



VOLUME 36, NOS. 1 AND 2

(1) Congress has amended the laws governing bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system.

and the Director. In fixing the amount of the award, the Director shall take into account the amount of the award made after advising with the Director. In fixing the amount of the award, the Director shall take into account the amount of the award made after advising with the Director.

History and Developments of U.S. Bankruptcy Law, 1970-2026



The Ninth Judicial Circuit Historical Society

WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

PUBLIC LAW 95-598—NOV. 6, 1978

92 STAT. 2549

Public Law 95-598
95th Congress

An Act

To establish a uniform Law on the Subject of Bankruptcies.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

TITLE I—ENACTMENT OF TITLE 11 OF THE
UNITED STATES CODE

SEC. 101. The law relating to bankruptcy is codified and enacted
as title 11 of the United States Code, entitled “Bankruptcy”, and may
be cited as 11 U.S.C. § , as follows:

TITLE 11—BANKRUPTCY

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Nov. 6, 1978
[H.R. 8200]

Title 11, USC.
Bankruptcy.

11 USC prec. 101
note.

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HISTORY AND DEVELOPMENTS OF
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Introduction

Two outstanding judges provided the germ of the idea to produce an issue devoted entirely to bankruptcy. Both found success at the trial and appellate level of bankruptcy judging. Jim Marlar and I go back to our high school days. Chris Klein and I share the U.S. Marine Corps experience. My colleagues on the Court of Appeals have for some time selected both Bankruptcy Judges and members of the Bankruptcy Appellate Panel, and it has been my honor to sit on screening panels for both. Someone smarter than me once observed that family law involves good people at their worst, while criminal law is where you see bad people at their best. My sense is that bankruptcy judges see a little of both, carrying out their work with talent and care, whether dealing with the heartbreak of personal bankruptcy or the complexity of large-scale corporate or municipal reorganizations.

We are delighted to have U.S. Bankruptcy Judge Scott C. Clarkson (Central District of California) as our Guest Editor for this issue. Scott has assembled a remarkable group of authors across a range of topics critical to the operation of the bankruptcy system, from the adoption of the 1978 Bankruptcy Reform Act, to the transition in bankruptcy from Referee to Judge, to the creation of Bankruptcy Appellate Panels and their remarkable efficiency as an intermediate appellate court. Fully half of those who fail to prevail there, but have a perfect right to appeal, choose not to, accepting the BAP's result.

We are also fortunate to have a wonderful set of book reviews, covering topics as varied as an admiral's view of naval warfare (particularly timely given world events), the work of legendary author Willa Cather, a fresh assessment of legendary gunfighter Wyatt Earp, and Justice Anthony M. Kennedy's reflections on his time on the Supreme Court. Good book reviews encourage readers to actually read the books being reviewed, and these reviews meet that mark. Gathering these reviews also involved personal connections: the Cather review is written by a childhood friend who went on to become a university president, the Earp review is written by a friend of more than forty years who has become the dean of Old West writers, and my colleague and dear friend Judge M. Margaret McKeown reviewed a book about the failed efforts to have former Chilean strongman Augusto Pinochet face war crime charges. Our Book Review Editor Kevin J. Hamilton brought us Lisa Marshall Manheim, his former law partner,

who clerked for Justice Kennedy and is now a professor at the University of Washington School of Law. Her review, done in collaboration with Madeline Cochran, captures the essential decency of a remarkable man who, even while serving at the pinnacle of the American legal system, made everyone he met feel comfortable.

Foreword

It is a singular honor to serve as guest editor of the 2026 edition of the *Western Legal History* Journal, a volume devoted entirely to the modern history and development of American bankruptcy law. This edition reflects not only the maturation of a specialized field, but also its profound and enduring influence on the structure of our national economy and the administration of justice. As I have had the privilege to observe from the bench, bankruptcy law is neither static nor peripheral: It is dynamic, responsive, and central to the balance between debt, equity, and opportunity in American life.

This volume arrives at a moment when bankruptcy law stands at the intersection of constitutional inquiry, economic necessity, and institutional innovation. From the enactment of the Bankruptcy Reform Act of 1978, of which I was a direct observer and participant as a legislative assistant to a member of the House Judiciary Committee, to the emergence of Subchapter V and the increasing complexity of mass tort restructurings, the arc of development over the past half century has been both expansive and consequential. The contributors to this edition engage deeply with these developments, offering not merely historical accounts, but critical analyses that illuminate the path forward.

What distinguishes this edition, above all, is the extraordinary caliber of its authors. This Journal brings together an unparalleled group of jurists, scholars, and practitioners whose collective expertise spans the full breadth of the bankruptcy system. Our scholar contributors have long shaped academic and judicial discourse in our country. Our distinguished members of the judiciary contribute perspectives grounded in their insights from the bench and their appreciation of both the history of bankruptcy law and its institutions. Finally, our leading practitioners bring front-line insight from complex restructurings and are among those who most fully recognize the dynamic power of bankruptcy law. The result is a volume of uncommon depth and authority.

The subjects addressed are equally significant. This edition examines the origins and evolution of the 1978 Code, the constitutional challenges that followed the *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* decision, and the institutional responses that reshaped the jurisdiction of bankruptcy courts. It explores the development of

bankruptcy appellate panels, the concept of bankruptcy exceptionalism, and the increasingly debated use of third-party releases. It also preserves the invaluable oral history of Richard B. Levin, whose contributions to the development of the 1978 legislation, and throughout the Code's existence, remain foundational.

In assembling this volume, I have come to appreciate more fully the role of scholarship in guiding both courts and practitioners. This Journal does more than document history. It frames the questions that will define the next generation of bankruptcy jurisprudence. It stands as both a reference point and a touchstone within the academic literature of the field.

It is my hope that this edition will serve not only those within the bankruptcy community, but also a broader audience interested in the evolution of federal law and the continuing dialogue between Congress, the courts, and the economy. If it succeeds in that aim, it will have fulfilled its purpose.



Hon. Geraldine Mund*

THE BIRTH OF THE MODERN BANKRUPTCY SYSTEM: INSIDE THE BANKRUPTCY REFORM ACT OF 1978

From the very beginning, the Constitution of the United States empowered, but did not require, Congress to make uniform laws of bankruptcy.¹ In the 110 years from the ratification of the Constitution until 1898, bankruptcy laws existed for a total of about eighteen years, and these were spread over three short periods of time.²

Finally, in 1898, Congress passed a comprehensive law that lasted—with some amendments—for eighty years until replaced by the Bankruptcy Reform Act of 1978 (the “Bankruptcy Code”).³ Although periodically amended with minor changes, the Bankruptcy Code is largely unchanged today with two major exceptions:

- (1) The Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”) was triggered by the ruling of the Supreme Court that the jurisdictional grant to bankruptcy judges in the Bankruptcy Code was unconstitutional.⁴ BAFJA not only

* Geraldine Mund is a retired bankruptcy judge serving on recall. She was the first female bankruptcy judge and first female chief bankruptcy judge in the Central District of California, having been appointed to the bench in 1984. She received a B.A. from Brandeis University, an M.S. from Smith College, a J.D. from Loyola Law School in Los Angeles, and later an M.A. from California State University, Northridge. She has published articles on bankruptcy history in the *American Bankruptcy Law Journal* including “Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978.”

1. U.S. CONST. art. I, § 8.

2. 1800–1803; 1841–1843; and 1867–1878.

3. An excellent and concise history of the various bankruptcy laws up to 1995 is presented by Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995). Another summary of the process leading to the passage of the Bankruptcy Code is Frank R. Kennedy, *Foreword: A Brief History of the Bankruptcy Reform Act*, 58 N. C. L. REV. 667 (1980).

4. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

restructured the judicial handling of bankruptcy cases but tightened up the ability to receive a consumer discharge and added some business provisions.

- (2) The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) focused on addressing the perceived misuse of bankruptcy protections, particularly by individuals who had the ability to repay their debts.

In general, the creation of, or amendment to, a bankruptcy law is triggered by financial panics or changes in the use of credit. The 1898 Bankruptcy Act came from the realization that state laws could not deal with the panics of 1884 and 1893. It broadened the discharge from that of the prior laws, but limited exemptions to those allowed by the state in which the debtor resides.⁵ It also had a method for fairer distribution of the debtor’s property to the creditors. While the federal district courts were the “courts of bankruptcy,” they appointed “referees-in-bankruptcy” to handle most of the work.⁶

During the Depression, Congress passed a variety of amendments to assist individuals and businesses in handling the debt-load and in reorganizing. These issues were all pulled together through the 1938 passage of the Chandler Act.⁷ Changes were made during the coming years, but by the 1960s it was clear that more uniformity was needed. So, Congress authorized the Supreme Court to promulgate uniform rules of bankruptcy procedure and the first such rules took effect in 1973.⁸

In 1965, the growth in consumer credit was one of the triggering factors that led the Judicial Conference of the United States (“JCUS”) to authorize the Brookings Institution to undertake an analysis of the effect of the increase in filings, the increase in total debt, the difference in approach among districts, and the questionable ethics of some prevalent practices. The report, published in 1971, concluded that the existing system was a failure.⁹

5. Prior to the Bankruptcy Code, the person or entity who filed bankruptcy was designated as the “bankrupt.” This was replaced in the Bankruptcy Code with the identification of “debtor.” For consistency, I use the word “debtor” throughout this article.

6. The title “referee in bankruptcy” is sometimes designated as “referee-in-bankruptcy.” For uniformity, I am connecting the words by dashes.

