized bankruptcy court, is the significant increase in the number of article III judges contemplated by the proposed law would dilute the significance and prestige of district judges.

Prestige is a very important factor in attracting highly qualified men and women to the Federal bench from more lucrative pursuits.

He went on to say:

The proponents of the specialized bankruptcy court have argued that the conversion of referees into article III judges would make that post more prestigious, and thus make it possible to attract more qualified men and women.

That is undoubtedly true, but I do not believe that there has been any problem in attracting qualified candidates to accept appointments as bankruptcy referees. The benefits which might flow from increasing the prestige in that post would be far outweighed by the dangers brought by loss of prestige of Federal district judgeships.

The Attorney General said :

To erect parallel to our district courts a system of article III bankruptcy courts would almost certainly operate to diminish the prestige and influence of our district courts.

From that you said earlier to Mr. Butler, I take it that you disagree with both of those statements?

Judge WEINFELD. I don't disagree with those statements at all. I think any proliferation of the court diminishes its strength in terms of public prestige. I don't disagree with that at all. I was taking exception to the remark that we were engaged in some kind of an ego trip. As a matter of fact, it was Mr. Justice Frankfurter who said—and he said it many years ago :

A strong judiciary is a small judiciary. There is no reason why, if there is need for this specialized type of work under the enlargement of the jurisdiction, that it can't be encompassed within the district court.

I tried to point out to you the very many areas here that require really expertise and knowledge, whether you're trying an antitrust case and go down to the steelmills, as I did in deciding one case, or you get into the intricacies of science, chemistry, or these problems you have in the environmental field today. This has been the strength of the district courts.

I agree with him completely.

Mr. LEVIN. If you agree with him, sir, would you say then, that it is easier to attract more highly qualified individuals to the district bench because of the increased prestige than it is to attract bankruptcy judges to an adjunct system? And do you have any comment about the different qualifications necessary for a bankruptcy judgeship or a district judgeship?

Judge WEINFELD. The answer is, in experience there has been absolutely no difficulty at all in attracting thoroughly competent men who have a background of experience to serve as bankruptcy referees. And if a vacancy came today in a single district in the United States, I assure you there will be more men applying than can possibly be considered for the position, and I don't care what district it is in this country.

Mr. LEVIN. I understand that to be the case from earlier testimony.

Judge WEINFELD. The fact of the matter is, there are justices of the highest courts in the States of this Union that have offered to give up their positions to become bankruptcy judges. There is no problem attracting men, even to this limited area which serves as an adjunct to the district courts, as you termed the expression.

Mr. LEVIN. Thank you, Judge Weinfeld.

Judge Brown, my question about the chart was, is there any items on there that you personally or the ad hoc committee of the Judicial Conference or the Judicial Conference itself would vigorously oppose or would be generally opposed to?

Judge BROWN. Mr. Counsel, to put in front of me 22 questions and then ask a question like that, without giving us an opportunity to study them and see how they fit into our program, is just—

Mr. LEVIN. Judge Brown, if I could ask, then, if we have this on an 8½ x 11 sheet, could we give it to you and ask you to submit comments on that?

Judge Brown. Of course. We're here to help you if we can, and I hope we do.

[The information referred to follows:]

**PROPOSED BANKRUPTCY COURT STRUCTURE**

1. Adjunct to (a) courts of appeals, (b) district courts.
2. Bankruptcy judges appointed for 15-year terms.
3. Appointment by the President with the advice and consent of the Senate.
4. Reappointment at expiration of term (a) Tax Court model (senior status if there is failure of reappointment), (b) District of Columbia Superior Courts model (reappointment unless a Commission recommends against it).
5. Removal for cause only.
6. Salary of \$54,500.
7. Improved retirement benefits, modeled after, but lower than, retirement benefits for Tax Court judges.
8. Determination of number of bankruptcy judgeships by Congress.
9. Administrative control over bankruptcy courts by bankruptcy judges.
10. Power to appoint and remove court clerks.
11. Provision of law clerks and court reporters.
12. Full legal libraries, or access to shared libraries with other Federal judges.
13. Pervasive jurisdiction over all civil matters related to a bankruptcy case, derived through the (a) courts of appeals, (b) district courts.
14. Full power to act in all cases and matters over which the bankruptcy court has jurisdiction.
15. Appeals to (a) courts of appeals, (b) district courts.
16. Limited contempt power.
17. Limited injunctive power.
18. Power to issue writs of *habeas corpus*.
19. Power to conduct jury trials in plenary matters.
20. Membership on the Judicial Conference.
21. Full participation in the judicial conferences of the circuits.
22. Membership on the Board of the Federal Judicial Center.

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS,**  
*Washington, D.C., January 16, 1978.*

Mr. RICHARD LEVIN,  
*Counsel, Subcommittee on Civil and Constitutional Rights,*  
*Washington, D.C.*

DEAR RICH: In accordance with the agreement we reached during our telephone conversation last week, I am transmitting the enclosed document presenting Judge Brown's response to the group of 22 items presented during your Hearings on December 13.

Within the past 10 days each member of the Ad Hoc Committee has had the opportunity to review the enclosed document and discuss it fully with Judge Brown. This morning, the Judge directed me to forward the material to you, for inclusion in your Hearing Record.

On behalf of Judge Brown, and all members of the Ad Hoc Committee, let me express our appreciation for the opportunity to address the 22 items in this fashion.

Sincerely,

WILLIAM JAMES WELLER,  
*Legislative Liaison Officer.*

Enclosure.

**RESPONSE OF JUDGE WESLEY E. BROWN, CHAIRMAN OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON BANKRUPTCY LEGISLATION, TO THE QUESTION BY COMMITTEE COUNSEL ON THE VIEWS OF THE COMMITTEE ON TWENTY-TWO ITEMS RELATING TO A "PROPOSED BANKRUPTCY COURT STRUCTURE"**

Mr. Chairman, in accordance with the permission granted by your Subcommittee, I am pleased to respond herewith in writing to the general question by committee counsel on the views of the Judicial Conference Ad Hoc Committee with regard to twenty-two items relating to a proposed bankruptcy court struc-

ture. My comments with respect to each of these items are intended to be consistent with the overall recommendation contained in the report of the Ad Hoc Committee which has been submitted to your Subcommittee and which has been made a part of the record of the hearings held on December 13th.

The basic recommendations contained in the report of our Ad Hoc Committee are these: (1) That jurisdiction over bankruptcy cases continue in the United States district courts; (2) That the jurisdiction of the district courts be enlarged to embrace all cases and controversies involving the estate of the debtor—so-called plenary jurisdiction; (3) That Bankruptcy Judges continue as judicial officers in the district courts with additional powers and responsibilities, particularly in plenary suits, but that they be appointed by the circuit councils rather than district judges; (4) That, consistent with the concept of separating the administrative functions of Bankruptcy Judges from their judicial functions, there be established in each district court a new office of "Bankruptcy Administrator"; and (5) That the "Bankruptcy Administrator" be appointed by the circuit council rather than the district court.

With this background my comments with respect to each of the twenty-two items are as follows:

#### 1. ADJUNCT TO (a) COURTS OF APPEALS OR (b) DISTRICT COURTS

The Ad Hoc Committee recommends that bankruptcy cases continue to be under the jurisdiction of the district courts, with appointment of bankruptcy judges by the circuit councils. The Committee sees no need for a separate court system which would inevitably create jurisdictional conflicts and would be very costly.

#### 2. BANKRUPTCY JUDGES APPOINTED FOR 15-YEAR TERMS

The Committee believes that the terms of office for bankruptcy judges should be increased. In 1960 the Judicial Conference first recommended that the term of office be increased from 6 to 12 years. Consistent with that recommendation the Committee has suggested that the term of office be set at 12 years.

#### 3. APPOINTMENT BY THE PRESIDENT WITH THE ADVICE AND CONSENT OF THE SENATE

In view of the recommendation that a separate bankruptcy court *not* be created, the Committee sees no need for Presidential appointment. The Committee recommends appointment by the circuit council.

#### 4. REAPPOINTMENT AT EXPIRATION OF TERM (a) TAX COURT MODEL OR (b) D.C. SUPERIOR COURT

We would suggest that reappointment be left to the judicial council of the circuit. Except for special circumstances, we would anticipate that reappointment would be a normal procedure. Courts are reluctant to replace appointees of known and demonstrated ability, particularly in an area such as bankruptcy law.

#### 5. REMOVAL FOR CAUSE ONLY

The Committee recommends the continuation of the present provisions of law authorizing the removal of a bankruptcy judge for cause. In addition the Committee has suggested an additional provision permitting the termination of a position no longer needed. Although the volume of bankruptcy cases has increased through the years, significant fluctuations have occurred and the future is unpredictable. To protect against having positions authorized, which in fact may not be needed, the Committee believes there should be an appropriate way of coping with such a contingency.

#### 6. SALARY OF \$54,500

The committee believes that the existing annual salary of \$48,500 is sufficient to attract qualified applicants. The present salary already exceeds the salary paid to justices and judges of the highest courts in many states. No difficulty has been experienced in recruiting men and women of the highest calibre to serve at the existing salary.

**7. IMPROVED RETIREMENT BENEFITS, MODELED AFTER, BUT LOWER THAN,  
RETIREMENT BENEFITS FOR TAX COURT JUDGES**

In 1960 the Judicial Conference recommended increased retirement benefits for bankruptcy judges. Both H.R. 8200 and S. 2266 contain provisions to increase retirement benefits for existing bankruptcy judges. The Committee supports the general concept of increasing retirement benefits.

**8. DETERMINATION OF NUMBER OF BANKRUPTCY JUDGESHIPS BY THE CONGRESS**

Within the structural framework for the administration of bankruptcy cases recommended by the Committee the number of bankruptcy positions should be administratively determined based upon workload and other factors set out in the existing Bankruptcy Act. This system has worked well. To require legislation to change the number of positions may entail delay which would be inimical to bankruptcy administration.

**9. ADMINISTRATIVE CONTROL OVER BANKRUPTCY COURTS BY BANKRUPTCY JUDGES**

Bankruptcy judges should have complete administrative control over the personal staffs assigned to them for the discharge of their functions, similar to the personal staffs assigned district judges. It seems to the Committee that those responsible for the overall administration of the district court, namely the judges of that court, should have administrative control if they are to discharge their duties properly.

**10. POWER TO APPOINT AND REMOVE CLERKS**

The committee has addressed this question only in relation to the creation of a separate office of "bankruptcy administrator." With a separation of judicial from administrative functions, the bankruptcy judge would be a judicial officer having no need for a clerical or administrative staff. The bankruptcy administrator would appoint his own staff to assist him in the discharge of his responsibilities and the clerk of the district court would continue to be the fiscal officer for the court and would have responsibility for keeping the records of the court to assure public access to them.

**11. PROVISION OF LAW CLERKS AND COURT REPORTERS**

If the need is demonstrated, bankruptcy judges should be provided with law clerks to assist them in the discharge of their judicial responsibilities. Similarly, court reporter services should be made available to bankruptcy judges and will be required if they are given additional responsibilities in "plenary suits". The Bankruptcy Act now makes provision for reportorial services as an expense of the administration of bankruptcy estates.

**12. FULL LEGAL LIBRARIES, OR ACCESS TO SHARED LIBRARIES WITH OTHER FEDERAL  
JUDGES**

It is our view that bankruptcy judges should have available, in chambers, those standard legal works which they need to consult on a regular basis. To the extent that libraries or collections of law books are available in buildings in which bankruptcy judges have chambers, they should be shared, and *separate* libraries should not be furnished. In any event bankruptcy judges should have reasonable access to the legal publications required for the performance of their duties.

**13. PERVERSIVE JURISDICTION OVER ALL CIVIL MATTERS RELATED TO A BANKRUPTCY  
CASE, DERIVED THROUGH THE (A) COURTS OF APPEALS, (B) DISTRICT COURTS**

The report of the Ad Hoc Committee advocates that jurisdiction of bankruptcy cases and cases related thereto be placed in the district courts to be exercised by district judges and bankruptcy judges. This position is consistent with the Standards of Judicial Administration advocated by the American Bar Association. As indicated above, the Ad Hoc Committee report recommends an increase in the jurisdiction of the district courts over "plenary suits".

#### 14. FULL POWER TO ACT IN ALL CASES AND MATTERS OVER WHICH THE BANKRUPTCY COURT HAS JURISDICTION

The recommendations of the Ad Hoc Committee provide that the district court, acting through the district judge or the bankruptcy judge, have full power to act in all bankruptcy matters. The only exceptions would be in the exercise of certain contempt and injunctive powers which, as explained below, would be reserved to a district judge.

#### 15. APPEALS TO (A) COURTS OF APPEALS, (B) DISTRICT COURTS

The ad hoc committee report recommends that the initial review or appeal of decisions of bankruptcy judges be heard by district judges. Direct appeals to courts of appeals of decisions of bankruptcy judges would entail delay and considerable additional expense which is undesirable.

#### 16. LIMITED CONTEMPT POWER

Title IV of H.R. 8200 limits the contempt powers of bankruptcy judges to acts committed within the presence of the bankruptcy judge and not warranting punishment exceeding a fine of \$250. The report of the ad hoc committee adopts this restriction on the contempt powers of bankruptcy judges which the committee agrees are appropriate.

#### 17. LIMITED INJUNCTIVE POWER

The ad hoc committee recommends that bankruptcy judges be authorized to exercise injunctive powers in bankruptcy cases and in proceedings relating to bankruptcy, except that the bankruptcy judge not be permitted to enjoin a court. This proposal is consistent with the provisions respecting bankruptcy judges contained in the transitional provisions of H.R. 8200.

#### 18. POWER TO ISSUE WRITS OF HABEAS CORPUS

Bankruptcy Rule 913 now provides for the issuance of writs of habeas corpus by bankruptcy judges. The substance of rule 913 might appropriately be included either in the statute or remain in the rule. The ad hoc committee expresses no preference.

#### 19. POWER TO CONDUCT JURY TRIALS IN PLENARY MATTERS

Based on its study the Ad Hoc Committee concluded that bankruptcy judges, who are judicial officers in a district court, could conduct jury trials of plenary suits arising out of bankruptcy cases. Judge Ruggero Aldisert, a member of the ad hoc committee, addressed this question in testimony before both the House and Senate Judiciary Subcommittees.

#### 20. MEMBERSHIP ON THE JUDICIAL CONFERENCE

The ad hoc committee recommends against expanding membership on the Judicial Conference of the United States to include bankruptcy judges, United States magistrates, or other officers in the Federal Judiciary. The work of the Conference is analogous to that of the President's Cabinet in the overall administration of the Judiciary. Final decisions should be made by those in whom is placed the responsibility for administration and further, should be based upon suggestions and recommendations of the officers and employees of the Judiciary. To expand membership beyond the present 25 members of the Conference would tend to impair its effectiveness as a working body.

#### 21. FULL PARTICIPATION IN THE JUDICIAL CONFERENCES OF THE CIRCUITS

The statute, 28 U.S.C. 332, presently restricts official attendance at circuit conferences to the judges of the circuit. Members of the bar may be invited but must attend at their own expense. From time to time clerks of court, bankruptcy judges, United States magistrates, Federal Public defenders, and chief probation officers have requested permission to attend circuit conferences, but their requests have been denied for lack of statutory authority except in special circumstances justifying individual attendance beyond mere presence at the

conference. The question of attendance by officers and court attachés involves considerations of the appropriate size of these conferences, their intended purposes, their effectiveness and the cost thereof. The Ad Hoc Committee, noting these problems, has recommended against any enlargement of circuit conferences at this time.

## 22. MEMBERSHIP ON THE BOARD OF THE FEDERAL JUDICIAL CENTER

The Board of the Federal Judicial Center now consists of a small group of seven persons who review proposed research projects, appoint the Director of the Center, consider problems concerning the internal organization of the Center's staff, and set policy in the areas of research and training. This small Board is authorized by law to meet quarterly. Educational and training programs, which are the largest part of the activities of the Center, are designed by program committees. In the area of bankruptcy law and procedure the program committees consist mostly of bankruptcy judges who, for the most part, serve as faculty members and discussion leaders. This procedure is similarly followed in designing and executing training seminars for clerks of court, probation officers and United States magistrates. The Ad Hoc Committee is convinced that the existing organization of the work of the Center fully takes into account the views of those having an interest in the work of the Center and that no reason exists to alter the structure of the Board.

Judge BROWN. I think we just want to help, gentlemen. We know that you have all kinds of problems, and we're grateful that you gave us the opportunity to appear before you because we think it's important that you see our views and that you—I know you'll give them consideration. For that, we're grateful. We can't ask for anymore. We don't want anymore.

Mr. LEVIN. Thank you, Mr. Chairman. I have no further questions.

Mr. EDWARDS. Mr. Klee?

Mr. KLEE. Thank you, Mr. Chairman.

Judge Weinfeld, article II, section 2, clause 2 of the Constitution indicates that inferior officers of the United States are to be appointed, among others, by courts of law. Your proposal has the bankruptcy referee, or judge, who, in light of the Supreme Court opinion holding that a court clerk is an inferior officer of the United States, would certainly be an inferior officer of the United States, appointed not by the courts of appeals, but by the judicial councils.

Do you think that for the purposes of the Constitution, the judicial councils are courts of law within the purview of the Constitution?

Judge WEINFELD. I would think if the district court judges could appoint a bankruptcy referee or bankruptcy judge, clearly, the court of appeals would have the same power to make the appointment.

I think, as was pointed out, there are appointments being made now by the court of appeals.

Mr. KLEE. My question was may the councils rather than the courts of appeals make the appointments?

Judge WEINFELD. I think this is—really, the use of the terms is a distinction without a real difference. After all, the court or appeals and the circuit council are the same. They're composed of the active judges in the court of appeals. This is nomenclature now.

Mr. KLEE. I respect that position. If judges meeting in a collegial body such as a judicial council other than a court are, nevertheless, considered to be a court for constitutional purposes, and, as you say, it's a distinction without a difference, then do you think that the opinion by the judicial councils with respect to the constitutionality of

the proposed adjunct court system constitutes an improper advisory opinion?

Judge WEINFELD. The judicial council wouldn't be rendering an opinion. The court of appeals would be rendering an opinion.

Mr. KLEE. You just told me that was a distinction without a difference.

Judge WEINFELD. But the appeals go to the court of appeals. I think we're dealing with statutes here, not with hypothetical situations.

Mr. KLEE. Thank you, Judge Brown?

Judge ALDISERT. Could I add to that?

Mr. KLEE. Certainly.

Judge ALDISERT. I want to make it clear, Mr. Chairman, that if the committee has a problem on this that we would change our recommendation from appointment by the circuit council to appointment by the U.S. court of appeals.

This would be no problem.

Now to answer your question, Counsel, speaking from personal experience, the Judicial Council of the Third Circuit passed a regulation regarding a matter in the district of New Jersey. It was challenged through the courts. When it came up to the Court of Appeals for the Third Circuit, the active judges constituting the circuit council all refused ourselves, and the Third Circuit Court of Appeals found, sitting with their judicial hats on, that the Third Circuit Council was wrong.

Judge BROWN. This happens all the time.

Mr. KLEE. Thank you, Judge Aldisert, how do you feel about Presidential appointment of bankruptcy judges?

Judge ALDISERT. Well, I can only—if you're asking me as a philosophical matter—I would be very cautious of Congressman Butler's inquiry as to the propriety of Federal judges making recommendations as to substantive law. Let me respond only from the standpoint of the impact on the courts. If having a judge appointed by the President would create another court with appeals to the courts of appeals, as a circuit judge I would say that that would give the court of appeals additional work, and we are already overworked from the standpoint of caseloads.

It has been suggested by the distinguished Professors Carrington, Meador, and Rosenberger, in their book, "Justice on Appeal," that the figure for the number of fully briefed cases on the merits that each active circuit judge should handle in a year is 225.

Right now in our court each active judge is handling about 260 to 270 cases. From the standpoint of responding to the question of an impact on the court of appeals, I would say that I would be opposed to that. I would prefer to have the appeals go to the district court, which acts as a filtering device.

Mr. KLEE. Judge Brown, it seems to me that the issue here is whether the bankruptcy court, with pervasive jurisdiction that will no longer be doing administrative work, but that will be resolving real disputes just as complicated as other disputes passed on by article III judges, whether that court should afford its litigants the same quality of justice before judges with the same prestige as antitrust litigants, civil rights litigants, and securities litigants have.

I take it from what Judge Weinfeld said that you would not be adverse to returning jurisdiction to the district court and to having district judges hear bankruptcy cases. But I take it in light of the fact that time is of the essence in bankruptcy cases, that would require a priority to require bankruptcy cases to be heard before the *res* dissipates.

In your view, would that be a desirable system and, if not, why not?

Judge BROWN. Well, in my view, the handling of those matters in the district court, which requires the adjudication by the judge, can be done by the district judges with the help of the bankruptcy judges in processing the cases when they come up.

There isn't any second-class citizenship connected with this. We can appoint special masters to hear matters, and then they're presented to us, and sometimes we have to.

Mr. KLEE. Special masters may not enter final orders.

Judge BROWN. Special masters may not enter final orders, but they may grant recommendations for the orders before us. Nobody says that because that approach is used, that litigants don't get a proper consideration of the merits.

As a matter of fact, I see no problem with that.

Mr. KLEE. Judge Brown, the jurisdictional proposal contained in the Judicial Conference proposal leaves a gaping loophole that I'm not sure was intentional. I think it would undo the effect of the 1970 dischargeability amendments by failing to give the bankruptcy court jurisdiction over a third party, moving on a debt that, arguably, has been discharged in bankruptcy after the case is closed, or a creditor moving against exempt property that has been set aside in a previous bankruptcy.

Is that your intention, to carve that out of the Bankruptcy Code?

Judge BROWN. No; of course not.

Judge WEINFELD. That 1970 Dischargeability Act, of course, was a very important one. It certainly wasn't our intention to do that.

Mr. EDWARDS. Gentlemen, thank you very much for your assistance and for your excellent testimony.

Judge BROWN. Mr. Chairman, may we thank you for your courtesy. We're grateful.

Mr. EDWARDS. Our next witnesses, representing the National Conference of Bankruptcy Judges, are the Honorable David Kline, district of Oklahoma—Judge Kline is the president of the National Conference of Bankruptcy Judges; the Honorable Conrad Cyr of the district of Maine, the immediate past president; the Honorable Joe Lee, district of Kentucky; and Arthur Moller, Esq.

Gentlemen, we are delighted to have you with us. Also, the witness following those representing the National Conference of Bankruptcy Judges will be Mr. John W. Ingraham, vice president of Citibank of New York, representing Robert Morris Associates.

All of these witnesses have kindly consented to make up a panel after the formal statements are made.

So, Mr. Ingraham, you may also come to the table. We're delighted to have you all. Proceed.

[The prepared statement of Judge Conrad Cyr follows:]

STATEMENT OF HON. CONRAD K. CYR, U.S. BANKRUPTCY JUDGE FOR THE DISTRICT OF MAINE ON BEHALF OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

I am Conrad K. Cyr, U.S. Bankruptcy Judge for the District of Maine. I am the immediate past president of the National Conference of Bankruptcy Judges, Editor in Chief of the American Bankruptcy Law Journal and Chairman of the Legislative Committee of the National Conference of Bankruptcy Judges. It is my privilege to appear here today, along with my colleagues, at the request of the Subcommittee on Civil and Constitutional Rights, on behalf of the National Conference of Bankruptcy Judges. My colleagues and I deeply appreciate this further opportunity to appear before the Subcommittee to offer our views in connection with the establishment of new court and administrative systems for the bankruptcy courts of the future.

With me today are Bankruptcy Judge David A. Kline of Oklahoma City, Oklahoma, President of the National Conference of Bankruptcy Judges; Bankruptcy Judge Joe Lee of Lexington, Kentucky, a former president of the National Conference of Bankruptcy Judges and the principal draftsman of H.R. 32, a forerunner of H.R. S200; and Arthur Moller, Esquire of Houston, Texas, a former bankruptcy judge and a prominent member of the bankruptcy bar.

Judge Lee and I have submitted formal written statements for the record. I shall touch briefly upon the highlights of my statement in respect to the establishment of a new bankruptcy court. Judge Lee will discuss the creation of a new trustee system. We will then attempt to respond to any questions put to us by the Subcommittee.

#### INTRODUCTION

The bankruptcy court system requires modernization if it is to comport with sound principles of judicial administration. The apparatus presently in use is the product of neither judicial nor legislative design, but of decades of experimentation at the bankruptcy trial court level. The present bankruptcy court has simply evolved in response to the inherently specialized nature of its subject matter jurisdiction<sup>1</sup> and the fitful fluctuations and territorial spottiness of its caseload. The emerging maturity and independence of the bankruptcy court are natural consequences of two essentially unrelated phenomena—the preoccupying enlargement of the general jurisdiction of the federal district courts and the staggering growth in credit and its companion phenomenon, insolvency, since World War II.<sup>2</sup>

#### *Current system inefficient*

The *sine qua non* of any sound bankruptcy system, expeditious administration, is legislatively unobstructed under current law by arbitrary jurisdictional impediments which severely deplete the estate available for distribution in liquidation and reduce the prospects of effective debtor rehabilitation in arrangement proceedings.

In view of the great volume, magnitude and importance of bankruptcy litigation, it has become an increasingly intolerable inefficiency to permit the continued adulteration of bankruptcy court jurisdiction in deference to overcrowded state and federal courts of general jurisdiction. The economies which would result from elimination of the serious delays, waste and uncertainty caused by the present jurisdictional limitations would almost certainly exceed the increased costs of funding an Article III bankruptcy court system.

<sup>1</sup> The current debate as to whether the bankruptcy court is or should be a specialized court is mooted by the fact that the bankruptcy court has been a specialized court since at least 1938. It must be recognized that the present bankruptcy courts have evolved into specialized courts because they are engaged primarily in the resolution of money disputes, where delay effectively diminishes or extinguishes the res in litigation. The specialized nature of the present bankruptcy court, as well as that of the future, is dictated by the need for prompt disposition of bankruptcy litigation which cannot be accommodated within the framework of courts of general jurisdiction along with their other civil and criminal litigation.

<sup>2</sup> Consumer credit outstanding in 1945 amounted to a mere \$5.6 billion dollars. H.R. Rep. 1040, 90th Cong., 1st Sess., at 10 (1967). See also Note, 71 Colum. L. Rev. 905 (1971). At present consumer installment credit outstanding totals \$203.2 billion dollars. National Consumer Finance Ass'n., Finance Facts (Nov. 1977), at 3. Of course, commercial credit exceeds consumer credit, though it has been predicted that the latter may soon surpass commercial credit in the United States. See Address of George L. Falstitch, Jr., Annual Convention of American Bar Assoc. (Miami Beach, Fla. Oct. 31, 1970), at Fig. 4.

### *Reform efforts*

Bankruptcy judges have sought to assist the current bankruptcy reform effort, led by the Subcommittee on Civil and Constitutional Rights. The National Conference of Bankruptcy Judges applauds the Herculean efforts of the Subcommittee and its staff, as a welcome replacement for the more familiar practice of tinkering with the makeshift machinery of the bankruptcy system. Congressional commitment to bankruptcy reform has come none too soon, however, particularly in view of the increasingly important responsibilities being reposed in the bankruptcy courts, responsibilities which strain its capacity to function relevantly and with the desired efficiency and effectiveness.

### *Reform jeopardized*

Ten years after it began, there are hopeful indications that the long-delayed reform effort may at last produce concrete results. There is widespread agreement that bankruptcy reform is long overdue. There is an emerging consensus among the principal participants in the process concerning the substantive and procedural changes needed. There is even substantial agreement as to the goals of structural reform. But the entire reform effort has been slowed and may even be jeopardized because of the controversy concerning reform proposals for restructuring the bankruptcy court and the trustee system. A clearer recognition of the common aims shared by those engaged in the debate may enable a lowering of voices and suggest some slight alteration in legislative course to accommodate the legitimate interests of all concerned.

### *Reform goals*

A successful reformation of the bankruptcy system must maximize the actual and apparent quality of justice available in the bankruptcy court, in accordance with a legislative formula that is constitutional and achievable. While the functional components of a sound structural design may be somewhat nebulous, it is a relatively simple matter to identify them and to fashion responsive proposals.

The ultimate purposes of any structural reformation of the bankruptcy court and trustee systems include:

(1) A functionally independent court constitutionally vested with complete original trial jurisdiction over all Title II cases and proceedings and all civil proceedings related to bankruptcy cases [subject to limited discretionary abstention only];

(2) A trustee system that maximizes the separation between the judicial and administrative functionaries involved in the bankruptcy system, by minimizing the administrative responsibilities of the trial judge.

The frustration of either of these fundamental objectives would work a forfeiture of meaningful bankruptcy reform. It is readily demonstrated, moreover, that H.R. 8200, among all pending proposals, best assures adequate bankruptcy trial court jurisdiction and independence.<sup>3</sup> In our discussion of possible alternative proposals, it is important, therefore, that the basic purposes of H.R. 8200, if not its precise design, be preserved.

### *The appearances of justice*

There are important respects in which the present court structure is deficient in terms of prevailing standards of judicial administration. There is little, if any, dissent from the proposition that the appearances of justice are less than desirable in the bankruptcy courts, for two primary reasons:

(1) The umbilical dependence of the bankruptcy judges upon the district courts which appoint and review them:

(2) The appearance of accommodation that results from the supervision and to a lesser extent the appointment by the bankruptcy judge of the trustee in bankruptcy and other fiduciaries who regularly appear as litigants in the bankruptcy court.<sup>4</sup>

It is an actual dependence on the part of the bankruptcy judges upon the district courts, not merely its perception, which prompts unflattering misgivings from the decisions of the bankruptcy judge are taken to the district court. The bankruptcy judge is appointed by the district court for a limited six-year term.

<sup>3</sup> See Appendix I, Chart I *infra*.

<sup>4</sup> Judge Lee will discuss these matters in connection with the establishment of a new trustee system.

The bankruptcy judge is likewise removable by the district court. Appeals from the decisions of the bankruptcy judge are taken to the district court. The trial jurisdiction of the bankruptcy judge is dependent upon local district court rule. Punishment for contempt of the bankruptcy court's orders is a matter for the district court. The availability of physical facilities, personnel, equipment and library depends largely upon the personal relationships between the bankruptcy judge and the district judge.

The overwhelming preponderance of district judges exercise their ultimate responsibility for the bankruptcy court with a view to every appropriate consideration involved, notwithstanding the fact that they are reluctant participants in the governance of a court with whose affairs they have little inclination and less time to familiarize themselves. The time has come to recognize that there is no legitimate basis for permitting control of the bankruptcy court to remain with the district courts, which devote less than 1 percent of their time to bankruptcy matters, to the virtual exclusion of bankruptcy judges who devote 100 percent of their time to bankruptcy matters.

We are aware of no serious reform proposal which does not contemplate widening the separation, to one degree or another, between the bankruptcy court and the district court. We believe that the record demonstrates compellingly that a total separation would best serve the interests of both courts, as well as their litigants.

#### AN INDEPENDENT BANKRUPTCY COURT?

Serious distortion usually develops at the very outset of the independent court debate. At the present juncture, however, when the legislative record is replete with evidence and testimony as to the need for an independent bankruptcy court, further discussion should proceed from the inquiry—why *not* establish an independent bankruptcy court?

We submit that nothing approximating a functional ground has ever been advanced in opposition to the creation of an independent bankruptcy court. On the contrary, objections have almost invariably centered either on the cost of such a system or its perceived tendency to dispart the federal court system. The debate over the costs of an independent bankruptcy court has proceeded largely on self-serving conjecture, due to the fact that it is impossible to project with accuracy the manpower and other needs of such a system without some actual experience under its expanded jurisdiction.<sup>4</sup> We further suggest that there would be no disruption whatever of the federal court system, such as might in any way impede the effective delivery of judicial services, either in bankruptcy or other proceedings. Rather, more effective judicial services would become available for dealing with bankruptcy litigation, long the stepchild of the federal court caseload, notwithstanding the fact that it regularly exceeds 200,000 new cases annually and involves the individual financial problems of scores of thousands of American families, as well as staggering sums.<sup>5</sup>

For far too long the stepchild status of the bankruptcy court as an adjunct of the district court has endured because of irrelevant institutional apprehensions on the part of those not as concerned with the bankruptcy court and its litigants as with the perpetuation of the federal court case system, which demeans the bankruptcy court, as well as its judges, without regard to the importance or effectiveness of their function. It is time to identify the functional needs of the bankruptcy court in designing a new court system and to recognize that systemic tinkering has gone as far as it can go. It is now time to structure a bankruptcy court system whose function, as a forum for insolvency litigation, controls its design, rather than permit its design limitations to continue to dictate its function.

The stepchild treatment accorded the bankruptcy court has contributed substantially to the functional irrelevance of the present adjunct apparatus. Furthermore, because virtually every important advance by the bankruptcy court in recent years has met with determined resistance from powerful elements within the higher federal judiciary, only some compelling functional rationale for retaining a dependent bankruptcy court system would warrant perpetuation of the serious shortcomings that are bound to result.

<sup>4</sup> See the textual discussion entitled "Need For More Answers", *infra*.

<sup>5</sup> There were 27 billion dollars worth of assets and 42 billion dollars in liabilities involved in cases pending in the bankruptcy courts in 1975. See Report of Subcomm. on Civil & Constitutional Rights of House Comm. on the Judiciary, "Constitutional Bankruptcy Courts" (Committee Print), 95th Cong., 1st Sess., No. 3, App. I, at 39 (June 1977).

### ***A bankruptcy division of the district court?***

The suggestion has been advanced that the future bankruptcy trial court should be constituted as a division of the United States district court and presided over by a United States district judge specifically designated to preside in the bankruptcy division at the time of his appointment to the bench.<sup>6</sup>

It must be conceded that such a bankruptcy court would be more "independent" than "separate." The adoption of the 'divisional court' concept would lead to a bankruptcy court "separate" only in the sense that it would no longer be subordinate to the district court. Unfortunately, while it is entirely appropriate that the future judges of the bankruptcy court should not be subservient to district judges, there is little basis for confidence that the subject matter of the bankruptcy court's jurisdiction would not soon become subordinated to the other, more alluring, litigation of the federal district courts, which seems constantly to be enlarging in both volume and scope.

The principal benefits of the divisional court concept are said to be that it would substantially elevate the status and image of the bankruptcy court, while preserving the necessary judicial specialization which the nature and volume of bankruptcy cases require. Another important advantage attributed to the divisional court proposal is that the district judge in bankruptcy could serve interchangeably with other federal district judges in non-bankruptcy matters. Flexibility in the use of judicial manpower is unquestionably advantageous from the standpoint of processing the crowded calendars of the district courts. But the goal at hand is the modernization and improvement of the bankruptcy system. It is difficult to appreciate the overriding benefits of this proposal from the perspective of the bankruptcy courts.

In our judgment the powerful forces in response to which the referee system evolved will not diminish in the future. The federal district courts determine many of the more important and prominent issues of our time. There seems little likelihood that either the volume, scope or importance of the general jurisdiction of the federal district courts will be restricted appreciably in the foreseeable future.<sup>7</sup> The prominence and importance universally attributed to much of the litigation overcrowding the dockets of the federal district courts cannot be compared to the much less glamorous gruel of the bankruptcy court. It seems all too predictable that the time and attention of the district judge of the bankruptcy division would soon be diverted to non-bankruptcy cases to such an extent that bankruptcy litigation would become a distinctly secondary concern. The unremitting demands of the enormous volume of large and small insolvency cases<sup>8</sup> would then require reference by the district judge of the bankruptcy division to magistrates or special masters appointed to hear and report. It is very likely that it would not be long after the establishment of such a system that we would have come full circle—back to the referee system, with the probable additional disadvantage that the future "referees" would be generalists, rather than specialists.<sup>9</sup>

<sup>6</sup> The proposal referred to is that adopted in 1970 and 1971 by resolutions of The National Bankruptcy Conference, in response to recommendations of its Committee On An Independent Bankruptcy Court. The National Bankruptcy Conference retreated from that position in 1972.

<sup>7</sup> This view is persuasively supported by the former Chairman of the Senate Subcommittee on Improvements in Judicial Machinery:

"The law explosion following the conclusion of World War II was a concomitant of an increased population and an acceleration in the socio-economic affairs of this nation. Neither factor can reasonably be expected to decrease in the near future. While decisions on what is a rational basis for federal jurisdiction are required, such decisions will not eliminate the present problems of our federal appellate courts. The volume of civil rights and habeas corpus litigation of the past decade may well be exceeded by consumer and ecological litigation in the next decade." Burdick, "Federal Courts of Appeals: Radical Surgery or Conservative Care," 60 Ky. L. J. 807, 815 (1972).

<sup>8</sup> See note 32 *infra*.

<sup>9</sup> Presently under study by the Judicial Conference of the United States is a recommendation of its Ad Hoc Committee on Bankruptcy Legislation contained in the Separate Report of the Ad Hoc Committee on Bankruptcy Legislation Concerning the Interchangeable Use of Referees in Bankruptcy and United States Magistrates, recently submitted to the Chief Justice of the United States and the Judicial Conference. In actuality, this Report, which fairly covets the judicial positions of the more than 200 bankruptcy judges who might be diverted (as have many of their clerks in consolidated clerks' offices) from bankruptcy court responsibilities, now at the heaviest level in their history, to magistrate duties in aid of the district courts (soon to be authorized more than one hundred additional judgeships), if only the position of bankruptcy judge, as such, could be eliminated and bankruptcy court duties, with few, as all magistrate functions, could be entrusted to magistrates.

The lessons learned from decades of experience in the administration of bankruptcy proceedings must not be disregarded in designing the future bankruptcy court system. Real improvements in the bankruptcy court system can be achieved only if its design is as strongly influenced by the mistakes and accomplishments of the past as by the demands of the future.

#### *District Court adjunct system?*

Complete elimination of the dependence of the bankruptcy court upon the district court cannot be accomplished within the framework of a district court adjunct system, except at the expense of restricting bankruptcy court jurisdiction to the point of forfeiting the primary purposes of structural reform, simply because that would require withdrawal of the trial and appellate jurisdiction and the appointive power of the district courts. Constitutional difficulties would appear to be raised by the delegation of Article III judicial power to a non-Article III judge, absent retention of the power to review by the Article III court.

Unless there is some legitimate basis for continuing to append the bankruptcy court to the district court, with all the real and apparent problems inherent in that approach, court reform proposals, even of the adjunct variety, ought to adopt some more relevant functional design.

#### *Court of Appeals adjunct system?*

The courts of appeals are the other obvious repositories of original trial jurisdiction in bankruptcy matters and of the power to appoint bankruptcy judges. There may be problems with a court of appeals adjunct system as well, however. The power to appoint and to review are once again lodged with the same authority. In fact it would appear that further difficulty may be posed by vesting original trial, as well as original and final appellate, jurisdiction in the courts of appeals under this approach. If it be suggested that appellate jurisdiction be vested in the district courts, the anomaly of having the orders of the bankruptcy trial judge, a delegate of the court of appeals, reviewed by the district court cannot be ignored.

All pending adjunct court proposals either perpetuate the dependence of the bankruptcy judge upon the district court or raise constitutional problems to the extent that the jurisdiction of the non-Article III bankruptcy judge is expanded as required for meaningful reform. It is difficult, if not impossible, to fashion a constitutional adjunct system which imports the essential expansion of jurisdiction to the bankruptcy judge, without conferring original bankruptcy jurisdiction and hence first-level appellate jurisdiction upon the circuit courts of appeal.

It may be that original and exclusive trial jurisdiction in all Title II cases and proceedings can be reposed constitutionally in the courts of appeals and by them automatically delegated to bankruptcy courts established as functionally independent adjuncts of the courts of appeals and whose orders are subject to review either by the court of appeals itself or indirectly by the district court acting as the delegate of the primary appellate jurisdiction of the court of appeals. The constitutional integrity of such an adjunct system would remain substantially intact as measured against the present system, with the significant advantage that the appointing authority would be one step further removed by the interposition of the district court as the first-level appellate court.

Nevertheless, the anomaly of imposing the appellate function in specialized bankruptcy matters upon a trial court of general jurisdiction cannot be ignored. By the same token the relative convenience and accessibility of the district courts as trial courts in bankruptcy matters, especially in consumer case appeals, is an attribute of the present system which merits recognition. But why, it must be asked, do we look to either the district courts or the courts of appeals, overburdened as they both are, to appoint future bankruptcy judges, or to handle appeals from their decisions, particularly in light of the long tradition favoring presidential appointment of federal judges?

#### *An Adjunct System Apart From the District Courts and the Courts of Appeals?*

The appointive power need not be lodged in either the district courts or the courts of appeals absent some sound functional justification. The power to appoint federal judges traditionally has been reposed in the President, acting by and with the advice and consent of the Senate. There can be no doubt whatever that the bankruptcy judges who staff the bankruptcy court of the future, vested with complete jurisdiction of bankruptcy cases and bankruptcy

related civil actions, will be federal judges in every sense of the word. Their appointment, like other federal judges, should be lodged in the President, acting by and with the advice and consent of the Senate.

For all these reasons, if an adjunct system is to be established, it would appear preferable that it be separate from either the district court or the courts of appeals.

#### *United States Court of Bankruptcy*

The Congress should establish the United States Court of Bankruptcy as a separate Article III court. The United States Court of Bankruptcy might comprise three divisions, an appellate division, to be known as the Court of Bankruptcy Appeals; a trial court division, to be known as the United States Court of Bankruptcy, Trial Division; and an administrative division, headed by the Clerk of the Court of Bankruptcy, in which all administrative duties of the United States Court of Bankruptcy might be reposed.<sup>10</sup>

#### *Court of Bankruptcy Appeals*

The Appellate Division of the United States Court of Bankruptcy would be staffed by Article III judges, appointed by the President, by and with the advice and consent of the Senate. The Article III judicial power which may be needed to enable the United States Court of Bankruptcy to exercise the broad grant of trial jurisdiction contemplated by H.R. 8200 would be conferred by Congress upon the United States Court of Bankruptcy and automatically delegated by its Article III judges to the judges of the Trial Division, subject always to an appeal of right from the decisions of the trial judges to the Court of Bankruptcy Appeals.

#### *Constitutional Considerations*

There appears to be little question but that its supervening legislative prerogatives in the field of bankruptcy law<sup>11</sup> sufficiently empowered the Congress to confer exclusive jurisdiction over bankruptcy cases and proceedings, as well as civil actions arising out of or in connection with bankruptcy cases, upon an Article III court. Constitutional difficulties seem to worsen with any attempt to preserve the broad equitable powers of the present bankruptcy court, while expanding its jurisdiction, outside the framework of an Article III tribunal.

There is little agreement as to the constitutional status of the present office of referee in bankruptcy.<sup>12</sup> Nevertheless, as a practical matter referees in bankruptcy have been exercising almost all of the powers of the United States district courts in bankruptcy cases for forty years. There can be no question of the power of Congress to create "inferior" courts pursuant to Article III and to invest them with the requisite jurisdiction in bankruptcy cases. The important consideration for our purposes is that, provided the bankruptcy court of the future is established pursuant to Article III— it can receive an exercise, directly or by delegation, the "judicial power of the United States," so long as its Article III judges retain appellate review powers over the decisions of the non-Article III judges.

We are of the view that Congress can establish an Article III 'United States Court of Bankruptcy' and confer upon it all of the powers and jurisdiction presently vested in the United States district courts sitting in bankruptcy, as well as whatever expanded powers and jurisdiction are deemed appropriate, including those contemplated by H.R. 8200.

The 'United States Court of Bankruptcy' might comprise an 'Appellate Division' and a 'Trial Division,' as well as an 'Administrative Division.' The judges of the 'Trial Division,' by automatic delegation from the Article III judges of the 'Appellate Division,' would be vested with whatever jurisdiction and powers are required for the efficient conduct of a functionally independent bankruptcy trial court possessed of the clearly defined, enlarged jurisdiction needed to permit expeditious and effective, full-fledged, one-stop bankruptcy service. The 'Appellate Division' would retain the right of appellate review of all decisions of the

<sup>10</sup> See Appendix III *infra*.

<sup>11</sup> U.S. Const. art. I, § 8, cl. 4.

<sup>12</sup> See, e.g., Bondurant, *The Bankruptcy Court as a Constitutional Court*, 45 Am. Bankr. L. J. 235 (1971); Broude, *The Referee in Bankruptcy As An Article I Judge: A Reply To Mr. Bondurant*, 46 Am. Bankr. L. J. 39 (1972). See also Peterson, *The Federal Magistrates Act: A New Dimension In the Implementation of Justice*, 56 Iowa L. Rev. 62, 91 n. 126 (1970).

non-Article III bankruptcy trial court judges. In this manner the troublesome constitutional uncertainties which may otherwise intrude in the congressional selection of the most suitable bankruptcy court system are substantially reduced if not altogether eliminated, without wharping the future court system in disregard of its functional requirements. Moreover, the Congress can thereby retain the requisite flexibility with which to select the most appropriate method of appointment, tenure and emoluments of office of the bankruptcy trial judges, with a view toward attracting the most qualified judges available.

#### *Territorial jurisdiction of the bankruptcy trial court*

Greater flexibility in prescribing the territorial jurisdiction of the individual bankruptcy trial courts would significantly advance many long-standing objectives of sound bankruptcy administration.

The territorial jurisdiction of the bankruptcy trial court judge under the system we propose need not be confined within present district or circuit boundaries, particularly if those judges are appointed by the President of the United States. Should the Congress decide to provide for appointment by the Judicial Councils of the Circuits, their territorial jurisdiction could coextend symmetrically with that of the appointing authority.

The convenience of litigants as well as the courts would be better served by affording a more accessible bankruptcy forum, which would enable the definition of territorial boundaries without the present rigid regard for district and circuit boundaries.<sup>23</sup> A better balance in the distribution of caseloads could be achieved among the various bankruptcy judges. The impact of the sometimes substantial and seldom predictable gyrations and spottiness in bankruptcy case filings could be reduced. Greater flexibility in territorial jurisdiction would almost surely enable the achievement of another of the more important goals in judicial administration, which has also been the most stubbornly resistant to practical solution over the years—avoidance of the need for part-time judges.

Another persistent problem in bankruptcy administration is traceable to the complex and mix of its caseload. Numerically, more than 85 percent of bankruptcy cases are filed by consumer debtors. The remainder are the larger, and often huge, mercantile insolvency proceedings. The mix is not consistent, however. Large metropolitan areas receive a disproportionately high percentage of business bankruptcies, arrangements and reorganizations, whereas the complexion of the caseload in most areas is more consistent with the national average. By freeing the individual bankruptcy trial courts of present restrictions on their territorial jurisdiction, a much greater capability to utilize the special 'feel' and commitment of the various individual bankruptcy judges, whether in consumer or business bankruptcy or rehabilitation proceedings, would result.

Congress could work substantially similar results by other means, e.g., the statutory realignment of judicial district and circuit boundaries.<sup>24</sup> But we believe these improvements are likely to come about more promptly through legislative change specifically designed with the bankruptcy court system in mind, rather than as a result of proposals embracing the federal courts generally, whose problems are not the same.

#### *Appointment and Term of Office of Bankruptcy Trial Judges*

In the Wei Dynasty, A.D. 220, a Chinese philosopher, Sin-Yu, complained: "[t]he imperial rater of blue grades seldom grades men according to their merits, but always according to his likes and dislikes."

Since long before the Wei Dynasty societies have vexed over various schemes for securing the most meritorious men to judicial service. At this moment in

<sup>23</sup> Neither district nor circuit court boundaries were drawn with the bankruptcy courts in mind. These are many instances of inefficiency in the parceling of bankruptcy cases among the courts caused by district and circuit court boundaries. Because Cincinnati, which has two resident bankruptcy judges, is in Ohio, cases filed by the residents of its 'twin city,' Covington, Kentucky, must be brought before our colleague, Judge Lee, who is the only bankruptcy judge in Eastern Kentucky. Judge Lee regularly travels long distances to hold court in Covington. But for the constructions of district boundaries, either of the Cincinnati judges could hear Covington area cases without leaving the Cincinnati courthouse. A few miles down the Ohio River we have an example of the circuit barrier to efficient use of judicial resources. Two bankruptcy judges are headquartered at Louisville, Kentucky [Sixth Circuit]. None is headquartered in New Albany, Indiana [Seventh Circuit], directly across the Ohio. Although New Albany area bankruptcy cases could be conveniently heard in Louisville, the bankruptcy judge at Evansville must now travel several hours each court day to hear those cases.

<sup>24</sup> But see Burdick, *Federal Courts of Appeals: Radical Surgery or Conservative Care*, 60 Ky L. J. 807, 812-13 (1972)

our history when public confidence in our judicial system is ebbing, but the societal burdens challenging the judiciary are at an all time high, the commitment to quality and independence in the judicial selection process is more vital than ever.<sup>15</sup>

The objective must be to secure for the new bankruptcy court the requisite status to enable it to perform its important duties free of present constraints upon its independence, except those which tend to promote the high calibre of judicial conduct and competence which litigants, attorneys and the public rightfully expect.

The proposal contained in H.R. 8200 that future judges of the bankruptcy court be appointed by the President, by and with the advice and consent of the Senate, contemplates tenure during good behavior and compensation not subject to diminution. These safeguards were designed to insure judicial independence and are synonymous with Article III judicial power. In this connection attention is invited to the fact that there would appear to be no obstacle, except an absence of precedent, to preclude the Congress from creating an Article III bankruptcy trial court whose judges would be appointed by some authority other than the President.<sup>16</sup> The only requisites of Article III judicial status are that the court be created by the Congress and that its judges be entitled to serve during good behavior without diminution of their compensation. It is also deserving of mention that appointment by the President, by and with the advice and consent of the Senate, need not be 'during good behavior' and therefore need not confer Article III judicial status.<sup>17</sup>

It now appears somewhat problematic whether the proponents of a separate and independent Article III bankruptcy trial court can muster the necessary legislative support. For this reason, we suggest that Article III status be conferred only upon the handful of Appellate Division judges of the United States Court of Bankruptcy and that its Trial Division judges be appointed by the President, for fifteen-year terms, by and with the advice and consent of the Senate.

One objection to the proposal that bankruptcy judges be appointed by the President, by and with the advice and consent of the Senate, derives from the inordinate delays which often accompany that process.<sup>18</sup> The problem is particularly acute where the bankruptcy courts are concerned, inasmuch as they are charged with the jurisdiction of the more than 200,000 bankruptcy cases filed each year, many requiring immediate judicial action to avoid irreparable loss or injury to parties in the interest. The nature and volume of the bankruptcy court caseload is such that extended delays in the filling of positions vacated by death, resignation or retirement, which annually amount to as much as eight to ten per cent of the bankruptcy bench, would be intolerable. We would propose that any vacancy left unfilled for more than 120 days be filled through appointment by the Judicial Council of the Circuit and that incumbents be permitted to continue to serve until a successor has qualified.

#### APPELLATE JURISDICTION IN BANKRUPTCY PROCEEDINGS

Current commentary on the appellate process in bankruptcy proceedings is critical of the fact that appellate jurisdiction is reposed in the district courts, in part because of the fact that the district courts appoint the bankruptcy judges whose decisions they review. The more seriously deficient aspect of this archaic

<sup>15</sup> "[An] essential of a sound judicial system is, of course, a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution, thoroughly grounded in his knowledge of the law and of human nature, including its political manifestations, experienced at the bar in either trial or appellate work and preferably in both, of such a temperament that he can hear both sides of a case before making up his mind, devoted to the law and justice, industrious, and, above all, honest and believed to be honest." (Emphasis supplied.) Vanderblit *The Essentials Of A Sound Judicial System*, 43 NW. U. L. REV. 1, 3 (1953).

<sup>16</sup> It is expressly so provided in Article III, Section 2 of the Constitution. See note 43 *infra*.

<sup>17</sup> The term of office of the Judges of the Tax Court, who are appointed by the President, by and with the advice and consent of the Senate, is fifteen years. See 26 U.S.C. § 744 f.

<sup>18</sup> As one experienced authority in the field of bankruptcy administration has stated:

"If . . . a recommendation is made, it should include some method of appointing referees in bankruptcy other than by Presidential nomination, with confirmation by the Senate. Time is of the essence in bankruptcy administration, and pending cases cannot wait months or years while a ponderous system decides who is to be appointed to fill vacancies in referee positions." Jackson, "Bankruptcy Administration Then and Now," 45 AM. BANKR. L. J. 249, 278 (1971).

appellate procedure lies in its real or apparent threat to the judicial independence of the bankruptcy trial court judges.<sup>19</sup>

But the problem is not one dimensional. Appellate review of the decisions of bankruptcy specialists by judicial generalists originated and endures not because it is any less desirable or important that expedition and expertise be encouraged at the appellate level, but because the docket pressures brought on by bankruptcy appeals have never developed to the proportions necessary to prompt the pronounced changes in the appellate process that we have witnessed at the trial court level.<sup>20</sup> We must be alert, however, to the possibility that increasing case-loads and the contemplated broadened jurisdiction of the bankruptcy courts could increase those pressures significantly.

In repairing the structure of the bankruptcy courts appropriate attention should be given to the need for an independent bankruptcy trial court and to providing a specialized appellate tribunal for bankruptcy appeals. We are aware that there are some highly competent federal judges at all levels of the federal judiciary who are knowledgeable in bankruptcy law and practice. We note, however, that the available empirical data<sup>21</sup> strongly suggest that neither the opportunity nor the commitment required to develop or maintain expertise in bankruptcy law and practice is likely to exist on the part of most of the otherwise overburdened federal judges. We believe that considerable benefit would redound to the federal district courts, the courts of appeals and the bankruptcy court from removing the responsibility for appellate review of the decisions of the bankruptcy trial court from the federal district court to a newly created Court of Bankruptcy Appeals. We recommend the establishment of a court of bankruptcy appeals for a number of reasons.

#### *Uniformity*

The Court of Bankruptcy Appeals would enhance the prospect for achieving greater uniformity in judicial decision-making under the Bankruptcy Act. The realization of greater uniformity is particularly important in this field of the law which so closely relates to the flow of interstate commerce.<sup>22</sup> The goal of increased uniformity in this field has been extremely difficult of realization for several reasons. The Bankruptcy Act, although itself federal, respects local law in a number of important respects. As state law varies from one district to another, the uniform application of the provisions of the Bankruptcy Act is substantially impeded. But as commercial legislation itself becomes more uniform, such as the Consumer Credit Protection Act and the Uniform Commercial Code, this obstacle to uniformity can be expected to recede in importance.

The more important factors inhibiting promotion of more uniform bankruptcy laws are rooted in the low silhouette of bankruptcy law. The promotion of uniform bankruptcy law and practice is now the ultimate responsibility of the United States Supreme Court and the Congress. With the relatively low priority and narrow application of bankruptcy law these are inadequate to insure anything approaching the desired uniformity.

As the pace of change and the growth in consumer and commercial credit accelerate, the importance of a more readily accessible appellate monitor for our insolvency system becomes more critical. The establishment of a special court, with appellate jurisdiction limited to the review of decisions of the bankruptcy trial courts, is strongly indicated. Moreover, the court's technical expertise in bankruptcy law should serve as a more effective buffer against regional fragmentation in the case law of the various circuits. Finally, the Congress could insure uniformity in bankruptcy law per se by making the Court of Bankruptcy Appeals the court of last resort, except for local law and constitutional questions.<sup>23</sup>

<sup>19</sup> "[An] essential of a sound judicial system is, of course, a corps of judges, each of them utterly independent and beholden only to the law and to the Constitution. . . ." Vanderbilt, *The Essentials Of A Sound Judicial System*, 48 NW. U. L. REV. 1, 3 (1953).

<sup>20</sup> See note 24 *infra*.

<sup>21</sup> The paucity of appeals from bankruptcy court decisions leaves little doubt that very few district or circuit court judges are often exposed to such litigation. Bankruptcy appeals now account for less than 2% of the total cases appealed to the circuit courts, and less than one-half of 1% of the district court caseload. See note 26 *infra*. See also Stanley & Girth, *BANKRUPTCY: PROBLEM—PROCESS—REFORM* (Brookings Institution 1971), at 155-58.

<sup>22</sup> The constitutional mandate to the Congress is "to establish uniform laws on the subject of bankruptcies." U.S. Const. art I, § 8, cl. 4.

<sup>23</sup> See Appendix II, Chart D.

### *Expedition and economy*

Statistical data suggest that the comparatively light volume of reviews and appeals in bankruptcy proceedings could be conveniently and expeditiously decided by not more than three (three-judge) appellate panels riding circuit.

In fiscal year 1976 there were only 302 appeals taken from the decisions of the district courts to the circuit courts of appeals; in 1977 there were 303.<sup>24</sup> In 1976 the courts of appeals disposed of 210 bankruptcy appeals, more than half after hearing or submission; in 1977, 320 bankruptcy appeals were disposed of by the courts of appeals.<sup>25</sup> Bankruptcy appeals constituted slightly over 25 percent of the total number of appeals commenced in the courts of appeals in 1971;<sup>26</sup> whereas in both 1976 and 1977 the figure was less than 2 percent.<sup>27</sup> There were 586 petitions to review decisions of referees in bankruptcy filed in the United States district courts in fiscal year 1971, and another 791 filed in 1972.<sup>28</sup> In 1977 there were a total of 1257 appeals to the district courts from the decisions of the bankruptcy judges.<sup>29</sup>

In sharp contrast to the relatively stable volume of bankruptcy appeals commenced during the years from 1971 through 1977, the total volume of all types of appeals cases commenced in the courts of appeals jumped from 12,788 in 1971<sup>30</sup> to 19,118 in 1977,<sup>31</sup> almost a 50 percent increase. Even more significant is the fact that in 1972 there were 182,968 bankruptcy cases commenced in the bankruptcy courts, compared to 214,339 cases in 1977,<sup>32</sup> yet the increase in appeals reaching the courts of appeals was a negligible 4 cases, notwithstanding the fact that the appeals from the bankruptcy court to the district court during the same period jumped from 586 to 1257, more than a 100 percent increase. Even in fiscal year 1975, when the all-time high of 254,484 new bankruptcy cases occurred, there were only 246 appeals taken to the courts of appeals.<sup>33</sup>

Once again it is important to point out that, due to the nature of the res in litigation in the bankruptcy courts, extended appeals are anathema, since time is money and, for the most part, the litigation before the bankruptcy courts involves money disputes.

Two principal themes emerge from an analysis of the appellate caseload emanating from the bankruptcy courts. First, the volume of bankruptcy appeals presently reaching the courts of appeals is so relatively insignificant that it would be an egregious error, as some have suggested, to design the future bankruptcy court system with a primary view to minimizing the burdens of the courts of appeals. The bankruptcy cases appealed to the circuit courts annually throughout the nation are less than sufficient to occupy one three-judge appellate panel on a full-time basis.<sup>34</sup> Secondly, the appellate needs of the bankruptcy courts and the constitutional demands of uniformity in bankruptcy law are best met by as convenient and expeditious an appeal process as is practicable before a specialized court of bankruptcy appeals.

Although statistical averaging is an especially crude tool with which to evaluate such varied judicial proceedings, it may be somewhat helpful in projecting the judicial resources required to establish a specialized bankruptcy appeals court. In fiscal year 1977 the average pending workload of each three-judge panel of the courts of appeals amounted to 478 cases.<sup>35</sup> All other considerations being equal, which they are not,<sup>36</sup> such calculations hint that no more than two appellate judges would be required to process the entire 270 bankruptcy appeals pending

<sup>24</sup> See 1976 Annual Report of the Director of the Administrative Office of U.S. Courts [hereinafter Annual Report], Table B1, at I-2; 1977 Annual Report, Table B1, at A-2.

It is interesting to note that in fiscal 1971 there were 259 bankruptcy appeals taken from the decisions of the district courts to the courts of appeals; in 1972 there were 299 such appeals, 1971 Annual Report, Table B1, at 241; 1972 Annual Report, Table B1, at A-1.

<sup>25</sup> 1976 Annual Report, Table B1, at I-2; 1977 Annual Report, Table B1, at A-2.

<sup>26</sup> 1971 Annual Report, Table B3, at 247.

<sup>27</sup> See note 25 *supra*.

<sup>28</sup> Courtesy, Bankruptcy Division, Adm. Off. of U.S. Courts.

<sup>29</sup> 1977 Annual Report, Table C2, at A-14.

<sup>30</sup> 1971 Annual Report, Table B1, at A-1.

<sup>31</sup> 1977 Annual Report, Table B1, at A-2.

<sup>32</sup> 1972 Annual Report, Table F1, at A-72; 1977 Annual Report, Table F1, at A-110.

<sup>33</sup> Annual Report, Tables F1 & B1, at A-78 & A-2, respectively.

<sup>34</sup> See 1977 Annual Report, at 2.

<sup>35</sup> *Id.*

<sup>36</sup> Major differences result from the fact that the Court of Bankruptcy Appeals should ride circuit to keep bankruptcy appeals as convenient and accessible as reasonably practicable. Another important factor, of course, is that the more numerous appeals now proceeding to the district courts would go instead to the new Court of Bankruptcy Appeals.

before the courts of appeals at the end of fiscal 1977.<sup>37</sup> In addition, of course, there were the 1257 appeals from the decisions of bankruptcy judges lodged in 1977 with the district courts pursuant to Bankruptcy Rule 801.<sup>38</sup> If it were to be assumed, which seems improbable, that all bankruptcy appeals to the district court would be as time consuming for the new appellate tribunal as are the appeals now lodged with the courts of appeals, this would point to the need for a total complement of from between 7 to 9 appellate judges on the basis of pending appellate workloads in fiscal 1977.<sup>39</sup>

There are many factors to be taken into account in projecting the costs of any new appellate system, but there are certain significant constants in the equation. Among the constants is the fact that virtually the same number of judicial man-hours would be freed by the removal of appellate responsibility from the district and circuit courts, as would be required to staff the new Court of Bankruptcy Appeals.

Considerable additional travel would be required on the part of the judges of the Court of Bankruptcy Appeals.<sup>40</sup> But it is entirely possible that the greater familiarity which the bankruptcy appeals court would have with the technical aspects of bankruptcy litigation might conserve considerable judicial time in the disposition of such appeals.

Consideration should also be given to the fact that the present procedures for prosecuting an appeal from the district courts to the courts of appeals do not differentiate between bankruptcy cases and other appellate litigation within the ambit of the jurisdiction of the courts of appeals. For example, in "small" consumer bankruptcy or rehabilitation proceedings there is no appropriately simple, inexpensive and expeditious means presently provided for appealing the decisions of the district courts, such as there is for the review of the decisions of bankruptcy judges by district judges. It would seem entirely appropriate and desirable that the Court of Bankruptcy Appeals establish appropriately convenient appellate procedures for this category of cases.<sup>41</sup>

#### *Organizational and Structural Flexibility*

We recommend elsewhere the creation of the office of Clerk of the United States Court of Bankruptcy Appeals,<sup>42</sup> which would be charged with prescribing and auditing administrative records and procedures in the bankruptcy trial courts, the supervision of the clerical staff of the bankruptcy trial courts, and responsibility for the administrative processing of the caseload of the Court of Bankruptcy Appeals. We also suggest the possible creation of one or more departments within the Office of the Clerk of the Court of Bankruptcy Appeals; e.g., for the supervision of certain trial court administrative personnel, possibly including the official trustee.

The Bankruptcy Division of the Administrative Office of the United States Courts, adequately funded and staffed, could become the primary administrative arm of the new court, while the more general support facilities of the Administrative Office of the United States Courts could continue to serve the new bankruptcy court system as required.

The present bankruptcy courts are effectively denied representation in the policymaking of the Judicial Branch of Government by virtue of the prohibition against membership on the part of non-Article III judges in the Judicial Conference of the United States and the adamant resistance which has long prevailed against permitting bankruptcy judges to become members of the Committee on Bankruptcy Administration, although membership on the various committees of the Judicial Conference can and does include practicing attorneys,

<sup>37</sup> 1977 Annual Report, Table B1, at A-2.

<sup>38</sup> See 1977 Annual Report, Table C2, at A-14. Of course, the annual appeals burden on the Court of Bankruptcy Appeals would be that presently imposed on the district courts.

<sup>39</sup> This number could be substantially reduced were consumer bankruptcy appeals made the responsibility of one-judge appellate panels.

<sup>40</sup> It may be advisable to consider the adoption of something akin to Rule 26 of the Rules of Practice for the Tax Court of the United States, which contemplates the selection of places for holding tax court sessions "to afford a taxpayer reasonable opportunity to try his case with as little inconvenience and expense as is practicable." Rule 26 prescribes places where tax court sessions will be held at the request of taxpayers, if court business warrants and facilities are available.

<sup>41</sup> There would seem to be sound justification for requiring one-judge appellate panels to hear consumer case appeals at the site of the bankruptcy trial court which entered the decision.

<sup>42</sup> See Appendix III *infra*.

professors and magistrates. This poses a very serious institutional problem for any future bankruptcy court system and it does not appear likely that it will yield to anything short of legislative solution.

The Chief Judge and an Associate Judge of the Court of Bankruptcy Appeals should be ex officio members of the Judicial Conference of the United States. The Chief Judge should be ex officio chairman of the Committee on Bankruptcy Administration of the Judicial Conference and a member of the Board of Directors of the Federal Judicial Center. Trial judges of the United States Court of Bankruptcy should comprise a majority of the membership of the Committee on Bankruptcy Administration.

#### APPOINTMENT, TENURE AND CONSTITUTIONAL STATUS OF THE JUDGES OF THE U.S. COURT OF BANKRUPTCY

##### *Appointment*

Appointment of the judges of the Court of Bankruptcy Appeals would be made by the President, by and with the advice and consent of the Senate. The absence of any precedent for the delegation of the power of appointment of judges of Article III courts, although seemingly permissible,<sup>43</sup> strongly militates in favor of presidential appointment.

##### *Tenure*

In view of the manifold advantages to the establishment of an Article III court, especially a very small one, we would suggest that the judges of the Court of Bankruptcy Appeals hold office during good behavior and that their compensation not be subject to diminution. Of course, the greatest single advantage to this approach is that the creation of such a tribunal would permit the establishment of a functionally independent bankruptcy trial court with sufficiently expanded jurisdiction, without the need to confer Article III status on the trial judges themselves.

##### *Constitutional status*

Earlier we broached some of the constitutional considerations involved in remodeling the bankruptcy court structure. We postulate that the requisite judicial power can be conferred by Congress upon a bankruptcy court whose appellate judges are appointed during good behavior and whose compensation is not subject to diminution while in office and that the Congress can direct the automatic delegation of the trial jurisdiction and powers of the Article III judges to non-Article III judges as required for the effective conduct of the trial functions of the bankruptcy court, subject to the right of review.

#### SUMMARY OF RECOMMENDATION

The Congress can create the United States Court of Bankruptcy as an Article III court. Congress can prescribe by statute that various divisions be established within the Court of Bankruptcy, including an Administrative Division, an Appellate Division and a Trial Court Division.<sup>44</sup>

All administrative responsibilities could be reposed in the Clerk of the Court of Bankruptcy, who would head the Administrative Division of the court.

The Appellate Division of the Court of Bankruptcy would be known as the Court of Bankruptcy Appeals; presided over by a Chief Judge and associate judges with Article III judicial status.

The judges of the Trial Division of the Court of Bankruptcy would be appointed by the President of the United States by and with the advice and consent of the Senate, for 15-year terms. The statute should provide for the automatic delegation from the Article III judges of the Court of Bankruptcy Appeals to the non-Article III judges of the Trial Division of the Court of Bankruptcy whatever Article I and/or Article III judicial powers are requisite to the accomplishment of the congressionally mandated mission of the Bankruptcy Trial Court. Appeals from the decisions of the Bankruptcy Trial Court would proceed exclusively to the Court of Bankruptcy Appeals and from there to the courts of appeals as a matter of right where constitutional or local law issues are involved.

<sup>43</sup> ". . . the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

<sup>44</sup> See Appendix III *infra*.

*Need for more answers*

Comparative analysis of the various court and administrative reform proposals can proceed only so far before it becomes apparent that the empirical evidence with which to verify that analysis is utterly lacking.

Who can predict with confidence the cost of an Article III bankruptcy court, or the impact of the new court system on the courts of appeals without first knowing the size of the caseload and the number of judges required? What would the U.S. Trustee system cost? Can panels of trustees under centralized supervision function as well as the U.S. trustee system? How many U.S. trustee offices would be required? No amount of effort can enable reliable forecasts about these vital matters. Yet the important decisions involved in preferring one particular court or administrative system over another presume answers to these critical questions, despite the fact that rational debate over competing reform proposals is ended before it begins because conjecture about these important issues satisfies no one, not even its proponents.

It can hardly be doubted that transition experience under the expanded jurisdiction of the new bankruptcy court is the most reliable means of determining the number (and locations) of bankruptcy judgeships required under any new court system. Transition offers practically unlimited opportunity for acquiring other important experiences needed to enable sound decisionmaking, not only as to the number and locations of personnel required under any new system, but, more importantly, selection of the most suitable system for the future. Final selection either of the court or of the administrative system of the future should not be made before reliable answers are available in respect to each of the competing reform proposals, for these fundamental questions:

*Court*

- (1) Constitutionality?
- (2) Cost?
- (3) Efficiency?
- (4) Effectiveness?

*Trustee system*

- (1) Cost?
- (2) Efficiency?
- (3) Effectiveness?

Experience in the actual operation of the various competing systems can provide needed answers to these basic questions. In the absence of reliable evidence as to their comparative costs, efficiency and effectiveness, should the Congress select any particular court or administrative reform proposal over any other?

*Transition Framework*

A meaningful survey of bankruptcy court experience under the expanded jurisdiction contemplated by H.R. 8200 requires a transition period extending for a minimum of five to six years. It would seem reasonable to anticipate that a somewhat longer period, perhaps seven years, would be required to measure and analyze the comparative advantages and disadvantages of the several competing court and administrative reform proposals.

The advantages attendant upon the adoption of a broader transition focus are readily apparent. The need to separate the administrative from the judicial functions in bankruptcy is almost universally acknowledged, but serious disagreement persists as to the appropriate means for doing so. The proposed placement of the Office of U.S. trustee in the Department of Justice has caused controversy because of apparent conflicts of interest. On the other hand, the placement of the Office of U.S. trustee in the Judicial Branch is strongly opposed in some quarters because of the belief that it would receive insufficient public support to enable it to perform its functions effectively. These hypotheses could be put to the test in transition. U.S. trustee offices could be established in selected pilot districts and their relative cost effectiveness could be compared with pilot districts in which expanded administrative responsibilities were assigned to panels of private trustees supervised by the Administrative Office of the United States Courts.

We respectfully recommend that the Congress consider utilizing transition to full advantage, by conducting pilot tests of the various competing proposals with a view toward probing their relative advantages.