7. Pub. L. No. 75-696, 52 Stat. 840 (1938).

8. Bankruptcy Rules and Official Bankruptcy Forms, 411 U.S. 989 (1973).

9. David T. Stanley & Marjorie L. Girth, *Bankruptcy: Problem, Process, Reform* (1971). For a summary of the methodology and recommendations,

Congress was already holding hearings on some of the issues in the bankruptcy law, and in 1969 Senator Quentin Burdick (D-ND) sent a letter to every bankruptcy referee asking them to identify the ways that the bankruptcy system would be inadequate to handle a future major financial crisis. This led to the formation of a commission in 1969 to study the existing bankruptcy law and system.¹⁰

The Commission of nine members included appointees by President Richard Nixon, Chief Justice Warren Burger, and active bankruptcy practitioners appointed by the House and Senate. Although Senator Burdick had made it clear to Chief Justice Burger that he was to appoint “two active full-time referees in bankruptcy,” Burger appointed two district court judges. No bankruptcy referees were included.¹¹

Having been excluded from membership on the Commission, the bankruptcy referees increased their efforts to have input into the Bankruptcy Committee of the Judicial Conference. They were turned down. They sought to attend the annual circuit conferences at which all Article III judges and their invited lawyer-delegates were participants. Their request was rejected. Even as the Commission began public hearings, the bankruptcy referees suggested that the JCUS Bankruptcy Committee establish a study/liaison committee to offer suggestions to the Commission and to react to the Commission’s report. Once again, they were refused.

But the Commission itself was not so exclusionary. It held hearings around the country, sent out questionnaires to bankruptcy practitioners and others, and sought and received reports and testimony from a variety of groups. This included the National Conference of Referees in Bankruptcy (“NCRB”), the National Bankruptcy Conference, and relevant committees of the American Bar Association. In June 1972, the Commission asked the NCRB to prepare a draft bankruptcy act to present to the Commission. When the Commission report included a new administrative agency in the executive branch, the NCRB again went to the JCUS representative on the Commission and asked for a

see Marjorie L. Girth, *Prospects for Structural Reform of the Bankruptcy System*, 63 CAL. L. REV. 1546 (1975); see also Kennedy, *supra* note 3 at 670 n.21.

10. For a more detailed history, see Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978* (pts. 1 –5), 81 AM. BANKR. L.J. 1 (2007), 81 AM. BANKR. L.J. 165 (2007), 81 AM. BANKR. L.J. 341 (2007), 81 AM. BANKR. L.J. 515 (2007), 82 AM. BANKR. L.J. 175 (2008). Tapes and transcripts of interviews, letters, and other sources are available at the Biddle Law Library, University of Pennsylvania Archives and Special Collections, National Bankruptcy Archives.

11. Mund, 81 AM. BANKR. L.J. at 8 n.22 (2007).

discussion. They were rebuffed and told to go directly to the House and Senate Committees where the legislation would be pending. So, they did!

The structure of the bankruptcy system was crucial. As Ken Klee,¹² one of the staff members tasked with dealing with the bankruptcy amendments in the House of Representatives, put it:

Under the [1898 Bankruptcy] Act ... the district courts had the ability to appoint the bankruptcy judges, and it was sort of a patronage position for the district judge. And the district judge treated the referee sort of as an assistant, and a lot of times if an appeal was taken from a referee to the district judge, the district judge would talk to the referee *ex parte* and find out what was going on, because it was like having someone who worked for you making a preliminary decision. And there was a real view that there needed to be some independence of the bankruptcy judges, there needed to be a higher caliber and elevation of the office and that the way to get this done initially was by having an independent Article III bankruptcy court, appointed by the President with the advice and consent of the Senate.¹³

The Commission was presented with four alternatives for organizing the bankruptcy system: (1) the Brookings proposal to set up a separate, executive-branch agency to handle all liquidation cases; (2) the NCRB concept of a separate court of bankruptcy with its own intermediate court of appeals; (3) the existing system with some modest improvements; and (4) the National Bankruptcy Conference idea of making the bankruptcy court a division of the district court with direct appeal to the court of appeals.

The Commission Bill was a compromise. It proposed a bankruptcy court independent of the district court with judges appointed by the President and confirmed by the Senate for fifteen-year terms, as was done with the tax court. All sitting referees were to be terminated on the effective date of the act. The Bill allowed the JCUS to determine the number of judges to be appointed and the territory to be served by each bankruptcy court. Each bankruptcy court would have a clerk, but that person would be designated by the judges of the district court from among their deputy clerks. Appeals were to be to the nearest

12. Associate Counsel to the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary.

13. Interview of Ken Klee (Jun. 9, 2003), 14.

district court. The United States Bankruptcy Administration was to be created as an independent agency in the executive branch. It would receive the filings in all cases (except railroad reorganizations), would handle all claims and the first level of claims disputes, would generally administer every aspect of each consumer bankruptcy case that did not require judicial intervention, and would supervise various aspects of business liquidation and reorganization.¹⁴ This, along with other provisions, was designated as the Commission Bill.

The Commission was aware that the increase in consumer filings was largely due to the widespread availability of consumer credit. They looked at the wide variation of state exemption laws, the debtor's ability to waive their exemptions, and reaffirmations of consumer debt. They recommended:

- (1) Indigent debtors be authorized to file *in forma pauperis* petitions in bankruptcy without payment of filing fees, and failure to pay the fee be eliminated as a ground for denying discharge.
- (2) A debtor with a regular income be given the benefit of counseling by the Bankruptcy Administration before he is required to choose any form of relief under the Act.
- (3) A debtor's exemptions in bankruptcy be determined by reference to uniform federal standards prescribed in the Act.
- (4) Waivers of exemptions other than those creating indefeasible security interests be unenforceable in bankruptcy.
- (5) The bankruptcy court be given jurisdiction of disputes between the debtor and his creditors involving the property set apart to him as exempt.
- (6) A debtor be allowed to redeem collateral securing a dischargeable consumer debt by paying its appraised value if less than the amount of the debt.
- (7) A discharge be given the effect of extinguishing a debt so that the debt may not thereafter serve as the basis for an enforceable obligation or judgment as a result of a mere "reaffirmation."
- (8) The use of a false financial statement be eliminated as the basis for excepting a consumer debt from the effect of a discharge.

14. COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, JULY 1973, H.R. DOC. NO. 93-137 at 94 (1973).

- (9) An educational loan not be dischargeable in any bankruptcy case commenced within five years after the first installment becomes due, absent unusual circumstances.
- (10) Any debt incurred for the purpose of obtaining money, property, or services within 90 days of bankruptcy without the intention of paying the debt, and in contemplation of the filing of a petition under the Act, not be dischargeable.
- (11) The six-year bar on a subsequent discharge in bankruptcy be modified in the following respects: (a) the confirmation of a wage-earner's composition should not be a bar to subsequent relief under the Act; (b) the six-year bar period should be reduced to five years; and (c) the operation of the time bar should not be absolute but subject to being lifted if the debtor's inability to pay his debts is due to causes beyond his control and enforced payment would impose an undue hardship on the debtor.¹⁵

They looked at Chapter XIII limitations and recommended:

- (1) Any debtor with regular income be counseled by the Bankruptcy Administration as to the availability of relief in the form of a composition or extension plan as well as straight bankruptcy under the Act.
- (2) Relief by way of composition as well as extension be available despite the debtor's having obtained a discharge or confirmation of a composition within the previous five-year period.
- (3) The confirmation of a composition not be a limitation on future relief under the Act.
- (4) A proposal for a composition or extension be subject to approval by the Administrator on his finding that it complies with the Act and that it is in the best interests of creditors, without the necessity of submitting the plan to creditors for their consent.
- (5) An extension of debts of an individual with regular income require payment pursuant to the plan of no more than the amount of the indebtedness, from which should be deducted the expenses of administration.
- (6) The debtor be able to include in his plan a proposal for paying debts secured by liens on his residence and curing defaults thereon within a reasonable time.

15. 4 COLLIER ON BANKRUPTCY, app. pt. 4(c) (Richard Levin & Henry J. Sommer eds., 16th ed. 2025).

- (7) A debtor be able to include in his plan provisions for paying creditors secured by personal property, which protect their interests in the collateral, without affording them a veto of any plan including them.¹⁶

Beyond that, the Commission proposed a single type of business reorganization instead of the three that had existed. And they talked about the Absolute Priority Rule.

Meanwhile, the NCRB drafted its own bill, which not only contained its preferred court structure, but also dealt with a variety of other issues. For example, it gave the bankruptcy court the jurisdiction to enforce the discharge rather than making the debtor go to the state court for relief.¹⁷ By preparing its own bill, the bankruptcy referees were able to participate directly in the legislative process of overhauling the bankruptcy law.

In October 1973, the Commission Bill was introduced in both the House and Senate.¹⁸ But all work stopped as Congress began to conduct the Watergate hearings, leading to the drafting of articles of impeachment of President Nixon.

Serendipitously, about this same time the referees-in-bankruptcy were first officially recognized by the title “bankruptcy judge.” The JCUS adopted the first set of National Bankruptcy Rules in September 1973, which defined the “bankruptcy judge” as either the referee-in-bankruptcy or the district judge assigned to the case.¹⁹ From that point on, many referees began using the title “bankruptcy judge” and the title was largely adopted by Congress. The National Conference of Referees in Bankruptcy changed its name to the “National Conference of Bankruptcy Judges” (“NCBJ”). Consequently, when the bill drafted by the referees was heard in Congress, it was called the “Judges Bill.”

When the 94th Congress convened in 1975, the same congressmen who introduced the Commission Bill (H.R. 31 and S. 236) also introduced the Judges Bill (H.R. 32 and S. 235) and the two bills proceeded side-by-side.

16. *Id.*

17. A summary of the major differences of the Commission Bill and the Judges Bill is described in Russell L. Hiller, *Bankruptcy, the Threshold of Change*, 31 U. MIA. L. REV. 253 (1977).

18. For an excellent and concise legislative history of the 1978 Bankruptcy Code, see Ken Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941 (1979); see also 1 COLLIER ON BANKRUPTCY 20–24 (Richard Levin & Henry J. Sommer eds., 16th ed. 2025).

19. Bankruptcy Rule 901(7) (repealed 1978).

The Judges Bill offered alternatives to many provisions in the Commission Bill in every area from court structure and administration of bankruptcy estates to consumer bankruptcy and business reorganization. In general, the witnesses who testified and Congress itself saw these proposals as more practical than those recommended in the Commission Bill.

However, the main concern of the judges dealt with their future, particularly arising from the Commission's proposal of a new agency in the executive branch to oversee the administrative functions of bankruptcy cases. This posed a serious threat to their personal livelihood, since it was projected to reduce the number of bankruptcy judges from the current 220 to a mere 50. And the bankruptcy judges had substantial questions about the wisdom of creating a new bureaucracy and serious doubts about its projected effectiveness. NCBJ members were also leery of presidential appointments which, because of their lack of political connections, likely would exclude most sitting bankruptcy judges from even the remaining positions.

Faced with the prospect of exclusively presidential appointments and aware of the political problems of creating an intermediate court for bankruptcy appeals, the bankruptcy judges dropped their request for a mixed Article I/Article III bankruptcy judiciary. Instead, they proposed that all bankruptcy judges be selected and appointed by the judicial council of their respective circuits. Aware that it would be politically impossible to assure that the current judges would be granted the fifteen-year terms that the bankruptcy judges also favored, they proposed that the bankruptcy judges in office on the effective date of the new law be folded in for transitional terms of six years or until a successor was appointed. Appeals were to go directly to the existing courts of appeals, administration of bankruptcy cases would be in the Administrative Office, and the bankruptcy court would appoint its own clerk.

By Spring 1975, both the House Subcommittee on Civil and Constitutional Rights ("House Subcommittee") and the Senate Subcommittee on Improvements in Judicial Machinery ("Senate Subcommittee") were ready to move forward with hearings. The House Subcommittee had hired two amazing young attorneys as committee staff: Ken Klee (Harvard JD '74) on the Republican side and Richard Levin (Yale JD '75) on the Democratic side. On the Senate side, Robert Feidler began work in 1974 and Harry Dixon in August 1975. During the following year, the House Subcommittee held thirty-five days of testimony on the two bills (over a hundred witnesses) while the Senate Subcommittee held twenty-one days of testimony (sixty-two witnesses).²⁰

20. Mund, *supra* note 10 at 81 AM. BANKR. L.J 23 n.72.

When the hearings in the 94th Congress ended in May 1976, there was no question that all the pertinent players were considering a separate bankruptcy court with bankruptcy judges to be appointed for a term of years. It appeared that the major structural decisions would be whether the appointment power was to remain in the judiciary or shift to the President and which branch of government would host the new administrative agency.



House Judiciary Committee Chief General Counsel Alan Parker (center) and Assistant General Counsel (now Congresswoman) Zoe Lofgren, 1976. Photo courtesy of Guest Editor Hon. Scott C. Clarkson.

The time had come for a single bill in the House. Staffers consulted with the National Bankruptcy Conference and the NCBJ during thirteen days of meetings in November and December 1976. By January 1977, House staff had invested innumerable hours creating a single version of the bill, taking parts of the Commission Bill, sections of the Judges Bill, concepts from the National Bankruptcy Conference's partial bill, ideas from various witnesses, and their own thoughts. H.R. 6 introduced the concept of the creation of the office of the United States Trustee in the executive branch with certain, but limited, administrative functions. It also included the creation of an Article III bankruptcy court.²¹

21. The Senate Bill, S. 2266, 95th Cong. (1977), was not introduced until October 1977.

Staffers Ken Klee and Richard Levin seriously doubted the possibility that the Senate would approve an Article III bankruptcy court. But because the goal was to give the bankruptcy court broad jurisdiction to enable the bankruptcy judges to hear virtually any matter that arose in or was related to the bankruptcy case, they were convinced that the tax court model that had been used in the prior bills was constitutionally insufficient. H.R. 6 proposed the creation of a separate Article III bankruptcy court, which would be staffed by judges appointed by the President with advice and consent of the Senate, for life or good behavior.

The introduction of H.R. 6 with its Article III provision drastically changed the nature of the debate both within the NCBJ and the judiciary as a whole and led to the active involvement in the legislative process by the JCUS and its Bankruptcy Committee.

For the first time, the JCUS took action when, in March 1977, Chief Justice Burger created an Ad Hoc Committee on the Bankruptcy System ("Ad Hoc Committee"). The Ad Hoc Committee consisted of fifteen district court and court of appeals judges with representation from all judicial circuits. Needless to say, no bankruptcy judges were included in the group. It was chaired by District Judge Wesley Brown (Kansas), a member of the Judicial Conference and a former referee-in-bankruptcy.

The Ad Hoc Committee completed its preliminary report on April 15, 1977. They transmitted it to the Chief Justice and members of the JCUS. It was immediately sent to the leaders of the House and Senate subcommittees (and perhaps to the committee members), and shortly thereafter to the Attorney General. It was also circulated throughout the judiciary. In drafting the preliminary report, the Ad Hoc Committee determined that it would oppose the legislation on three grounds: the establishment of a specialized bankruptcy court was against all trends in judicial administration and court structure, a specialized court was entirely unnecessary, and the costs involved in creating such a court and elevating the bankruptcy judges could not be justified.²²

The Ad Hoc Committee adopted a five-part strategy: (1) to seek more time; (2) to develop widespread support from the Article III judiciary and the leadership of the American Bar Association, which was seen as the most influential legal organization in the country; (3) to convince Congress that the current system worked well, though a few minor changes might be warranted; (4) to oppose an administrative agency for bankruptcy cases if it were to be placed in the executive

22. JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY REPORT OF THE SPECIAL COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES TO REVIEW H.R. 6, 95TH CONGRESS, A LEGISLATIVE PROPOSAL RELATING TO BANKRUPTCY ADMINISTRATION 3 (1977).

branch; and (5) to develop the argument of fiscal waste so as to appeal to Congress not to transform the referees into Article III judges.²³

The JCUS had delayed action on the bankruptcy proposals which had been pending in Congress since the Commission Report in 1973 and the introduction of the Commission Bill and of the Judges Bill in 1975. All had included some form of an independent bankruptcy court staffed by judges who were no longer to be appointed by the district courts.

But once the JCUS began, it did an all-out effort to derail an independent bankruptcy court. Chief Justice Burger had meetings with members of Congress. The Ad Hoc Committee sought support from the circuits through the upcoming circuit conferences, which met annually and included all Article III judges and a group of lawyer delegates who were handpicked by those judges. At least six circuits passed virtually identical resolutions supporting the position taken by the JCUS.

The Ninth Circuit was an outlier. In 1975 its circuit conference had supported a separate bankruptcy court with the judges to be appointed by the President, but it now gave into pressure from the JCUS along with some of its own concerns. Chief Judge James Browning had invited five bankruptcy referees to attend the Ninth Circuit Judicial Conference (a unique move), and because of their presence the Ninth Circuit's resolution was detailed and nuanced. It did not specifically support a separate court, but it did not totally condemn the idea. It requested more time for a judiciary study by the JCUS and by the Ninth Circuit Conference to move recommendations to Congress before a vote would be taken.²⁴ In fact, Ninth Circuit Judge Shirley Hufstедler (later the Secretary of Education under President Carter) approached Congress with her own proposal for a structure that did not include an Article III bankruptcy court. Hufstедler's concept suggested a two-level bankruptcy court with a base of Article I judges at the local level and a group of Article III judges covering one or more circuits who would do trials that required broader jurisdiction and would handle all appeals.²⁵ This was surprisingly similar to the multi-tier "court of bankruptcy" that Bankruptcy Judge Conrad Cyr had originally suggested to the Commission and reiterated in his testimony before the congressional subcommittees in 1975 and 1976.²⁶

23. Judge Aldisert defended the decisions and actions of the Ad Hoc Committee, the JCUS, and Chief Justice Burger in Ruggero J. Aldisert, *The Judicial Conference and the New Bankruptcy Act*, 65 A.B.A. J. 229 (1979).

24. Mund, *supra* note 10 at 81 AM. BANKR. L.J. 179 n.34.

25. Mund, *supra* note 10 at 81 AM. BANKR. L.J. 179 n.35.

26. The goal of Chief Judge James Browning of the Ninth Circuit was to prevent a flood of bankruptcy appeals reaching the Court of Appeals. Thus, he

One of the goals of the Ad Hoc Committee was to give the district judges more control over the bankruptcy courts, though not transfer to the district judges the responsibility of actually handling bankruptcy cases. To accomplish this, it proposed combining the offices of bankruptcy judge and magistrate and consolidating the clerk's offices under the control of the district court clerk. It also called to reinstate the title of "referee-in-bankruptcy" in place of "bankruptcy judge," which had been included in the 1973 Rules of Bankruptcy Procedure and which was used in the various drafts of bankruptcy legislation pending in Congress. This was the exact opposite of the goal of the Commission and of the Judges Bill which sought to separate those who heard the bankruptcy cases from those who heard appeals from them.