APPENDIX IChart IFUNCTIONAL INDEPENDENCE

	(1)	(2)	(3)	(4)	(5)	(6)
	ART. III (8200)	ART. III DISTRICT CT	ART. III BANKRUPTCY CT w/APPELLATE- TRIAL DIVISIONS	ART. I (H.R. 31)	S. 2266	RAISBACK DANIELSON
PERVASIVE JURISDICTION	A	A	A	A-	C	D
SEPARATION OF APPOINTMENT AND APPELLATE FUNCTIONS	A	A	A	A	B	C
SEPARATION OF TRIAL AND APPELLATE FUNCTIONS	A	A	A	A	B	C
COURT CONTROL OF PERSONNEL, FACILITIES AND EQUIPMENT	A	A	A	A	B	C
COURT POLICYMAKING ACCESS	A	A	A	A+	C	D
FLEXIBILITY IN CASELOAD MANAGEMENT & TERRITORIAL JURISDICTION	B	C	A	A-	B-	C
<u>CUMULATIVE RATING</u>	<u>A</u>	<u>A-</u>	<u>A</u>	<u>A</u>	<u>B-</u>	<u>C-</u>

APPENDIX I

Chart II

ANALYSIS OF APPELLATE PROCESSES

(1)	(2)	(3)	(4)	(5)	(6)
ART. III (8200)	ART. III DISTRICT CT	ART. III BANKRUPTCY CT W/APPELLATE TRIAL DIVISIONS	ART. I (H.R. 31)	S. 2266	RAILSBACK DANIELSON
COURTS OF APPEALS' BURDEN	C	C	A+	B+	B+
DISTRICT COURTS' BURDEN	A+	A-	A+	B-	C
APPELLATE COURT ACCESSIBILITY	C	C	A	A+	A+
SEPARATION OF APPOINTMENT AND APPELLATE FUNCTIONS	A	A	A	A	B
SEPARATION OF TRIAL AND APPELLATE FUNCTIONS	A	A	A	A	C
FLEXIBILITY APPELLATE PROCESS	B-	C	A+	A-	C
BANKRUPTCY LAW UNIFORMITY	B	B	A+	A-	B
<u>CUMULATIVE RATING</u>	<u>B</u>	<u>B</u>	<u>A+</u>	<u>A-</u>	<u>B</u>
					<u>B-</u>

APPENDIX I

Chart III

COMPATIBILITY WITH EXISTING  
FEDERAL COURT SYSTEM

(1)	(2)	(3)	(4)	(5)	(6)
ART. III (8200)	ART. III DIV. OF DISTRICT CT	ART. III BANKRUPTCY CT W/APPELLATE- TRIAL DIVISIONS	ART. I (H.R. 31)	S. 2266	RAILSBACK DANIELSON

INTERCHANGEABILITY OF JUDGES

C

C

C

B

A-

A+

BLEND WITH EXISTING  
FEDERAL COURT SERVICE  
AND SUPPORT SYSTEM

B

B

C

B+

A

A+

FEDERAL JUDICIAL  
CENTER MEMBERSHIP

D

B

D

A

A-

A-

MEMBERSHIP JUDICIAL CONFERENCE

D

D

D

A

A-

A-

CUMULATIVE RATING

CII

CII

CII

A-

A-

A-

APPENDIX I

Chart IV

POTENTIAL FOR ATTRACTING  
QUALIFIED JUDGES

	(1)	(2)	(3)	(4)	(5)	(6)
	ART. III (8200)	ART. III DISTRICT CT	ART. III BANKRUPTCY CT w/APPELLATE- TRIAL DIVISIONS	ART. I (H.R. 31)	S. 2266	RAILSBACK DANIELSON
FUNCTIONAL INDEPENDENCE	A	A-	A	A	B-	C-
TERM OF OFFICE	A+	A+	B	B	B-	B
RETIREMENT SYSTEM	A+	A+	B+	A+	C	D
SALARY	A+	A+	A+	A+	B	B
PANOPLY OF JUDICIAL POWERS	A+	A-	A-	B	C	D
APPOINTMENT POWER	A+	A+	A+	A+	C	C
COMPARABILITY WITH PRESENT DISTRICT COURT JUDGESHIP	-	A-	B+	B	C	D
<u>CUMULATIVE RATING</u>	<u>A+</u>	<u>A</u>	<u>A-</u>	<u>A-</u>	<u>C+</u>	<u>C-</u>

APPENDIX IChart V

CUMULATIVE ANALYSIS OF  
COMPETING COURT REFORM PROPOSALS

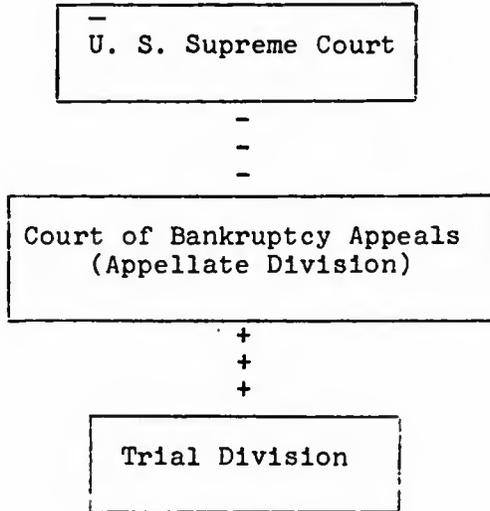
APPENDIX I CHART #	(1)	(2)	(3)	(4)	(5)	(6)
	ART. III (8200)	ART. III DISTRICT CT	ART. III BANKRUPTCY CT W/APPELLATE- TRIAL DIVISIONS	ART. I (H.R. 31)	S. 2266	RAILSBACK DANIELSON
I. FUNCTIONAL INDEPENDENCE	A	A-	A	A	B-	C-
II. ATTRIBUTES OF APPELLATE PROCEDURES	B	B	A+	A-	B	B-
III. COMPATIBILITY WITH FEDERAL COURT SYSTEM	A	A-	A-	CC-	C	C-
IV. POTENTIAL FOR ATTRACTING QUALIFIED JUDGES	A+	A	A-	A-	C+	C-
CONSTITUTIONALITY*	A+	A+	A-	C	A-	B
COST	?	?	?	?	?	?
<u>CUMULATIVE RATING</u>	<u>A</u>	<u>A-</u>	<u>A</u>	<u>B</u>	<u>B-</u>	<u>C+</u>

\* It is assumed for these purposes that pervasive jurisdiction can be conferred upon an Article III United States Court of Bankruptcy and by it delegated to its Trial Division, staffed by non-Article III judges, subject always to an appeal of right to the Appellate Division, staffed by Article III judges.

APPENDIX II

Chart A

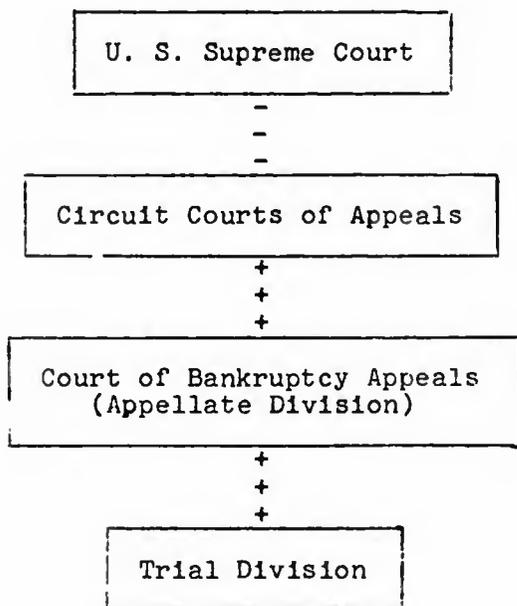
Appellate Process - Alternative I\*



Legend:

- Discretionary Review: -  
-  
-
- Appeal of Right: +  
+  
+

\*Appeals involving all but constitutional questions.

APPENDIX IIChart BAppellate Process - Alternative II\*Legend:

Discretionary Review:

-  
-  
-  
-

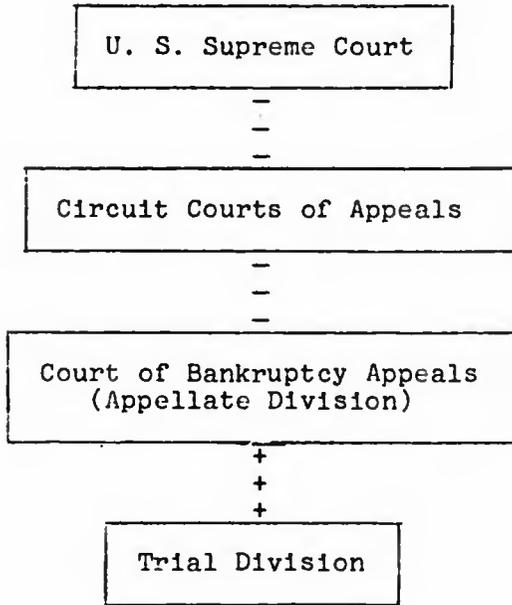
Appeal of Right:

+  
+  
+\*Appeals involving all but constitutional questions.

APPENDIX II

Chart E

Appellate Process - Alternative III C\*



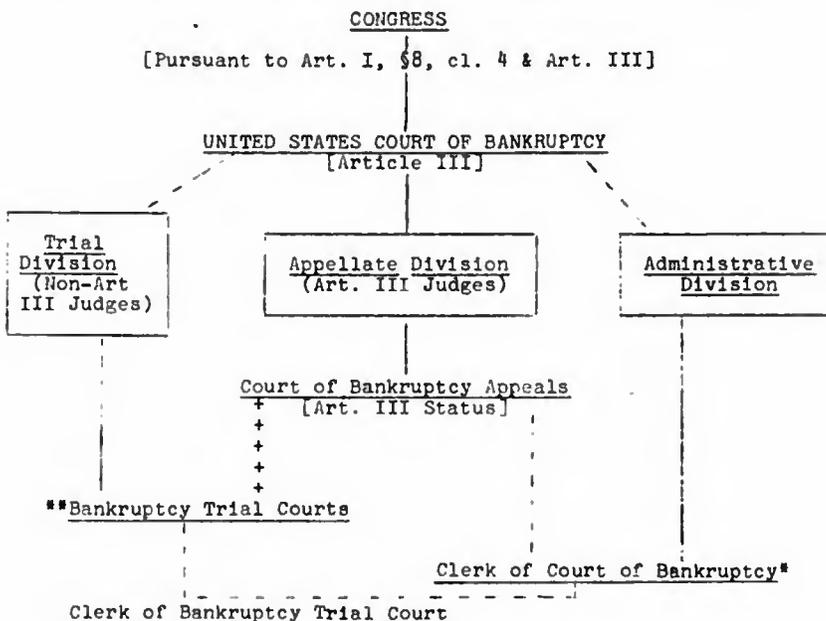
Legend:

- Discretionary Review: -  
-  
-
- Appeal of Right: +  
+  
+

\*Appeals involving bankruptcy law questions.

APPENDIX III

STRUCTURE FOR AN ADJUNCT BANKRUPTCY TRIAL COURT  
SEPARATE AND INDEPENDENT OF THE DISTRICT AND CIRCUIT COURTS



\* [Ex officio Clerk of Court of Bankruptcy Appeals & Chief Clerk, Bankruptcy Trial Court]

\*\* Exercise Art. III power by delegation.

Legend:  
 +  
 Appeal of Right: +  
 +  
 +

Note: Appellate route alternatives are depicted in Appendix II.

**TESTIMONY OF HON. CONRAD CYR, IMMEDIATE PAST PRESIDENT,  
NATIONAL CONFERENCE OF BANKRUPTCY JUDGES, ACCOMPANIED BY ARTHUR MOLLER, ESQ., HOUSTON, TEX.**

Judge CYR. Thank you, Mr. Chairman.

Mr. Chairman, my name is Conrad Cyr. I am a bankruptcy judge in Maine. I am delighted to appear here along with my colleagues at the request of the subcommittee on behalf of the National Conference of Bankruptcy Judges.

We deeply appreciate this further opportunity to appear before the subcommittee to offer our views in connection with the establishment of new court and administrative systems for the bankruptcy courts of the future.

With me today are Bankruptcy Judge David A. Kline, the president of our conference; Bankruptcy Judge Joe Lee of Lexington, Ky., a former president; and Arthur Moller, Esq., of Houston, Tex., a former bankruptcy judge and a prominent member of the bankruptcy bar.

Judge Lee and I have submitted formal written statements for the record. I shall touch only briefly upon some of the structural alternatives and proposals in respect to the establishment of new bankruptcy courts. Judge Lee will discuss the creation of a new trustee system. We will then attempt to respond to any questions you may have.

Mr. EDWARDS. We also hope that since you were in the chamber when the Judicial Conference witnesses appeared, that you might comment on some of the statements that were made during that testimony.

Judge CYR. Thank you, Mr. Chairman.

Before I get into my own remarks, with the chairman's permission, I would like to comment on the very emphatic statements that were made by a preceding witness, who stated without qualification and most firmly that there was absolutely no problem whatever with attracting qualified bankruptcy judges to the court today.

I would like to remind this committee—although I don't really believe that this committee needs reminding—that in 1974, or thereabout, roughly 18 of the most outstanding bankruptcy judges in the country left the bankruptcy bench because for some 4 years prior to that time their salaries had been frozen at the insistence of the Committee on Bankruptcy Administration on the Judicial Conference.

It was, in fact, this committee which was most helpful in rectifying that problem. The salary of bankruptcy judges today is entirely adequate, in my judgment, and we're very grateful for that.

I would suggest that if there is no lack of qualified applicants for this position today, it is due more to the efforts of this committee than it is to the Committee on Bankruptcy Administration, whose primary responsibility it was and has been all these years.

Now Mr. Chairman, I would invite the committee's attention to the charts which appear as appendixes at the end of my statement, merely to call your attention to the fact that I have attempted to lay side by side six of the proposals which have either appeared prior to this time or are currently involved in the debate as to the bankruptcy court structure.

Unfortunately, I was not familiar with Judge Hufstедler's proposal this morning, so I haven't rated it along these grounds. But it is, I might note, quite similar to the proposal which we are offering here today as an alternative to a straight article III court.

I'd like to make it clear from the beginning that H.R. 8200, as presently drafted, is clearly the best choice. We believe that one of the large problems which has developed here is an attempt to warp the function of the bankruptcy court to suit available structural accommodations for it.

We believe, rather, that what should concern us is what this committee did earlier when it proposed H.R. 8200, which was to identify the function to be performed. Then it designed a structure and a system to meet that function.

We believe that's still the way to approach the problem.

We're also aware that there's a problem of achievability and that it may be somewhat problematic at this time whether or not H.R. 8200, as presently drafted, can receive the required legislative support. In the interest of trying to be constructive, we have put forth an alternative proposal which we hope lends itself to the more important goals essential to any meaningful reform.

That structure is essentially set out in appendix 3 of the statement, and it involves, basically, the conferral of article III power upon a U.S. court of bankruptcy, which would then be comprised of two divisions: a trial division, staffed by non-article III judges; and then an appellate division, staffed by article III judges.

It is also submitted that it might comprise an administrative division. We believe that if the present system is at all comfortable constitutionally, and we confess to not having the final word on this, then the alternative system we propose would surely be so. It would involve the delegation by the Congress of the article III power to the article III judges who sit on the court of appeals of the bankruptcy court, and from them to the article I trial court judges, who would always be subject to review as a matter of right by the article III judges.

In this fashion, we feel that we could accomplish one apparently desirable goal: that is, minimizing the number of article III judges required.

We are of the view that that has been a major obstacle in connection with H.R. 8200, the aversion to too many more article III judgeships.

Mr. Chairman, I don't intend to go beyond that in connection with my statement in view of the time and in view of the fact that I'm sure that any areas which you may be interested in could be probed more effectively through your questions.

I would turn the matter over to Judge Lee at this time for his remarks concerning the administrative system.

Mr. EDWARDS. Judge Lee?

[The prepared statement of Judge Joe Lee follows:]

STATEMENT OF HON. JOE LEE, BANKRUPTCY JUDGE, LEXINGTON, KY.

I wish to propose alternatives to the trustee system provided for in H.R. 8200 and to the systems heretofore proposed by others during the course of the long proceedings to revise the bankruptcy laws of the United States.

While acknowledging there are a number of deficiencies in the bankruptcy system which can be remedied by the creation of some type of official trustee,

the Attorney General opposes the placement of the U.S. Trustee system in the Department of Justice as proposed in H.R. 8200. Moreover, the Attorney General has not endorsed wholeheartedly the U.S. Trustee system provided for in the Danielson-Railsback amendment of the trustee system proposed in S. 2266, although he finds these alternatives preferable to the placement of the U.S. Trustee in the Department of Justice. The Attorney General has suggested that the official trustee might be located within the Judiciary as an independent establishment much like the Federal Judicial Center.

The Ad Hoc Committee on Bankruptcy Legislation of the Judicial Conference of the United States has advocated creation of the office of "bankruptcy administrator" in each judicial district as a means of separating the judicial and administrative functions in bankruptcy administration. Under their proposal a "bankruptcy administrator" appointed in each district by the circuit council would assume responsibility for the creation of panels of private trustees and the supervision of the work of trustees. The bankruptcy administrator would select trustees from the established panels to serve as trustee in liquidation cases and would also appoint the standing trustee in Chapter XIII cases. The bankruptcy administrator would conduct the first meeting of creditors, allow or disallow claims, set aside exemptions, determine the priority of claims, grant discharges, and perform such other duties as may be prescribed under regulations adopted by the Judicial Conference. Disputes arising in the administration of estates would be referred to the referee in bankruptcy or the district judge for judicial determination.

The proposals of the Ad Hoc Committee illustrate the continuing confusion involved in delineating the administrative and judicial functions in bankruptcy administration.

It is our view, that an administrator should not be involved in the allowance or disallowance of claims, the setting aside of exemptions, or the granting of discharges.

The bankruptcy rules provide that claims shall be deemed allowed as filed for purposes of distribution unless objection is made by a party in interest. Rule 306(b). Consequently there is no need for an administrator to allow claims. The trustee has an affirmative duty to object to claims, unless no purpose would be served thereby. Rule 306(a). Some types of objections to claims may be presented by motion. Rule 914. For example an objection to a claim as not having been timely filed is classifiable as a contested matter and can be raised by motion. Other types of objections are considered adversary proceedings and must be presented by a complaint. The rules specify that a proceeding to determine the validity, priority, or extent of a lien must be commenced by a complaint. Rule 701. Also, an objection to a claim if joined with a demand to recover money or property must be in the form of a complaint. Rule 306(c). Obviously, the drafters of the Rules of Bankruptcy Procedure concluded quite correctly that an objection to a claim whether classifiable as a contested matter or as an adversary proceeding is a judicial matter appropriate for determination by the court. Some of the most involved litigation in bankruptcy cases may be commenced as an objection to a claim.

Also, traditionally it has been the duty of the trustee to set aside exemptions claimed by the bankrupt. Rule 403(b). If no objections are filed within the time permitted by the rules, the trustee's report of exempt property is deemed approved by the court. If an objection to the report is filed either by the bankrupt or a creditor such an objection is considered a contested matter appropriate for resolution by the court. Consequently, there is no need for an administrator to set aside exemptions.

The Bankruptcy Rules provide that on expiration of the time fixed for filing a complaint objecting to discharge the court shall forthwith grant the discharge unless a complaint objecting to discharge has been filed. Consequently, the granting of a discharge is a ministerial function which appropriately may be performed by the clerk of the bankruptcy court. There is no need for an administrator to perform such function. And, of course, if a complaint objecting to the discharge of a debtor or to the dischargeability of a debt is filed such an adversary proceeding must be determined by the court.

I have dealt with these matters in some detail merely to illustrate that when we bankruptcy judges speak of separating administrative and judicial functions we are primarily concerned with being relieved of the duty of appointing and supervising trustees. That is our major administrative function; that is the aspect of the present system that creates the appearance of unfairness and reflects on the character of the court.

With respect to the matter of who should preside a the first meeting of creditors, our view is that it would be preferable for the interim trustee rather than an administrator to preside at the first meeting of creditors. In those districts where the court sits at several locations the trustee is likely to be resident at the place of holding court and would not have to travel at government expense. Also, if the administrator is bogged down holding first meetings of creditors he will have substantially less time to devote to supervising trustees. There would appear to be no need for both the administrator and interim trustee to be present at the first meetings.

We are not particularly pleased with the method of appointment, job description or title of the "bankruptcy administrator" as proposed by the Ad Hoc Committee. The method of appointment and title suggest the "bankruptcy administrator" is subject to the control of the court, a connotation we wish to avoid. But it is not our purpose to be overly critical or negative; we are here to offer constructive suggestions.

The following proposal is a combination of the proposals of the Ad Hoc Committee and the Attorney General. The proposal probably would be acceptable to the National Bankruptcy Conference in that it dislodges the apparatus for appointing and supervising trustees from the Administrative Office of United States Courts. The proposal is acceptable to the National Conference of Bankruptcy Judges because it (1) relieves the bankruptcy judge of the responsibility for appointing and supervising trustees, and (2) accomplishes a separation of administrative and judicial functions without conferring upon a Supervising Trustee duties which are inherently judicial.

There could be established within the Judicial Branch of Government an independent agency known as the United States Trustee. The agency should have a board of directors, but the directors probably should not be chosen from among members of the judiciary as are the directors of the Federal Judicial Center. Service by members of the judiciary on the board of directors would be inappropriate because the United States Trustee will be supervising litigation in the Federal Courts. The members of the Board of Directors should be appointed by the President with the initial appointees being appointed for staggered terms. The directors in turn should be authorized to employ a director and assistant director to manage the agency and carry out the policies of the board.

The board would establish policies and develop programs for the United States Trustee in conformity with the objectives of the Bankruptcy Act, and should be required to submit periodic reports to the President, Congress and the Judicial Conference.

The United States Trustee could be authorized to appoint a Supervising Trustee for each judicial district. The Supervising Trustee would establish, maintain, and supervise a panel of private trustees to serve in bankruptcy cases. He would appoint the interim trustee from the panel of trustees at the outset of a case or would serve as interim trustee if none of the persons on the panel of private trustees were willing to serve as trustee in a case.

Except for the differences in the appointive process and the composition and location of the supervisory apparatus this proposed system would function much like the United States Trustee system proposed in H.R. 8200.

An alternative scenario for a trustee system might be as follows. There could be created within the Judicial Branch of Government a body corporate known as the Official Trustee in Bankruptcy. The Official Trustee should have perpetual succession and could, in its corporate name, acquire, hold or transfer any property and sue and be sued. This would obviate the problem of bonding trustees, or appointing successor trustees. The Official Trustee would have a board of directors appointed by the President. None of the directors should be members of the judiciary. The directors should be authorized to employ a director and assistant director to manage the affairs of the Official Trustee.

Upon the filing of a petition in bankruptcy the estate of the bankrupt would be administered by the Official Trustee.

To assist in the administration of estates the Official Trustee would establish in each district a panel of private attorneys to perform the duties of the trustee and to represent the Official Trustee in bankruptcy cases.

The Official Trustee would maintain an office in each district with personnel responsible for appointing attorneys for the trustee on a rotating basis from the panel of attorneys. The personnel in this office would be clerical type rather than professional type employees and would be responsible for auditing the accounts filed by attorneys for the trustee and responsible for closing cases.

The Official Trustee would maintain at its headquarters a legal section manned by attorneys who would be available to advise and consult with attorneys on the panel of attorneys representing the Official Trustee in the field. This arrangement would eliminate the necessity for a lawyer-type government employee in each district to appoint and supervise the trustee and therefore could be substantially less expensive than the trustee system proposed in H.R. 8200.

The Official Trustee would be supported in large part by assessments against estates under administration. Attorneys for the trustee would be paid by the Official Trustee on the basis of services rendered in much the same manner as private attorneys serving as public defenders are now paid.

Under either of these systems the creditors would retain the right to elect a trustee.

Trustee systems similar to those herein proposed were suggested by us to the Commission on Bankruptcy Laws of the United States as long ago as 1972. We believe the time may be ripe for reconsideration of these proposals.

### **TESTIMONY OF HON. JOE LEE, BANKRUPTCY JUDGE, LEXINGTON, KY.**

Judge LEE. Would it be appropriate for me to comment on some of the other testimony that has been given yesterday and today?

Mr. EDWARDS. Yes, please.

Judge LEE. Yesterday, Judge Rifkind suggested that the bankruptcy judges were supporting the article III court proposed in H.R. 8200 because we expected to be appointed article III judges. That's not the reason we're supporting an article III court.

As you know, originally, we proposed an adjunct system of appointments by the judicial council of the circuit. Then we had to face up to the fact that there was a constitutional problem involved in the administration of the bankruptcy laws under such systems. In fact, we see a constitutional problem in the way the bankruptcy court is structured today.

In recognition of that problem, intellectual honesty requires us to support an article III bankruptcy system. That's why we support it, and not out of expectation of being appointed bankruptcy judges.

Judge Hufstедler said that she could not think of any reason why bankruptcy matters should be given first call on article III judicial time and she couldn't see any reason to creating an article III court to handle bankruptcy matters specifically.

But the Supreme Court has several times said that one of the goals of the Bankruptcy Administration is a speedy liquidation of estates. That's what an article III court would accomplish and it would be consistent with the pronouncements of the Supreme Court on this subject, as I see it.

Judge Weinfeld has explained why the Judicial Conference waited until now to become involved in the hearings process on this legislation. But it will be noted that the ad hoc committee has in the course of their involvement in this process and even during their testimony in here today, changed their position on several matters. They've changed their position on title, they've changed their position on expanded jurisdiction, and we think that if they had gotten involved sooner, they might be where you are today as members of this committee concerned with the constitutional problems involved in the structuring of bankruptcy court.

I think it's unfortunate that they did not get involved in this process sooner.

Another aspect of this is the frequent reference to ABA standards about a single trial court. Those ABA standards were adopted for the State court systems and not the Federal court system. When you apply those standards in the Federal court system, you run up against constitutional problems. In referring matters to referees and magistrates, the court is confronted with jurisdictional limitations imposed by the Constitution. I don't think that anyone would argue that ABA standards should take precedence over the Constitution of the United States in structuring a bankruptcy court.

That's been a matter of concern for us.

Now with respect to the problem in bankruptcy administration of separating the administrative and judicial functions with which my statement is concerned, we support the trustee system proposed in H.R. 8200. We want to make that clear. We were simply asked to give some possible alternatives to that system.

We disagree with Mr. Marsh's statement that H.R. 8200 does not accomplish the separation of judicial and administration functions. We think it does. We think that the proposal of the ad hoc committee of the Judicial Conference on the separation of administrative and judicial functions really doesn't come to grips with what is administrative and what is judicial.

The bankruptcy judges have already been relieved of many administrative functions by the operation of the bankruptcy rules, which provide that claims are allowed as filed unless objected to.

So we don't need an administrator to allow claims. The rules provide that the exemptions are automatically approved unless objected to, so we don't need an administrator to approve exemptions. And if a contest arises in these areas, obviously, it's appropriate for a court to resolve those conflicts.

We have taken the recommendations of the ad hoc committee of the Judicial Conference and of the Attorney General and combined them. We are proposing that there be created in the judicial branch of Government some sort of body corporate or board like the Federal Judicial Center, which would serve to supervise trustees in bankruptcy.

It would be our view that members of the judicial branch, the judiciary, should not serve on this board as they do on the board of the Federal Judicial Center, because this board or this body would be supervising trustees who litigate in the Federal courts and, therefore, it would be inappropriate for bankruptcy judges or district judges or circuit judges or Supreme Court Justices to serve on that body.

We think it should be some sort of separate board. The members of the board of directors would not necessarily have to be full-time appointees. They could serve on a pro bono basis or an interim basis of some sort and be compensated only for their expenses.

The board would employ a director and an assistant director who would, in turn, appoint supervising trustees in each Federal judicial district and supervise the supervising trustees who would, in turn, supervise the members of the panel of private trustees. We're proposing an alternative

Another alternative we propose is very similar, except that the trustee would be a body corporate and would automatically take title if you will, to assets of bankrupt estates, and then, instead of hav-

ing a panel of trustees in each district, we have a panel of attorneys in each district who would be appointed on a rotating basis to represent the official trustee in the bankruptcy cases.

So the official trustee would not necessarily be present in person in bankruptcy courtrooms, but would be present in spirit and by counsel. Such a system might be less expensive because it's easier to feed a spirit than it is a person. It could reduce the cost of the system somewhat.

We're recommending those as alternatives, but we want to make clear that we do not object to the trustee system as it is in the bill at the present time.

Mr. EDWARDS. Thank you, Judge. Judge Kline?

### TESTIMONY OF HON. DAVID KLINE, PRESIDENT, NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

Judge KLINE. May I make just a few comments directed to some remarks made by the ad hoc committee?

The record fairly indicates that the principal interest of the ad hoc committee in bankruptcy legislation arose at the time they discovered in a practical way that there was meaningful bankruptcy legislation pending creating article III judges. I don't say this overly critically, but I believe that the fact that the ad hoc committee in the short period of time it's been involved here has noticeably modified its original position is a real indication that initially there had not been an understanding of or a coming to grips with the basic problems.

While I might be wrong on this, I respectfully suggest that it is entirely possible that at the time the resolution of the judicial conference was passed in March opposing H.R. 6, that probably many, if not all, of the judges had not even read the bill.

If I'm wrong on that, I would be delighted to be corrected. But I truly suspect such is true. This goes to the point of whether or not there is basically a disposition, a predisposition, to keep, to retain a condition which is apart and distinct from what really makes sense, or to urge full support has been given the referees.

Certainly, generally, we have no problem with our individual district judges. We wouldn't be here if it weren't for their support. And our appointments have been a very wonderful opportunity, which I acknowledge.

But the suggestion that the bankruptcy court does not operate in a stepchild way, or to attempt to indicate that "a fine referee system" exists, is totally unrealistic.

For example, how could any court appropriately operate without a regularly assigned court reporter? How any judge in this country could seriously urge that anything that approached a court system could exist without a court reporter attached, and that all reasonable efforts had been made to upgrade the system—why, it's unbelievable.

As to the law clerk situation: It might be that in some districts you haven't needed individual law clerks for each bankruptcy judge. In my district, for example, I think with the two judges of us working closely there together, very candidly now without expanded jurisdiction, probably one law clerk would have been adequate. But there were no law clerks provided for bankruptcy courts period.

The suggestion that some real effort had been made to furnish libraries and books: Look at Judge Weinfeld's figure given here of some 48,000 volumes shown to be checked out to the bankruptcy courts. That's about 270 books per bankruptcy judge. That would not be enough for one Fed. Supp. set. It doesn't give you Fed. Second, it doesn't give you U.S. Code, it doesn't give you the U.S. Reports, UCC reports or the state reports, for which there's a need.

That, to me, is just illustrative of the problems with which we're dealing. No genuine, consistent interest to upgrade has existed.

On the question of consolidated clerks' offices: There's no reason on principle why a consolidated clerk's office couldn't probably work if there were a spirit to make it work, to make it work fairly and reasonably. But we do suggest that there is evidence of record that, for the most part, no consolidation which has taken place—and we believe there has been an increased interest in consolidating offices since the passing of the resolution against H.R. 6—has been done for the benefit of or with the good in mind of the bankruptcy court.

We can cite individual instances where bankruptcy court control has been lost, and where there is absolute confusion between the two operations. The present function and responsibility of the bankruptcy clerk is so distinct and separate from the general operation of the U.S. district court clerks, that in most districts, very sensibly, there has been an agreement and accord between all interested parties not to mix the two.

And even where—for example, in Houston, where consolidated offices have worked pretty well, I understand—it's been kept separated physically. There's a geographic separation and there's an appreciation for what's being done in each office.

Now all we're saying is this: The suggestion, the repeated implication, that bankruptcy is not operating in the shadow of the district court in a very real way, and intended to be kept there, just ignores the facts.

Really, I don't want to be personal on this, but I did hear Judge Brown testify two weeks ago before the Senate subcommittee, and he has somewhat modified on his views on law clerks. Then he was asked, "What do you think about bankruptcy judges' need for law clerks?" He replied, in substance, "Why should they have them? That's why we appointed them."

I'm not critical of the Judge. That is the position he holds. I say basically he holds it because he was a referee clerk clear back in '58 to '62. Respectfully, I suggest that the only person right now in principle that is more difficult to deal with than a person who knows nothing about bankruptcy, and realizes it, specifically the way the bankruptcy practice has developed, particularly since 1970, is, with all due respect, a person who actually feels that he knows all about it, when he doesn't, because there's no real way to get at him, to modify him.

The suggestion of the willingness to call referees bankruptcy judges goes to the point made by the chairman of the bankruptcy committee of the suggested high regard held for appointees in his district. I personally can say that I know Judges Herzog and Babbitt very well. I've served on numerous seminars with them. To me Judge Asa Herzog is "Mr. Bankruptcy" in the United States. And I don't intimate this is

to be charged all to Judge Weinfeld since there are a number of judges in New York's Southern District but I did get it on what I consider to be reliable information that at the time the bankruptcy rules in '73 were passed, there was a very serious question for some period of time whether or not the bankruptcy judges were going to be permitted to use the title "bankruptcy judge". After some jockeying around, such was permitted. Here a man, Judge Herzog, who has been a judge in fact longer than we can all imagine, was then finally and apparently reluctantly granted the permission to be called such.

We are talking about a very real, a very practical thing of acceptable court status and the matter of coming to grips with it.

Mr. EDWARDS. Mr. Moller?

Mr. MOLLER. I don't plan any opening statement. I'm here simply to answer the questions that the committee wishes to put to me.

Mr. EDWARDS. Thank you, Mr. Moller.

Mr. Ingraham, would you introduce your colleagues and proceed?  
[The prepared statement of John W. Ingraham follows:]

**STATEMENT OF JOHN W. INGRAHAM ON BEHALF OF THE ROBERT MORRIS ASSOCIATES,  
THE NATIONAL ASSOCIATION OF BANK LOAN AND CREDIT OFFICERS**

Mr. Chairman and members of the Committee. I am John W. Ingraham, Vice President of Citibank, N.A. and a member of The Robert Morris Associates Task Force on Bankruptcy. I am accompanied by George Wade, Esq. of the law firm of Shearman & Sterling of New York, who represents Citibank, N.A. and by John J. Jerome, Esq. and Herbert P. Minkel, Jr., Esq. of the law firm of Milbank, Tweed, Hadley & McCloy of New York, who represent The Chase Manhattan Bank, N.A. Messrs. Wade and Minkel have acted as counsel to The Robert Morris Associate Task Force.

We appreciate the opportunity to appear before your Subcommittee to offer our comments with respect to Title II of H.R. 8200 governing the structure of the Bankruptcy Court under the proposed revision of the bankruptcy act.

**INTRODUCTION**

The Robert Morris Associates is a national association of over 6,000 bank loan and credit officers who represent about 1,650 banks holding 78 percent of all U.S. commercial banking resources. The Association, founded in 1914, was named after the American patriot who was a signer to the Declaration of Independence and was largely responsible for financing our Revolutionary War. Subsequently Robert Morris helped establish a banking system for the new nation.

The Association is essentially educational in its activities and is concerned with sound commercial bank lending practices. Given the fact that banks today lend over \$190 billion of funds to commercial and industrial firms on both a secured and an unsecured basis, the Association is interested in the legislation which has been introduced in the House and the Senate which could substantially affect lending practices in this country.

**POSITION WITH RESPECT TO COURT STRUCTURE**

Members of the Robert Morris Associates Task Force have previously testified before this Committee concerning H.R. 31 and H.R. 32 and have testified on November 29, 1977 with the American Bankers Association before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. While the greater part of our prior testimony was devoted to certain of the technical aspects of the pending legislation, we have throughout the legislative process supported what we consider to be the paramount goals of the Bankruptcy Reform Act, namely upgrading the status of the Bankruptcy Court and streamlining the jurisdiction of that Court.

I must confess that initially I wondered whether it was appropriate for a banker to address issues of court structure, particularly in light of the strong

views articulated on this subject by the Judicial Conference of the United States, various members of the Federal Judiciary, the American Bar Association, and the American College of Trial Lawyers. Upon reflection, however, I recall that there is a precedent for a banker, and, in fact, a banker from the State of New York, to involve himself in a debate concerning the structure of Federal courts. Some years ago a New York banker wrote, "The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . . If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty." The author of those words signed his name as Publius and while much has changed in the 200 years since Alexander Hamilton, founder of the Bank of New York and architect of the National Banking System, wrote those words, the issue of the appropriate position of judicial officers, their status, and method of appointment, is the very issue which dominates these hearings. It is an issue which is of grave concern to commercial lending institutions throughout the country since they are as much parties in interest in proceedings filed under the Bankruptcy Act as the debtors who seek relief thereunder.

We are appearing today at the invitation of the Subcommittee because we are alarmed by the controversy which has been generated by Title II of H.R. 8200 and the proposed creation of the Office of the U.S. Trustee in the Justice Department.

We, as bankers, are not experts in judicial administration but we are daily participants in bankruptcy proceedings with a unique, if perhaps subjective, view of the system as it presently exists. While we respect the rights of others to differ, we do not believe that court reform can be addressed simply in terms of salary, law clerks, libraries, and tenure. The issue of status is inextricably bound together with the issues of separation of administrative from judicial functions and expansion of the jurisdiction of the Bankruptcy Court.

On this point, we agree with Harold Marsh, the former Chairman of the Commission on the Bankruptcy Laws of the United States, that the Bankruptcy Court should be restructured as a separate and independent court and the jurisdiction of the Bankruptcy Court should be enlarged to include litigation between the bankruptcy trustee or debtor in possession and third parties. But we are opposed to expanding the jurisdiction of the court if the present combination of judicial and administrative functions in a single bankruptcy judge is not eliminated. Throughout the past 4 years of discussions concerning bankruptcy reform, we have supported the creation of a system which would facilitate the reorganization of debtors within reasonable periods of time. We have repeatedly articulated our feelings that the existing structure for reorganizations, particularly Chapter X, overwhelms most corporate debtors, with the result that corporations which could be reorganized die under the surgeon's hand during the pendency of such proceedings. We are also aware of the problems posed by the existing limitations on the jurisdiction of the Bankruptcy Court and are concerned about the delay created in many reorganization cases while issues of jurisdiction are litigated at length well before the court has had an opportunity to hear the merits of the controversies before it.

In many areas, H.R. 8200 is quite vague and gives the bankruptcy judge considerable discretion in applying specific provisions. Our support of this legislation in the face of these uncertainties has been largely predicated on our expectation that Congress would create a bankruptcy court with the stature of the district, and which would function as an impartial tribunal free of the *ex parte* contacts which arise out of the existing administrative role of the bankruptcy judge. We in the lending community fear that the proposed revision of the bankruptcy laws is on the verge of becoming a revision of substantive bankruptcy law which revision will not be well received unless accompanied by the promised reform of the bankruptcy court system.

On the basis of prior testimony before this Subcommittee, it should be clear that the existing Bankruptcy Act creates an environment in which creditors with claims adverse to the estate often seriously doubt the fairness and impartiality of the bankruptcy court, as presently constructed. We have taken the liberty of attaching to our statement a letter from Bankruptcy Judge Robert L. Ordín to Senator DeConcini which describes the problem with admirable candor. As Judge Ordín states :

"The Bankruptcy Court is a departure from the traditional Anglo-American concept of a trial court; an impartial arbiter who receives evidence in accordance with procedural and evidentiary rules of ancient vintage; and who receives no evidence or communication except on the record and in the presence of both counsel. The administrator-judge does not and cannot fulfill this image."

Quite frankly we were dismayed by the support received by the Danleison-Railsback amendment in the House and we were even more dismayed by the nature of the criticism which has been directed to the proposed creation of an Article III bankruptcy court. We understand that the opposition to the Article III court is based, in part, upon the belief that such a court: (1) would reduce the status of Federal judges by increasing the number of persons entitled to be addressed as Federal judge; (2) would be contrary to the trend of judicial administration which favors generalized, as opposed to specialized, courts; (3) would reduce the prestige of the Federal district court by removing from that court jurisdiction over bankruptcy cases while creating a more prestigious court by virtue of vesting in the bankruptcy court both bankruptcy and general federal jurisdiction; and (4) would give Article III status to existing bankruptcy judges who do not meet the standards of the federal bench.