The Administrative Office of U.S. Courts ("AO") undertook to study and then prepare proposed legislation to combine the role of magistrate and bankruptcy referee. The draft bill would remove the restriction against a full-time referee performing magistrate duties. The AO argued that this would curtail the number of low-paying part-time magistrates and provide backup that could fill gaps.²⁷

During the next months, the Ad Hoc Committee prepared and disseminated several preliminary reports and appointed a drafting committee to prepare a bill to go to the Senate. They focused on S. 2266, which had been introduced in October 1977, some ten months after the House bill. They suggested removing the sections dealing with clerk's office employees and substituted the term "referee-in-bankruptcy" for "bankruptcy judge" as the preferred title for the judicial officer who would conduct proceedings. They presented this through a series of strike-outs to the text of S. 2266. On a visual basis, this did not serve the judiciary well. Title II had 42 pages, and over and over again the term "bankruptcy judge" was stricken to be replaced by "referee-in-bankruptcy."²⁸ By March 1978 it was clear to the JCUS Bankruptcy Committee that there would be no return to the title "referee" as Congress was uninterested in pursuing

established the first Bankruptcy Appellate Panel, which has operated continuously since 1979 except for a short interruption after the *Northern Pipeline* decision. The Ninth Circuit has the longest continually-operating BAP in the nation. For more information about the proposal and development of the BAP, and the key role of Ninth Circuit Chief Judge Browning in that history, you may review the article in this volume by Hon. Benjamin P. Hursh and M. Jonathan Hayes.

27. For a detailed description, see Mund, *supra* note 10, 81 AM. BANKR. L. J.185–88.

28. Mund, *supra* note 10, 81 AM. BANKR. L. J.192 n.71.

the issue. Thus, it was quietly dropped from the Ad Hoc Committee's agenda.

The NCBJ was attacked by the Ad Hoc Committee and by various district judges and district courts through threatening resolutions, petty actions, and historic subordination. For example, the Federal Judicial Center reverted to using the title "referee-in-bankruptcy" instead of "bankruptcy judge" in its printed materials, even destroying those that had been printed using the title of bankruptcy judge. In some districts, bankruptcy judges were barred from using the judges' lunchroom or the judges' elevator. In some they were ordered to wear gray rather than black robes to distinguish them from the district judges. And some court directories identified them as "Mr." or "Mrs." rather than "Honorable."²⁹ These petty actions did not sit well with Congress.

While the judiciary—supposedly the only non-political branch of government—was at war with itself, the members of Congress were working with surprising cooperation. The Democrats held the House of Representatives by a sizeable majority, so they could have pushed through anything they wanted. And the temptation to do so may have been there because partisan rancor still remained in the aftermath of Watergate. But Don Edwards (D-CA), chair of the House Subcommittee, was determined to work for non-partisan cooperation and create what is sometimes called a "good government bill." He wanted it done right and without either party deriving political advantage from it. This was not unusual for Edwards, a committed liberal Democrat from Northern California who nonetheless avoided partisan rancor and was always a gentleman and generous to other members. Accordingly, he had become one of the most highly respected members of the House.³⁰

Edwards's Republican counterpart on the Commission and the House Subcommittee during the early 1970s was Charles Wiggins, another Californian whom Edwards described as "a very good friend of mine and a great guy." When Wiggins moved to the crime subcommittee during the 94th Congress, M. Caldwell Butler (R-VA) became the ranking minority member of the Subcommittee. Butler was also cooperative, very interested in the bill and in understanding the nuances of the decisions the Subcommittee was being called on to make. Edwards and Butler were philosophically different—the former was an ardent liberal, the latter a dyed-in-the-wool conservative. Still, as Robert Feidler has observed, "they were both soldiers for their cause.

29. Mund, *supra* note 10, 81 AM. BANKR. L. J. 183 nn. 43, 44.

30. Mund, *supra* note 10, 81 AM. BANKR. L. J. 342 n. 1. Oral History of Richard Levin, taken by Scott C. Clarkson, 5/24/2025, p.17.

Once they had a House position, those two guys stuck together and acted honestly and decently with one another. As did both of them with both senators, I might add.” And both Edwards and Butler had agreed to the creation of an Article III bankruptcy court.³¹

After forty-two hours of mark-up and adoption of over a hundred amendments, the House Subcommittee unanimously approved the bill and voted it out of the Subcommittee. The House Judiciary Committee then held four days of mark-up on H.R. 8200 (the current form of the Article III bill) before voting it out for consideration by the entire House of Representatives.

During the Judiciary Committee’s mark-up process, Thomas Railsback (R-IL) sought to amend the bill to remove the Article III provisions while still creating a separate bankruptcy court. His motion was joined by George Danielson (D-CA), who expanded it so as to move the appointment of the United States Trustee to each bankruptcy court, rather than having it in the Department of Justice or the JCUS. After various maneuvers, questions and argument, both amendments were voted down by the House Judiciary Committee, largely due to the unanimous and vocal position of the members of the House Subcommittee that had studied the bill for so many hours. Nonetheless, Danielson and Railsback were determined to bring their amendments to the full House when the bill was to be presented for floor debate and a vote.

On the floor of the heavily Democratic House, Congressman Danielson, the Democrat, proposed an expanded amendment providing that bankruptcy judges would be appointed by each circuit council for fifteen-year terms and that the bankruptcy court would remain as an adjunct to the district court. It restricted the jurisdiction of the bankruptcy judges and placed the appointment and supervision of the United States Trustee in the district court. Railsback, the Republican, then joined in the amendment. With ninety-two members not voting, the amendment passed 183-158. At that point, Congressman Edwards pulled the bill from the floor to prevent it passing with this amendment.³²

While the major issue was whether the new court would be staffed by Article III judges, the topic of the appointment and supervision of the trustees in each case was also disputed. Under the prior law, the

31. Mund, *supra* note 10, 81 AM. BANKR. L. J. 342–43 nn. 2–5.

32. Once he was aware that the amendment would pass, Congressman Edwards also changed his vote to “yes” so that later he could raise a privileged motion to reconsider the vote. Levin Oral History, p. 26.

bankruptcy referee had appointed the case trustee and supervised the administrative angles of the case, even signing distribution checks. The goal was to remove this link and assign the administrative functions elsewhere while retaining the judicial functions of dispute resolution in the court. The House and Senate Subcommittees disagreed on the approach to take, but they reached a compromise to establish a pilot project under the Department of Justice.³³

The bill went back to the House Subcommittee for further testimony. There were three days of testimony from twenty-two witnesses. The Subcommittee voted to support the original bill and reject the Danielson-Railsback amendment. Klee and Levin undertook a huge lobbying effort at the staff level. At the member level, the members of the House Subcommittee and of the House Judiciary Committee were all assigned to contact and “lobby” the remaining members of the House. The bankruptcy judges undertook to encourage their congressional representatives to vote down the amendment. Whereas the amendment had passed in October by a thirty-vote margin, on February 1, 1978, it went down to defeat 146 in favor, 262 against. The unamended version of H.R. 8200 then passed by voice vote and the separate bankruptcy court was safe—at least in the House of Representatives.³⁴

On the Senate side, S. 2266 was introduced in October 1977, right after Congressman Edwards pulled H.R. 6 from the House floor. The Senate Subcommittee began its hearings and representatives of the JCUS Ad Hoc Committee appeared to testify. They came across as picayune and inflexible in trying to explain their position—insisting on using the term “referee,” attempting to justify the lack of bankruptcy judges on the JCUS Bankruptcy Committee, and stating that the “referees” really served as law clerks to the district judges. The Ad Hoc Committee continued to argue against a separate court, now adding an unfounded theory that the district court handled most of the larger bankruptcy cases, that the cost would be excessive, and that the JCUS needed more time to study the proposals.³⁵ At least some members of Congress saw this as an attempt of the district judges to retain the patronage of appointing bankruptcy judges and also to elevate their

33. Levin Oral History, p. 27. In 1986, the Office of the United States Trustee was established as part of the Department of Justice and now covers all districts except Alabama and North Carolina.

34. For a detailed description see Mund, *supra* note 10, 81 AM. BANKR. L. J. 343–47, 353–54.

35. Mund, *supra* note 10, 81 AM. BANKR. L. J. 348–50.

own status by excluding bankruptcy judges from the JCUS, which is the policy-making body of the federal judiciary.³⁶

With hearings taking place in both the House Subcommittee and the Senate Subcommittee, it was clear that the Senate Judiciary Committee would not agree to Article III status, which was no surprise. The National Bankruptcy Conference also accepted that an Article III court was not going to be possible but, like the NCBJ, they pushed for a court in the model of the tax court, as long as it was independent of the district court.

Although the Senate had not yet passed its version of the bill (S. 2266), during the summer of 1978 the House and Senate staff started working on a plan to reconcile about 170 substantive disparities between the two bills. In this way they could avoid the delay and publicity that would be caused by a conference. When Congress reconvened, time was growing short.

On September 7, 1978, after four amendments were passed (none dealing with court structure), the Senate substituted the text of S. 2266 into H.R. 8200 and passed the bill in that form, requesting a conference with the House. No conferees were appointed and staff immediately implemented the plan to resolve differences. On September 22, the Senate vacated its passage of H.R. 8200 and then immediately repassed it so as to remove a tax provision, which by constitutional law cannot originate in the Senate. Still the Senate did not appoint conferees, preferring that the differences be resolved without opening the process to potential delays and public comment. The lobbyists did not expect that a bill of this magnitude could be passed without a conference and a Conference Report. The staff continued to work in private to resolve the differences. They also assured that the final form would be pre-printed by the GPO and it could be passed by unanimous consent and sent to the President all in the same afternoon.