It is hard for members of the banking community with hundreds of millions of dollars invested in debtors who have invoked the jurisdiction of the Bankruptcy Court, to sympathize with the positions taken by opponents of Article III status. We believe that improvement of the status of the Bankruptcy Court would not reduce the stature of the District Court but rather would increase public esteem for the Federal judiciary generally.

As a banker who has been involved with substantial cases under the existing Bankruptcy Act, I am not in a position to comment with respect to trends of judicial administration. However, even a banker can recognize that today the Bankruptcy Court constitutes a separate court system. Bankruptcy judges exercise jurisdiction over all straight bankruptcy cases and all Chapter XI, Chapter XII and Chapter XIII cases. In some districts Chapter X cases are automatically referred to bankruptcy judges and in those districts where district court judges retain jurisdiction, many matters are referred to bankruptcy judges for determination. Bankruptcy judges may issue injunctions and final judgments and a bankruptcy judge's findings of fact are binding upon the parties unless "clearly erroneous."

Whether or not bankruptcy judges are technically classified as judicial officers of the United States, they are perceived as such by litigants who appear before them. To the extent that they are capable and fair, rule judiciously and write in a lucid and scholarly fashion, bankruptcy judges reflect credit on the Federal judiciary. In those cases where a litigant does not get a fair hearing, it is not merely the prestige of the bankruptcy court which suffers, but that of the entire judiciary.

As to the objection that H.R. 8200 would tenure judges who don't meet the standards of district court judges, we understand that the bill does not tenure presently-serving bankruptcy judges. We would hope that highly qualified bankruptcy judges would be nominated by the President to serve on the proposed Bankruptcy Court, but we expect that all persons nominated as bankruptcy judges will meet the high standards against which nominees for the Federal bench have traditionally been judged.

A review of the issues presented to bankruptcy judges in the course of cases in which we have been involved strongly suggests that the Bankruptcy Court is today a forum for the adjudication of matters the complexity and impact of which is at least equal to those heard by any other court. One needs to look no farther than the issues which are currently being litigated in Chapter XII cases to recognize the Bankruptcy Court is constantly called upon to define the very relationship between the power of Congress to legislate and the rights of individuals to adequate protection in respect of their property.

In our opinion, the evolution of bankruptcy courts since Congress enacted the Act of 1898 has produced a separate highly specialized court with jurisdiction over controversies touching on all aspects of federal and state law. We believe that the time has arrived to recognize the special status and responsibilities of the Bankruptcy Court and to provide the judges of that court with the tenure and prerequisites associated with an Article III court.

I have been informed by counsel that there are precedents for Congress establishing non-tenured Article I courts in special circumstances such as in the territories of the United States and in the District of Columbia. In order to better

understand the issues I have read the letters of various legal scholars addressed to Chairman Rodino concerning the court structure proposed in H.R. 31 and H.R. 32. Although my understanding of these issues is only that of a layman it appears to me that there is substantial agreement that the question presented concerning the constitutionality of an Article I bankruptcy court is an extremely difficult one and the legal precedents in this area are "horribly murky". Beyond that point of consensus, there appears to be little agreement on the issues under discussion. As a hanker I have followed this debate over court structure for several years and as a banker, I am persuaded that prior hearings held before this subcommittee amply demonstrate the need for full constitutional status for the Bankruptcy Court if it is to exercise pervasive jurisdiction. I am also persuaded that the creation of an Article I bankruptcy court will lead to extended litigation concerning the constitutionality of that court. Until these issues are resolved by the courts, such litigation will unquestionably paralyze the rehabilitation process. We hope the Judiciary Committee will impress on other members of the House the constitutional problems posed by establishing in the United States for the first time in our history a permanent non-tenured Federal court of general jurisdiction and will push for ultimate approval of reform legislation which includes a tenured court removed from administrative responsibility.

On behalf of The Robert Morris Associates, I would like to thank the Committee for affording us the opportunity to put before you our thoughts concerning the pending bankruptcy legislation.

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LOS ANGELES, CALIF., August 30, 1977.

Re H.R. 8200.

HON. DENNIS DECONCINI,  
*Chairman, Subcommittee on Improvements in Judicial Machinery,*  
*U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: I urge the Subcommittee to reject H.R. 8200 in its present form.

In taking this position, I am not unmindful of the years of intensive effort and study which have been expended in the preparation of the proposed legislation. Dissatisfaction with specific provisions in the Bill would not justify rejection of the Bill in its entirety. However, my objection is addressed to a fundamental premise upon which the new statute is based: the grant of pervasive jurisdiction to an administrator-judge who retains the inherent conflicts of the "Referee in Bankruptcy".

An understanding of the unique characteristics of the bankruptcy court, as we know it, is essential to a proper evaluation of the structure of the court contemplated by H.R. 8200. This unique quality is derived from the fact that (i) the bankruptcy referee performs the dual function of administrator and judge; and (ii) the bankruptcy court is a court of limited jurisdiction. An examination of these facets of the court may prove useful.

#### 1. THE DUAL FUNCTION OF THE REFEREE

##### *a. The administrative functions*

The administrative duties of the referee cover a wide range of activities. The following, while not an exhaustive list, will give some idea of these administrative functions:

- (i) Examination of the Bankruptcy Schedules and Statement of Affairs.
- (ii) Presiding over the first meeting of creditors. The bankrupt is under a statutory duty to submit to examination by the trustee or creditors. That examination relates to the conduct of the business, the cause of bankruptcy, dealings with creditors and others, the nature, amount and whereabouts of property and all matters which may affect the administration of the estate.
- (iii) Appointment of the trustee.
- (iv) Hearing objections to claims.
- (v) Determining exemptions and hearing disputes with respect thereto.
- (vi) Hearing objections to discharge.
- (vii) Determining which creditors' claims are nondischargeable.
- (viii) Conducting sales of assets of the bankrupt.

(ix) The appointment of receivers, accountants, auctioneers, appraisers, and attorneys for trustees and receivers. These appointments are made on written applications which must set forth facts justifying the appointment.

(x) Examination and approval of accounts and reports filed by these court appointees.

(xi) Fixing fees to be paid to receivers, trustees, accountants, auctioneers, and appraisers.

(xii) Determining whether assets should be abandoned as burdensome and of inconsequential value.

The referee's relationship to the Chapter proceeding is, perhaps, more intimate. At the outset, certain crucial determinations must be made, viz. (i) should the debtor's business be operated or should it be shut down; (ii) should a receiver be appointed to take possession of and operate the business (this involves displacement of management to some extent); and (iii) should the debtor be required to post an indemnity bond against erosion of creditors' equity during the Chapter proceedings. Such determinations cannot be made without a hearing, without making inquiry into the nature of the business, its financial affairs and condition, the experience, honesty, technical capabilities and general characteristics of management and the causes which led it into the bankruptcy court. This inquiry frequently involves a review of operating statements and financial data and the receipt of considerable input concerning the history of the debtor and its relationships with the business community.

Most Chapter proceedings will also involve:

(i) The review of periodic reports concerning the operating condition and financial status of the debtor;

(ii) Formation of a creditors' committee and the appointment of counsel for the committee;

(iii) The relationship between secured creditors and the debtor. While secured creditors are not affected by the Plan of Arrangement as such, it is an unusual Chapter proceeding in which a secured creditor does not seek leave of court to permit foreclosure of a lien described in its security instrument.

(iv) A proposed Plan of Arrangement is filed in every successful Chapter proceeding. A hearing must be held to determine whether the Plan should be confirmed. If anyone objects to the Plan, an extended hearing may result.

#### *b. The trial Judge functions*

Litigation in the bankruptcy court is generally classified either as "adversary proceedings" or "contested matters". Adversary proceedings involve the more important kinds of litigation in the bankruptcy court, including actions to:

(i) Recover money or property.

(ii) Determine validity, priority or extent of a lien or interest in property.

(iii) Sell property free and clear of liens.

(iv) Object to or revoke discharges and determine dischargeability of debts.

(v) Obtain injunctions or relief from the automatic stay.

A streamlined version of the Federal Rules of Civil Procedure governs the conduct of this litigation. The term "contested matter" describes all other litigation in the bankruptcy court. While the same procedural rules can be made to apply to contested matters, they are frequently handled on a more informal basis.

The interplay between the administrative and judicial functions of the referee is a routine, ongoing characteristic of the job. The administrative functions cannot be performed without receipt and examination of a continuous flow of data concerning all phases of the affairs and assets of the bankrupt or debtor; the trial of adversary proceedings and contested matters is likewise part of the routine.

## 2. THE BANKRUPTCY COURT IS A COURT OF LIMITED JURISDICTION

It is an axiom of bankruptcy philosophy that one cannot be compelled to litigate a claim in the bankruptcy court unless (i) the dispute relates to an asset in possession of the bankruptcy court, or (ii) the adverse party consent to jurisdiction. However, the failure to make timely objection to the jurisdiction of the bankruptcy court constitutes "consent" under existing statutes, rules and case law. The careless, the unlearned, the unwary frequently find themselves "trapped" in the bankruptcy court as a result of conduct never fully understood nor in-

tended to have that result. Generally, however, the objection to jurisdiction is the threshold issue; the first line of defense. It would be difficult to exaggerate the colossal dissipation of time and energy devoted to the search for an answer to the endless question "Does the bankruptcy court have jurisdiction over this controversy?" The monumental effort to avoid the jurisdiction of the bankruptcy court must be regarded as the norm, the usual, the expected in bankruptcy litigation. It is appropriate to ask why this is so.

One need not look far for the answer. The office of "Referee in Bankruptcy" defines a continuous state of tension between its administrative functions and its judicial functions. The conflict is inherent and inescapable.

For example, a Chapter XII proceeding was pending before me in which the assets of the Los Angeles-based debtor included several apartment buildings in Texas. A trustee had been appointed. There was a negative cash flow and the trustee desired to employ a local manager for the apartment units in Texas. He had made arrangements with a realty management company which was willing to undertake management with a one-year, renewable contract. It was proposed that the management company would collect the rents, deduct their fees and remit the balance of the income to the trustee. The trustee sought permission to enter into such an agreement. An examination of the proposed contract disclosed (1) the trustee would have to institute suit in Texas if a dispute arose over the deductions made by the management company; and (2) if the Chapter proceeding aborted during the term of the management contract the estate might be subject to an administrative claim for breach of contract. I suggested to the trustee that the proposed contract be amended to provide that the bankruptcy court in Los Angeles would have jurisdiction over any dispute between the trustee and the management company and, further, that the management company waive any claims for damages in the event of adjudication during the term of the contract. As amended, the contract was approved. I had fulfilled my function as chief administrator. Query: To what extent did I compromise my judicial capacity to hear any dispute which thereafter arose between the trustee and the management company? Obviously, I would have disqualified myself. Does disqualification effectively deal with the conflict inherent in my position?

In a pending Chapter XI a creditor had filed an application for the appointment of a receiver. It was resisted by the debtor. A hearing was held, at which the debtor testified as to the expertise and qualifications of management and suggested that the appointment of a receiver would serve no useful purpose. On cross-examination, it developed that the witness was on probation, having pled guilty to a felony complaint for issuing checks on behalf of the debtor without sufficient funds. In addition, management was accused of illegally withdrawing inventory and seizing customer lists of the debtor and using the lists and inventory to create a competitive enterprise. At the conclusion of the hearing, I was satisfied that the accusations of mismanagement were fully sustained. Query: In future adversary proceedings in which the debtor's position depended upon testimony of management as to the operative facts, could the debtor receive a fair trial before me?

Another problem area suggests itself. When a hotel files a Chapter proceeding and a receiver is appointed, he must have that capacity to install in the premises reliable personnel having the requisite operating experience and knowledge to supervise the operation of the debtor; people who can run the bar, operate the restaurant and handle the logistics of the front desk. Similarly, when the proceeding involves a manufacturer with a large, ongoing operation, the court must have immediate access to persons with the technical knowledge necessary to comprehend the dynamics of the business and deal with its operating problems. We do not have a highly organized creditor body in our community (such as, I am advised, is the case in New York City).

Fortunately, a corps of experienced receivers and trustees has developed in this community. These professionals maintain, and have available on short notice, personnel with the various kinds of technical, business and accounting skills necessary to meet the needs of the bankruptcy system. Referees rely heavily on these professionals because experience has taught us that they can be depended upon to preserve the ongoing value of the business and to operate in accordance with the mandates of the Bankruptcy Act. They are geared to furnishing immediate and constant accounting data and up-to-date reports of business operations. Above all, their loyalty is to the court. While this makes good sense from an administrative point of view, it has the gravest implications in the judicial

context. When a contest arises between the debtor (operated by a court-appointed receiver) and a stranger to the estate, should that case be tried before the judge who appointed that receiver and who has learned to trust and rely on that receiver and his staff over a period of years?

Small wonder that the nonbankruptcy lawyer has developed a deep and abiding distrust for the bankruptcy court and a disinclination to litigate claims before the referee. The objection to summary jurisdiction is the first rule of survival. It is an outgrowth of the lawyer's instinct to shun an arena in which the judge may already be aware of the facts and circumstances surrounding the transaction and dispute.

The bankruptcy court is a departure from the traditional Anglo-American concept of a trial court; an impartial arbiter who receives evidence in accordance with the procedural and evidentiary rules of ancient vintage; and who receives no evidence or communication except on the record and in the presence of both counsel. The administrator-judge does not and cannot fulfill this image.

I agree with those who believe that the bankruptcy system would be improved by the creation of an independent court with pervasive jurisdiction. However, a precondition to the creation of such a court must be the redefinition of the functions of the referee and the elimination of its dual capacities as administrator and judge.

Historical analysis of the evolution of the present bankruptcy system may explain its defects and shortcomings. By and large, it is a good system and works reasonably well. We have learned to live and deal with its shortcomings, not the least of which is the waste associated with disputes over jurisdiction. We have even learned to accept and endure the distrust and suspicion manifest in the attitudes of the bar towards the bankruptcy court. It is, after all, a court of limited jurisdiction, not part of the mainstream of our legal system and the experience of our citizens. Such complacency may well be dispelled by the "pervasive jurisdiction" of H.R. 8200. Litigants and counsel long accustomed to the traditions and practices of the "outside world" will now be compelled to litigate *all* controversies with the bankruptcy estate before the administrator-judge. This cannot but undermine that faith and confidence in our legal system which has been the hallmark of the American experience.

I urge the Subcommittee to reject H.R. 8200 unless it is amended to provide a technique whereby the administrative aspects of bankruptcy administration are separated from the function of the bankruptcy judge.

Respectfully yours,

ROBERT L. ORDIN.

**TESTIMONY OF JOHN W. INGRAHAM, VICE PRESIDENT, CITIBANK,  
NEW YORK, N. Y., ACCOMPANIED BY HERBERT MINKEL, ESQ., NEW  
YORK, N. Y., AND GEORGE WADE, ESQ., NEW YORK, N. Y.**

Mr. INGRAHAM. Mr. Chairman, members of the committee, I am John Ingraham, vice president of Citibank and a member of the Robert Morris Associates Task Force on Bankruptcy. I'm accompanied by George Wade, on my left, of the law firm of Sherman & Sterling in New York; and Herbert Minkel of the law firm of Milbank, Tweed, Hadley & McCloy of New York, who represents the Chase Manhattan Bank on my right.

Mr. DRINAN. Mr. Chairman, might I welcome Mr. Herbert Minkel here, a very distinguished son of Massachusetts, a part of our brain drain and the son of a very distinguished physician in Boston.

Mr. INGRAHAM. As a footnote, Mr. Congressman, I am from Dedham, Mass. [Laughter.]

We appreciate the opportunity to appear before your subcommittee to offer our comments with respect to title II of H.R. 8200 governing the structure of the bankruptcy court under the proposed revision of the Bankruptcy Act.

Mr. Chairman, we strongly support that part of H.R. 8200 which would grant article III status to the bankruptcy judges.

I must confess that initially I wondered whether it was appropriate for a banker to address issues of court structure, particularly in light of the strong views on the subject by the Judicial Conference of the United States, various members of the Federal judiciary, the American Bar Association, and the American College of Trial Lawyers.

Upon reflection, however, I recall that there is a precedent for a banker and, in fact, a banker from the State of New York, to involve himself in the debate concerning the structure of Federal courts.

Some years ago a New York banker wrote:

Complete independence of the courts of justice is peculiarly essential in a limited constitution. If, then, the courts of justice are to be considered the bulwarks of the limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

The author of those words signed his name as "Publius," and while much has changed in the 200 years since Alexander Hamilton, founder of the Bank of New York and architect of the national banking system, wrote those words, the issue of the appropriate position of judicial officers, their status and method of appointment is very much the issue which dominates these hearings. It is an issue which is of grave concern to the commercial lending institutions throughout the country, since they are as much parties in interest in proceedings filed under the Bankruptcy Act as are the debators who seek relief thereunder.

We are here today appearing before the subcommittee because we are alarmed at the controversy which has been generated by article II of H.R. 8200 and by the proposed creation of the Office of U.S. Trustee in the Justice Department. But we are daily participants in bankruptcy proceedings, if perhaps subjective viewers of the system as it presently exists.

While we respect the rights of others to differ, we do not believe that court reform can be addressed simply in terms of salary, law clerks, libraries, and tenure. The issue of status is inextricably bound together with the issues of separation of administration from judicial functions and expansion of the jurisdiction of the bankruptcy court.

On this point, we agree with Harold Marsh, the former chairman of the Commission on the Bankruptcy Laws of the United States, that the bankruptcy court should be restructured as a separate and independent court and the jurisdiction of the bankruptcy court should be enlarged to include litigation between the bankruptcy trustee or debtor in possession and third parties.

But we are opposed to extending the jurisdiction of the court if the present combination of administrative and jurisdictional functions in a single bankruptcy judge is not limited.

Throughout the past 4 years of discussion concerning bankruptcy reform, we have supported the creation of a system which would facilitate the reorganization of debtors within reasonable periods of time. We have repeatedly articulated our feelings; particularly, chapter 10

overwhelms most corporate debtors. Most corporations that could be reorganized will die under the surgeon's hand during the pendency of such proceedings.

We are also aware of the problems posed on the existing limitations on the jurisdiction of the bankruptcy court and are concerned about the delay created in many reorganization cases while issues of jurisdiction are litigated at length, well before the court has had an opportunity to hear the merits of the controversies before it.

In many areas, H.R. 8200 is quite big and gives the bankruptcy judge considerable discretion in applying specific provisions. Our support of this legislation in the face of these uncertainties has been largely predicated on our expectation that Congress would create a bankruptcy court with the stature of the district court, which would function as an impartial tribunal, free of the *ex parte* contacts which arise out of the existing administrative role of the bankruptcy judge.

We in the lending community fear that the proposed revision of the bankruptcy laws is on the verge of becoming a revision of substantive bankruptcy law, which revision will not be well received unless accompanied by the promised reform of the bankruptcy court system.

On the basis of prior testimony before this subcommittee, it should be clear that the existing Bankruptcy Act creates an environment in which creditors with claims adverse to the estate often seriously doubt the fairness and impartiality of the bankruptcy court as presently constructed.

Quite frankly, we were dismayed by the support received by the Danielson/Railsback amendment in the House and were even more dismayed by the nature of the criticism which has been directed to the proposed creation of an article III bankruptcy court.

We understand that the opposition to the article III court is based, in part, upon the belief that such a court, first, would reduce the status of Federal judges by increasing the number of persons entitled to be addressed as Federal judge; second, it would be contrary to the trend of judicial administration, which favors generalized as opposed to specialized courts; third, would reduce the prestige of the Federal district court by removing from that court jurisdiction over bankruptcy cases by creating a more prestigious court by virtue of vesting in the bankruptcy court both bankruptcy and general Federal jurisdiction; and fourth, would give article III status to existing bankruptcy judges who do not meet the standards of the Federal bench.

It is hard for members of the banking community, with hundreds of millions of dollars invested in debtors, who have invoked the jurisdiction of the bankruptcy court, to sympathize with the positions taken by opponents of article III status.

We believe that improvement in the status of the bankruptcy court would not reduce the stature of the district court, but rather, would increase public esteem for the Federal judiciary, generally.

As a banker who has been involved with substantial cases under the existing bankruptcy act, I am not in a position to comment with respect to trends of judicial administration. However, even a banker can recognize that today the bankruptcy court constitutes the separate court system.

Whether or not bankruptcy judges are technically classified as judicial officers of the United States, they are perceived as such by litigants who appear before them. To the extent that they are capable and fair, rule judiciously, and write in a scholarly fashion, bankruptcy judges reflect credit on the Federal judiciary.

In those cases where a litigant does not get a fair hearing, it is not merely the prestige of the bankruptcy court which suffers, but that of the entire judiciary.

As to the objection that H.R. 8200 would tenure judges who don't meet the standards of district judges, we understand that the bill does not tenure presently serving bankruptcy judges.

We would hope that highly qualified bankruptcy judges would be nominated by the President to serve on the proposed bankruptcy court. But we expect that all persons nominated as bankruptcy judges will meet the high standards against which nominees the Federal bench have traditionally been judged.

A review of the issues presented to the bankruptcy judges in the course of cases in which we have been involved strongly suggests that the bankruptcy court is today a forum for the adjudication of matters, the complexity and the impact of which is at least equal to those heard by any other court.

One needs to look no further than the issues which are currently being litigated in chapter 12 cases to recognize the bankruptcy court is constantly called upon to define the varied relationship between the powers of Congress to legislate and the rights of individuals to adequate protection in respect to their property.

In our opinion, the evolution of bankruptcy courts, since Congress enacted the act of 1898, has produced a separate, highly specialized court with jurisdiction over controversies touching on all aspects of Federal and State law.

We believe that the time has arrived to recognize the special status and responsibilities of the bankruptcy court and to provide the judges of that court with the tenure and prerequisites associated with an article III court.

As a banker, I have followed the debate over court structures over several years. And also as a banker, I am persuaded that prior hearings held before this subcommittee amply demonstrate the need for full constitutional status for the bankruptcy court, if it is to exercise pervasive jurisdiction.

I'm also persuaded that the creation of an article I bankruptcy court will lead to extended litigation concerning the constitutionality of that court.

Until these issues are resolved in the courts, such litigation will unquestionably paralyze the rehabilitation process.

We hope the Judiciary Committee will impress upon other Members of the House the constitutional problems posed by establishing in the United States for the first time in our history a permanent, non-tenured Federal court of general jurisdiction, and will push for ultimate approval of the reform legislation, which includes a tenured court removed from administrative responsibility.

On behalf of the Robert Morris Associates, I would like to thank the committee for affording us the opportunity to put before you our thoughts concerning the pending bankruptcy legislation.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mr. Ingraham. That's an excellent statement.

I wish, while questioning was going on, that you would think of how you would answer this question a little more specifically. What kind of problems are you running into with the present system?

I know we're going to be interested in that.

Do your colleagues have a statement? Mr. Minkel?

Mr. MINKEL. No, Congressman. We would be prepared to answer questions.

Mr. EDWARDS. The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman. I thank all of you for your comments. I see the process, too, going on in which we, it seems, now are educating the Judicial Conference and some other people. I'm happy to say that the American Bankers Association has long since been educated and that they are now our allies. We welcome them, because if we failed to educate our Brothers Danielson and Railsback, I say, Mr. Chairman, let's go with the bankers.

We haven't had this type of support now for a long time, with all due respect to the bankruptcy judges and the distinguished judicial conference.

I would hope, as the chairman has suggested, that, Mr. Ingraham, you could give us a parade of the horrors about the death at the surgeon's hands here on page 6. This stirs my blood, and I'd like to hear more about the corporate debtors who died under the surgeon's hands because the bankruptcy court doesn't have jurisdiction to settle all of their debts.

I welcome your display of rhetoric here and your background of facts.

I wonder if you could tell us, Mr. Ingraham and the other fine people in the industrial world, were they also as dismayed as you were at the passage of the Danielson/Railsback amendment?

Mr. INGRAHAM. Yes, sir.

Mr. DRINAN. Perhaps you would like to name them for the record. We need their support.

[Laughter.]

Mr. INGRAHAM. I represent the Robert Morris Associates, and I speak only for that association of loan credit officers. That association represents about 80 percent of the commercial lending in the United States. It represents almost 2,000 banks, large, medium, and small. It is not an organization of, you might say, tokenism led by a few large banks. It is an organization rooted in, frankly, a lot of middle-market banks. And these are the problems that the bankers, lending officers who are faced with the extension of credit every day, are concerned with.

My job at Citibank is as a senior credit officer. It is to look at a variety of credits, both in the United States and abroad. And I worked with the lending officers of many banks throughout this country. And this represents a very broad view, not just that of a limited number of people.

I might add further that we have a well-organized task force which has created a great deal of interest in the banking community, and I

have a lot of bankers from all over the country that are in continuous contact with me that are interested in following this legislation.

In answer to the question: Yes, there is broad interest in the banking world as to having an article III court.

Mr. DRINAN. That I welcome and we—at least I—didn't know that we had this type of support out there in the real world when the Danielson amendment passed. I tended to feel that article III courts were a fantasy that we created, because, logically, that seems to follow from all the positions we took. I welcome the support that you give us.

We had support earlier today from the Commercial Law League of America. I hope that that support can be concretized in ways that will tell our brothers on the floor when we bring this back that a reversal of the Danielson amendment would serve the purposes of justice.

I welcome your report, and I want to thank Judge Conrad Cyr for your excellent testimony, all of which I have read, and we welcome you back. I know that this is taking a long time, but you have helped me a great deal by the arguments in your excellent comprehensive statement. I want to thank the others, too, for their statement.

I hope that we can pass as soon as possible the dream that you people share with us.

Thank you very much.

Mr. EDWARDS. Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman.

I am concretized for the moment. [Laughter.]

But I'll get over that.

I am grateful for the testimony we have received today. I had anticipated that these hearings would come forward with an acceptable alternative plan which we would have to come up with in the face of the expression of the membership that indicated that article III courts and what we had tried to do with H.R. 8200 was not generally accepted. But it seems to me that as we come up with alternate plans, each one of them is far less acceptable than what we had to begin with. And to find the broad support that we have is quite encouraging.

And I guess collaterally I'll have to admit that I'm firmed up in my view that it is a form of professional jealousy on the bench that we are fighting here.

I am really pleased that you are all firm in your position. Judge Cyr and Referee Cyr, and that you continue to support that position.

I really take issue with only one thing, Mr. Ingraham, since we have gotten so provincial here in Massachusetts and so forth.

I think the architect of the Federal Reserve System was Carter Glass. We feel that way in my district, where he was a representative years ago. And I think you cleared that up with your oral statement, but I want the record to be sure that that correction was made—and not Alexander Hamilton.

Mr. INGRAHAM. Mr. Butler, I stand corrected, and page 4 will be so amended to reflect the national banking system as opposed to the Federal Reserve System.

Mr. BUTLER. Thank you very much. I am deeply grateful for that.

And really, Mr. Chairman, I hate to bring these people in here and not ask them a lot of questions, but I think they have been supportive of the point of view that we have taken, so I yield back to counsel for what questions they have.

Mr. EDWARDS. You yield to me.

[Laughter.]

Mr. BUTLER. Excuse me.

Mr. EDWARDS. Well, I'd like to get back to why you feel this way; what happens to you and your member banks on a day-to-day basis that results in your going to all of this trouble of writing this excellent statement and coming here?

Judge Weinfeld says that the present system is really excellent, it's been working for years, and the other judges said the same thing. You must differ with that. You must have some problems that they don't recognize or certainly don't admit to.

Can you give me one or two?

Mr. INGRAHAM. Mr. Chairman, I wonder if I could have also the participation of Mr. Wade and Mr. Minkel.

Mr. EDWARDS. We're delighted, yes.

Mr. INGRAHAM. Mr. Wade.

Mr. WADE. There are two things, Mr. Edwards, that I think ought to be brought to the committee's attention right off the bat.

The first is, one can make statements about distinguished bankruptcy judges—and there are such—and one can make statements about distinguished opinions that have emanated from bankruptcy courts in the United States—and there are such—but the fact of the matter is, on the overall, day-to-day basis they are severely hampered and, therefore, we as litigants are severely hampered.

The second area is one of appeals, and this is why I was most interested in hearing Mr. Butler say that some of the alternative proposals did not seem to strike him as being terribly workable.

One of the major problems we have is the seriatim appeal problem.

Only last week I was threatened—"threatened," I will expunge that from the record—I was told by an indenture trustee that unless the bank went along with a certain argument, that he would appeal it to the district court, who would sit on it for a certain period of time, until he understood it, and then he would appeal it to the court of appeals, who would sit on it until a certain period of time had elapsed and they had understood the problem. And although the indenture trustee gave a nearly zero chance for prevailing on his point of view, we would be there for a year and a half.

Meanwhile, out there in the real world is a debtor with a business which is operating under court supervision and at the suffrance of his trade creditors, not to say of our usual clients, the banks.

So that one of the things that I would like to bring to an article III court argument is that while we don't want to race through major reorganizations in 2 weeks, we do need speed, and we do need efficiency.

And finally, I think the banks on a level of the smaller case find that there is an attitude in the bankruptcy court created by the confusion of the administrative and the judicial functions in which, especially when he leaves his own district, his own home base, that he does not believe that he is in a fair court. He may be in a fair court,

and it may be that no bias exists or it may be that a bias exists only unconsciously, but the confusion of the roles has led many members of the American Bankers Association and of the Robert Morris Associates to complain of the type of justice that can be meted out in a bankruptcy court context.

Mr. EDWARDS. Do you think that having an article III bankruptcy court would automatically take care of that?

Mr. WADE. No, sir; but the combination of the U.S. trusteeship, the combination of the separation of the judicial and administrative functions with the article III status accorded the person one meets in the judicial robe in the bankruptcy court, we think, would together go a long way toward the acceptability of justice.

Mr. MINKEL. Congressman, I think one of the things that's very much in the minds of the banking institutions is the fact that with the proposed consolidation of the reorganization proceedings, they are leaving what has been, at least for secured creditors, a relatively simple situation in chapter XI where in many cases they could avoid the proceeding entirely and work out some form of arrangement with the debtor outside of the court and then leave the debtor to attempt to work out an arrangement with the unsecured creditors.

And they are going into a world where H.R. 8200 gives considerable discretion to a court in terms of providing adequate protection. As presently drafted, it permits for a certain period of time the use of collateral, accounts receivable, and inventory which in many of these cases represents scores of millions of dollars.

In this particular environment the banks are, needless to say, quite uncomfortable. One reason that they have been supportive of H.R. 8200 with the hope of perhaps working out certain details in the bill, and of a consolidated reorganization proceeding is that in large cases they have to either live with the completely unsatisfactory situations in chapter X or the completely unsatisfactory situations of negotiating with the SEC in chapter XI cases involving public companies as to what will be necessary before the Securities and Exchange Commission will withdraw a transfer motion or what will be required in terms of treatment of holders of securities which are subordinated to banks in order that an SEC transfer motion will not be filed.

In that kind of an environment, many of the banks realize that a consolidated reorganization proceeding makes a great deal of sense.

On the other hand, we also know that in many cases they don't feel as secured creditors they have been treated fairly, or at least they feel that the balancing process has been more favorable to debtors than perhaps the reorganization purpose of the statute would necessarily require. And they have been comforted by the fact that they are not going to deal with the bankruptcy judges of old, and more importantly, that they are not going to have to deal with the traditions of old. They are going to deal with the traditions which have existed over time at the district court level.

We attached to our statement a letter from Judge Ordin, in which he talked about the American system of jurisprudence in terms of conversations between judges and litigants being on the record.

I think that has been true in the district court. The cases have been decided on the basis of evidence, and all matters were put on the record.

The year that I clerked for the Federal district court judge, even where there were conversations with counsel in chambers, a court reporter was brought in to record all that.

I think the bankers generally feel this is the appropriate way to resolve controversies in these cases.

There is much in the reorganization provisions of H.R. 8200 which frightens bankers. On the other hand, if they felt they had a fair forum in which to argue their efforts, they would be satisfied with the legislation.

I think it perhaps is too often thought that the bankers are against reorganization.

As Mr. Ingraham previously testified to this subcommittee in the context of the hearings on H.R. 31 and H.R. 32, banks by and large try to work these problems out out of court. It's only when a second chance fails that bankers favor a bankruptcy proceeding. When the second chance has failed, generally, there's a track record which shows some real problems which the reorganization chapter may be specifically attuned to take care of. In many cases the banks have agreed to restructure their debt. But there's problems in restructuring the debt of other creditors.

H.R. 8200 addresses these points and those banks which are regularly involved in attempts to restructure and maintain going concern values in and out of proceedings, I think, accept this. But in their minds their acceptance was in part the direct result of a fully adjudicatory court system.

Mr. EDWARDS. In other words, there are parts of the bill that you're not very crazy about, but you wouldn't object to those substantive changes too much if you did get the protection of a tenured judge.

Mr. MINKEL. I think there will be a continuing dialog concerning those areas where there are substantive problems.

Mr. EDWARDS. All right.

Mr. Levin?

Mr. LEVIN. Thank you, Mr. Chairman.

Mr. Ingraham, and your counsel, also, I would like to ask you to elaborate on two things that you said in the prepared statement.

One, you said that the issue of status is essential to any meaningful court reform. I'd like to know why you feel that such things as law clerks, libraries, adequate staff, adequate facilities, salary, and those matters are not adequate.

And, also, I wonder if you would elaborate on why you feel that the elevation of the bankruptcy court to article III status would increase the prestige and image of the Federal judiciary generally.

Mr. INGRAHAM. George?

Mr. WADE. Let me take the second first, just to be contrary, I suppose.

I do not think that the elevation to article III status is going to change the view that (a) a sophisticated banker or (b) a person who is around the courts a lot has of the Federal judiciary as a whole.

But there are quite a number of cases in which the only appearance before the court other than a traffic court of a person commercially or privately is before a bankruptcy judge, and it does seem to me that some of those appearances in which banks take part and in which banks very often have a major role are not up to the caliber that we

would like to have from our Federal judiciary and in general that the vast majority of cases get from our Federal judiciary.

On that point, also, the notion that is currently in the Bankruptcy Act—one has to make an appeal of anything he doesn't like to a district judge before he can get a circuitwide opinion on the subject—does tend to limit the acceptability of the bankruptcy judge's decision.

This then leads into the first question that you asked: Why is the status, law books, law clerks, the fact that he is on the second floor in the back corner, have anything to do with the quality of justice administered?

I think that is an acceptability problem as far as the bankers are concerned.

If I take a matter before Judge Weinfeld, and he decides it and he writes an opinion on it for or against me, I can go to my client and say, "Look, you're just not going to do any better, fella." I can say that this is a distinguished jurist who had a law review member working with him who has written a 10-page opinion on this point of law, and the chances of its being any different on the 17th floor, which is the second circuit, are quite remote.

On the other hand, that is not generally the attitude of the bar or of the banking community with respect to many of the bankruptcy judges' decisions, and I think that level of acceptability is needed if some of the complexities of commercial life which are dealt with in the bankruptcy courts are to be given the acceptability.

I'm not talking about the inherent quality of those decisions; I'm talking about acceptability.

Mr. LEVIN. A question that I'd like to address to the bankruptcy judges and also ask the Robert Morris people to comment on is: Do you feel that the constitutional uncertainty surrounding earlier proposals for an article I court would also surround an adjunct system; and what would the practical effect of that be in administering bankruptcy cases until that was decided?

Finally, will the scope of the jurisdiction the bill grants to an adjunct make any difference to your answer?

Judge CYR. Again, to be contrary and answer the second first, I would certainly think that the problems increase to the extent you extend the jurisdiction of the court to comprehend all plenary proceedings as H.R. 8200 does.

The only constitutional comfort I have in the proposal that I put forward in my statement and that, which was basically similar that came from Judge Hufstедler this morning is that 40 years of actual operation of the present system may be worth something. I don't know how to quantify that, of course. But I am inclined to believe that, in this morass of constitutional uncertainty, if we can't go the article III route plain and simple, which is what we believe is the preferred route, that it would be better to repattern the court after something that has survived for the past 40 years.

Mr. LEVIN. As to the workability of the court while a constitutional issue is being decided?

Judge CYR. I think that Judge Hufstедler put it extremely well this morning. I think that would be put on a very fast track and would

get through the appellate process to the Supreme Court and be resolved very, very soon.

There would be a period of uncertainty, but I don't think it would extend for years.

Mr. LEVIN. Are there any other comments on that?

Mr. MOLLER. In the meantime, of course, once the issue has been raised, it would put in doubt all of the rulings of the Court, and therein lies a tremendous block. Everybody thinks that it would be given an accelerated opinion, but you still are talking about 1 year or more.

Judge KLINE. At the risk of going what I know is pretty much upstream to the attitude present here—mine may be identified as a “West of the Pecos” point of view, I have felt that gaining popular approval for the establishing of 200 more lifetime judges in bankruptcy, or otherwise, is almost next-to-the-impossible. In fact, there is common conversation on how to get a little bit of a closer rein over the existing tenured judges. That's not said in a critical way personally because I don't agree with the suggestion. I'm firmly convinced of their need for independence. I'm pretty well federalized myself and firmly persuaded that the principle of judiciary independence must remain.

But we do sorely need expanded bankruptcy court jurisdiction. We need an upgraded court. And if article III is not feasible in a practical way, I earnestly urge that it is practical, as well as constitutional—that if the Congress makes it very clear that there will be a separate, a functionally independent bankruptcy court of stature, one way or another, and draws the line, and runs it through the federal judicial system, giving the federal court the chance to very carefully—although on a fast track—consider whether or not what is proposed is constitutionally acceptable, it will be solved one of two ways.

Article III isn't the only way to do it—although constitutionally certainly it's the preferred, safest way to do it. I'm now talking about the real world in which we live. And if we think we have problems now, it's just my suggestion that if this point is not made, if the bankruptcy court does not become a court of stature and become functionally independent regardless of what kind of an Article identification you put on it, I dare say that neither we nor the system will be in as good a shape as we are right now when things are all over. This will not remain static.

This thing, bankruptcy court upgrading, in my judgment, must go forward in a meaningful way legislatively, now, or there really will be “trouble in River City.”

Judge LEE. May I comment on that? We have a transition period of 5 years or so before these article I judges would be appointed. And I take it, the article I judges would have to be appointed, and a decision would have to be made by one of them before we can really get to the constitutional issue.

Because, otherwise, it would be hypothetical—only a hypothetical constitutional issue, unless we had a decision by one of those judges.

And then, you would have a whole raft of bankruptcy judges appointed to article I courts, with this underlying constitutional problem. I don't know whether people would take those jobs, because they might lose them if the initial article I appointment might be followed by an article III appointment.

We would have that kind of problem, and I don't think it could be tested as constitutional until we were beyond the transition period.

Mr. MINKEL. I have to differ with certain of the bankruptcy judges on this particular point. I have heard repeatedly over the past few weeks, that an article III court is not possible and I have been encouraged to take a moderate position on this point; but to us an article III court represents a reasonable and flexible point of view.

What those that counsel moderation on this point fail to understand is that if there is not an article III court, so long as this bill contains pervasive jurisdiction, there are going to be some very severe problems with this bill passing.

There are financial interests, who have been largely silent, who really cannot afford to have reorganization efforts delayed while constitutional issues are litigated. You cannot confirm a plan without determining the feasibility of the plan and feasibility will depend on judgments rendered by the bankruptcy court which will be appealed until the constitutional issues are resolved. In the context of reorganization cases, this will be most unsatisfactory.

People have made statements about "fast track" appeals. A number of cases have made their way to the Supreme Court in a rather fast timeframe. The speed in which the issue was placed before the Court reflected the importance attached to the issue. But that didn't mean that the Justices of the Supreme Court, in their abundant wisdom, managed to clarify the issues.

They rule on the case, and remand it for further action. Another case comes up, and they take another position on the facts of that particular case.

There's no reason to believe that there's going to be any real clarification of the constitutional issue for a period of years. There's no reason to think it couldn't be 5 years, seven years, or ten years before the issue is resolved. Meanwhile instead of litigating plenary versus summary jurisdiction, we will litigate the question of whether or not the expanded jurisdiction is unconstitutional. And I am sure, in that context, we will litigate whether or not the existing jurisdiction of the bankruptcy court is constitutional. If I had a crystal ball, and that crystal ball told me clearly that, within weeks of H.R. 8200 being enacted the constitutional question could be posed, and the court would find that the expanded jurisdiction for an article I court was constitutional, I would still say that it's inappropriate for Congress to establish for the first time in the United States a non-tenured court of general jurisdiction.

Judge Aldisert mentioned the Virgin Islands. I certainly think the Virgin Islands, and the District of Columbia, are distinguishable in terms of our constitutional history, from the States of the Union.

To establish this court, to make it less than an article III court, is about as reasonable as passing a law which provides for all Federal cases to be drawn by lot by magistrates, and to be tried by those magistrates with findings to be reviewed by a handful of district court judges, with the right of appeal to the court of appeals.

If that was suggested by this Judiciary Committee, I suggest that there would be considerable opposition by Federal judges in this country. And I'm somewhat surprised by the fact that they are sug-

gesting something which, philosophically, cannot be distinguished from that.

Judge CYR. Mr. Chairman, I would simply like to comment that I really don't believe there's any great difference in the view that Mr. Minkel has just expressed, and our own view.

We merely don't profess to be accomplished in what's either politically achievable or constitutional. What we do say is that, in effect, if the system is sinking, we would much prefer an 8-foot rope to none at all. We would much prefer a 10-foot rope, but if there's nothing else, we will take the 8-foot rope.

Mr. EDWARDS. Are there further comments?

Mr. INGRAHAM. Mr. Chairman, it seems, in banker's language, maybe one point might be inserted for the record. There's also the question of jobs, and social cost. And it seems to me that, when you present the final version of H.R. 8200 to your colleagues in the House, and with the usual jockeying that will go back and forth as to whether article III courts stays in or stays out, there's a very practical question that I hope some of your colleagues remember.

And that is: If you look at the U.S. economy, and the expansion and the contraction that takes place periodically, and the fact that some companies just don't make it, but we do try to give—at least in the financial community—a borrower, or a company that gets into trouble, a second chance. But it's very difficult, in some cases, to give them an effective second chance—which may mean that some companies, in the next business cycle, may go out of business.

Particularly, if you have a cumbersome, lengthy, process. And I am not going to predict when the next downturn in the business cycle is going to occur, but we are already into the 33d or 34th month in the upsweep of the current business cycle, and the typical business cycle runs around 36 months.

So, whether it's this year, or next year, or whenever, you have the problem of some companies getting into trouble. And I know jobs and employment are a significant item that every congressman, every one in the United States is thinking about.

We do try to help a company, but sometimes it's darn difficult, particularly if you see, from a financial standpoint, that putting new money at risk to a company that gets into difficulty, and where you're going to be tied up in knots, and waltzed around the maypole on appeals, and this and that, that sometimes the existing procedure becomes self-defeating.

That's sort of putting it into maybe, I hope, a very human perspective.

Mr. EDWARDS. That's very helpful, and that's very persuasive insofar as Members of Congress are concerned, because that hits back home, and that's what we're talking about. The votes are really determined back home, and not here in Washington.

Mr. LEVIN. One final question for the Robert Morris representatives: The bankruptcy judges indicated that they agreed with the separation of administrative and judicial functions proposed in H.R. 8200, and that it was adequate.

You indicated that you agreed with Harold Marsh that it was necessary. But I don't recall if you said that you felt that H.R. 8200 was adequate, or whether more should be done. And if so, what?

Mr. MINKEL. I indicated that the provisions of 8200, in that particular respect, give us pause insofar as much is to be left to the rules. We trust that the rules will help to establish a system of practice in bankruptcy cases whereby the ideal of separation of administrative and judicial functions will be maintained.

I think that there is some concern over section 102(1), which defines—"after notice and a hearing". Many people appear not to have focused on what that phrase means, as defined. I'm sure that the report highlights, and I'm sure that there will be additional efforts to make people aware of the way the proposed administrative system is supposed to function.

Professor Marsh noted that he was concerned that, without having the courts themselves supervise the trustees, that this would somehow lead to foul play by the trustees.

I hope that a distinguished person will be appointed as the head of the office of U.S. trustees, and that rather than having courts supervising the trustees, that a standard of conduct will be established in that system, so that the corrective mechanism would operate outside the judicial system. I think that would go far toward reducing the pressure perceived by bankruptcy judges to get involved in the administrative aspects of the case, so as to make sure that nothing happens in a case in which they are involved which they would not want to be personally associated with.

If a proper system of administration is created, the bankruptcy judges can do what they should be doing under H.R. 8200, and that is adjudicating controversies.

Mr. LEVIN. Thank you, Mr. Chairman.

Mr. EDWARDS. You're more interested in reorganization cases than in liquidation cases, I presume?

Mr. MINKEL. We have a small bankruptcy case back in New York by the name of "W. T. Grant," and that's a straight bankruptcy case, and is illustrative of the fact that we're concerned with all cases.

Mr. EDWARDS. Most of the reorganization cases would be with a debtor in possession, and you would be going to the court rather than to the trustee. Is that correct, most of the time?

Mr. MINKEL. We would hope that under a consolidated reorganization chapter that unless there was strong reason for a reorganization trustee being appointed, a debtor-in-possession would be allowed to run their business. And if the court felt it necessary, an investigator would be appointed.

If the debtor in possession is not conducting himself properly. I can assure you that parties involved in the proceeding will find their way to the courthouse.

Mr. EDWARDS. Are there further questions?

Mr. Klee?

Mr. KLEE. Thank you, Mr. Chairman.

Judge Cyr, earlier today Congressman Butler referred to a proposition advocated by the Judicial Conference which he termed "jurisdiction by delegation," and also, "jurisdiction by detriment." Do you object to the jurisdiction contained in the Danielson-Railsback amendment, insofar as it commits each of the district courts in the 94 districts to determine what part of the plenary jurisdiction is to be delegated to the bankruptcy court?

Judge CYN. I can see no reason to disrupt the uniformity, which I expect we all strive to obtain in this system, merely for the purpose of letting a given local district court continue to determine whether or not the bankruptcy judge would or would not hear these plenary matters.

I fail to see any justification for it.

Mr. KLEE. And you think the jurisdiction should be pervasive, as advocated by H.R. 8200?

Judge CYN. Indeed.

Mr. KLEE. What does Robert Morris Associates think on those two points?

Mr. MINKEL. Would you repeat the question for me?

Mr. KLEE. Yes. There were two questions.

First, do you favor jurisdiction by delegation as contained in the Danielson-Railsback amendment, whereby the local district courts would determine what part of the plenary jurisdiction would be delegated to the bankruptcy courts?

Mr. MINKEL. I think that, quite plainly, the amendment doesn't solve the problem presented in the Commission Report, and subsequently carried forward in the history of this legislation, for doing away with the plenary summary jurisdiction dichotomy.

Under the Amendment, we will undoubtedly litigate the question of detriment, in the same way that we are now litigating the question of whether or not there's a substantial adverse claim.

Mr. KLEE. The second question was: Do you support the grant of pervasive jurisdiction given to the bankruptcy court in H.R. 8200? Again, that is premised on the fact that it's an independent article III court.

Mr. MINKEL. Premised on that fact, we support it. I have to say also, it gives me pause, as Professor Marsh commented this morning, as to what kind of cases, which are not really controversies between the debtor and third parties might be brought into bankruptcy court.

I don't think the bankruptcy court should be the forum for the adjudication of securities law actions which more properly should be brought in another forum by creditors against such third parties as they feel appropriate.

I don't know that it really should be a part of the business of bankruptcy courts to litigate these cases and proceedings. In that respect, I think the present system seems to work fairly well.

Mr. KLEE. Thank you.

Mr. WADE. I would just add one thing to that. I don't think you will ever get rid of all litigation over jurisdictional matters.

On the other hand, the article III proposal embodied in 8200 does have the benefit of, I think, minimizing it by making the distinction much sharper and much clearer. And I think some of the combination proposals raise the same sorts of constitutional questions, raise the same sorts of fuzzy-ended questions that have driven us to distraction for a long time.

Mr. MOLLER. Regarding the point that was raised by Mr. Minkel, it seems to me that implicit in the pervasive jurisdiction is the very heavy consideration of absence by the bankruptcy courts in appropriate cases.

It is not compelled to take on every one of the cases, and I think you can certainly depend on the court to exercise that abstention at their discretion quite wisely.

Mr. KLEE. Judge Cyr, my last question for this afternoon focuses on footnote 43, found on page 41 of your statement. This is a small point, but it's such an excellent statement that I did want to clarify this for the record.

You seem to indicate that the power of appointment of judges of article III courts could be done other than by the President by and with the advice and consent of the Senate.

That assumes, perforce, that an article III judge would be an inferior officer of the United States, rather than an officer of the United States. I wonder if that conclusion was reached after due deliberation?

Judge CYR. I'm afraid it wasn't, and it's too late in the day for me to give that deliberation. I'd be glad to look into it.

Mr. KLEE. Thank you, Mr. Chairman. I have no further questions.

Mr. EDWARDS. Are there further questions?

[No response.]

Mr. EDWARDS. All members of the panel are thanked. You've helped us a lot.

The subcommittee will meet again tomorrow in this room at 9:30, and we're adjourned.

[Whereupon, at 4:55 p.m., the hearing was adjourned, to reconvene at 9:30 a.m. Wednesday, December 14, 1977.]

# BANKRUPTCY COURT REVISION

WEDNESDAY, DECEMBER 14, 1977

U.S. HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The hearing was reconvened at 9:30 a.m., in room 2226, Rayburn House Office Building; Hon. Don Edwards [chairman of the subcommittee] presiding.

Present: Representatives Edwards, Drinan, Butler, and McClory.  
Also present: Richard B. Levin, assistant counsel; and Kenneth N. Klee, consultant.

Mr. EDWARDS. The subcommittee will come to order.

This morning the subcommittee will continue its work on H.R. 8200, the bankruptcy reform bill. We are pleased that the distinguished Attorney General of the United States, Griffin B. Bell, is our first witness.

Mr. Attorney General, we welcome you, and we look forward to your testimony. And I yield to the gentleman from Virginia.

Mr. BUTLER. I just want to join in welcoming the Attorney General, and we appreciate this interest in our legislative process.

Mr. EDWARDS. Proceed, sir.

[The prepared statement of the Hon. Griffin B. Bell follows:]

## STATEMENT OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and members of the subcommittee, I am pleased to respond to your request to testify on the judicial and administrative structure aspects of bankruptcy reform. Indeed, it is the judicial and administrative structure portion of this Subcommittee's bill, H.R. 8200, with which I am most concerned. My statement will examine two provisions in H.R. 8200—the creation of Article III bankruptcy courts and the placement of the proposed United States Trustees within the Department of Justice.

### JUDICIAL STRUCTURE

As reported by the House Committee on the Judiciary, title II of H.R. 8200 would create a United States Bankruptcy Court for each judicial district<sup>1</sup> consisting of bankruptcy judges, appointed by the President, by and with the advice and consent of the Senate,<sup>2</sup> who would hold office during good behavior.<sup>3</sup> These proposed United States bankruptcy judges would not only receive the same salary as United States district judges<sup>4</sup> but would be authorized to sit, by designa-

<sup>1</sup> Proposed 28 U.S.C. 151, § 201(a), H.R. 8200, as reported with an amendment and committed to the Committee of the Whole House on the State of the Union, September 8, 1977. All subsequent references to H.R. 8200 will be to this version of the bill.

<sup>2</sup> Id. at proposed 28 U.S.C. 152.

<sup>3</sup> Id. at proposed 28 U.S.C. 153.

<sup>4</sup> Id. at proposed 28 U.S.C. 154.

tion, on district courts and circuit courts.<sup>5</sup> Decisions of the proposed United States bankruptcy courts could be appealed directly to the United States courts of appeals.<sup>6</sup>

Although this Subcommittee considered such an Article III court<sup>7</sup> in the Ninety-fourth Congress,<sup>8</sup> legislation proposing such a court was not introduced until the beginning of the Ninety-fifth Congress.<sup>9</sup> Earlier proposals<sup>10</sup> would have established a system of bankruptcy courts under Article I of the Constitution. The staff of this Subcommittee has concluded, quite correctly I believe,<sup>11</sup> that there is substantial doubt whether an Article I bankruptcy court "could be constitutionally permitted to exercise a complete grant of the powers necessary to adjudicate bankruptcy cases."<sup>12</sup> The full Judiciary Committee has agreed with this analysis.<sup>13</sup>

This Subcommittee's decision to propose an Article III bankruptcy court premised that the bankruptcy court should be separate and independent from the district court.<sup>14</sup> I continue to believe, on the other hand, that the bankruptcy court should remain an adjunct to the district court, and that an examination of the reasons advanced by proponents of a separate and independent bankruptcy court, will show that needed reform can be implemented without the drastic step of creating Article III bankruptcy courts.

One argument for a separate and independent bankruptcy court is that present bankruptcy judges are not assured of adequate clerical help, law clerks, and access to law libraries.<sup>15</sup> I, of course, would support whatever language is necessary to insure that bankruptcy judges are provided with adequate facilities and control over bankruptcy court personnel.<sup>16</sup> But adequate support for bankruptcy judges can surely be provided without creating a separate system of bankruptcy courts.

Another argument for an independent bankruptcy court is that such a court would attract better people to serve as bankruptcy judges.<sup>17</sup> There are of course many excellent people presently serving as bankruptcy judges. An upgraded court with judges appointed by an authority other than the district judge and with appointments for terms of substantial duration, would, I believe, assure bankruptcy judges of the highest caliber. Under the amendment to H.R. 8200 which passed in the Committee of the Whole,<sup>18</sup> the judicial council in each circuit would appoint bankruptcy judges to fifteen year terms.<sup>19</sup> The bankruptcy reform bill being considered by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery would have the judicial council in each circuit appoint bankruptcy judges to twelve year terms.<sup>20</sup> Although I have no preference with respect to twelve year or fifteen year terms, I do think that the appointment of bankruptcy judges by the judicial council in each circuit is a commendable change. Not only would a judicial council appointment mechanism serve to upgrade the status of bankruptcy judges, but it would also separate the appointment authority from the reviewing authority.<sup>21</sup>

<sup>5</sup> Section 205, H.R. 8200.

<sup>6</sup> Sections 237-240, H.R. 8200.

<sup>7</sup> Although the terminology is somewhat inexact, I shall refer to a court established under Article III, section 1, of the Constitution as an Article III court. The judges of such a court are required to have life tenure and protection from diminution of compensation. Similarly, I shall refer to a court established pursuant to a Congressional grant of power under Article I of the Constitution as an Article I court. The judges of such a court would not be required to have tenure or compensation protection.

<sup>8</sup> Hearings on H.R. 31 and H.R. 32 before the House Judiciary Subcommittee on Civil and Constitutional Rights, 94th Cong., 1st and 2d Sess., Part 4 (1975-76) [hereinafter cited as House Hearings].

<sup>9</sup> H.R. 6, 95th Cong., 1st Sess., § 201 (1977).

<sup>10</sup> H.R. 31, 94th Cong., 1st Sess., § 2-102 (1975); H.R. 32, 94th Cong., 1st Sess., § 2-102 (1975).

<sup>11</sup> See Letter from Assistant Attorney General Patricia M. Wald to the Honorable Peter W. Rodino, Jr., Chairman, House Committee on the Judiciary, July 14, 1977.

<sup>12</sup> Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, Constitutional Bankruptcy Courts, Committee Print No. 3, 95th Cong., 1st Sess. p. 38 (1977).

<sup>13</sup> House Committee on the Judiciary, Bankruptcy Law Revision, H. Rpt. No. 95-595, 95th Cong., 1st Sess., p. 52 (1977) [hereinafter cited as House Report].

<sup>14</sup> Id.

<sup>15</sup> See e.g., House Hearings, supra note 8 at 513.

<sup>16</sup> See e.g., proposed 28 U.S.C. 772, S. 234(n), H.R. 8200.

<sup>17</sup> See e.g., House Report, supra note 13 at 16-18.

<sup>18</sup> 123 Cong. Rec. H11763-83 (daily ed. Oct. 28, 1977).

<sup>19</sup> Id. at H11763 (proposed 28 U.S.C. 771).

<sup>20</sup> S. 2266, 95th Cong., 1st Sess., § 201 at proposed 28 U.S.C. 771 (1977).

<sup>21</sup> See e.g., House Report, supra note 13 at 17.

A third argument for an independent bankruptcy court is that bankruptcy cases are increasingly complex, involving larger sums of money, with more impact on the community.<sup>23</sup> We must remember, however, that the great bulk of bankruptcy cases continue to be uncontested nonbusiness cases.<sup>24</sup> An upgraded bankruptcy court operating as an adjunct of, and in conjunction with, the district court can adequately handle the remaining admittedly complex cases that occur in liquidation and reorganization proceedings.

Next, it has been argued that the bankruptcy courts need expanded jurisdiction in order to function efficiently and expeditiously and that such expanded jurisdiction requires a separate and independent court.<sup>25</sup> I agree that the distinction between summary and plenary jurisdiction in the bankruptcy courts is cumbersome, outmoded, and inefficient<sup>26</sup> and that resort to such legal fictions as jurisdiction by "consent" should end in favor of explicit authority in the district court to take jurisdiction over the affairs of the estate.<sup>27</sup> The Judiciary Committee bill would give the bankruptcy court original and exclusive jurisdiction of all cases under title 11, and original, but not exclusive, jurisdiction of all civil proceedings "arising under title 11 or arising under or related to cases under title 11."<sup>28</sup> A party would be able to remove any civil cause of action, other than a proceeding before the United States Tax Court or an enforcement action by a governmental unit, to the bankruptcy court having jurisdiction over that cause of action.<sup>29</sup>

Although this grant encompasses jurisdiction as broad as can be conceived,<sup>30</sup> I would not object to it, if the words "district court" were substituted for the words "Bankruptcy court," and a mechanism established to insure that the bankruptcy court is delegated the power to exercise the jurisdiction granted to the district court.<sup>31</sup> It is not necessary to create a separate and independent court to provide bankruptcy courts with as broad a jurisdiction as they need.

The jurisdiction provisions of the Senate bill, while narrower than those of the House bill, also have merit. The Senate proposal would grant the district courts original jurisdiction of title 11 proceedings which would be exclusive with regard to state courts.<sup>32</sup> It would also grant the district courts original, but not exclusive, jurisdiction of all civil proceedings by or against the representative of the debtor's estate.<sup>33</sup> The Senate bill's removal provisions would only be applicable to state court proceedings, and then only upon a showing of detriment to the estate.<sup>34</sup>

Again, although I would not object to a complete conferral of jurisdiction upon the district court, this Subcommittee may wish to consider a narrower grant of jurisdiction with a view toward increasing it if our experience with the new upgraded courts indicates a need for even broader jurisdiction.

My point is that an upgrading of the existing bankruptcy court system by having the judicial council in each circuit appoint bankruptcy judges to twelve or fifteen year terms, by giving the bankruptcy judges control over their own employees and facilities, and by giving the bankruptcy court increased jurisdiction through the district court, would satisfy the major arguments for a separate and independent bankruptcy court system.

In my view a separate and independent bankruptcy court is simply not needed. The existing bankruptcy courts work and they work well, and they are probably

<sup>23</sup> *Id.* at 10.

<sup>24</sup> Approximately 90 percent of all bankruptcy filings during the last decade were non-business cases. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics, 4 (1975). Among the 237,793 cases closed in 1976, only 25,154 were asset cases; 24,711 were nominal asset cases, 119,618 were no asset cases, 457 were Chapter XI cases, 10,799 were Chapter XIII cases, 16 were chapter X cases, and 11 were Chapter XII cases. Figures supplied by Division of Bankruptcy, Administrative Office of the United States Courts.

<sup>25</sup> See e.g., House Report, supra note 13 at 13; Report of the Commission of the Bankruptcy Laws of the United States, H.R. Doc. 93-137, 93d Cong., 1st Sess., Pt. I at ch. 4 (1973); House Hearings, supra note 8 at 140-154.

<sup>26</sup> See e.g., House Hearings, supra note 8 at 179.

<sup>27</sup> See e.g., *Id.* at 140-154.

<sup>28</sup> Proposed 28 U.S.C. 1471, § 243(a), H.R. 8200.

<sup>29</sup> *Id.* at proposed 28 U.S.C. 1478.

<sup>30</sup> House Report, supra note 13 at 445.

<sup>31</sup> See, e.g., proposed 28 U.S.C. 775(a), § 201, S. 2266.

<sup>32</sup> Proposed 28 U.S.C. 1334(a), § 202, S. 2266.

<sup>33</sup> *Id.* at proposed 28 U.S.C. 1334(b). I understand that the Senate Subcommittee's jurisdiction formula may not have incorporated the 1970 amendments to the Bankruptcy Act which gave the bankruptcy court jurisdiction to grant a judgment on an undischarged debt. P.L. 91-467, 84 Stat. 92 (1970). This, of course, would be a simple matter to correct.

<sup>34</sup> Section 204, S. 2266.

one of the few components of our judicial system in which there is no appreciable backlog.<sup>34</sup> Of course this does not mean that we should not move quickly to correct deficiencies as they appear; it does mean, however, that we should not hastily embrace a proposal for creating a novel and expensive nationwide system of separate, Article III bankruptcy courts.

In 1789, the First Congress determined that the judicial power of the United States under Article III of the Constitution should be exercised by a system of courts of general jurisdiction, the United States district courts.<sup>35</sup> With few exceptions for small specialized courts such as the United States Court for Customs and Patent Appeals, we have maintained for 200 years this nationwide system of courts of general jurisdiction. These courts, the United States district courts, are the core of the Federal judiciary. They have adapted successfully to their increasing and changing responsibilities which have paralleled the changing life of the nation. We do not have tax judges or antitrust judges, or civil rights judges or criminal law judges. To erect, parallel to our district courts, a system of Article III bankruptcy courts, which under H.R. 8200 would have even broader jurisdiction than the district courts,<sup>36</sup> would almost certainly operate to diminish the prestige and influence of our district courts. As Attorney General I have tried to insure the optimal use of our district judges by supporting legislation which would not only expand their numbers but which would also diminish the call on their services by the use of magistrates and alternative dispute resolution mechanisms.

In summary, an Article III bankruptcy court is unwise as well as unneeded.

#### ADMINISTRATIVE STRUCTURE

H.R. 8200 would also create a system of United States Trustees, with a United States Trustee for each judicial district appointed by the Attorney General to a seven year term.<sup>37</sup> A tenth Assistant Attorney General position would be created for the person who will assist the Attorney General in supervising the U.S. Trustee system.<sup>38</sup> Although the duties of the U.S. Trustee would vary with the chapter under which a case is filed, he would generally act as trustee in no asset cases and supervise private trustees in certain other cases.<sup>39</sup> In Chapter XIII individual repayment plan cases, the U.S. Trustee, rather than the bankruptcy judge, would have the primary responsibility for the conduct of the case.<sup>40</sup>

I support the establishment of a system of official trustees; it would have at least three beneficial effects on the present system of bankruptcy administration. First, the official trustee's authority to appoint and supervise private trustees would eliminate the current appearance of unfairness caused by the bankruptcy judge ruling on the actions of the trustee who is his appointee. Second, an official trustee could take over many of the supervisory responsibilities presently borne by the bankruptcy judge, thereby freeing the bankruptcy judge to concentrate his efforts on his judicial duties. Third, an official trustee could act as trustee in those cases, such as no asset or nominal asset cases, in which there is a minimum of credit control, thereby assuring that the case is handled in the public interest.

However, the Department of Justice, as attorney for the Federal Government, a major creditor in many bankruptcies, has concerns about any major role in bankruptcy administration. While I realize that the proposed U.S. Trustees would most often act as trustee in those cases in which there is no creditor interest, the appearance of a conflict of interest will always be present; and, of course, the appearance of a conflict of interest is just as harmful to our judicial system as the actuality of a conflict of interest. In legislation which seeks to remove apparent conflicts of interest in the current bankruptcy judge appointment mechanism and the trustee appointment mechanism, it would be ironic to create another apparent conflict of interest—the attorney for a major creditor being responsible for the supervision of the bankrupt's estate.

<sup>34</sup> See Administrative Office of the U.S. Courts, *supra* note 23 at 10. For the ten year period ending in 1975 the number of cases filed during each year approximates the number of cases closed during each year.

<sup>35</sup> The Judiciary Act of 1789, 1 Stat. 73.

<sup>36</sup> The removal provision, proposed 28 U.S.C. 1478, when read with the broad jurisdiction provision, proposed 28 U.S.C. 1471, would authorize the removal of litigation from the district courts and other Federal courts, such as the Court of Claims.

<sup>37</sup> Proposed 28 U.S.C. 581, § 224 (a), H.R. 8200.

<sup>38</sup> Section 218, H.R. 8200.

<sup>39</sup> *House Report, supra* note 13 at 101-102.

<sup>40</sup> *Id.* at 105.

I believe that the official trustee should be placed in the Judicial Branch. One alternative, proposed by the Danielson-Railsback amendment,<sup>41</sup> would be district court appointments of the official trustee; another alternative would be to place the official trustees under the supervision of the Administrative Office of the United States Courts. A third possible location would be within the Judiciary as an independent establishment much like the Federal Judicial Center.<sup>42</sup> Any of these alternatives would be preferable, in our opinion, to the placement of the United States Trustees in the Department of Justice.

Mr. Chairman, I wish to close my statement by commending this Subcommittee and its staff for producing a bill which, if enacted, will be the first major revision of the bankruptcy laws since the 1938 enactment of the Chandler Act.<sup>43</sup> H.R. 8200 is basically sound, much needed, legislation. Deletion of the provisions for Article III bankruptcy courts and Department of Justice control of U.S. Trustees would satisfy this Department's main objections to this most important legislation.

**TESTIMONY OF HON. GRIFFIN B. BELL, ATTORNEY GENERAL OF  
THE UNITED STATES, ACCOMPANIED BY PATRICIA WALD,  
MICHAEL DOLAN, AND THOMAS NEWKIRK**

General BELL. Mr. Chairman, Mr. Butler, I am pleased to respond to your request to testify on the judicial and administrative structure aspects of bankruptcy reform.

Indeed, it is the judicial and administrative structure portion of the subcommittee's bill, H.R. 8200, with which I am most concerned.

My statement will examine two provisions in H.R. 8200: The creation of article III bankruptcy courts; and the placement of the proposed U.S. trustees within the Department of Justice.

Turn first to judicial structure. As reported by the House Bankruptcy court for each judicial district consisting of bankruptcy judges, appointed by the President by and with the advice and consent of the Senate, who would hold office during good behavior.

These proposed U.S. bankruptcy judges would not only receive the same salary as U.S. district judges, but would be authorized to sit, by designation, on district courts and circuit courts. Decisions of the proposed U.S. bankruptcy courts could be appealed directly to the U.S. Courts of appeals.

Although the subcommittee considered such an article III court in the 94th Congress, legislation proposing such a court was not introduced until the beginning of the 95th Congress.

Earlier proposals would have established a system of bankruptcy courts under article I of the Constitution. The staff of this subcommittee has concluded, quite correctly I believe, that there is substantial doubt whether an article I bankruptcy court could be constitutionally permitted to exercise a complete grant of the powers necessary to adjudicate the bankruptcy cases. The full Judiciary Committee has agreed with this analysis.

This subcommittee's decision to propose an article III bankruptcy court premised that the bankruptcy court should be separate and independent from the district court.

I continue to believe, on the other hand, that the bankruptcy court should remain an adjunct of the district court, and that an examina-

<sup>41</sup> 123 Cong. Rec. H11765 (daily ed., Oct. 28, 1977).

<sup>42</sup> See 28 U.S.C. 620 *et seq.*

<sup>43</sup> Act of June 22, 1938, 52 Stat. 840.

tion of the reasons advanced by proponents of a separate and independent bankruptcy court will show that needed reform can be implemented without the drastic step of creating article III bankruptcy courts.

One argument for a separate and independent bankruptcy court is that present bankruptcy judges are not assured of adequate clerical help, law clerks, and access to law libraries. I, of course, would support whatever language is necessary to insure that bankruptcy judges are provided with adequate facilities and control over bankruptcy court personnel. But adequate support for bankruptcy judges can surely be provided without creating a separate system of bankruptcy courts.

Another argument for an independent bankruptcy court is that such a court would attract better people to serve as bankruptcy judges. There are, of course, many excellent people presently serving as bankruptcy judges. An upgraded court with judges appointed by an authority other than the district judge and with appointments for terms of substantial duration would, I believe, assure bankruptcy judges of the highest caliber.

I don't mean to imply by that that we don't have high-caliber bankruptcy judges now. I know many bankruptcy judges. Under the amendment to H.R. 8200 which passed in the Committee of the Whole, the judicial council in each circuit would appoint bankruptcy judges to 15-year terms. The bankruptcy reform bill being considered by the Senate Judiciary Subcommittee on Improvements in the Judiciary machinery would have the judicial council in each circuit appoint bankruptcy judges to 2-year terms.

Although I have no preference with respect to 12 or 15 years, I do think that the appointment of bankruptcy judges by the judicial council in each circuit is a commendable change. Not only would a judicial council appointment mechanism serve to upgrade the status of bankruptcy judges, but it would also separate the appointment authority from the reviewing authority.

A third argument for an independent bankruptcy court is that bankruptcy cases are increasingly complex, involving larger sums of money with more impact on the community. We must remember, however, that the great bulk of bankruptcy cases continue to be uncontested, nonbusiness cases. An upgraded bankruptcy court operating as an adjunct of, and in conjunction with, the district court can adequately handle the remaining admittedly complex cases that occur in liquidation and reorganization proceedings.

Next, it has been argued that the bankruptcy courts need expanded jurisdiction in order to function efficiently and expeditiously; that such expanded jurisdiction requires a separate and independent court.

I agree that the distinction between summary and plenary jurisdiction in the bankruptcy courts is cumbersome and inefficient, and that resort to such legal fictions as jurisdiction by "consent" should end in favor of explicit authority in the district court to take jurisdiction over the affairs of the estate.

The Judiciary Committee bill would give the bankruptcy court original and exclusive jurisdiction of all cases under title II, and original but not exclusive jurisdiction of all civil proceedings arising under title II or arising under or related to cases under title II.

A party would be able to remove any civil cause of action, other than a proceeding before the U.S. Tax Court or an enforcement action by a governmental unit, to the bankruptcy court having a jurisdiction over that cause of action.

Although this grant encompasses jurisdiction as broad as can be conceived, I would not object to it if the words "district court" were substituted for the words "bankruptcy court" and a mechanism established to insure that the bankruptcy court is delegated the power to exercise the jurisdiction granted to the district court. It is not necessary to create a separate and independent court to provide bankruptcy courts with as broad jurisdiction as they need.

The jurisdiction provisions of the Senate bill while narrower than those of the House bill also have merit. The Senate proposal would grant the district courts original jurisdiction of title II proceedings which would be exclusive with regard to State courts.

It would also grant the district courts original, but not exclusive, jurisdiction of all civil proceedings by or against the representatives of the debtor's State.

The Senate bill's removal provisions would only be applicable to State court proceedings, and then only upon a showing of detriment to the State.

Again, although I would not object to a complete conferral of jurisdiction upon the district court, this subcommittee may wish to consider a narrower grant of jurisdiction with a view toward increasing it if our experience with the new upgraded courts indicates a need for even broader jurisdiction.

My point is that an upgrading of the existing bankruptcy court system by having the judicial council in each circuit appoint bankruptcy judges to 12- or 15-year terms, by giving the bankruptcy judges control over their own employees and facilities, and by giving the bankruptcy court increased jurisdiction through the district court, would satisfy the major arguments for a separate and independent bankruptcy court system.

In my view, a separate and independent bankruptcy court is simply not needed. The existing bankruptcy courts work, and they work well, and they are probably one of the few components of our judicial system in which there is no appreciable backlog.

Of course, this does not mean that we should not move quickly to correct deficiencies as they appear. It does mean, however, that we should not hastily embrace a proposal for creating a novel and expensive nationwide system of separate article III bankruptcy courts.

In 1787, the first Congress determined that the judicial power of the United States under article III of the Constitution should be exercised by a system of courts of the general jurisdiction, U.S. district courts. I want to stop there for a moment to say something.

Judge Friendly's book on the Federal courts, speaks of district courts being courts of general jurisdiction. We can't be confused by that because when you talk and compare to the State courts of general jurisdiction, they're not courts of general jurisdiction. They have just such jurisdiction as Congress imposed on them.

In the State system the trial courts are courts of general jurisdiction. They have everything. But I think when we use the term here

we're talking in terms of a general jurisdiction as compared to specialized courts: tax court, bankruptcy court, and the like.

With few exceptions for small specialized courts such as the U.S. Court for Customs and Patent Appeals, we have maintained for 200 years this nationwide system of courts of general jurisdiction. These courts, the U.S. district courts, are the core of the Federal judiciary. They have adapted successfully to their increasing and changing responsibilities which have paralleled the changing life of the Nation.

We do not have tax judges or antitrust judges or civil rights judges or criminal law judges—I want to modify that to note that we do have tax judges: We do have a tax court. To erect parallel to the district courts a system of article III bankruptcy courts, which under H.R. 8200 would have even broader jurisdiction than district courts, would almost certainly operate to diminish the prestige and influence of our district courts.

As Attorney General, I have tried to insure the optimal use of our district judges by supporting legislation which would not only expand their numbers, but which would also diminish the call on their services by the use of magistrates and alternative dispute-resolution mechanisms, such as arbitration.

In summary an article III bankruptcy court, in my judgment, is unwise as well as unneeded.

Now, the balance of my testimony is very short. I'll just go head and read it. It's just three pages. It has to do with trustee problem.