On September 26, the Senate finally appointed its conferees. By then, all but eight issues had been decided by the staff. The issue of lifetime appointments had already been resolved, as had the length of term, which was to be fourteen years.³⁷ The fully independent court

36. Kenneth N. Klee, *The New Bankruptcy Act of 1978*, 64 A.B.A. J. 1865 (1978); Scott C. Clarkson, *More about the Bankruptcy Act of 1978*, 65 A.B.A. J. 736 (1979).

37. The Commission had set a fifteen-year term, but S. 2266 reduced this to twelve years, which is what the JCUS and the Ad Hoc Committee preferred. The choice of fourteen years came from a suggestion of Third Circuit Judge Aldisert, based on the finding of an AO study that the average length of service of a district judge before taking senior status was fourteen years.

was lost; the bankruptcy court was to be an adjunct of the court of appeals, but with its own jurisdiction and clerk.³⁸ So, these were no longer matters for discussion.

Of the remaining "member issues," four related to the court structure or treatment of bankruptcy judges. A retirement system for bankruptcy judges was agreed to, salary was set, and there were to be three voting bankruptcy judges on the JCUS and one bankruptcy judge on the Board of the Federal Judicial Center. The JCUS would study and make recommendations to Congress as to the number and location of bankruptcy judges to be appointed after the transition period. In general, the Senate's Bill largely prevailed with respect to the structure of the court, while the House version was adopted on most other matters.³⁹ The meeting started at 3:30 p.m. on the afternoon of September 26, the members made their deal, and adjourned at about 5:15 p.m.

When the Senate amendment to H.R. 8200 was brought to the floor of the House, Congressman Henry Hyde (R-IL) raised an objection as to the issue of reaffirmation agreements. But he was convinced to withdraw his objection. One other issue on reaffirmations was resolved and the House passed the bill by unanimous consent and with no further delays. That same day, the bill was physically carried over to the Senate. During the slight delay before the bill was brought to the Senate floor, Chief Justice Burger convinced Senator Strom Thurmond (R-SC) to put a hold on the bill to prevent its passage.

With passage delayed, the lobbyists moved in almost immediately. First the Forward Commodity Contract industry sought to insert some special provisions, followed by the Securities and Exchange Commission and the Department of Housing and Urban Development. Each received some concessions from Senator Dennis DeConcini (D-AZ), the current chair of the Senate Subcommittee, and Congressman Don Edwards (D-CA), the current chair of the House Subcommittee. Similarly, the finance companies were pressuring Senator

Aldisert argued that a fourteen-year term would be equivalent to a lifetime appointment. Telephone Interview with Ruggero Aldisert (Jan. 13, 2003).

38. The handling of the issue of a consolidated clerks' office is described in detail in Mund, *supra* note 10, 81 AM. BANKR. L. J. 515. On July 19, 1978, S. 3107 passed the Senate and on September 8, 1978, it passed the House by unanimous consent. This deconsolidation bill was signed by President Carter on September 22, 1978. Pub. L. No. 95-383, 92 Stat. 729 (1978).

39. Kennedy, *supra* note 3 at 677.

Dewey Bartlett (R-OK) to seek an amendment to the set aside agreement on reaffirmations.⁴⁰

Burger did not intend to kill the bill—just to make sure that it had a structure that he found satisfactory. Beyond the “elevation” in status of the bankruptcy judges, he objected to a provision that would have made the bankruptcy courts adjuncts of the courts of appeals. He contacted Attorney General Griffin Bell and asked him to try to reach a compromise between the parties. Bell met with the parties and worked out a compromise: they agreed that the bankruptcy court would be basically independent, though officially an adjunct of the district court (rather than of the court of appeals as had been agreed to in the prior iteration of the bill). While the President would still nominate bankruptcy judges for fourteen-year terms to be confirmed by the Senate, the President would select his nominees only after giving due consideration to the recommendations of the circuit councils. The JCUS would control whether the official court record was to be made by an electronic device or the more traditional court reporters. And bankruptcy judges would not be required to be added to the committees of the JCUS prior to 1984 when the transition to the new law would be complete. The number of bankruptcy judges to sit on the JCUS after the transition was reduced from three to two.

Initially, Bell required that appeals go to the district courts, but later he changed his mind and accepted the appellate route in the House Amendment, which provided for an alternative intermediate appeal to a bankruptcy appellate panel made up of sitting bankruptcy judges. At first, all retirement provisions for bankruptcy judges were stricken from the bill, although later Bell agreed to accept the Senate retirement proposal during transition. After the meeting, Bell added the further provisions that the bankruptcy court could appoint a clerk only “based on need” and that the chief judge of the circuit could remove bankruptcy judges during transition upon the recommendation of a merit screening panel. Then Bell met Thurmond and convinced the Senator to release his hold.⁴¹ On October 5, the bill passed the Senate without a recorded vote.

Time was running out, and unless the House passed this amended bill without change, there was a chance that Burger would again convince Thurmond to place a hold. The next day the amended version

40. Levin Oral History, p. 18 – “the credit industry had figured out how to make bankruptcy completely ineffective for consumers who wanted to use it.” They did this through reaffirmations where the debtor promised to repay the entire loan.

41. Mund, *supra* note 10, 81 AM. BANKR. L. J. 370 n.98.

of the bill was called up in the House for unanimous consent, but this was stopped when several congressmen objected on unrelated grounds. They were convinced to withdraw their objections and the bill passed without objection.

The ten-day period for the President to sign a bill into law starts running only when the enrolled bill is transmitted to him. At the end of the 95th Congress, there was a lot of legislation that had to be put into proper form and transmitted to the White House, so there was no particular rush on this bill. In fact, House Speaker Tip O'Neill wanted it slowed down until at least November 1. Bankruptcy Judge Saul Seidman, who sat in Hartford, CT, had earned the distain of the district court due to an appearance of cronyism and favoritism in bankruptcy case administration, and there were claims that he was arbitrary. Seidman's current six-year term was due to expire at midnight on October 31, 1978, and the district judges did not intend to reappoint him.⁴²

The new bankruptcy law extended the terms of all bankruptcy judges by six years and that meant that it could not be signed before November 1, which was after Seidman's term had expired. Although O'Neill had obtained an agreement with President Carter that this bill would not be signed before November 1, he ordered the enrolling clerk to delay enrolling it and sending it to the President. But it slipped into a group of a hundred bills that O'Neill signed before he left for Rome to attend the installation of Pope John Paul II, and on October 25 it was received by the White House. The ten-day period for the President to sign, veto, or let the bill die by pocket veto began running.

As soon as the bill had passed both Houses, communications started rolling into the White House. Thirty-five urged the President to sign; six requested a veto. Credit managers associations, organized labor, the bar, lawyers, and many national bankruptcy groups supported the bill. Four of the six negative contacts came from Article III judges. One congressman opposed the student loan provisions and one Louisiana Democrat found it "highly inflationary, creates a new bureaucracy and creates uncertainty for judges."⁴³ But the major opposition was from Chief Justice Burger who, on October 27, went so far as to have his letter requesting a veto hand-delivered to the White House and taken directly to the President. Thus, it did not go through the normal process of staff review.

In the letter, the Chief Justice forcefully argued that although it was appropriate to increase the number of district and appellate

42. Mund, *supra* note 10, 82 AM. BANKR. L. J. 176 n.3.

43. Mund, *supra* note 10, 82 AM. BANKR. L. J. 180 n.15.

court judges by the 152 in the omnibus bill, creating 215 bankruptcy judgeships “is wholly unjustified.” Admitting that this merely converted the present referee positions into judgeships, Burger stated that as a responsible citizen it was necessary that he point out that such an action carried a huge concealed or deferred cost, which would be partially created by “grade creep.” Burger then compared the benefits being given to bankruptcy judges that were not extended to U.S. magistrates and which fairness would require be given to them, resulting in a further escalation of costs. The Chief Justice argued that the substantive provisions of bankruptcy reform could be reenacted by Congress “leaving the administration of bankruptcy essentially as it has been and as it was passed by the Senate on September 7, 1978.” The Chief Justice attached a copy of the AO estimate of how much more H.R. 8200 would cost than S. 2266 (\$96 million in non-recurring and \$46 million in recurring annual costs). Burger made no mention of the estimate of the non-partisan Congressional Budget Office that the annual cost of H.R. 8200 would be in the amount of \$17 million to \$20 million per year and that the cost of H.R. 8200 was “slightly higher than that for S. 2266, primarily because of the inclusion of the U.S. Trustees pilot program.”⁴⁴

While these arguments seem to reflect the dispassionate analysis of an administrator doing his job, other sections of the letter reveal an unseemly level of animosity and elitism. Burger blamed the bankruptcy judges for wanting higher status, implying that they somehow hoodwinked or controlled Congress to get this bill passed. He used the military analogy of promoting all the sergeants-major to the rank of captain (an interesting choice to present to Carter, who graduated from Annapolis). Burger also argued that the bankruptcy judges would retire at age fifty-five with fourteen years of service and go out into private practice to make excessive compensation.⁴⁵ The hostile tone about bankruptcy judges undercut Burger’s arguments with key White House staff.

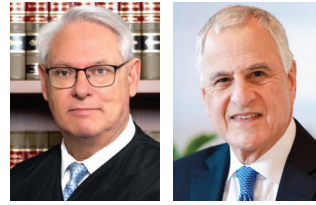
President Carter sent the letter to Stuart Eizenstat (President Carter’s chief domestic policy advisor and executive director of the White House domestic policy staff), with a note reading “Stu—I agree.” This triggered immediate action by Eizenstat and Robert Lipshutz (White House Counsel) to change Carter’s mind. They sought and received letters of support from Chairman Rodino, Congressman

44. Mund, *supra* note 10, 82 AM. BANKR. L. J. 183–34 n.32.

45. Letter from Chief Justice Warren E. Burger to President Jimmy Carter (Oct. 27, 1978) (on file at Jimmy Carter Presidential Library, Staff Offices, Office of the Staff Secretary—Presidential Handwriting File, “10/31/78 [2]”, Box 108).

Edwards, and Congressman Butler and they obtained a copy of the CBO cost estimate. They solicited Senate support for the bill. And they requested that Attorney General Bell, a close friend of President Carter, urge him to sign the bill.

The last day to sign the bill was midnight on November 6, 1978, the day before mid-term elections. Carter was at Camp David, resting after his campaign travels. After five in the afternoon, Carter sat down to work and made a series of quick phone calls to Stuart Eizenstat, Frank Moore (assistant to the President for congressional relations), Griffin Bell, and Jody Powell (his press secretary). With five hours left, at about 7 o'clock on November 6, 1978, President Carter signed the Bankruptcy Act of 1978 and the bankruptcy system moved into the modern age.



Hon. Scott C. Clarkson*

THE ORAL HISTORY OF RICHARD B. LEVIN**

Preface

The oral history you are about to read is, in many ways, the story of how American bankruptcy law came of age. It is also the story of one man, Richard B. Levin, who, through intellect, perseverance, and an uncommon sense of public duty, helped forge the Bankruptcy Reform Act of 1978. That statute remains, nearly half a century later,

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the foundational legal framework for reorganization and liquidation in the United States.

As one who was present at the creation during those years in Washington, D.C., serving as a legislative assistant to a member of the House Judiciary Committee, I witnessed firsthand not only Richard's extraordinary talent and dedication but also his work in a singular moment when Congress, through bipartisan resolve, undertook one of the most sweeping revisions of commercial law since the New Deal. The oral history that follows is not merely a recollection, but a living bridge between that moment of reform and our own time, recorded for the benefit of scholars, judges, practitioners, and generations yet to come.

Prepared in conjunction with the Centennial of the National Conference of Bankruptcy Judges (National Conference), this oral history will find its permanent home in the Biddle Law Library at the University of Pennsylvania Carey Law School. Its inclusion is meant to ensure a wider circulation of these recollections that will enrich our collective understanding of how lawmaking works, how institutions evolve, and how individuals can leave an indelible mark on history.

I. Setting the Stage: The Mid-1970s.

Richard Levin arrived in Washington in 1975, fresh from Yale Law School and his California bar studies. The American bankruptcy system was fraying at the edges. The Chandler Act of 1938 had long since been overtaken by commercial realities: the growth of consumer credit, the explosion of corporate reorganizations, and the structural shortcomings of a system still reliant on "referees in bankruptcy," many of whom combined judicial, administrative, and even quasi-clerical functions in ways that eroded public confidence.

The Commission on the Bankruptcy Laws of the United States (Commission), established in 1970, issued its report in 1973. That report, together with a competing proposal advanced by the National Conference, formed the raw material from which Congress would have to shape a modern code. Yet raw material alone does not make law. It requires the steady hand of legislative craftsmen, individuals capable

the drafting of the 1978 Bankruptcy Code. He is a member of the National Bankruptcy Conference (where he served as Chair and Vice Chair) and the American College of Bankruptcy (Vice President, Board Member) and has served as adjunct faculty at Harvard Law School. He earned his undergraduate degree from the Massachusetts Institute of Technology and his law degree from Yale Law School.

of marrying policy to principle and drafting to vision. Richard Levin became one of those craftsmen.

One of the earliest times I met Levin and his colleague and counterpart, Kenneth N. Klee, they were hunched over large comparison charts in the House Judiciary Subcommittee offices. What they were studying were not computer spreadsheets — such technology was unavailable to us then — but enormous bound pages, printed by the Government Printing Office, filled with side-by-side comparisons of the Commission bill (H.R. 31) and the National Conference bill (H.R. 32), both introduced in 1975, as well as H.R. 6, the combined result of those bills which was introduced in 1977. Armed with scissors, tape, and typewriters, Levin and Klee dissected each provision of the bills, reconstructed language, and prepared the stage for markups and negotiations that would last another two years.

This was painstaking work to say the least. Their youth belied their authority. Both were only in their late twenties, yet daily they fielded testimony and lobbying from the titans of the bankruptcy bar: Harvey Miller, George Treister, Vern Countryman, Frank Kennedy, Leonard Rosen, and others whose names still echo in our jurisprudence. They did so in a bipartisan atmosphere under the leadership of Bankruptcy Subcommittee Chairman Don Edwards (D-California) and Ranking Member M. Caldwell Butler (R-Virginia), placing good government above partisan gain.

II. The Architecture of Reform

Richard Levin's oral history carefully recounts the five pillars of reform identified by the Committee:

1. Judicial Structure – Elevating bankruptcy referees to true judges, granting them broader jurisdiction, and separating judicial from administrative functions.
2. Administrative Reform – Professionalizing the appointment and supervision of trustees, removing the perception and sometimes reality of favoritism.
3. Consumer Relief – Modernizing exemptions, regulating reaffirmations, and creating meaningful discharge for overburdened households.
4. Business Reorganization – Consolidating Chapters X, XI, and XII into a unified Chapter 11, anchored by the absolute priority rule.
5. Substantive Coordination – Harmonizing bankruptcy with developments in commercial law, particularly the Uniform Commercial Code.

Each of these pillars carried fierce debates with them. Should bankruptcy judges be made Article III judges with life tenure? Should reaffirmation of debts be prohibited outright, or merely regulated? Should states retain control of exemptions, or should Congress impose a national standard? Should educational loans be dischargeable? The answers that emerged from these questions reflect both compromise and vision.

Levin's recollections remind us that lawmaking is never abstract. It is an act of institutional design shaped by personalities, power, and persistence. He recalls, for example, the struggle to preserve Article III status for bankruptcy judges, a battle that was won in the House only to succumb to compromise later. He recalls the lobbying battles over reaffirmations and the Senate's insistence on state opt-outs from the federal exemption scheme. He recalls the debates over consumer protection, over the scope of trustee authority, and over the fundamental philosophy of discharge itself.

III. The Human Element

What is striking in this oral history is the humanity of its participants. Judge Joe Lee from Kentucky, who modestly introduced himself simply as "Joe Lee." Judge Clive Bare of Tennessee, whose Southern drawl enlivened the hearings. Judge James Moriarty of California, who returned from lunch one day to find the word "Chief" chiseled off his office door after he testified against consolidation of bankruptcy and district clerk offices. These stories remind us that behind every statute are people, judges, lawyers, staffers, and members of Congress, whose convictions and personalities shape the law's trajectory.

Levin also remembers the integrity of Congressman Don Edwards, who insisted that the legislation not be captured by special interests, and the bipartisan spirit of Caldwell Butler, whose own staff counsel, Kenneth Klee, worked seamlessly with Levin despite certain policy differences. As a young legislative aide, I too witnessed these dynamics, lobbyists tugging at my sleeve during markups, amendments scribbled on scratch pads, and Members debating with genuine passion. The reputation of fairness of those working on the legislation was critical in securing the eventual passage of the bill.

IV. From Draft to Enactment

The road from hearings to enactment was long and uncertain. The first unified bill emerged as H.R. 6 in January 1977, though some had hoped for the symbolic designation of H.R. 1. Spring of that year

brought twenty-one days of markup, line by line, section by section, through three hundred pages of proposed code. Levin, Klee, and the legislative staff, including me, guided Members through technical complexities that might otherwise have paralyzed the process.

Setbacks came. A vote to grant Article III authority to bankruptcy judges failed on the House floor, forcing the bill's withdrawal. New hearings were convened. Testimony came from unlikely sources, including a young Assistant U.S. Attorney General, Antonin Scalia, who opposed Article III status for bankruptcy judges. Yet through persistence, the subcommittee reversed its loss, a nearly unprecedented feat in congressional practice, and restored much of its vision before sending the bill to the Senate.

There, further compromises were required. Educational loans were rendered nondischargeable. State exemptions were preserved through opt-outs. Bankruptcy judges remained Article I judicial officers, even then subject to later constitutional challenges. But the essence of reform survived: a comprehensive, modern code that became effective on October 1, 1979, reshaping American bankruptcy law for generations.

V. Legacy

This history matters because the Bankruptcy Reform Act of 1978 was not merely a technical revision. It was a rethinking of the relationship between debtors and creditors, between federal and state law, between courts and administration. It was, in the truest sense, a constitutional moment in commercial law.

Richard Levin has gone on to a distinguished career, editing *Collier on Bankruptcy*, serving in leadership positions within the National Bankruptcy Conference, practicing and teaching at the highest levels. But it is this early chapter of his life, when he labored in the committee rooms of the House of Representatives, that secured his place in history.

This history was produced for the 2026 centennial of the National Conference, and it is fitting that Levin's recollections be preserved and circulated. They remind us that bankruptcy law is not static; it must adapt to economic change, to evolving credit practices, and to the needs of justice. They also remind us that reform is possible, that bipartisan cooperation, grounded in principle, can achieve enduring results.

VI. Personal Reflections

Conducting this oral history was both a professional honor and a personal journey. I knew Richard Levin then, not as the venerable figure he is today, but as a fellow staffer, a young lawyer armed with

intellect, humor, and a sense of mission. Watching him navigate Members of Congress, lobbyists, judges, and academics showed a poise far beyond his years.