H.R. 8200 would also create a system of U.S. trustees, with a U.S. trustee for each judicial district, appointed by the Attorney General to a 7-year term. A 10th Assistant Attorney General position would be created for the person who will assist the Attorney General in supervising the U.S. trustee system. Although the duties of the U.S. trustee would vary with the chapter under which a case is filed, he would generally act as trustee in no asset cases and supervise private trustees in certain other cases. In chapter XIII individual repayment plan cases, the U.S. trustee, rather than the bankruptcy judge, would have the primary responsibility for the conduct of the case.

I support the establishment of a system of official trustees. It would have at least three beneficial effects on the present system of bankruptcy administration. First, the official trustee's authority to appoint and supervise private trustees would eliminate the current appearance of unfairness caused by the bankruptcy judge ruling on the actions of the trustee who is his or her appointee.

Second, an official trustee could take over many of the supervisory responsibilities presently borne by the bankruptcy judge, thereby freeing the judge to concentrate his efforts on his judicial duties.

Third, an official trustee could act as trustee in those cases such as no asset or nominal asset cases, in which there is a minimum of creditor control, thereby assuring that the case is handled in the public interest.

However the Department of Justice, as attorney for the Federal Government, a major creditor in many bankruptcies, has concerns about any major role in bankruptcy administration. While I realize that the proposed U.S. trustee would most often act as trustee in those cases where there is no creditor interest, the appearance of a conflict of

interest will always be present. And of course the appearance of a conflict of interest is just as harmful to our judicial system as the actuality of a conflict of interest.

In legislation which seeks to remove apparently conflicts of interest in the current bankruptcy judge appointment mechanism and the trustee appointment mechanism, it would be ironic to create another apparent conflict of interest—the attorney for a major creditor being responsible for the supervision of the bankrupt estate.

I believe that the official trustee should be placed in the judicial branch.

One alternative proposed by the Danielson/Railsback amendment would be district court appointments of the official trustee. Another alternative would be to place the official trustees under the supervision of the Administrative Office of the U.S. Courts.

A third possible location would be within the judiciary as an independent establishment much like the Federal Judicial Center. Any of these alternatives would be preferable, in our opinion, to the placement of the U.S. trustees in the Department of Justice.

I'd like to say at that point that as Attorney General I don't want to be kept in a role of trying to block things and trying to shirk responsibility. If the committee were to look at all of these alternatives and finally decide that the Justice Department is the best place, I suppose I would cheerfully go along with it and set it up the best I could. I don't know if these alternatives are the best.

I have an idea that the court administrative office would be the best place to put the trustee. They have quite an administrative set-up. For example, they keep up with all the wiretaps granted even in the State courts, and they publish an annual report on that. So they have some other duties.

But I'd be glad to come back again and meet with the committee and the staff sometime and talk about it, if you get to the point where you think the Justice Department really ought to do it.

I wish to close my statement by commending this subcommittee and its staff for producing a bill which, if enacted, would be the first major revision of the bankruptcy law since the 1938 enactment of the Chandler Act. H.R. 8200 is basically sound, much needed legislation. Deletion of the provisions for article III bankruptcy courts and Department of Justice control of U.S. trustees would satisfy this Department's main objections to this most important legislation.

Mr. Chairman, I think that concludes my statement. I'd be glad to try to answer any questions.

Mr. EDWARDS. Thank you, Mr. Attorney General, and thank you for your offer of cooperation with regard to the final decision on the placing of the U.S. trustee. That is not our largest problem. We can live with that trustee being in different places. We can handle that OK.

The bill—more than 300 pages—has an amazing amount of support. There's hardly anybody who doesn't say that all 300 pages are good. And yet there are some really revolutionary reforms in the bill—in addition to whatever we might decide about the court system, or the trustee system—and yet it has support throughout the United States.

However, we are in a catch-22 position with regard to the court system. Much of the support will melt away—we have found that out with recent witnesses—if the system such as you suggest, or certainly in the Danielson-Railsback proposal is made a part of the bill. We really won't have much support throughout the United States for this.

For example, the banks testified yesterday—representing literally hundreds and hundreds of banks around the United States—saying there are provisions in the bill that are not to their advantage, insofar as credit is concerned, foreclosures, secured creditors, and so forth, perhaps indicating that portions of the bill favor the debtor more than these large creditors would like.

However, they are willing to go along with those changes only on the condition that they have a better forum for their huge problems regarding insolvency—hundreds and hundreds of millions of dollars involved on a yearly basis, for which they have to go to referee in bankruptcy.

The referee's order—how do they know how good it is? If they went to a tenured judge, an article III judge, the lawyers for the bank would say, "yes, we can count on that. We can move ahead; not just the first step down the road."

And we've had much testimony over the last 3 days saying that we don't want any more specialized courts. Well, we've got a specialized court, right now. The bankruptcy judges are a court, only they do all the work. We've got a specialized court. All we're trying to do is make it an effective court. And it is a problem.

We're losing bankruptcy judges, too. Just last year, or the year before, we lost 15 to 18 of the best bankruptcy judges in the country.

I recognize the gentleman from Virginia, Mr. Butler.

Mr. BUTLER. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for your very concise statement and careful analysis.

I guess I detect some mellowing on the question of the U.S. trustee, and I appreciate the concern with this problem and the basis for your questioning our earlier decision in this regard.

General BELL. Let me say right now, I recognize that that is a problem. I've been practicing law a long time. I expect I have been in bankruptcy court long before any of the members of this committee.

And when I was a young lawyer, an old lawyer said the bankruptcy court was run for the benefit of the referee and the trustee, and the referees' pension fund. That was just a general comment. And he said, "no creditor ever gets anything." And sometimes, that seemed to be true. But there's been a tremendous upgrading of the caliber of the bankruptcy referee, now "judge," and the whole system has been upgraded over the years.

I've seen it improve with my own eyes. But the trustee part is a problem. People wonder who gets all these trusteeships. Whose friends are they? Who supervises them? That sort of thing.

And I don't want to be cast in the role of not trying to solve the problem. I'm certainly a problem solver, and I'd like to help however I can. That's what I meant.

Mr. BUTLER. Yes, sir. Well, I appreciate that.

As a matter of fact, I feel that, throughout this, you have pretty well stated the problem. There are only slight differences on the solutions, from time to time. That's helpful.

To understand your view with reference to, for example, the extent to which your jurisdiction—as I judge, you have some views—but not with reference to the extent to which we would expand the jurisdiction of the bankruptcy court, that you're not adamant in this view.

And I judge that you are familiar, of course, with the Danielson amendment. I would like to share with you some views about this jurisdiction by detriment, which is the effect of that.

It's just been my view that, instead of improving the situation, that's one more problem for jurisdiction that would take the energy of the court and the time of the litigants, without really advancing the quality of the justice.

And I wondered if you had some thoughts on that ?

[Pause.]

General BELL. Yes, I know what it is——

Mr. BUTLER. I will read you the section.

General BELL. Read me that, if you will.

Mr. BUTLER. The section is:

An original action, under this subsection, may be filed only with the consent of the district court upon the showing of need to have the case heard in the district court to prevent a potential loss of assets or to avoid other adverse effects upon the administration of the estate of the debtor. The decision of the district court denying consent to the filing of such an original action shall not be reviewable by appeal or otherwise.

General BELL. I don't favor that.

I'm not getting into any part of the bill except the two points that I mentioned. Now, if you want me to say something about that, I would not favor that because it would add another hearing in the district court; we can't handle all the hearings we have now. And we ought to have jurisdictional statements spelled out.

There is a jurisdictional problem in the Federal court. Experienced lawyers know that it's very hard to tell the difference between summary and plenary jurisdiction.

Mr. BUTLER. Well, it's a great source of litigation. I guess we've got to keep the lawyers busy.

General BELL. Well, we've got more lawyers than ever.

Mr. BUTLER. That's right. I think we produce them fast.

General BELL. We have a lot of things in the law, though, that can be analogized to this. In a Supreme Court decision—I think it's *Bell v. Hood*—decided 15 or 20 years ago, at least, the Supreme Court, for the first time, recognized that oftentimes you take jurisdiction to see if you have jurisdiction. That's what this would be.

Take jurisdiction to see if you have jurisdiction. If you don't, then you release your case. But that would add another step.

So, I wouldn't favor adding a step like that.

Mr. BUTLER. I appreciate that view.

There's one other thing that disturbs me in the Danielson amendment. And that is the provision which would, in effect, have each district court set its own rules as to—we call that “jurisdiction by delegation” as a shorthand method—“and each bankruptcy court shall serve

under this chapter and shall have the power to conduct proceedings authorized by rule or order of the district court.”

The effect of that, we felt, I think, would be to have a different system of jurisdictional criteria for each of the U.S. district courts. And then, we questioned whether that was a uniform bankruptcy system.

I'd like your views on that.

General BELL. Well, as I understand that, the district court would have the jurisdiction at all times. The question would be whether the district judge would handle it, or would refer it to a bankruptcy judge.

So, in that sense, it doesn't seem to me it would be any hardship. You'd have the litigant, or the applicant, who would always have that jurisdiction available.

Mr. BUTLER. The jurisdiction would be in the district court.

General BELL. Right, so it would be available.

Mr. BUTLER. The question would be whether it would be delegated or not, and the answer would be different in each district according to the rules of the court.

General BELL. That might seem, on the face of it, like a difference, but it really isn't a difference. Because we think of it in terms of "the court." The jurisdiction is in the court. The district judge would just have to exercise himself, rather than get the bankruptcy judge to do it.

I don't really perceive that to be a big problem.

Mr. BUTLER. All right, sir; thank you.

We felt—and I still feel—that it is.

General BELL. It might be.

Mr. BUTLER. It's a lack of uniformity.

General BELL. It is that.

Mr. BUTLER. Because there's no uniform jurisdiction in the bankruptcy courts, and you don't know whether you're going to wind up in a bankruptcy court or a district court.

General BELL. I wouldn't want to be drawn in a hard position on either side on that question, if I can avoid it.

Mr. BUTLER. I'll try to avoid that. You're pretty charitable in this regard, so we won't push it too far in that regard. I thank you.

I have endeavored to figure out what was the most we could do if we were stuck with the adjunct system of bankruptcy courts. The caption is a "proposal." It's not a proposal; it's kind of a fallback position, as far as I'm concerned, but there are a number of items there.

I think, on the basis of what you said that you don't have, really, argument with many of them—and I won't hold you to that at the moment, but we will give you a copy of that list and ask you to review it in terms of whether you really have any strong objections to the features of the adjunct court that we would try to impose.

General BELL. Well, I am just glancing over it. Let me say something. You know, I used to be a Federal judge—

Mr. BUTLER. I heard about that. [Laughter.]

General BELL [continuing]. And I resigned. When I resigned, I received nothing. I was able to get the money back that I paid into the widow's pension fund, but no pension of any sort.

When the bankruptcy judge retires, he can get a pension when that time runs out. They can serve for 15 years—be 35 years old when they go on the bench, quit at 50, get a pension, and go practice law. That

way, it's a more desirable job than a Federal district judge, or a circuit judge, because in those positions you can't get out.

The judge system is fixed where they keep you—I don't want to say it's slavery, but it's awful hard to leave. [Laughter.]

Mr. BUTLER. That's the reason so many Federal judges resign and take the referee's job? [Laughter.]

General BELL. I haven't heard of a referee resigning who went on pauperage, either. I know of bankruptcy judges who've resigned because law practices are very good these days. There's an advantage to this system.

Every Federal judge—not every Federal judge, but many Federal judges—would like to be put on a 15-year plan so they'd have that option, that you could quit if you wanted to. A lot of Federal judges would even go along with standing for reconfirmation, if they knew they could get the pension.

So, this system is not all bad. Now, of course, in life, you pay a lot of attention to honor—it would be an honor, I guess, to be an article III judge. But you can give the bankruptcy judges all of these things—everything that an article III judge has, except life tenure. And as a tradeoff, they get disability to quit and draw a pension. So I don't think they're in bad shape, from that standpoint.

Surely they ought to be supplied with their own law clerks, court reporters, and such things, and I would think that most of them do.

I think the basic problem is that, in some districts, the bankruptcy judge may be treated almost like, or feel like a second-class judge. Of course, he's around there in the same courthouse as the district judge—he's appointed by the district judge, instead of being appointed by some outside group. And he probably feels his status needs upgrading.

The same would be true, eventually, with the magistrates. What we get down to in the end is: What kind of court system—overall court system—do we want?

I was on the American Bar Commission on Standards of Judicial Administration for 5 years. Judge McCree, incidentally, was on the same Commission. We got out three volumes, and one of them was on court organization. And we decided, instead of all the State court systems, and the Federal system, it was a better system to have a trial court of somewhat general jurisdiction, and then have people in that court called judicial officers who handled the specialized matters.

In the Federal system, we've got bankruptcy judges and we have magistrates. I haven't heard anybody say anything about the title of magistrates versus judges. I think everybody's pretty satisfied with that name. But that's a system. And in that sense, they're all in the same court system.

You can't have them appointed differently. As you know, in the magistrate's bill, you get a little different appointment system.

I think the way we stand now, the district judges can recommend people. If they're to be approved by the Judicial Council, you can get some kind of different appointments system, in itself, that brings about a little different status. But I do favor the system where you're all in the same court, and most of the time you have the same clerk's office.

It's completely unnecessary, in my judgment, to have a separate bankruptcy court clerk's office. You've got all these people working in the clerk's office in most places.

Mr. BUTLER. I think probably the problems would arise from the subordinate position of the referees, and the subordinate position of the clerks.

General BELL. It gets down to status. If you have status, you have power; if you don't have status, you don't have the power. I think that they think they're being mistreated, and I'd stop that, because these are important positions they hold; they're important courts; and anything the committee can do to change that ought to be done.

I think that maybe one error, or fault, in the system, has been that the Judicial Council has never been charged with looking into what goes on in a bankruptcy court. I know, as a member of the Judicial Council for the Fifth Circuit, we didn't have too much to do. We'd have some hard problems come up sometimes—problems of discipline, and those sorts of things that we could handle—but we didn't send somebody around to see what the morale problems were; how efficient these various courts were—we left that completely to the district judge, and for a very good reason.

The district judges picked those bankruptcy judges, and picked the magistrates. I had, one time in my own State, a district judge who selected a magistrate. I heard he selected one that didn't suit me too well. I went to see the circuit judge in the State. I found out there was nothing I would do about it. Those sort of things are problems.

But I don't think the problem is article III versus something else: it's a structure in the system. If it would turn out some day that we'd have to take this question up again, of course we'll debate it again. But I think you're making so much progress in this bill, that I wouldn't want it to fail because we're arguing about article III versus a 15-year term, full-pensioned selection by the Judicial Council.

Mr. BUTLER. Selection by the President of the United States of bankruptcy judges? Would that disturb you? By the President?

General BELL. It would not. It would be a little different from what we're doing now, I guess—we're doing it the same way. We have a lot of these appointments.

As you know, I've been having a lot of problems with U.S. attorneys. That seems to be a big problem in selecting judges. I guess it's more political.

Mr. BUTLER. Those are the folks who seem to do pretty well when they quit, too.

General BELL. If the Congress wants to do that, we could handle that.

You might be charged with giving the party in power more patronage. You have to recognize, if you have a system where the Judicial Council, or even the district judge recommending to the Judicial Council, that they be selected, you have less of a political system. Because some judges are Democrats, some are Republicans.

If you want to give it all to the Democrats, we'd—we, being in power right now, I guess I couldn't object to it.

Mr. BUTLER. Patronage is a "burden" of power, I think, in my observation.

[Laughter.]

General BELL. It is a burden, I think. It really is that. I wouldn't quarrel with you if you think that's the way to do it.

Mr. BUTLER. Thank you, Mr. Attorney General. My time has expired.

Mr. EDWARDS. Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman, and thank you Mr. Attorney General for coming once again to help us. I was glad to hear you say that you didn't want the bill to fail because of the controversy over article I and article III judges.

But it appears to me—and I reflect the opinion of the subcommittee—that this is really a crucial thing. The point was made yesterday that never in the history of the Republic has Congress appointed article I judges for controversies in Federal courts involving two litigants and not the Government. The specialized courts that I've cited, such as the tax court involve the sovereign. Therefore, they are specialized courts in the technical sense.

Consequently, I am persuaded that if bankruptcy is going to remain as it is between two divisions in the Federal court, article III judges are required by the Constitution. If we don't put in article III judges there's going to be litigation that will go on for years and years as to the constitutionality of article I judges, adjudicating these disputes.

Now ultimately, in almost every statement that we have received, they come to the point that you come to on page 9: that somehow the appointment of more article III bankruptcy judges would almost certainly operate to diminish the prestige and influence of our district courts.

Well, I try to analogize that to the Congress. Suppose that 100 more Members of the House were going to be added, and we were going to go from 435 to 535. I'm certain all of us would say this diminishes our prestige and influence.

But I don't think the argument in this case, of course, has substance because these people are now doing this work. It seems to me if we elevate the positions but not the individuals holding them we make no commitment to any referee that he's going to have a job as a judge. It seems to me that would add to the prestige and influence of our Federal courts.

General BELL. I disagree. I don't think the bankruptcy judges, engaged as they are in very specialized work, really are doing the same thing as district judges. A district judge has to be a person, or should be a person, of wide knowledge, experienced in many phases of the law; much more so than a bankruptcy judge. That doesn't mean that bankruptcy judge couldn't do it.

But I would suggest that if any bankruptcy judge wants to be a district judge, we've got a lot of vacancies now. And as you know, if we're going to have 125 more. So I think they ought to apply to be district judges if they want to be district judges.

Of course, that's what they're really doing. You can call it something else if you want to. But you provided that they can sit on the circuit court of appeals; they can sit on it interchangeably with the

district judges. So why not let them apply to be district judges? Let's go and find us some bankruptcy judges. People that are happy doing that. And there are a lot of people who are happy doing this.

Mr. DRINAN. But you have the image that everyone has: that somehow bankruptcy courts are really not as important as the district courts. As you put it yourself, there's a certain prestige element. In many districts, and I'm quoting you, the bankruptcy judges are treated as inferior. Article I status would mean that they're still inferior. As you say, quote unquote, it gets down to status, and that the judges understandably say, this diminishes our prestige.

But I insist that it diminishes the prestige of bankruptcy when 40 years ago the Federal district judges said, listen, get this stuff out of here. This is too complicated. This is specialized. We want to reverse that decision and say that a bankruptcy case is just as important as a tort case or antitrust or anything else.

General BELL. Before I would agree to have article III bankruptcy judges, I would first agree to abolish the bankruptcy courts. I'm not certain that we need bankruptcy courts in the sense that we have them now, anyway. The district judges can be bankruptcy judges. They do many things now more complex than handling bankruptcy cases. Back 40 years ago they didn't. It was a sinecure to be a district judge, until about the sixties, the beginning of the sixties.

So we haven't looked at that. I'd be glad to get into that myself, if you want to get into it. Just do away with the bankruptcy courts altogether. Use judicial officers, use masters, and whatever you need, and specialized clerks.

You know that you don't need any judge now in chapter XIII for the wage earner plan. Every place has got a standing trustee; some lawyer there is handling them. A lot of these complex corporate reorganizations a district judge could handle. They handle things now that complex.

Under title VIII, equal employment opportunity they've got nearly every major corporation in America in a present level of receivership.

Mr. DRINAN. Mr. Attorney General, you're saying precisely what the thrust of this bill is: That we want to get away from the bankruptcy court as it has operated namely, sort of a second tier, and inferior status court. We want to do precisely what you've just said, and we've gone about it in the most realistic way we can.

We say that article III judges should preside over the ultimate decisions that are made in bankruptcy cases, and that lesser judicial officers or the trustees should in fact be administering the technical aspects.

We're doing precisely what you just suggested. We can't do that with article I judges, because that perpetuates the parallel system, the subordination and the second class status of the bankruptcy proceedings.

General BELL. I don't favor article I. I just favor judicial officers who are adjunct to the district court, just part of that same court. That's my testimony.

And I don't object to any bankruptcy judge being made a district judge. I'm just trying to hold it to district judges. I just don't want

to have two classes of article III judges; one bankruptcy, one district judges. And then, later on, we'll get the magistrates in, and they will be another class. That would be bad.

Mr. DRINAN. You're saying precisely what this bill says, that these courts may be parallel in the sense that certain people are specialists or become specialists in bankruptcy, but that a Federal district court judge is a Federal district court judge. If in Montana the so-called bankruptcy judge doesn't have enough to do, then he can sit on any case that comes before that Federal district court.

General BELL. I'm not saying that. I'm saying that there should be just one class of judges, district judges, and we do away with bankruptcy judges. Period. If we need another 100 district judges, let's get them.

Mr. BUTLER. Would the gentleman yield on that point?

Mr. DRINAN. Yes.

Mr. BUTLER. What you're saying is that you would prefer an expansion of the jurisdiction of existing district courts, with perhaps the additional provision for a division, a bankruptcy division, at that level, rather than separate article III bankruptcy courts?

General BELL. Precisely.

Mr. BUTLER. Do you have a view with reference to assigning a priority in the statute so that we can expedite hearing bankruptcy cases?

General BELL. If I had to start over, if you asked me to be the master and come in here and get up some sort of a plan for you, if it looked like we had a choice of setting up a bankruptcy court as an article III court, I would just say that I would add district judges. I would say to the district judges, "You're the bankruptcy judges, just like you're the title VII judges and all these other statutes that we have, judges. You handle it."

Now, what they will do most likely would be appoint somebody known as the judicial officer. It would be—I guess in the end we would have bankruptcy referees again. We would come full circle. But they would have somebody doing that work.

But we'd just have one set of judges. They'd be called district judges, and they'll handle all of these things. That's my idea about the magistrate's bill. They just serve under the district judges.

The litigants can decide if they want to use a magistrate. First the judge decides.

Mr. DRINAN. Mr. Attorney General, that was precisely the architecture of this bill. But we didn't realistically think we could just wipe out all the trustees in the whole bankruptcy system as it works now.

So we have devised a system to do precisely what you're suggesting. That is the U.S. Trustee, and these other individuals, will do the work that is not judicial, the administrative work of carrying forward the estate. So I think we're saying the same thing. I welcome you, in that you too, like the subcommittee, have been born again.

General BELL. I hope you don't think that, because I'm not agreeing. [Laughter.]

I'm not agreeing to making any bankruptcy judges article III judges.

Mr. DRINAN. We don't say that in the bill. We say that these people who are now referees or judges can sit there and hope and pray

that they'll be appointed by the President as a judge. But they have absolutely no right to that.

General BELL. Whoever gets appointed will be called a bankruptcy judge; that's what I object to.

Mr. DRINAN. We're not going to call them that. We're going to call them judge.

General BELL. Let's call them U.S. district judges.

Mr. DRINAN. We'll call them that.

General BELL. With full duties.

Mr. DRINAN. Article III life tenure.

General BELL. Full duties.

Mr. DRINAN. My time has expired. I'm very grateful for your testimony.

Mr. EDWARDS. The gentleman from Illinois, Mr. McClory.

Mr. McCLORY. Thank you, Mr. Chairman.

I've examined your statement, Judge Bell, and have listened attentively through to the responses to various questions.

I don't interpret your views here this morning the same as my colleague from Massachusetts, Father Drinan, does. And I rather feel that you are not agreeing with what his interpretation of your testimony is.

General BELL. I think Father Drinan knows that I'm not agreeing to it.

Mr. McCLORY. I'd like to point out that I came on the subcommittee and got into this subject of bankruptcy at about the same time that you became Attorney General. So we're starting off about the same time-frame as far as understanding what this legislation is endeavoring to do.

However, I think it's extremely unfortunate that you come here this morning and, in my view, don't contribute to our resolution of a dilemma which the committee is experiencing.

In other words, the subcommittee unanimously opposed the Danielson/Railsback amendment with which you appear to be in general agreement.

General BELL. I wrote a letter saying I was in agreement with the Danielson/Railsback amendment.

Mr. McCLORY. You were in agreement?

General BELL. I have not changed.

Mr. McCLORY. And I think it's unfortunate that you hold to that position in this effort that we're undertaking here for a substantial improvement, I would say, of the law with regard to bankruptcy.

In my own case—I initially was of the view that we should not have article III judges. And I argued that and went through the whole thing, but came finally to the conclusion that if we want to do what this amendment to the bankruptcy law undertakes to do, that we would be frustrating our own efforts by endeavoring to continue this type of role for the bankruptcy judge or referee or whatever title he might have.

And recognizing the vast amount of assets that are involved each year in bankruptcy, and the extreme importance of this to the economy and to our society, this whole subject of bankruptcy, it seems to me that we have to develop a bankruptcy court which has greatly expanded authority and which—and your letter which I saw—an earlier

letter that you wrote—the bankruptcy judges could not exercise constitutionally—unless they were article III judges.

I do have a couple of questions.

One, is there any authority for the appointment of bankruptcy judges by judicial councils, if judicial councils were to undertake this authority? What would be the constitutionality of that? What article of the Constitution would authorize it? What majority would be required on the judicial council in order to name bankruptcy judges under the Danielson/Railsback type of amendment?

And I suppose, do you feel that such judges, if appointed, could exercise all of these powers, including limited contempt power and limited injunctive power?

General BELL. Well, the first question: Does the judicial council have authority to make such appointments?

No; the answer is no. The statute could so provide, though. If you want to give the judicial council that power.

I've not been asked about that. Based on my experience, if the committee would ask me how to handle that, I would say quickly that the way to handle it is for the district court to make the appointment subject to the approval of the judicial council. The judicial council won't know anything about who these applicants for jobs in, say Atlanta are. They're going to call the district judges and ask them to tell them; that's where they're going to get the names anyway.

So why not let the judges make nomination or selection subject to the approval of the judicial council. That's really all you need. And that can be easily done by statute.

The judicial council has more power, but that's not in the law. That's the answer to that question.

Now, the second question, you're talking about jurisdiction. My theory, which is not an article I court but an adjunct court, the jurisdiction is in the district court. Now, that needs to be clarified. The law is so unclear in the area of summary versus plenary jurisdiction. And these conflicts where State courts somewhere have assets and bankruptcy courts are trying to protect them.

I don't know about the contempt power and the injunctive power. I know that bankruptcy judges would feel better if they had some contempt power. I wouldn't object to giving them some small amount of contempt power. I'm not much on judges having contempt power, period.

I have the usual trepidation of any lawyer who appears before a judge. I've been a judge too, so I worry about abuse of power. But I don't object—they've got to have some way to maintain order in the courtroom. There are some obstreperous lawyers. So I'd give them something.

And the same might be true as to injunctive power. There'd be some things where you wouldn't want to go get the district judge to rehear the injunction.

So that's something—all those things can be handled. You're not asking me for advice. You're saying that I'm not helping. I'm glad to help. I'm on the Hill all the time. People call me and ask me to give advice on something, to mediate. I do it all the time.

Mr. McCLORY. I would say that my own view is, we're not really working together today or at this time. I think we're working at odds.

General BELL. We're working at odds on article III courts.

Mr. McCLORY. As the good Father said, that's rather the crux of what's involved here. Could I encourage you to study and consider an alternate position, a perhaps compromise position which your office and this committee might be able to work together to resolve this?

It has been suggested to use that perhaps converting the whole referee system into district judges, which has been described here by some without knowledge of the subject that this was going to add 200 or 300 district judges, which is not the case at all. In the legislation, there's no specific number of judges that would be added.

But would you consider that we might designate, say, 30 additional district judges to serve as the district bankruptcy judges, with this broad authority which we would like the bankruptcy judges to have so they could handle all of the aspects of a large reorganization, all of the questions of labor law, including injunctive authority and titles and equitable interests and all kinds of different subjects which are involved in almost a typical reorganization plan?

General BELL. Well, I'd be glad to do that.

Mr. McCLORY. And then have augmented authority for this second tier of district judges, which would handle the more routine bankruptcy subjects.

General BELL. Transfer the railroad reorganization from district judges over to the bankruptcy judges? You know that bankruptcy judges now are not allowed to handle railroad reorganization. There's a judge in Philadelphia who hasn't done anything for 2 or 3 years but work on the *Penn-Central Railroad* case.

I mean, I cite that to prove that district judges do have intelligence enough to handle some matters that are akin to bankruptcy. So I don't know if you need to go out and pick 30 people and say, "We're going to call you a bankruptcy judge," and though they have some unusual power or ability.

I would work with the committee to set up what I thought would be a good system, and just say, we're going to transfer these things into the district court; the district judge is responsible for them; we'll add more district judges; bankruptcy judges who want to be district judges can apply. And the district judges would have a few legal officers of some sort to handle some of the things. That's the way it would finally work out, and really might be better.

You see, any time you get two parallel systems, you've got trouble. Because you haven't got accountability. And one—the district judges have more power than bankruptcy judges, by hiring people and that sort of thing. So I don't blame the bankruptcy judges. I feel I know what they really feel about the situation. And they want to get some relief. And I want to help in that regard.

Mr. McCLORY. Judge, my time is up. But I judge, too, that you're reluctant to consider and recommend this alternate proposal.

General BELL. I am, sir; yes.

Mr. EDWARDS. Thank you, Mr. McClory. Mr. Levin?

Mr. LEVIN. Thank you, Mr. Chairman.

Judge Bell, I would like to pursue for a moment something you said earlier to Father Drinan, and that is that you would have no

objection to eliminating the referee system and creating, additional district judgeships to handle bankruptcy cases.

We heard testimony in the last few days that bankruptcy cases are handled somewhat differently than ordinary civil cases. They are an ongoing proceeding with many matters coming up during the course of the proceeding. And there is a certain need for speed because of dissipating assets and so on.

I'd like to read from the court organization standards that you mentioned in the unified court system.

It says, "The trial court should have specialized procedures and divisions to accommodate the various types of criminal and civil matters within its jurisdiction."

If the subcommittee were to decide to create the additional district judgeships to handle bankruptcy court cases, would you favor creating some kind of specialized procedure or division to handle bankruptcy cases separate from title VII cases or antitrust cases?

General BELL. I'm not certain I would. I'd have to think about that, because we have so many specialized modalities now in the Federal court that I don't know if you need to do that, because a matter of administration is all it is.

You probably have an administrative system in the clerk's office who would really be the clerk of the bankruptcy division, and you might be able to assign judges to the bankruptcy division on a rotating basis.

I'd have to think about that a little bit.

But I don't believe it's an insurmountable problem.

It could well be more efficient to assign somebody as a bankruptcy judge for 2 or 3 years, if he wanted to do that.

The trend in recent years has been for the case to be assigned to district judges on a rotating basis, the so-called wheel system.

Mr. DRINAN. If counsel will yield: Judge Bell, there's 250,000 bankruptcy cases every year. That's double all the cases that come into Federal court. So I don't think it's very realistic to say that you don't want a specialized division. The specialized division is there. In assets and in volume of cases, the docket is overwhelmingly larger than the regular Federal district court.

General BELL. I had this checked out further, and 85 percent of those cases are not cases; they are really nonasset filings and chapter 13's, and there is no bankruptcy judge that I've ever seen who can't handle a chapter 13. They're routine. They might talk to somebody occasionally. But we don't call those cases.

So that's been the problem from the beginning. They'll be using that kind of testimony over in the Senate. We had 245,000 cases. "Cases." I don't know who started that, but it's just simply completely an unrealistic way to approach the problem.

One of those figures—

Mr. BUTLER. It's a footnote on page 5 of your testimony.

General BELL. I'd have to say though, in fairness to you, Father Drinan, that even in the mix of Federal cases in the district courts now, there is a vast difference. The court administrative officers had to come up with something called a weighted case load index, and they say an antitrust case counts as one, and a habeas corpus might count

a quarter. They try to balance it and see what the caseload is in one district as compared with another district. You can do the same thing in these bankruptcy cases.

Mr. DRINAN. Except that the law that we have proposed, the chapter 13, will be greatly expanded. The wage earner will become a small business. We encourage rehabilitation rather than liquidation. So I think that we put a whole new accent on it, and the number of cases that are prolonged may well increase. We want it to increase rather than just have liquidation.

I yield back to counsel.

Mr. LEVIN. Thank you, Father Drinan.

Judge Bell, I only have one other question.

If the subcommittee decides for structural reasons, constitutional reasons, whatever, that the U.S. trustee system should not be in the judicial branch but should be in the executive branch, would you prefer that it be placed in a separate agency or a new agency or a different department or agency than the Department of Justice?

Judge BELL. I'm not certain about that.

I might prefer that it be in the Department of Justice.

I'm not trying to expand the Department, but we have so many parts of the Department of Justice now that I might be able to insulate it in some way to remove the appearance of any impropriety.

I don't know. I'd like to get back to you on that. I'd like to talk to my people some about that.

Mr. LEVIN. Thank you, Judge Bell.

Thank you, Mr. Chairman.

Mr. EDWARDS. This subcommittee is assisting you in reducing the workload of the Department of Justice, we have been cooperating with the FBI for a number of years in reducing their domestic intelligence load. [Laughter.]

General BELL. I'd have to say that we just about finished that project. There's very little left.

Mr. EDWARDS. Mr. Klee.

Mr. KLEE. Thank you, Mr. Chairman.

Mr. Attorney General, I might point out that in the few bankruptcy cases that are big cases, you often have up to 500 litigated matters. So those cases might be akin to several more than just one case. That's another aspect in which the statistics are misleading. The point that has been made by previous witnesses, though, is that because bankruptcy involves an estate, a *res* that is in a sense a wasting asset, an asset that will dissipate unless it is distributed promptly, that if you restored bankruptcy jurisdiction to the district courts, you either have to be prepared to give it priority over criminal cases to insure that it will be heard in a timely fashion or you have to be prepared to create a separate division with judges either assigned to that division or rotated into that division to insure that prompt attention will be paid to the bankruptcy cases.

This bill proposes to separate the administrative and judicial functions so that all the bankruptcy judges will be doing is resolving disputes, doing judicial matters, no more first meetings of creditors and things like that.

Based on that premise, if the jurisdiction were returned to the district court, would you prefer giving bankruptcy cases priority over

criminal cases and retaining bankruptcy jurisdiction with the district judges or would you prefer creating a separate division of the district court?

General BELL. You've got me in a no-win position in that case. Why don't you just go ahead and ask me if I've stopped beating my wife? [Laughter.]

You know I can't say I wouldn't give priority to criminal cases or the American public would want me to resign. We've got to try criminal cases.

My answer is that we're supposed to have enough capacity in the court system to try all cases. I would also worry about some widow whose husband got killed and she can't get her money, or about a civil rights case where people are being discriminated against and can't get a hearing. So the debate is not between criminal cases and bankruptcy cases; it's between handling all the cases.

Mr. KLEE. Except—

General BELL. I want to handle all cases. I don't want to deny anyone justice. You know, the banks may think they've got some special priority to get into the bankruptcy courts as creditors, and somebody else over here might think they have a better case than the banks. Now, who is it the bankruptcy courts are helping?

Mr. KLEE. They are helping the entire public interest, as the banks pointed out yesterday. The only reason that they are willing to live with the bankruptcy system is because it has the potential of working reasonably well. They are not going to make loans to businesses and give them workouts if they have a terrible bankruptcy court system. They are going to refuse to roll over the loans and put people out of jobs and put businesses down the drain unless they have a reasonable court system under which they can save their money.

General BELL. I have been a bank lawyer off and on all my life, and I'll guarantee you that the bank would have more confidence with the district judge handling the bankruptcy cases than they would under the present system.

So if you want to make the business people feel good, turn them over to the district judges.

Mr. KLEE. Thank you, Mr. Attorney General.

Thank you, Mr. Chairman.

Mr. EDWARDS. Mr. Attorney General, thank you very much for very helpful testimony. We appreciate your coming up here today. And we also thank you for your offer of cooperation.

General BELL. Let me know anything I can do. I'll be glad to do it.

Mr. EDWARDS. Thank you.

Our next witnesses represent the National Bankruptcy Conference. Will you all proceed to the witness table?

Mr. George M. Treister, Esq., Los Angeles; William Rohelle, Jr., of Dallas; Professor Frank Kennedy, University of Michigan Law School—Professor Kennedy was the heart of the Commission, and we're just delighted to have you, Frank, here—and our old friend, Professor Vern Countryman of Harvard Law School.

We're loaded with authors today. The gentleman from Massachusetts, Mr. Drinan, has written a bestseller, "Save Israel," and

Mr. Countryman has written a bestseller that I've just purchased—I must say, for \$18—

[Laughter.]

Mr. EDWARDS [continuing]. On the opinions of Justice Douglas. It's really a beautiful book. Congratulations on a very interesting book.

And then, of course, Professor Lawrence King, of New York University Law School who helped us so much on chapter IX that we were successful in getting through we got spoiled there.

Professor KING. Maybe it will set a good precedent, Mr. Chairman.

Mr. EDWARDS. Although I remember one or two nights that people worked all night on it.

Professor KING. Any good product requires that kind of work.

Mr. EDWARDS. We're glad to have you all. And who's going to speak?

[The prepared statement of the National Bankruptcy Conference follows:]

#### MEMORANDUM OF THE NATIONAL BANKRUPTCY CONFERENCE RE H.R. 8200

This statement is submitted by the following persons on behalf of the National Bankruptcy Conference:

Vern Countryman, Vice-Chairman, National Bankruptcy Conference, Professor of Law, Harvard Law School.

George M. Treister, Vice-Chairman, National Bankruptcy Conference, Stutman, Treister & Glatt, Los Angeles.

Frank R. Kennedy, Chairman, Drafting Committee, National Bankruptcy Conference, Professor of Law, Michigan Law School.

William J. Rochelle, Jr., Rochelle, King & Balzersen, Dallas.

The National Bankruptcy Conference ("NBC") is a nonprofit, unincorporated organization composed of representatives of different groups who are interested in the administration of bankruptcy law, including bankruptcy judges, full-time professors of law and practicing attorneys who specialize in this area. There are 58 full members and 11 associate members and all areas of the country are represented among the membership. Since about 1932 the Conference has devoted itself to the improvement of the bankruptcy law and its administration. Since the filing of the Report of the Commission on the Bankruptcy Laws of the United States, the Conference has devoted itself to studying the Report and all the bills following it introduced in both the House and Senate with a view toward assisting in the passage of an Act which would substantially improve and reform the present law.

No aspect of bankruptcy reform is as important as the subjects of today's subcommittee hearings—the questions of bankruptcy court structure and the separation of the administrative and judicial functions.

#### I

The NBC for many years has supported the concept of an independent bankruptcy court, one that is not subservient to nor an adjunct of the District Court. It is clear from our collective personal experiences that such a court is needed if bankruptcy cases are to be processed with fairness as well as with efficiency and dispatch. As has been amply demonstrated during previous hearings before this subcommittee, the bankruptcy court has already developed into a specialized court. It now deals with matters equal in importance to those dealt with by any other trial court. Yet due in large part to its present relationship with the District Court—one that not unreasonably has been referred to as a stepchild position—the bankruptcy court cannot attract sufficient numbers of highly qualified appointees to its bench. An outstanding lawyer does not customarily aspire to be someone else's assistant.

Recognizing this, the NBC has proposed or endorsed various different versions of an independent bankruptcy court. At one time, we proposed that the bankruptcy court be a separate division of the District Court, so long as the presidential appointment of judge or judges was made specifically to that division

(to insure that the bankruptcy business of the court did not again become relegated to stepchild status). When the Commission on the Bankruptcy Laws of the United States recommended an independent bankruptcy court of Article I status, on the Tax Court model, the NBC supported, and still would support, such a proposal.

Of course, the NBC strongly supported, and still supports, the H.R. 8200 proposal for a full Article III bankruptcy court. Perhaps H.R. 8200 is the best of all the possibilities, for it avoids the presently apparent problem of creating a special division within a court that can be expected to be hostile to the concept, while achieving the prestigious stature of a constitutional court.

In any event, current proposals such as the Danielson-Railsback amendment which leave the bankruptcy court in an adjunct status do not accomplish the needed reform. For one thing, a court that derives its jurisdiction and powers through another court is not of equal stature with the court upon which the jurisdiction is initially conferred. It is plain that proposals that would keep the bankruptcy court essentially in its present place, even with expanded jurisdiction, will not attract the judicial talent to which the court is entitled.

There is a need, also, for the pervasive grant of jurisdiction to the new bankruptcy court as contemplated by both H.R. 8200 and the Bankruptcy Commission. Otherwise, the objectives of dispatch, efficiency and economy in bankruptcy administration cannot be attained. Virtually everyone knowledgeable in the bankruptcy field would agree that the present summary-plenary jurisdiction distinctions spawn litigation and cause unneeded delay and expense. Unless the jurisdictional lines are drawn much as H.R. 8200 draws them, or in some equivalent manner, the wasteful litigation can be expected to continue.

An abstention provision contained in H.R. 8200's proposed 28 U.S.C. Section 1471(c) is the best way to remit litigation to another forum when the estate's interest is insufficient to justify the bankruptcy court's exercising its expanded jurisdiction. The approach to this problem of proposed Section 1334(c) of the Danielson-Railsback amendment predictably will generate as many if not more jurisdictional disputes than are being experienced under present law.

In summary, the NBC believes that the following are minimum requirements if the new bankruptcy court is to have the independence, power and prestige sufficient to achieve the reform goals:

- Appointment of bankruptcy judges by a prestigious appointing power, preferably Presidential appointment subject to Senate confirmation. In no event should appointment be by another trial court.

- A minimum 15-year term of office.

- Adequate salary, retirement benefits and emoluments.

- Control by the bankruptcy court over its own adequate supporting staff, including clerks, law clerks, secretaries and reporters.

- A voice of bankruptcy judges in the budgeting process for their courts and in the bankruptcy aspects of the work of the Administrative Office of the United States Courts.

- Pervasive jurisdiction of the bankruptcy court over all litigation in which the bankrupt estate has an interest.

- Adequate powers in the bankruptcy court to enforce its orders and judgments.

- Appeals from the bankruptcy court should run directly to the Court of Appeals. It is anomalous, and detracts from the dignity of a trial court, for appeals from its orders to run to another single judge court, particularly if that court is essentially a trial court itself.

## II

The present combination of administrative and judicial duties in the bankruptcy court is perhaps the most glaring defect in the system. This fact has been thoroughly documented in the record of the earlier hearings before this subcommittee. The NBC has long been in favor of separating the functions to the greatest practical extent. To this end, we supported both the Bankruptcy Commission's concept of an independent administrative agency and the U.S. Trustee system contemplated by H.R. 8200.

The placement of the administrator or official trustee within the existing branches of government is a matter of some difficulty. What seems clear, if the separation of functions is to be achieved, is that the placement should be as far as is possible from the bankruptcy court. Thus, appointment of the U.S.

Trustee by the District Court, as contemplated by the Danielson-Raisback amendment, plainly appears undesirable.

As a matter of logic, the U.S. Trustee system would seem to belong in the executive branch. The U.S. Trustee would be an administrator or a supervisor of private administrators; he or she would not make orders or decide disputes. The U.S. Trustee's role in the courts would not be as an assistant to the court but as a party or amicus curiae. There is some similarity here to the U.S. Attorney's office.

The proposal of H.R. 8200 that the U.S. Trustee system come under the Justice Department therefore seems reasonable. Moreover, the prestige of the Justice Department is such that placement under this department would tend to attract highly qualified personnel to this important new office. We do not believe that any conflict of interest would arise as a result of this placement, at least no more than a theoretical one. In view of the private trustee system of H.R. 8200, it is unlikely that the U.S. Trustee would be serving as trustee in any case involving significant assets; these are the cases where a dispute concerning a government claim would be apt to arise. If a true conflict did arise, the U.S. Trustee could always appoint a private trustee to represent the estate.

If the Department of Justice is unwilling to assume the new responsibility, however, it should be noted that the NBC has also recommended in the past that the administrative system be created as an independent agency in the judicial branch, independent of both the Judicial Conference and the Administrative Office, as the Federal Judicial Center is independent of them. The NBC has disapproved suggestions that the bankruptcy administrative agency be part of the Administrative Office of the U.S. Courts. That office's function is a house-keeping one for the courts; it serves courts. As has been noted, the administrator or U.S. Trustee concept is not that of an aide to the bankruptcy court. If the placement is to be in the judicial branch, an independent agency is required because no other existing judicial agency or office has similar responsibilities.

Finally, the NBC supports the provisions of H.R. 8200 respecting the manner of appointment and terms of office of the U.S. Trustee. However, if placement of the agency is not to be in the Department of Justice, the NBC favors a system of presidential appointment for a similar term.

**TESTIMONY OF GEORGE M. TREISTER, LOS ANGELES, CALIF.; WILLIAM ROCHELLE, JR., DALLAS, TEX.; FRANK KENNEDY, UNIVERSITY OF MICHIGAN LAW SCHOOL; VERN COUNTRYMAN, HARVARD LAW SCHOOL; AND LAWRENCE KING, NEW YORK UNIVERSITY LAW SCHOOL**

Mr. TREISTER. I'm George M. Treister of Los Angeles, Calif.

I practice insolvency and bankruptcy law there and teach at the University of Southern California and Stanford University Law Schools.

Mr. EDWARDS. Incidentally, without objection, all of the statements are made part of the record, and I do hope that all of the witnesses will comment on what the Attorney General said and the ideas that we heard yesterday—Larry, you were here when we had the pleasure of the Judicial Conference of the United States testifying. We'd like to get into that testimony, too. Proceed.

Mr. TREISTER. We have a written statement, Mr. Chairman.

And if I may just summarize it briefly, and then make all of us available for your questions, I'd like to proceed in that way.

Just by way of general comment, we agree with much of what the Attorney General has just said, but disagree with many of his conclusions on the points that we're about to address—not all of them. Some of them, I think, are in agreement with our views.

The National Bankruptcy Conference has long favored an independent bankruptcy court. We think it has to be independent. It cannot be an adjunct of or subservient to another court.

Without the independence, we don't think that the bankruptcy court can attract the quality of judicial talent to the bench that people expect of Federal courts.

I think it is a fact that if an appointment to the district court were offered to lawyers in any given community, there would be a large number of the most talented lawyers eager to accept that job. The office of referee in bankruptcy or any adjunct judicial office—if that office were offered, it would be lucky if qualified people applied. That is a problem in our present system.

I think the Attorney General is correct when he speaks of the prestige of the district court. The banks would rather try their cases before district courts rather than before bankruptcy judges because of the quality of the judicial talent. It's not the title that they're concerned with. It's the personnel who will be deciding their cases.

The bankruptcy court has developed into a specialized court over a period of years as a matter of history. If we were starting from scratch, maybe we wouldn't make it that way. But we do have the specialized courts as a fact, and the question is whether we're going to have a good, high-quality specialized court, or one of lesser stature. Without the independence, you don't have the stature, you don't have the power, you don't have the prestige, and the court can't do as good a job.

The National Bankruptcy Conference has supported different versions of an independent court. I think our first recommendation before the Bankruptcy Commission reported was for a separate division of the district court. That was our first proposal.

We specified that the President would make the appointments to that division specifically, because we would fear that if we just threw bankruptcy matters back into the district court, exactly what the Attorney General predicted would happen. The district courts would relegate bankruptcy to stepchild status, and over a period of years we would get our present system back. But if special division of the district court were created, if the President appointed a district judge specifically as a bankruptcy judge, that would be the judges prime responsibility, and we thought that was a workable system.

Then when the Bankruptcy Commission recommended an independent article I bankruptcy court, on the Tax Court model, we supported that, also.

H.R. 8200 may be the best of all. The court it contemplates has the prestige of an article III court, and it certainly has the independence.

But we think the main point is independence, not adjunct status, and that's why we think that the Danielson/Railsback amendment is unfortunate. The amendment does not achieve the reform goal that H.R. 8200 without that amendment would achieve.

I think that almost everybody who is familiar with the present system, at least on a technical basis, knows that the present jurisdictional lines of the bankruptcy court are impractical. They stimulate too much litigation. To the extent the court lacks jurisdiction, the system can't do a good job of collecting the assets of the estate. And we think H.R.

8200's approach, the pervasive grant of jurisdiction, is the proper approach.

Now, when you create the complete grant of jurisdiction, there will be some matters within the jurisdiction limits that are only incidentally related to bankruptcy and that the bankruptcy court should not get involved with. We think H.R. 8200's approach to that problem is a proper one, the abstention doctrine. We don't think there's a risk that the bankruptcy courts will actually exercise jurisdiction when it shouldn't.

Under the present system, where bankruptcy courts have jurisdiction over a number of things, by accident usually, the record shows that they abstain many times in the cases where they should abstain. In the dischargeability litigation, for example, when the merits of the nondischargeable claim, gets too unrelated to bankruptcy, the bankruptcy courts now defer to other courts. They have developed their own abstention doctrine under present law.

We think the appeals from this new bankruptcy court should not run to a single judge trial court. We disagree with the Bankruptcy Commission's recommendation in that respect.

The National Bankruptcy Conference agrees with H.R. 8200's approach to the problem of appeals. If that creates too big a burden on the Courts of appeals, then I think we ought to approach the appellate problem directly and see how we can solve it. We don't think the answer is to run appeals to the district court. That tends to demean one trial court, to have another trial court reviewing its judgments.

And then, finally, the National Bankruptcy Conference has long emphasized that there has to be a separation of the judicial or dispute-deciding function in bankruptcy from the administrative role of the present court. The Bankruptcy Commission's proposal in this respect was a satisfactory proposal. The U.S. trustee system of H.R. 8200, particularly as its operations are explained in the House Judiciary Committee report, also appears to be a satisfactory system, and so we support that, too.

And I was pleased to hear the Attorney General indicate that perhaps the Justice Department would be the place for the overall supervision of the U.S. Trustee system because that is the National Bankruptcy Conference's recommendation, also.

The prestige of the Justice Department would tend to make it a better system if the U.S. Trustee is under the overall supervision of the Attorney General.

That is a summary of the National Bankruptcy Conference position on the subjects of today's hearing, and we'd be more than pleased to attempt to answer any questions you may have.

Mr. EDWARDS. Thank you.

Do any other members of the panel desire to be heard?

Professor KENNEDY?

Professor KENNEDY. I would just like to address myself to some of the things that the Attorney General recently observed.

He made an important point in his argument that we do not need this innovative article III court to have expanded bankruptcy jurisdiction. But he improperly separates his view of the court from his recognition that we ought to eliminate this expensive, time-wasting

litigation over jurisdictional distinctions and these things are conjoined. If we are going to give this comprehensive jurisdiction to this bankruptcy court, it is very important that we have a court with the authority and the status to handle all of that responsibility, and you just cannot separate the expansion of the jurisdiction from the view that we have to have an article III court. And I believe the Attorney General does not really follow through some of his own views when he says, yes, we should have a bankruptcy judge but he shouldn't have comprehensive contempt power. He's still thinking of a bankruptcy judge with an inferior position when he says we don't want a bankruptcy judge with comprehensive contempt power. What we want is a judge with prestige and the responsibility so that he can conduct jury trials, can impose contempt sanctions appropriate to the offense, and that would have the confidence of people who are adversaries of the trustees.

Mr. McCLORY. Would the chairman yield for a question just to clarify this?

I asked the Attorney General what the constitutional authority was for appointment of these judges by judicial councils. He did not answer that question. He said that he wanted recommendations. I gather finally he said that the district judges would make recommendations to the judicial councils.

I think—these are circuit councils. These are not—this is not the national judicial conference. These are circuit judicial councils, as I understand this—circuit judicial councils—under the Danielson/Railsback bill.

Would you address yourself to the question as to what kind of constitutional authority there is for this?

Professor KENNEDY. I don't think there is any constitutional authority for appointment by council. There is constitutional authority for appointment by courts. District judges would be courts. The courts of appeals would be courts.

But I think it's not possible to rationalize constitutionally the appointive power in the judicial council. I assume that the Attorney General meant was that really what you would have then would be appointment by the district judges, who are courts, and ratification would be maybe a veto or a confirmation. But the appointments would then be by a court.

In any event, I quite agree with the import of your question, that there isn't any constitutional authority for vesting the authority to appoint in a council. It doesn't have constitutional status.

Mr. TREISTER. That comes from the bankruptcy judges bill, one of the predecessors of this legislation. They had suggested originally that the judicial councils appoint—I guess their theory is, well, judicial councils are composed of the same judges as the court of appeals, so it's a court. I don't know how sound that is. I think that's where the Danielson-Railsback amendment comes from.

Professor KENNEDY. If I may continue on another point I have a great deal of difficulty with the Danielson-Railsback amendment—I think it's garbled in the version that I have, so it needs some changes in any event. But it appears to me that it cuts back very substantially even on the U.S. district court's jurisdiction in bankrupt cases.

First, it gives exclusive jurisdiction of cases or proceedings under title 11 to the district courts exclusive of the States. Then, it gives original but not exclusive jurisdiction of all civil proceedings by or against a debtor in possession or trustee or other representative. And then it comes along and says that an action under "b" shall not be brought in the district court without the consent of the court, and not even then unless there would be a prevention of a potential loss of assets or avoidance of other adverse effects.

Well, there is a great deal of difficulty for me in distinguishing between proceedings that are subject to exclusive jurisdiction and those civil proceedings that are subject to nonexclusive concurrent jurisdiction. In any event, it appears to me that all of the jurisdiction that the bankruptcy court and the district court now has, based on consent of actions under the preference, fraudulent transfer, and other avoidance sections will not be in the district court unless the court consents and unless it can be shown that there will be no loss to the estate or prejudice.

It seems to me there is a tremendous cutback, and there is also this very troublesome, litigious issue, what is an adverse effect? What is potential loss of an asset? This seems to me to be fleeing from the frying pan into a very hot fire of litigation. This would be a very objectionable change in the jurisdiction of the court.

Mr. BUTLER. If the chairman would yield just a minute—I judge that without burdening the panel with the opportunity or requirement of repeating what you said, that this is substantially the views of the other members of the panel who have had an opportunity to examine the Danielson-Railsback amendment?

Professor COUNTRYMAN. Yes it is.

Mr. BUTLER. The effect of it, as you read it, is to cut back the jurisdiction of existing courts?

Professor KENNEDY. Tremendous cutback.

Mr. BUTLER. It also creates the further burden of the jurisdictional dispute, which arises as to whether it's a detriment or not.

Professor KENNEDY. A worse issue than the ones coming before the court now.

Mr. BUTLER. Do you classify this, then, as a step backward?

VOICES. Yes.

Mr. BUTLER. Now, I'll ask the panel one more question.

Do you have a comment on the jurisdiction by delegation provisions?

Professor KENNEDY. Yes. I quite agree with the implication of the question that there will be a great variation across the country in the scope of the jurisdiction that can be exercised by the bankruptcy judge. In some places the bankruptcy judge will be able to conduct jury trials. In some places presumably he may have jurisdiction that will handle the whole case. In others he won't be able to render a judgment; the judgment will have to be certified up to the district court, and the district court will have to approve or reject, treating bankruptcy judge as a master. There will be a great variation.

Now, I rather think that the project of writing the rules for the various systems that would be extant across the country, would be tremendous.

Professor KING. Could I give one example of what happened in the past in an analogous situation. Some years ago the Advisory Commit-

tee on Bankruptcy Rules with respect to the chapter X rules proposed in a rule that chapter X cases should be automatically referred to the bankruptcy judges, just as almost all other cases under the various chapters of the Bankruptcy Act.

That rule was approved finally by the Advisory Committee after the rules had been submitted to the bench and bar for comment. There was some disagreement with respect to that rule.

The final wording of the rule, however, because of the intervention and suggestions of the Standing Committee on Rules of Practice and Procedure, was that that was a matter that should be left for local rule of the district court; the district court could adopt a local rule automatically referring chapter X cases to the bankruptcy judge, but in the absence of such a local rule, a chapter X case would go before the district judge as provided in chapter X of the Act.

My understanding of what has happened in the time since those rules became effective—and I think it was August of 1975—is that in some few districts there is a local rule for automatic reference, and in other districts there is not. And there is, therefore complete lack of uniformity with respect to this one little matter.

Now, in the amendment, the Danielson-Railsback amendment, you could end up with precisely the same situation.

Mr. ROCHELLE. If I may speak, Mr. Chairman, to a pragmatic aspect of our problem, which you touched upon earlier in your conversations with the Attorney General. I am flanked by four professors— [Laughter.]

I plead guilty to trying to teach on occasion, but basically I am a practitioner in this field, and in my 30 years of experience in the area, I have appeared in bankruptcy courts in more than 20 states, and through my work in the conference and my attendance at annual conferences of bankruptcy judges, I have come to know the great majority of them and have come to have a very high regard for a great many of them. And I express the fear to this group that unless we get the reform, the upgrading in status contemplated by 8200, we're going to lose some of our very best judges who are just now hanging on in the hope—indeed, in the expectation—that we'll get an 8200 type of reform.

Now, unfortunately, I fear that we will not lose those that perhaps we'd be just as well off without. We're going to lose some of our very best ones unless their status is upgraded. I'm greatly concerned about this.

Mr. EDWARDS. Do they expect that if 8200 becomes law that they can look down the road in 5 years to becoming an article III judge?

Mr. ROCHELLE. Of course, they have no guarantee of that, but I think they feel, as all of us feel, that this vast reservoir of excellent expertise and talent which we have in many of these judges will not be wasted when appointment time comes in 5 years.

But even if they are not made bankruptcy judges in 5 years, still their present and current status will be that which we would expect a competent person to want before he takes the job.

Mr. EDWARDS. I understand.

Are there any further comments on the subject?

Mr. Drinan?

Mr. DRINAN. No. I'd like to hear Professor Countryman. I'm sure he has something to say. [Laughter.]

Professor COUNTRYMAN. You know me well, Father. [Laughter.]

I listened with great interest to the Attorney General's testimony. I was delighted to hear him apparently take the position that if the subcommittee should conclude that U.S. trustees should not be put in the judicial branch, the best place to put them would be under the supervision of the Department of Justice.

I happen to think that that's the best place to put them in any event. But I listened with some amazement to the balance of his testimony where it seemed to me he came in proposing article III courts and went out endorsing the present system, going right down to referees in bankruptcy again.

I found it difficult to reconcile his position there with his alternative suggestion that it's all right to make bankruptcy judges article III judges as long as you call them district judges instead of bankruptcy judges.

I hardly think that that matter of labels raises any real constitutional question or any policy question either. And to the extent that he recognized that it would be a good thing to make the judges who handle bankruptcy article III judges, I believe our organization fully supports him, and we do not care much what title you give that judge, although I think it would be a little more clarifying and easier to understand if they were called judges of bankruptcy courts.

Mr. DRINAN. Mr. Chairman if I may. Would you feel, therefore, that the Attorney General really was persuaded to our point of view in different words, that he was really saying the same thing as the whole thrust of our bill?

Professor COUNTRYMAN. I thought he was, until you pointed out to him that he was. [Laughter.]

Mr. DRINAN. He's halfway on the road to being born again. He's resisting the grace of the Lord. [Laughter.]

Mr. ROCHELLE. One point the Attorney General made I completely fail to understand. When he said a parallel system is bad because there is no accountability, I simply don't follow that. If the case is filed in the bankruptcy court, then the bankruptcy judge is accountable for it. If it's a civil case or a criminal case, then the district judge is accountable for it.

The Attorney General's argument in that regard is something that I simply can't follow.

Mr. BUTLER. Mr. Chairman, may I ask a question of the panel?

Your statement says—and I think in your telescoping of it you had said you proposed that the bankruptcy court at one time be a separate division in the district court so long as the presidential appointment of the judge or judges were made specifically to that division and to assure that the bankruptcy business of the court did not again become relegated to the stepchild status.

Then, of course, you got preempted by a higher order there or something. I wish you would enlarge a little bit on that. I have the impression that the Attorney General thought it would be preserved if that was the decision of the Congress.

Mr. TREISTER. That original proposal, which I suspect would meet with a lot of hostility from the present district judges now—and

that's why we have welcomed another article III approach—we were concerned that if you merely said that there's a special division of the district court called the bankruptcy division, one, the least impressive judge to happen to be around at the time would be assigned to it. I've had that kind of personal experience with district courts in the bankruptcy context. Or when things got busy and the criminal cases or whatever pressed for attention, the bankruptcy business would be ignored or put into a stepchild position again.

Our proposal was that if the President were to appoint a judge to the bankruptcy division of the court, then that appointee would be the bankruptcy judge; he would be someone who accepted that appointment because he knew the bankruptcy business would be his main occupation on that court, and he would tend to consider bankruptcy to be an important function. And we thought that might work. It was truly a bankruptcy division—one or more bankruptcy judges in the division who are always available to handle litigated bankruptcy matters.

Now, I don't understand the Attorney General's proposal that way. The way I understand the Attorney General's proposal is that we will have a district court bench and if something really important, like the reorganization of Penn Central comes along, we'll have a district judge handle it. Other than that, we're going to have some assistant to the district judge, a magistrate or a referee in bankruptcy, handle that litigation.

Now, to the parties involved, that is not an acceptable solution. That is what I think the banks are afraid of:

You propose to give the bankruptcy court great jurisdiction. We have millions of dollars at stake in litigating in that court. We're entitled to a topflight judicial officer to decide our rights. Don't delegate it to an assistant, someone who does not have the qualifications of that article III judge.

Mr. BUTLER. If I may interrupt, I understand that your proposal was basically that we would have exactly the system that we're contemplating here, except with the article III judge under H.R. 8200 being fungible, is the word we used. You would simply say he goes on to the existing bench, but he's designated an article III U.S. district court judge for the bankruptcy division, or something of that nature.

Mr. TREISTER. I think H.R. 8200 is a better solution of the problem because it insures that you're not going to lose your bankruptcy judge to some other judicial chore.

Mr. BUTLER. It's better insurance against the erosion of the independence of the bankruptcy division.

Mr. TREISTER. That's my personal opinion.

Professor KENNEDY. I may say that Harold March and I along with George Treister were on the committee that made the recommendation to the National Bankruptcy Conference, that we have a bankruptcy court that would be a division of the U.S. district court, but during the later consideration of this matter by the Commission on Bankruptcy Laws the record shows a concern on the part of Harold Marsh as the chairman and of others that this bankruptcy division would become a sort of stepchild of the U.S. district court.

And something else that's happened along the way—there has been a consolidation of bankruptcy court clerical offices with United States District Court offices in some places, and that experience has, in several

instances, been very unsatisfactory from the viewpoint of the organization of the business of the bankruptcy clerk. Consolidation has left the paperwork and the office work of the bankruptcy part of that office treated in a very unsatisfactory way. So, the Conference thinks, and the Commission thought, too, that there has to be a separation with an ability to control that bankruptcy business, which is voluminous and requires expeditious and efficient treatment.

Mr. BUTLER. Any compromise of independence is the beginning of a turn back to the system which we're trying to dismantle.

Professor KING. Yes; I'd like to make a comment on that, Congressman Butler.

I think that one of the faults or a major fault of the suggestions for some type of an adjunct system really maintains what we presently have and what is very much needed is a break from the past and the present traditions, that is, keeping the bankruptcy court in the sort of stepchild position.

Frank just mentioned one aspect of that, currently the consolidation of the clerk's office.

I'd like to pick up one little point that was mentioned yesterday by Judge Weinfeld, when he indicated, in response to a question, that as far as he saw in the southern district of New York it was not necessary for bankruptcy judges to have law clerks because none had come and requested them.

I think there are two answers to that. One is—and I don't know this for a fact because I don't call and make those requests—that probably they wouldn't make the request because they would have the feeling that it would be denied out of hand.

But second, I do know for a fact that they need law clerks. They come to me. The bankruptcy judges come to me personally every year, and ask me to send them students from the law school on a volunteer basis, for no pay, no credit, nothing except a learning experience, to work as clerks. And ours is not the only law school that tries to help out. They go to other law schools in the city. And I'm sure that our experience in New York is repeated in various parts of the country.

But the fact is, it seems to me, from the testimony that was received from the ad hoc committee, that there's a failure to recognize what is happening in the bankruptcy courts, what has happened in the past, and a failure to go out and get the information to do anything about it.

In another forum I heard testimony that on the various committees of the judicial conference, there are persons such as lawyers, public defenders, deans of law schools and the like, persons other than district or circuit court judges. But on the bankruptcy committee there has never been a bankruptcy judge. And yet, the work of that committee directly affects the bankruptcy bench.

Professor COUNTRYMAN. I have had precisely the same experience that Larry has had with bankruptcy judges in Boston, bankruptcy judges calling me and asking me if I couldn't get some student to come down and work as a clerk on a pro bono basis because they needed the help.

Also, I'd like to remind the subcommittee that when the Attorney General was explaining how this appointment of judges by the judicial

council would work, he, in effect, admitted that members of the judicial council would have little basis for qualification for selecting bankruptcy judges.

So his proposal was that the recommendation come from the district court, which is almost back where we are right now.

Mr. McCLORY. Mr. Chairman?

Mr. EDWARDS. Yes, Mr. McClory.

Mr. McCLORY. I would just like to ask this question. We are back here again after having had the bill on the floor because of the problem that we experienced with regard to the Danielson/Railsback amendment. And I think we're all in agreement that if we could have H.R. 8200 with the article III judges, we would be able to have this special type of bankruptcy court with all the authority and prerogatives that we think it can have.

Now, you don't come out and say you want article III judges in your statement here beginning on pages 5, 6, and 7. I agree with all of the things that you recommend that you want for the bankruptcy judges. But tell me this: Can we provide legislatively, in your opinion, for this kind of authority, including, "adequate powers in the bankruptcy courts to enforce its orders and judgments," perhaps maybe the appeal authority, without vesting—well, of course, you say a minimum 15-year term, so I assume that would be an article I-type judge.

Can we establish article I judges under article I with all of this authority and all of these prerogatives, or are you doubtful about it?

Mr. ROCHELLE. I suggest, sir, that you have asked us a question which, ultimately, must be answered by the Supreme Court of the United States, and we don't know. But we fear—

Mr. McCLORY. We want your recommendation now as to what we should do. I don't know whether we should go back with what we had before and give it another try. We don't know that.

We're going to get into a huddle here, I imagine, very soon to determine that. We have had some rather unusual alternatives and kind of a double-tiered bankruptcy court and a double-tiered court of appeals for bankruptcy cases, which seems to be just too complicated to try to translate into legislation and put across. But we had one suggestion, I think yesterday, that we should have sort of the lower tier of article I-type district or bankruptcy judges, and then have approximately 30 bankruptcy or district court judges in a division of bankruptcy which would have all these prerogatives. So that when we got into these hard problems, the judges would be there to exercise the kind of jurisdiction—

Mr. TREISTER. Essentially, to create a new article III bankruptcy appellate court, and then make the bankruptcy trial courts adjuncts of the appellate court.

Mr. McCLORY. So you could immediately refer the case and not argue out the jurisdictional question.

Mr. TREISTER. Well, just speaking for myself, the National Bankruptcy Conference must have thought that an article I court was constitutional because we approved and recommended the Bankruptcy Commission's recommendation, which contained the pervasive grant of jurisdiction, plus an article I court. And we—at least I—have read the various opinion letters that appeared in the House Judiciary Com-

mittee report, and I don't think anybody can be sure, but the ones that seem most persuasive to me are the ones that conclude—particularly Professor Shapiro's letter—conclude that the article I court would be constitutional.

Now, my own feeling is that if the present system is constitutional, where you have nontenured bankruptcy judges exercising the judicial power of the bankruptcy court than an independent article I bankruptcy court would also be constitutional. It is only paper shuffling to say that the present untenured bankruptcy judges are not the bankruptcy court. Their orders are final if they're not appealed within a given period of time.

They have a limited contempt power, but they do enforce their orders by execution under the bankruptcy rules.

Now, if that system is constitutional, which everybody starts out assuming it is, then I don't see why this article I system wouldn't be equally constitutional. But I agree with Professor Wright: no one is going to know the answer to that until the Supreme Court tells us.

And I think if the article III court is not attainable, then I think it's a reasonable approach to go the other way. But the article III court is preferable.

Mr. McCLORY. The Attorney General really thwarts our effort by telling us that the kind of authority that we want the bankruptcy bench to have is not constitutional. He has written to us to that effect. And that if we want to grant this authority, it must be article III. So it's so frustrating to have that adverse opinion at a time when we would like to go on with this hope and expectation that what you have recommended would be constitutional.

Mr. BUTLER. I judge you're arguing that it is constitutionality by adverse possession.

Mr. TREISTER. By historical need. And that's probably the reason that legislative courts developed at all.

Mr. EDWARDS. Wouldn't you be inviting, if an article I court were established, much litigation for a number of years to determine its constitutionality?

Mr. TREISTER. In view of the history that's gone on in considering this legislation, the thing that I think is so remarkable is that no one's challenged the present system before. But in view of this history, you just know someone is going to raise that the first chance out, and I think we will find out quickly.

Mr. EDWARDS. If 8200 were enacted in its present form, during the transition period with the bankruptcy judges—the present bench—exercising expanded power, would you anticipate much litigation?

Mr. TREISTER. I don't know if it would decide the question, because I think even if a permanent article I court is unconstitutional, it might very well be constitutional to have it during a 5-year transition period.

Now, I don't know that the correct lawsuit could be brought until we really get down to the real court.

Mr. McCLORY. Could I ask one more question, Mr. Chairman?

The American Bar Association bankruptcy committee came before us, and they recommend that we have a 7-year transition period. I don't know whether you've read their statement. They want a 7-year transi-

tion period. They don't want us to do anything now about the restructuring of the bankruptcy court.

We have this transition period, and at the end of 5 years, and with 2 years remaining, then we would determine what kind of a bankruptcy court we were going to have.

I criticized that. I think all that's doing is deferring something that needs to be done, in the hope that we're just passing the buck to a later Congress.

What do you think about delaying; you know, just going in and saying, "Well, we'll have the transition period, and then we'll authorize this restructuring at the end of 3, 4, or 5 years?"

Professor COUNTRYMAN. I don't think that would make the resolution of the constitutional question a bit easier.

I would like to point out, coming down on the plane last night, I again read the opinion letters which you solicited from a number of constitutional law experts, and I took a little inventory. And I noted that the vast majority of them, even those who said it ought to be an article III court, conceded that if the committee were to make detailed findings of specialized need for an article I court to handle this job, that that determination would very likely carry great weight with the Supreme Court when it came to decide the constitutional question.

Now, I believe all of us on this side of the table would, for policy reasons, like to have an article III court; reasons with which you're all very familiar. But if it's your decision that that is not feasible, then we would certainly prefer to go with the article I court, with detailed findings of specialized need, than to fall back to anything like what is proposed in the Railsback amendment, or by the Attorney General.

Mr. DRINAN. Would the gentleman yield for a question?

Would that be the first time in the history of the country when the Congress would have proposed an article I court for important litigation involving two citizens, and not involving the Government as a litigant?

Professor COUNTRYMAN. I believe the territorial courts and the District of Columbia courts have that sort of jurisdiction in civil cases.

Mr. DRINAN. Isn't there a constitutional distinction, though?

Professor COUNTRYMAN. The constitutional distinction is made by people who find it by pointing out that that was geographical. Then, when we get to something else, we're told, well, that's because the Government is a litigant. But I know of no very persuasive authority that says if it is not geographical, and if it doesn't involve a special Government interest—where the Government is, in fact, one of the litigants—that that's as far as you can go.

Professor KENNEDY. Congressman Drinan, do you regard the present bankruptcy court as an article I court or as an article III court?

Mr. DRINAN. I'm hoping that someone will challenge it, and will win.

Professor KENNEDY. Today, there can be disputes between a creditor and a debtor under the dischargeability provisions of 17(c), and the bankruptcy judge, is he's an article I judge, is determining the issues in the dischargeability suit, and the court renders a judgment on the nondischargeable claim against the third party. And the bankruptcy judge, who maybe is an article I judge, is rendering a final judgment.

Mr. DRINAN. Help my ignorance. Has there ever been a constitutional challenge to that whole system?

Professor KENNEDY. Yes.

Mr. TRIESTER. To the present system?

Professor KENNEDY. Yes; there was a challenge out in Judge Stephen Covey's court, and there was a ruling that the present system is constitutional. I think Judge Morgan in Peoria ruled that it's constitutional. Incidentally, the referee there joined with the challenger. He thought that the system was unconstitutional. But the district judge, Judge Morgan, held that it was a constitutional system.

Mr. DRINAN. Was it appealed?

Professor KENNEDY. To the district court. I heard it went up to the court of appeals, but I never did find any published opinion on it. The Administrative Office is familiar with that case. I have seen extensive briefs on the question presented.

Mr. DRINAN. Maybe the bankers or the Commercial Law League could manage to have a suit brought in the next month or two. It would be very helpful. [Laughter.]

Mr. TRIESTER. I think the people who say the article I court proposed by the Commission would not be constitutional assume that the present system is constitutional. The Attorney General, in one of his letters to this committee, I believe, took that position.

Mr. ROCHELLE. Mr. McClory asked the group, I think, a question that none of us have answered; and that is, what would you have us do? Of course, we cannot speak for the Conference on this point, because the Conference has not made its suggestion. I can speak only for myself.

And that is, I would like to see you go back to the House with 8200 as it is. And if some compromise down the road is necessary, in the conference committee or whatever, be that as it may. But the constitutional implications of an article I court with pervasive jurisdiction, full contingent power, are serious.

As Professor Krattenmacher says, "The precedents are horribly murky, doctrinal confusion abounds, and the constitutional text is by no means clear."

Mr. McCLORY. Then you have the Attorney General telling us, in advance, that in his opinion it's unconstitutional. That's the thing that bothers me more than anything else.

Mr. ROCHELLE. And how tragic, after we have been working under a system, and perhaps have billions of dollars in property rights supposedly vested, if we find out that the system is unconstitutional. That would be tragic.

Mr. DRINAN. Sir, if I may.

We have this option when we get back to the floor in January or February: that we can seek, just before final passage, for another vote on the Danielson amendment. That's permitted under the rules. But before we do that, we have to have a good deal of support. We have support now from the Commerce Law League, which said yesterday that it would withdraw its support from the bill unless the Danielson amendment is washed out.

The American Bankers Association yesterday, in effect, said that they want article III judges. They were very distressed with the Danielson amendment.

I'm wondering if the National Bankruptcy Conference could obtain, by mail or otherwise, a vote that would go to the same point.