To sit with him forty-eight years later, to retrace those days, was to be reminded that history is not written only in books or statutes. It is carried in the memories of those who lived it. By capturing Levin's memories, we ensure that future generations can understand not only what the Bankruptcy Code says, but how and why it came to be.

This oral history stands as both testimony and invitation; it testifies to the life and work of Richard Levin, one of the architects of the modern Bankruptcy Code. It testifies to the bipartisan spirit of the 94th and 95th Congresses, to the leadership of Don Edwards and Caldwell Butler, and to the countless judges, lawyers, and staffers who contributed.

And it invites us, judges, scholars, lawyers, and citizens, to continue the work. For, as Levin himself observes, every forty years or so the Code requires overhaul. Our generation, too, must reckon with reaffirmations, exemptions, dischargeability, and the balance between debtor relief and creditor rights. To read these pages is not to rest in nostalgia, but to prepare for the challenges ahead.



Author/interviewer Judge Scott C. Clarkson and fellow House staffer Ivy Davis watching on closed circuit television House passage of the Bankruptcy Reform Act in February 1978. Photo courtesy of author.

**Oral History Interview
with
Richard B. Levin**

**May 24, 2025
New York City, New York**

Interviewed by Scott C. Clarkson

CLARKSON: Today is May 24, 2025. I'm Bankruptcy Judge Scott Clarkson from the Central District of California. At the request of the National Conference of Bankruptcy Judges (NCBJ) I am conducting an oral history interview with Richard Levin. He needs no introduction, but I'm going to ask him to give us a little background at this point.

LEVIN: Good morning, Judge Clarkson.

CLARKSON: Mr. Levin, would you please provide us with a short background of where you grew up, where you went to high school, and your college and law school education.

LEVIN: I started in Hollywood, California where I was born. I attended Hollywood High School and then headed east for college and law school at Yale Law School. I graduated from Yale Law School in 1975 before heading to Washington, D.C. to work on what ultimately became the bankruptcy code.

CLARKSON: Now, your undergraduate studies were at MIT, correct? Usually that's known as either a science, math or business university.

LEVIN: Yes.

CLARKSON: What got you moving into law school?

LEVIN: I had always been thinking about law school through junior high and high school. But I had some technical abilities, as well as some math and science abilities through high school and MIT seemed like the practical school for me. So, I went there and thought I'd be a chemistry major. That didn't quite work out. I tried a couple of engineering fields that didn't quite fit. Finally, I wound up in political science getting my degree in political science from MIT. From there I went on to law school.

CLARKSON: Do you recall if you applied to other law schools besides Yale?

LEVIN: I do. I applied to Harvard, Stanford, Boalt Hall. And I think UCLA, I think I applied to five schools.

CLARKSON: Do you recall how you decided that Yale was your choice?

LEVIN: It was, it was small. It seemed less corporate than Harvard, and it had a great reputation. I don't even remember if I visited it before I made the decision, but yes, it was my first choice.

And so, when I was accepted, I withdrew my application from Stanford and I think from Boalt (University of California - Berkeley), I hadn't heard from either at that time. I was also considering Stanford, UCLA — coming back to California where I'd grown up.

CLARKSON: When was the first time you ever considered or actually heard about the world of bankruptcy?

LEVIN: When I was a first-year law student. I needed a summer job after first year to pay expenses.

Then as now, most law firms did not hire first year students. They hired only second year students. But I had a friend in LA who had a lot of contacts with lawyers, and he gave me a list of lawyers to go visit these people and suggested that I see if they can do something for me.¹

One of the people on the list was Jack Stutman of Stutman, Treister and Glatt. I met with Jack briefly and he introduced me to one of his younger partners, Bruce Spector. He described to me what their practice was like and it sounded to be a very interesting practice, not straight corporate or litigation, but somewhat of a hybrid of the two, but not especially a specialization.

1. Interviewer's note: In 1987, after initially practicing law in Washington, D.C., including serving as a panel trustee in D.C., the interviewer contacted Mr. Levin and Mr. Klee (both of Stutman, Treister and Glatt at the time) requesting that they provide him with a list of bankruptcy law firms in Los Angeles where he could submit his resume and application. Six weeks later, he moved to Los Angeles to begin his own California legal experience.

It sounded very interesting to me, very business oriented. So that was my first exposure. This was between my first and second year of law school. I expressed interest in working for them, but they offered me a job only if I committed to coming back to the second year as well so that they wouldn't risk losing me to another firm where I would otherwise work for my second summer.

I was unwilling to walk into a bankruptcy firm my first year, so I went to another general practice firm in Los Angeles my first year and then in the second year I called Stutman back and asked if the offer was still open. They said yes, and so I came and worked there my second summer. And that's how George Treister became my mentor at the firm both then and for many years after.

CLARKSON: Rich, you decided to go back to Los Angeles and work with Stutman, Treister and Glatt in your second summer.

LEVIN: Yes, that's right. And I worked there for the summer. And one of my mentors there was George Treister, partly because he was the only attorney in the firm from Yale. There were a lot of lawyers in the firm from UCLA and Harvard, but he was the only one from Yale.

CLARKSON: Well, you both must have had the secret handshake.

LEVIN: Yes, I think that's what it was. Anyway, he was instrumental in getting me to Washington.

When I was in my third year at law school, I wasn't quite ready to go off and practice law. Instead, I wanted to go to Washington, D.C., as I had a big interest in policy and politics. Still do. I wanted to spend a few years in Washington if I could.

George Treister was visiting Yale in the fall of my third year, and I had dinner with him. I told him that I would not be coming back to the firm the following year, but that I was heading to Washington. He said, "Well, if you're interested in this area and you're going to Washington, rather than just getting some general job that has nothing in particular to do with bankruptcy, you might consider contacting the Judiciary Committees." The Commission on the Bankruptcy Laws of the United States, which was formed by Congress in 1970, has recently filed its report with Congress. And George

told me that he understood that the committees, the House and Senate Judiciary Committees, would be taking up that report and working on a reform of the bankruptcy laws.

He said if you're really interested in this area and you want to be in Washington you ought to go see if you can get hired by that committee. And so that's what I did.

CLARKSON: Tell me a little bit more about George Treister, please.

LEVIN: George was a brilliant lawyer. And a brilliant academic in the law. He had clerked for Supreme Court Justice Hugo Black, and he worked for one of the justices of the California Supreme Court before clerking for Justice Black. He came to LA, where I think he grew up. He was also in the California A.G.'s office in LA and worked on a matter involving Jack Stutman of that firm. He was offered a job and he went to work for the firm.

He was considered one of the absolute leading experts on the substance and procedure of bankruptcy law through the sixties and seventies and into the eighties. He was a member of the Advisory Committee on Bankruptcy Rules that wrote the first set of Rules in 1973 and then the subsequent Rules.

He taught at USC. I think he taught at Stanford also. He did practice law in his spare time at the law firm, but that wasn't his real love. His real love was more the policy and the study and the academic approach to bankruptcy law, which was also of interest to me. So, it was a good fit.

CLARKSON: And so, you decided to go to Washington D.C. Do you recall being job-interviewed by anyone in Washington?

LEVIN: Yes, one of the professors at Yale named Burke Marshall² had been an assistant attorney general and knew his way around DC and somebody directed me

2. Burke Marshall (1922–2003) gained national prominence leading the Civil Rights Division at DOJ (1961–1965), playing a central role in key civil rights milestones such as the Voting Rights Act and desegregation enforcement. After his DOJ service, he practiced law at Covington & Burling, served as general counsel at IBM, and engaged in civil justice reform through roles like chairmanship at the Vera Institute of Justice before joining Yale Law School.

to him to figure out how to go about looking for a job in D.C. And he put me in touch with the Chief Counsel of the subcommittee that had bankruptcy jurisdiction who was Alan Parker, whom you knew quite well. I contacted Alan and told him what my interest was. I came to Washington and sat with him for an interview for the job. This was I think in December 1974, and I came and visited him again once or twice in the spring of 1975.

I told him I was interested in working on the revision of the bankruptcy law, and what he told me was that in January 1975, the 94th Congress was convening new budgets for all the congressional committees and new staff and all of that. And he told me that the subcommittee chair, Congressman Don Edwards of California, definitely wanted to take up the report of the Bankruptcy Commission so that they could process that bill and move forward with bankruptcy reform.

He wanted to hire a staffer to work on that project and he was just waiting to get budget authorization. In April 1975, he called me, and he said he had authorization now. I've always understood or believed that for every job on the Hill in Washington, and you know this as well since you were there, that for every opening on the Hill, they're about 300 applicants. But in 1975 as to the House Judiciary Committee, I was probably the only applicant who came forward and said, I actually want to work on bankruptcy law.

It was not such a popular field at the time, not so well respected. In fact, some of my classmates at Yale, when I told them I was going to work on bankruptcy law, asked me, isn't that like one step below ambulance chasing? But I found it interesting, I was committed to it, and when Alan offered me the job that April about a month before I graduated, I readily accepted and headed off to Washington. He gave me one condition though, which I was very glad he did. He said I will only give you this job if you agree that for your first couple of months here you will study for the bar and take the bar in July and not wait. So, he gave me time off to study through June and July, I took the bar, and fortunately I passed.

CLARKSON: You took the bar in Massachusetts?

LEVIN: California. I came back to California and took the bar. I thought I figured I'd be ultimately heading to California afterwards.