Professor KENNEDY. We submitted, the day the Danielson/Railsback amendment was voted on, a statement that had the unanimous support of all the members of the Conference in attendance. And that statement was hand-distributed over here on the Hill. That letter was very strong in opposing the Danielson/Railsback amendment, and in favor of H.R. 8200 as written.

Professor COUNTRYMAN. That was approved unanimously.

Mr. DRINAN. That had slipped my mind.

So that we do have your support.

Professor KENNEDY. Yes.

Mr. TREISTER. This statement in here is critical, the one we submitted in connection with these hearings.

Mr. DRINAN. So there's nothing further that we need to get the full support of your organization.

Mr. TREISTER. In opposition to the Danielson/Railsback amendment? No doubt about that.

Mr. DRINAN. All right.

Professor KING. And there is a statement in our written statement that was filed today that the NBC strongly supported, and still supports, the H.R. 8200 proposal for a full article III bankruptcy court.

Mr. DRINAN. I assume that you're testifying to that point in the Senate?

Professor KING. Yes.

Mr. DRINAN. All right.

Mr. BUTLER [presiding]. Mr. Levin?

Mr. LEVIN. Thank you, Mr. Chairman.

Some witnesses have told the subcommittee that the present system is working well. It seems to process an enormous volume of cases with reasonable dispatch. Is it working well—I should say, is it working at all? And if so, why do we need to change it?

Mr. TREISTER. Let me try to respond to that.

The present system does process a large volume of cases remarkably well, for what they've got to work with. But it is not working well, in my opinion, and I think in the opinion of the National Bankruptcy Conference, on an overall view. Because too many people, particularly those outside the system, feel it is working unfairly.

It appears to be an unfair system. And in many cases, it is actually an unfair system in my view. There is a bias in favor of the estate. It arises in a number of ways, and your House Judiciary Committee report very accurately documents it.

So my conclusion is, it is not working well. It's not working as badly as it could work. But there's much room for improvement, and I think that H.R. 8200 would go a long way toward improving the system.

Mr. LEVIN. A witness yesterday suggested that improving facilities, improving staffing, improving libraries, and increasing terms, was not adequate to have the kind of court system we need. The Judicial Conference suggested it was. The Attorney General, though not unequivocal, also suggested it was.

Do you feel there is something more than staff and facilities that is involved here?

Mr. TREISTER. Well, I think there are two main needs: One, to separate the administrative from the judicial, which H.R. 8200 does, and does very well. The other one is to see that this court becomes a high-class Federal court, and not a court which is not as good as litigants experience when they deal with district courts.

Professor KENNEDY. And everybody seems in favor of expanding the jurisdiction to eliminate this wasteful, time-consuming litigation over the difference between summary and plenary jurisdiction. The Attorney General said he was all in favor of eliminating that. When we expand that jurisdiction, we have to have this kind of prestigious court.

Mr. TREISTER. You may get some highly qualified people accepting bankruptcy judges' appointments under an adjunct system. It's probably true you get some. But in numbers, you won't get many, because the best lawyers, when they make the financial sacrifice that it takes to go on the bench—and it is a financial sacrifice—the best lawyers don't want to be somebody else's assistant.

That's why I think you need the independent court.

Professor COUNTRYMAN. May I just emphasize one thing?

The bankruptcy judges don't have to approve my salary. I agree with what Bill Rochelle said earlier. There are some very good presently incumbent bankruptcy judges, but there are also some terrible ones. And in some districts, they're all terrible.

We really need to elevate the status of this court so that we can attract better people. It would be a catastrophe if, as the Attorney General indicated he was willing to do, all the present bankruptcy judges would be appointed to the new court. We would have lost at least half of what we're trying to do.

Mr. LEVIN. Professor King, you heard Judge Rifkind on Monday afternoon state that an adjunct system would attract highly qualified individuals, but that it was simply not necessary that bankruptcy judges be as qualified as people we appoint for district judgeships.

Would you comment upon that?

Professor KING. Well, it goes back to what I said before I think. It's bankruptcy court. He doesn't seem to have any idea with respect to the type of litigation, and the need for that judge to adjudicate very, very important matters which are as important as the matters that come up in the district court.

It's inconceivable to me at this time, at the end of this study, we should not come out with a resolution that the bankruptcy judges have to be as qualified as district court judges.

I think other points were made by other witnesses to the effect that so many of the persons in this country who have any exposure to the judicial system have that exposure in a bankruptcy court rather than in any other court, and they should come up before a person who certainly is as highly qualified as a district court judge.

Mr. BUTLER. Mr. Klee?

Mr. KLEE. Thank you, Mr. Chairman.

Mr. ROCHELLE. Excuse me.

Mr. BUTLER. Certainly.

Mr. ROCHELLE. Mr. Levin says he heard the remark that the present system is working fairly well.

Mr. BUTLER. I think he was baiting you. [Laughter.]

Mr. ROCHELLE. It's like Henny Youngman: "How's your wife?" "Compared to what?" Compared to the fee system, when the referees earned a percentage of the cases, of course this system works far better than it did. And to Professor King's point, I simply refer you to page 10 of the very excellent report of this committee where it outlines the variety of legal issues encountered in bankruptcy courts and by bankruptcy judges. I know of no other field of the law where there must be the expertise required of a bankruptcy judge. I'm sorry.

Mr. KLEE. Professor Countryman, point 19 on our chart refers to the power to conduct jury trials in plenary matters. Much of the difference between an article I court and an article III court is focused on the contempt power and the power to enjoin another court.

But the jury trial question has not received, really, the analysis that it should have.

In your opinion, does the right to a jury trial under the Constitution mean trial by a judicial officer such as an article III judge, or would the requirement be satisfied by trial before an officer not exercising the judicial power of the United States?

Professor COUNTRYMAN. At this moment, off the top of my head, I can only say what my colleague, Professor Shapiro, said when he wrote to you about this: that while he knows of no authority on the point, he reads the seventh amendment to require a jury trial, but not to require it before any particular kind of a judge.

Now that, as I say, is based on nothing so far as ease law is concerned. But this is a very serious question which, if you would like, I would be happy to try more deliberately to formulate an answer to and send to you.

Mr. TREISTER. Of course, under the present statute, a referee can preside at a jury trial.

Professor COUNTRYMAN. I guess Congressman Butler would say we're claiming jurisdiction by adverse possession.

Mr. BUTLER. We have no objection to that, but the magistrates seem to be trying jury cases right now with no authority that I know of, except maybe, I think, lazy judges. I don't know. But they're doing it.

Professor COUNTRYMAN. Yes; they are.

Mr. BUTLER. I guess if you get a good verdict, why, you don't argue about it. All right.

Mr. KLEE. Just to follow that up, Professor Countryman, it may be necessary, too, to distinguish between an administrative court with an article I judge and a magistrate or referee who, arguably, may be exercising a delegated judicial power of the United States.

Professor COUNTRYMAN. That is one theory which is used to explain the constitutionality of the present bankruptcy judges.

Mr. KLEE. Thank you, Mr. Chairman. I have no further questions.

Mr. McCLORY. No? Thank you all. I'd like to express the gratitude of the entire committee for this expert group that has come before us this morning. I think they have shed more light on the whole subject of the whole problem that we're struggling with right now than any other testimony that we've received.

As a member of this subcommittee, I'm very, very appreciative of your forthright and very helpful statements.

Thank you, Mr. Chairman.

Mr. BUTLER. Thank you.

The chairman asked me to express his appreciation. He had a sudden call. An emergency arose which he had to take care of. But we do appreciate your contribution.

Professor King, you've been here for the four hearings. You know that they've been very productive hearings. And we'll review our thinking and keep you posted, and we do appreciate your interest and your attention.

Thank you.

These hearings are adjourned.

[Whereupon, at 11:40 a.m., the hearings in the above-mentioned matter concluded.]

[Additional material received for the record follows:]

U.S. DISTRICT COURT,  
DISTRICT OF MAINE,  
Bangor, Maine, December 21, 1977.

Congressman DON EDWARDS,  
Chairman, Subcommittee on Civil and Constitutional Rights,  
Washington, D.C.

DEAR MR. CHAIRMAN: During the course of the most recent hearings conducted on H.R. 8200 before your Subcommittee on Civil and Constitutional Rights, on December 14, 1977, Attorney General Griffin Bell expressed the opinion that no appreciable judicial time was required in chapter XIII cases. At the risk of burdening the legislative record I must take respectful exception to that view, which is all too commonly shared among those with little experience or familiarity with the workings of our bankruptcy courts.

I am forwarding under separate cover a sampling of chapter XIII case opinions (300 plus pages), entered in this court in recent years. As you will readily note, the issues involved are both complex and of great importance to the individuals and families involved, as well as to their creditors.

In virtually every chapter XIII case the court must rule upon the validity, perfection, priority and amount of each secured claim, as well as determine the acceptance and feasibility of the plan. Since chapter XIII presents the prospect that creditors may indeed receive payment of their claims, disputed claims applications to reject executory contracts and allowance of discharges under section 661 commonly require formal disposition by the court.

I invite your attention particularly to *In re Truman et als.*, which represents the culmination of fifteen years of litigation between the chapter XIII trustees and small loan company creditors in this district, involving hundreds of thousands of dollars worth of claims disputed as usurious, arising in thousands of chapter XIII cases. Litigation of the issues presented in those cases alone easily involved the equivalent of five full years of judicial time. Similar litigation, involving Morris Plan banks, has also consumed huge amounts of judicial time.

I hope that the impression conveyed by the testimony of the Attorney General may in some measure be corrected hereby.

Respectfully,

CONARD K. CYR,  
U.S. Bankruptcy Judge.

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STATE UNIVERSITY OF NEW YORK AT BUFFALO,  
FACULTY OF LAW AND JURISPRUDENCE,  
Buffalo, N.Y., December 30, 1977.

Re: Reconsideration of H.R. 8200.

Representative DON EDWARDS,  
Chairperson, Subcommittee on Civil and Constitutional Rights, House Committee on the Judiciary, The U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE EDWARDS: I am submitting this statement on behalf of David T. Stanley and myself. We appreciate this opportunity to present our

views on H.R. 8200 to the subcommittee. As our earlier testimony<sup>1</sup> indicated, I was formerly a research associate at the Brookings Institution and co-authored its nationwide study of the administration of the bankruptcy laws. Mr. Stanley directed that study, which resulted in the book entitled *Bankruptcy: Problem, Process Reform*, (1971) and was a senior fellow at Brookings until his retirement last year. He currently is a consultant and writer on public administration. The opinions expressed below are our own and are not necessarily shared by others at the Brookings Institution or the State University of New York at Buffalo.

We wish to comment briefly on two proposals in H.R. 8200:

#### 1. THE U.S. TRUSTEE SYSTEM

We strongly support the proposal for a salaried U.S. trustee system, to be used when creditors do not elect a trustee in liquidation cases, as well as in those chapter 13 cases for which a standing trustee is not available (§ 224). This proposal has attracted widespread support as a means of providing the trustees with independence from supervision and compensation by bankruptcy judges, who may later have to decide contested issues in the cases which the trustees are administering. Among the entities currently under consideration for supervision of the U.S. trustee system, we prefer the Administrative Office of the U.S. Courts, because its staff would not face the potential conflict of interest which the Justice Department perceives if it supervises the trustees.<sup>2</sup> If the Administrative Office is selected as the supervising entity, we urge that it be assured adequate staff for that added responsibility.

#### 2. THE PROPOSED SYSTEM OF BANKRUPTCY COURTS

We continue to feel that the creation of a separate system of bankruptcy courts is unnecessary, because contested issues occur in such a small proportion of bankruptcy cases.<sup>3</sup> However, if your committee feels that such a system is unavoidable, we prefer the term judgeships provided in § 2-102 of H.R. 31 to the lifetime judgeships provided in § 201 of H.R. 8200 as reported by the committee.

Every effort should be made to minimize the costs of any new layer of judicial involvement in the bankruptcy system. We feel that creating possibly two hundred lifetime bankruptcy judgeships would have the opposite effect by maximizing the public cost for staff and benefits. We understand that such judgeships might be used to ease the heavy workload of the existing U.S. district judges, but recommend dealing with that problem directly by adding more U.S. district judges rather than indirectly in the context of reforming the bankruptcy system.

Whichever court structure may be selected, we urge you to retain H.R. 8200's appellate route directly to the circuit courts of appeal. (§ 237) We are not persuaded by mere assertions that "accessibility" will be denied excessively if the normal appellate route is followed. Those who seek to except bankruptcy appeals from normal processing should be asked to supply data which prove that travel costs are the determining factor in whether appeals will be taken.

We appreciate this additional opportunity to present our views to you and would, of course, be willing to answer any questions which you have for us.

Sincerely,

MARJORIE GIRTH,  
Associate Professor of Law.  
DAVID T. STANLEY,  
Consultant.

<sup>1</sup> Our earlier testimony can be found in "Bankruptcy Act Revision", Hearings before the Subcommittee on Civil and Constitutional Rights, U.S. House Committee on the Judiciary, (94th Cong., 1st Sess.), Part I, p. 361, *et seq.*

<sup>2</sup> See proposed 28 U.S.C. 586 (c), (d), and (e), included in H.R. 8200, § 224(a), for the committee's recommendation that the U.S. Attorney General be responsible for supervising the trustee system.

<sup>3</sup> Our findings on this issue appear in "Bankruptcy Act Revision", *op. cit.*, note 1, pp. 363-367.

HARVARD LAW SCHOOL,  
Cambridge, Mass., December 19, 1977.

RICHARD LEVIN, Esq.  
Subcommittee on Civil and Constitutional Rights,  
Committee on the Judiciary,  
U.S. House of Representatives, Washington, D.C.

KENNETH N. KLEE, Esq..  
Shutan & Trost, 1880 Century Park East, Los Angeles, Calif.

DEAR RICH AND KEN: I thought you might like to see how General Bell's system would work. Neither Gabriel nor his closest contender, Duffy, have had any bankruptcy experience.

Best regards,

VERN COUNTRYMAN.

Enclosure.

[From the Boston Globe, Dec. 14, 1977]

GABRIEL NAMED TO BANKRUPTCY JUDGESHIP

(By James H. Hammond)

Former U.S. Attorney James N. Gabriel of Cambridge yesterday was appointed by a majority of the five U.S. District Court judges to the newly-created \$48,500-a-year Federal bankruptcy judgeship in Massachusetts.

Gabriel, a former assistant attorney general under then Massachusetts Atty. Gen. Edward W. Brooke and former Massachusetts Atty. Gen. Elliot L. Richardson, had headed the U.S. attorney's office in Massachusetts for four years. He was replaced by Edward F. Harrington, a Democrat, as U.S. attorney Aug. 1.

The bankruptcy judgeship has remained vacant since Sept. 1. Gabriel, one of the finalists for the post, had the backing of Brooke, who is now a U.S. Senator.

There was no indication of how the judges voted yesterday, simply that a majority of them voted to appoint Gabriel.

Reportedly, U.S. Sen. Edward M. Kennedy, had supported the candidacy of William B. Duffy Jr., a former Assistant U.S. Attorney in Boston in 1963. Duffy is now with a Boston law firm.

The district court judges' order was signed by all five active members. Andrew A. Caffrey, chief judge, and by W. Arthur Garrity, Jr., Frank H. Freedman, Joseph L. Tauro, and Walter Jay Skinner.

Gabriel will be sworn in some time before Dec. 19, the date when his appointment for six years becomes effective.

Informed of his appointment Gabriel said: "This is indeed pleasant news. I want to thank the court for their confidence in appointing me. I'm looking forward to getting back into government service."

The post was authorized by Congress last summer to ease the bankruptcy case backlog in central and western Massachusetts.

The three other bankruptcy judges are Paul H. Glennon, Harold Lavien and Thomas W. Lawless.

The appointment of Gabriel is expected to clear the way for U.S. Senate hearings on the appointment of Judge David Mazzone of the Massachusetts Superior Court to a vacancy on the Federal District Court in Boston.

JUDGING BANKRUPTCY JUDGES

Despite a crushing workload and backlog of bankruptcy cases, a new bankruptcy judgeship for Massachusetts has gone begging for more than six months. Chief US District Judge Andrew A. Caffrey, who opposes a top nominee, has stalled a vote on the issue, which has led to public accusations that the normal politics of selection have sunk to an unusually low level. But the problem is more with the process than with the judges, and the process should be refined.

The district judges fill bankruptcy positions by majority vote. They have interviewed 10 candidates from the more than 40 applicants for the six-year, \$48,500-a-year job. At least two of the candidates, former US Atty. James Gabriel and William Duffy, a former assistant US attorney, have powerful political support. Gabriel is being supported by Sen. Brooke, Duffy has the backing of Sen. Kennedy.

Because the district judges are nominated for their own jobs by one or the other US senator, they are vulnerable to political pressure and may feel inclined to endorse a nominee who has been proposed by their own sponsor.

Ideally, the judges would resist naming hacks to bankruptcy judgeships or to any of the other positions that they have the statutory responsibility of filling, regardless of the nominee's backing.

In reality, however, there is no insulation between judges and the political process of nominating and promoting candidates for judicial positions such as bankruptcy judgeships and magistrates. Judge Caffrey wants his fellow judges here to change that process.

Taking his lead from Sen. Kennedy, who used a blue-ribbon screening committee to identify and evaluate candidates for the three or four new US district judgeships which Congress is now considering, Caffrey would like to establish a panel at least to weed out nominees who lack sufficient qualifications for administrative judgeships. Although such a process would not eliminate politics, it would surely reduce the likelihoood of an unacceptable candidate being forced upon the Federal bench.

The role Caffrey has played in delaying a call for the vote on the new bankruptcy job should not taint his proposal. The judges may feel confident that they have a pool of qualified applicants for the existing vacancy. If so, they should not be denied a chance to vote. But the unseemly maneuvering of the past six months should indicate that it is time to refine the process of finding and selecting administrative judges.

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#### CAFFREY MAY STALL BANKRUPTCY JUDGESHIPS

Former US Atty. James N. Gabriel and Atty. William B. Duffy, Jr., head a list of 10 candidates for the new bankruptcy judgeship scheduled to be appointed today by the five US District Court judges here.

The two attorneys are considered the leading candidates for the \$48,400-a-year position authorized by Congress to ease the bankruptcy backlog in central and western Massachusetts about which Chief Judge Andrew A. Caffrey has been complaining. Nearly 50 lawyers applied for the position which was widely advertised several months ago in *Lawyers' Weekly* and several other law publications.

The other finalists chosen by Caffrey and his judges are Asst. US Atty. Mary Brennan; Atty. Joseph A. Lena of Boston, a former asst. US attorney; Hertz N. Henkoff of Barron and Stadfeld; James F. Queenan, editor-in-chief of the *Mass. Law Quarterly*; Robert Robinson of Widett, Widett, Slater and Goldman; Louis J. Shrair, former law partner of Judge Benjamin Gargill; John J. Sullivan, who has his own law practice; and Eleanor F. Taylor, chief clerk of the Bankruptcy Court.

Today's vote was scheduled by Judge Caffrey on Oct. 19 after he and the four associates judges of the Federal court completed their interviews with the 10 finalists.

At today's session, Caffrey is expected to ask his colleagues to throw out the list and set up a screening committee to propose new candidates. The weakness in the chief judge's 11th hour postponement bid is his questionable motives.

His delaying tactics during the six months or so that the bankruptcy opening has existed have been so transparent that his pitch for starting all over for what he considers better qualified applicants lacks credibility. Any further delay in the deliberations will give the chief judge control over the appointment, and that is precisely what Caffrey wants.

Caffrey is opposed to Gabriel and has been maneuvering behind the scenes for months in a desperate effort to block the ex-Federal prosecutor, because he believes that the three judges appointed by Sen. Edward W. Brooke (judges Freedman, Tauro and Skinner) plan to vote for him.

It is doubtful that Judge Caffrey's colleagues will go along with his move for a screening panel at this late hour.

Caffrey's latest ploy surfaced only after he failed to get Sen. Edward M. Kennedy to expedite the appointment and seating of his nominee (Superior Court Judge A. David Mazzone) for the vacancy created last July 15 when Judge Frank J. Murray retired and took senior status.

To his credit, Sen. Kennedy resisted Caffrey's hurry-up exhortations and stayed out of the bankruptcy deliberations by letting the process of screening and nominating his new nominee for the bench take its normal course.

Caffrey's strategy was based on the premise that if Mazzone was sitting as the sixth judge, he would be able to control the bankruptcy vacancy—since in the case of a tie vote, the vote of the chief judge counts double, and Caffrey's choice would prevail.

If Gabriel gets the nod from the so-called Brooke judges, it will be because of their personal knowledge of his capabilities. Judges Freedman and Skinner both worked closely with him as assistant attorneys general. And he served as first assistant under Judge Tauro when the latter was US attorney.

Gabriel performed so well during Brooke's terms as an assistant A.G. that the senator's successor, Elliot L. Richardson, made him chief of the eminent domain division immediately after he became Attorney General in 1967. That was the division which had to pick up the pieces following the widespread scandals in land damage cases "settled" by the state earlier in that decade.

In his four years as Federal prosecutor, Gabriel established the region's first political corruption unit, which has triggered the formation of similar units by Gov. Michael S. Dukakis, Suffolk County Dist. Atty. Garrett H. Byrne, and others. The DiCarlo-Mackenzie and Mason Condon cases top the list of some 15 successful political corruption investigations launched by Gabriel's unit.

To his credit, the former Federal prosecutor has remained far in the background on the bankruptcy proceedings. Unfortunately, Chief Judge Caffrey's power play at the expense of clearing the backlog of bankruptcy cases in the Worcester-Springfield area has tainted the prestigious Federal court.

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#### DISSENTION ON A JUDGESHIP FOR GABRIEL

Former US Attorney James N. Gabriel may be allowed to assume a \$48,500 per year Federal bankruptcy judgeship with no outside review of his legal qualifications because of a vote here last week by the five US District Court judges.

In a meeting Nov. 7, the judges voted down a proposal by Chief Judge Andrew A. Caffrey to submit the name of Gabriel, or whomever the judges nominate for the bankruptcy vacancy, to a bar review panel which would rule on the candidate's legal competence.

The bankruptcy position is actually a quasi-judgeship, much on the level of a Federal magistrate's job. As a result, these positions have never been turned over to the public screening committees and judicial review boards that weigh the qualifications of other state and Federal-level judges.

Instead, bankruptcy judges and Federal magistrates are chosen by a vote of the local US District Court judges.

Critics of this selection process charge it is vulnerable to political pressure, with each Federal judge expected to vote the preference of his political sponsor. In this case, US Sen. Edward W. Brooke is backing Gabriel, a longtime protegee, while Sen. Edward M. Kennedy is supporting William B. Duffy, Jr.

Duffy is a former Amherst College football player, a graduate of Harvard Law School, and a longtime Kennedy supporter who was named an assistant US Attorney in Boston in 1963 by the late Robert F. Kennedy, who was US Attorney General at that time. Duffy is now with the Boston law firm of Johnson, Clapp, Ives and King.

Caffrey was not able to get a majority on the question of merit review, and the other judges involved—Walter Jay Skinner, Joseph L. Tauro, Frank Freedman and W. Arthur Garrity—refused to disclose their votes or even discuss the issue of judicial review panels.

With mounting pressure by the American Bar Assn. and state and local bar associations to set up merit selection procedures for all judgeships, few judges are willing to go on the record as being against the idea.

Caffrey was reluctant to talk about the meeting or the actual vote on his proposal for fear of violating the confidentiality of a judicial consideration.

The only formal order coming out of the meeting—which occurred Nov. 6—was an order to send Gabriel's name to the FBI for a clearance.

Many members of the Boston legal community say that usually this means that the judges have formally voted to approve Gabriel for the bankruptcy judgeship. Sources close to the situation say however that although it is a departure from tradition, this is not the case.

In fact, the order is only for the FBI clearance, and Gabriel will not be considered for the official nomination until after the clearance comes back from the FBI.

As things stand now, Gabriel has the support of the three judges who owe their own appointments to Brooke—Tauro, Skinner and Freedman. Duffy is supported by Caffrey and Garrity.

The wild card in the selection process is the pending confirmation of Judge A. David Mazzone, who is awaiting approval by the President, the US Senate and the Justice Department before he can step into the vacant sixth Federal judgeship here.

If Mazzone can be confirmed before the Gabriel question comes up for a vote, he is expected to vote for Duffy, creating a tie vote which would be broken because extra weight is given to Caffrey's vote as chief judge.

Kennedy's office has said that it will stay out of the matter, though it has the power to expedite the decision on Mazzone, expected to take at least three more weeks. The FBI clearance for Gabriel would normally take four to six weeks, but may come more quickly since he is a former US Attorney.

Sources on Gabriel's side say that Gabriel is qualified and that the judges were right to vote against a bar review panel on the Gabriel nomination since it was an obvious political ploy by Caffrey to stall until Mazzone can be seated as a Federal judge.

Legal sources on the other side, however, say that although this is obviously a very political situation, they oppose Gabriel not just on the basis of politics, but because they consider him unqualified for the very technical position of bankruptcy judge.

Although the bankruptcy job was once virtually no more complicated than a clerk's position, it has grown enormously in importance in the last decade with the decline of the American economy and the increased acceptance of the bankruptcy process by both individuals and large corporations.

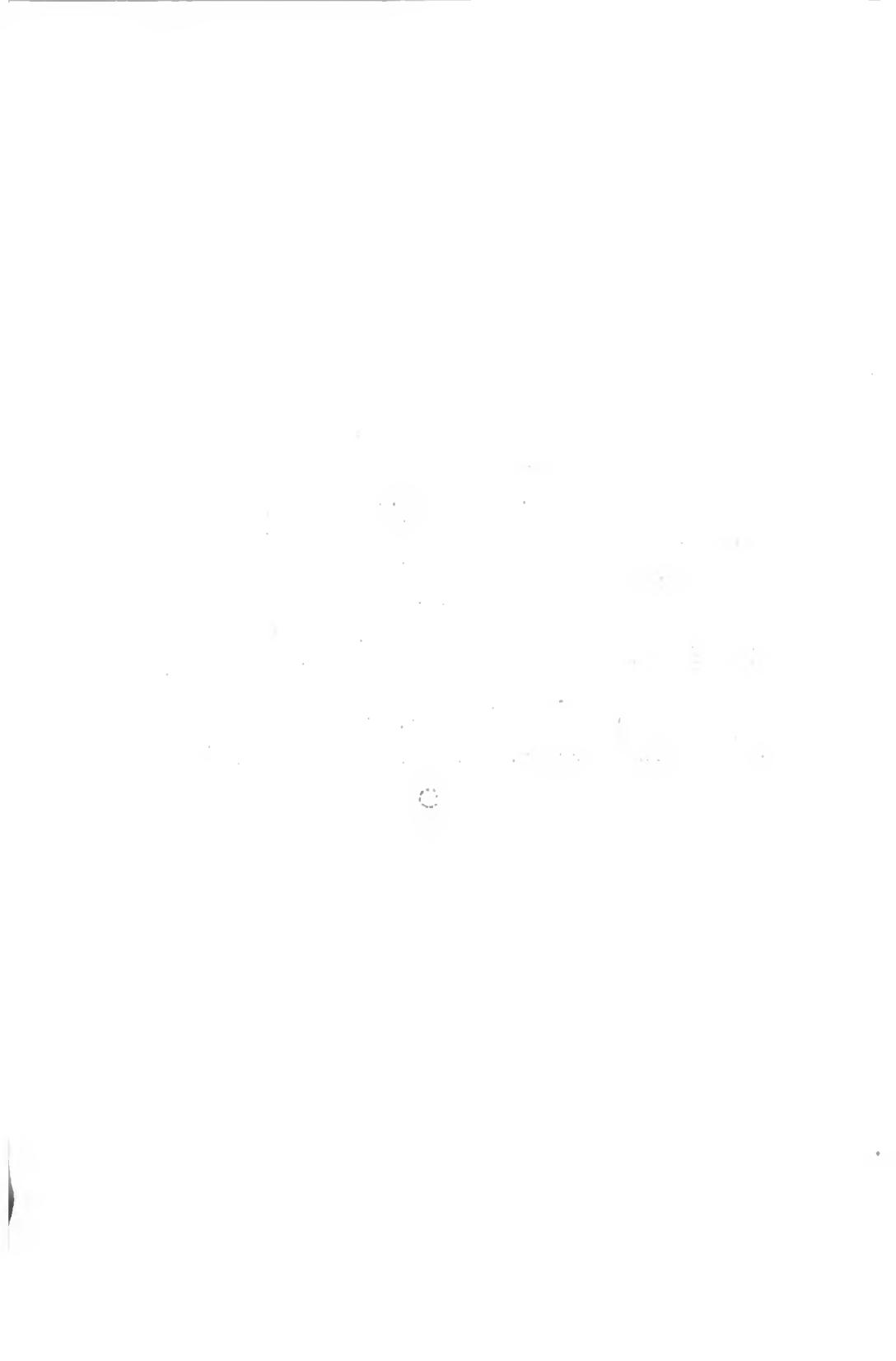
There also is legislation in Congress this year which would upgrade the bankruptcy position to a full Federal judgeship, and although it is not expected to pass during this session, it is certain to come up again.

Gabriel applied for a Federal magistrate's job only last year, but he was not chosen for either of two openings.

Gabriel said he did not feel it would be appropriate for him to comment on his qualifications or on the desirability of a merit selection review panel since he is a candidate for the job.

Sources close to Caffrey say that whatever happens in the Gabriel situation, he is serious about the need for some sort of bar panel to rule on the qualifications of future nominees and will soon resubmit such a proposal.





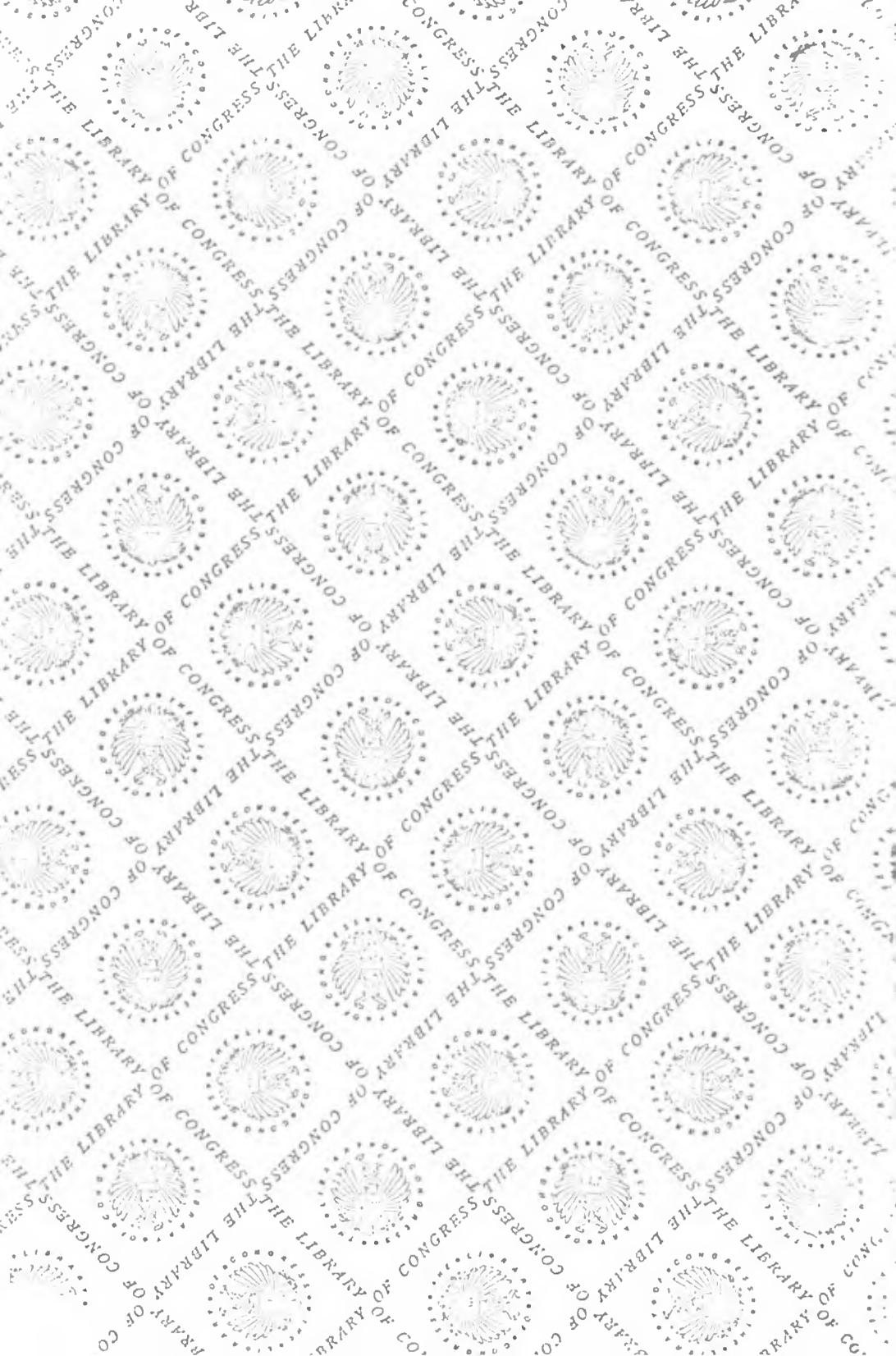


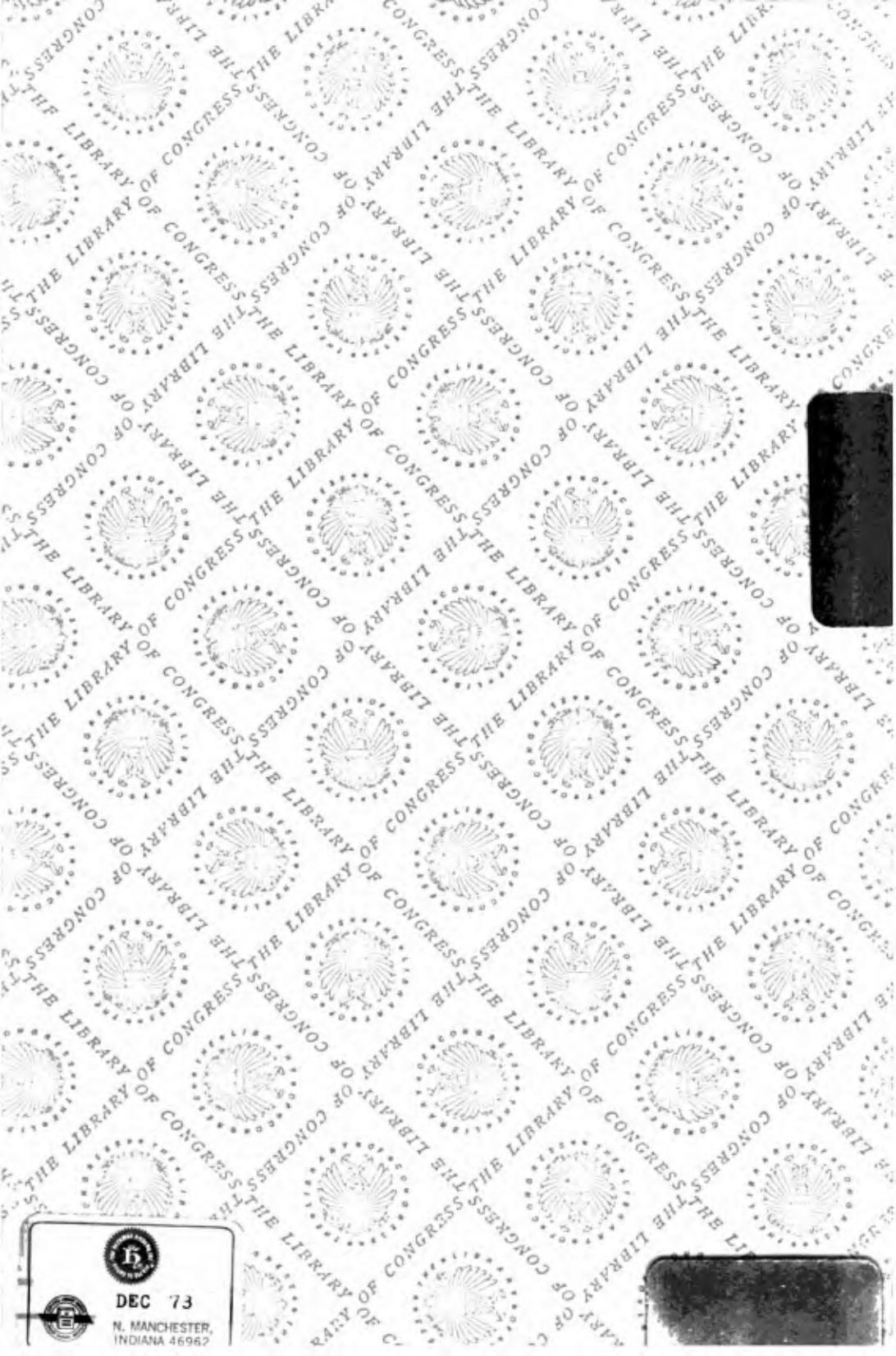
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