CLARKSON: There seemed to be several Californians involved in the House Judiciary Committee, although the chairman was Peter Rodino of New Jersey. Are there other Californians that you ran into in 1975 and 1976, who worked alongside you.

LEVIN: Well, certainly, Don Edwards, chair of the subcommittee, was from California. He was from San Jose. There were other Californians on the subcommittee.

CLARKSON: I'm thinking of Tom Breen.

LEVIN: Well, let me tell you about that. Alan Parker was the general counsel or the chief counsel of the subcommittee. He also was from San Jose, and Don Edwards had hired him. That was Alan's connection to that job. After I joined the committee in May of 1975, Alan brought in one of his colleagues from California, Tom Breen, whom you mentioned. I think Tom hired on sometime mid to late 76. It might have been 1977. I'm not sure exactly when he became a staffer on the subcommittee. But yes, he was there.

He ultimately became a California Superior Court judge.

CLARKSON: Well, in fact, Tom presided over Cheryl's and my 1985 marriage ceremony, in El Dorado County, California.

LEVIN: And Tom was a Superior Court Judge sitting in San Benito County, which is very close to San Jose.

CLARKSON: Yes, that would be the city of Hollister.

Let's talk about your first introduction to the world of bankruptcy when you arrived on the Hill.

Who was making the plans for establishing hearings and moving legislation forward?

LEVIN: Well, I was working on the majority side, the Democrats in those years. The Republicans had hired Ken Klee, I'm sure most of the listeners of this video will have heard of him. He was Republican, a minority staffer. The

ranking minority member on the committee in those days was Chuck Wiggins. Charles Wiggins was also from California, who ultimately became a Ninth Circuit judge after leaving Congress.

And they had decided in the 93rd Congress that this would be a bipartisan effort. The Bankruptcy Commission itself was a bipartisan effort. Mr. Edwards sat on the committee, Mr. Wiggins did, and then two senators, a Republican and a Democrat, from the committee with bankruptcy jurisdiction in the Senate.

And so, when I arrived in the spring of 1975, Alan said, get together with Ken, and then the three of us will sit down and figure out how we're going to stage the hearings on what was then the Commission's bill and also a competing bill proposed by the National Conference of Bankruptcy Judges.

And so that was the process. Ken, Alan and I sat down and figured out how we would structure the hearings, how long they would take, how many hearings we would have, what topics they would cover, who our witnesses would be, and so on.

And we started that process in the summer of 1975 and continued through the spring of 1976.

CLARKSON: To refresh your recollection, the very first hearing on HR 31 and 32 was on May 7, 1975.

LEVIN: That was before I got there.

CLARKSON: The hearings continued through May 3, 1976. Let's now talk about H.R. 31 and 32.

LEVIN: Well, let me talk about H.R. 31 and 32. The Bankruptcy Commission had drafted a bill which was introduced in the 94th Congress. And the National Conference of Bankruptcy Judges had drafted a competing bill that was also introduced in the 94th Congress. Those were introduced in January 1975 as H.R. 31 and 32, so those are the two bills that we were talking about.

CLARKSON: So, H.R. 31 was the Commission bill and H.R. 32 was the Judges Bill.

Who do you think drafted the Judges Bill?

LEVIN: Well, I don't know who has their hand on the pen. Except I suspect that a lot of the drafting was done by Murray Drabkin. Murray Drabkin had been a Judiciary Committee staffer under Peter Rodino's predecessor, Emanuel Celler, a Democrat from Brooklyn and Queens, in New York City.

And Murray was hired by NCBJ as the judges' lobbyist. And he, I think, advised the judges that if they were going to have any role to play in addressing the Commission's bill, their best strategy was to draft a competing bill rather than just commenting on or proposing changes to the Commission bill, they rather should have a complete package to present. So I think he was instrumental in creating what became H.R. 32.

CLARKSON: Reviewing the various hearings in 1975 and 1976, I noted that the discussions didn't particularly focus on the actual essence of H.R. 31 and H.R. 32, but actually bankruptcy theory. And the group of witnesses included over a hundred witnesses. During that time, they were really focusing on fundamental changes in the bankruptcy code. Would you like to point out some of those changes that were highlighted, at least now in your mind.

LEVIN: Yes, you're right about the hearings. Most of the witnesses talked about important, both major and minor policy issues in bankruptcy. They didn't get into the drafting so much although there were a lot of comments on the hearing testimony and especially the written testimony.

They had extensive comments on the drafts themselves, H.R. 31 and 32, but as the hearings developed and as our work on reform developed, we characterized five major areas of reform that needed work. The first and most important was reform in the court system. The second was the reform of the administrative structure of bankruptcy. The third was modernizing and reforming the relief that consumers would get in bankruptcy. And the fourth was modernizing business reorganization, and finally the fifth was revising some of the substantive laws to better coordinate changes in other laws made over the forty years since the prior enactment of the Bankruptcy Act in 1938, including the Uniform

Commercial Code Articles 2 and 9. It was important to coordinate what was happening in bankruptcy law with the changes in general commercial law.

CLARKSON: Let's talk first of all about the structural changes of bankruptcy law. From pre-code enactment to what ended up as the 1978 Act, what was one of the top fundamental changes of the bankruptcy structure that you witnessed?

LEVIN: Yes, most important to almost all of the witnesses and the bankruptcy community was to upgrade the status and powers of the bankruptcy judge. Also to expand the bankruptcy judges' jurisdiction, to be able to deal completely with issues that arose in bankruptcy cases.

Also, they asked to separate the administrative and judicial functions of the bankruptcy judges and the role that the referees had played beginning in 1898. They were very much involved in the administration of cases to the point where many judges were countersigning checks the trustees were writing. That's how deeply involved they were in the administration, and many felt that this gave a real appearance of partiality and conflicts of interest.

CLARKSON: Who was appointing the trustees of pre-code?

LEVIN: One of the issues concerning the administration of the bankruptcy system was the appointment of the trustees. The referees were renamed bankruptcy judges by the 1973 rules. They were responsible for appointing trustees. Each judge, referee, had his own group or single trustee and they referred to the trustee as "my trustee." If you're in litigation against the trustee before a bankruptcy judge and he's talking about "my trustee," or the trustee has just walked out of chambers ahead of the judge because they've been discussing some administrative aspect of the case, you might not think that you're getting a completely unbiased and impartial decision.

So that was a real problem in the bankruptcy system. It was definitely a perception problem, and it might have been a real problem, as well.

But in any event, almost all of the witnesses felt that way. As part of separating the administrative and

judicial functions, the appointment of trustees had to be moved away from the bankruptcy judges to remove that appearance of partiality.

CLARKSON: And who was appointing the bankruptcy judges?

LEVIN: The bankruptcy judges, and before that the referees, were appointed for six year terms by the judges of the district court in each district. And the district judges often referred to them as "my referee." So, when you're taking an appeal from a referee you might have that same concern about impartiality going before the district judge. Especially in districts where there were only one or two district judges. You know, a place like the Central District of California where there are many district judges, or in New York, where there are thirty-some district judges, you might be a little bit less concerned about that. But certainly, in the smaller districts that was a real concern.

CLARKSON: When you were onboarded to the committee, what were your first steps in familiarizing yourself with the activities of the subcommittee and the reform?

LEVIN: My first step was to read the Commission Report, and then to read H.R. 31 and 32. And one thing that Ken and I did was that we put together a really big document and when I say big, I mean physically big, it was three columns and probably a seventeen-inch by eleven-inch piece of paper, made into a book. It was a comparison, a side-by-side comparison of H.R. 31 and 32. The authors of the Judges Bill had started with the commission bill and made changes by writing a competing bill along the same template. It had the same section numbers, but with different provisions. And they added some sections, as well as deleting some.

So we did this very large side by side comparison, which was our working document for the next year and a half before we started drafting our own bill. So that was the first thing we did.

CLARKSON: I recall going into the committee offices and seeing these large books that were spiral bound and they were printed by the congressional printing office downstairs.

LEVIN: I think the Government Printing Office, the GPO.

CLARKSON: Government Printing Office. And so, you didn't have computers.

LEVIN: No, we had electric typewriters.

CLARKSON: Oh, the IBM Correcting Selectric. And so how are you cutting and pasting your work?

LEVIN: Well, as you know, we'd type up a section and if we needed to move something around, we would take scissors and cut it out and tape it on to some other place. And we'd write an insert on another piece of paper and tape it on to show where it was to be inserted. And this is what got sent off to GPO to be typeset. And, and they would then send it back to us to work on the next draft.

CLARKSON: So, you're familiarized yourself with the Commission bill. Who were some of the Commissioners? Did you get a chance to meet any of those members?

LEVIN: Oh yes, the chair of the Commission was Harold Marsh. He was a corporate securities and sometimes bankruptcy lawyer and a bit of an academic. He taught at UCLA and was a lawyer in Los Angeles. He was very well regarded and respected in the field. He was the chair of the Commission. The legislation creating the commission in 1970 created a nine member commission. Harold Marsh was the chair appointed by the president.

There were two other presidential appointments Charles Seligson from New York, New York, and Wilson Newman from Short Hills, New Jersey.

CLARKSON: Was Frank Kennedy on the Commission?

LEVIN: Frank Kennedy was the Executive Director of the Commission. He was not on the Commission. Don Edwards and Chuck Wiggins were the two members from the House appointed by the Speaker, and two members appointed by the President of the Senate.

And now I'm drawing, drawing a blank. I know who the senators were that got involved later. I'm drawing a blank on who the senators were.

CLARKSON: Was it Quentin Burdick?

LEVIN: Yes, I think it's Quentin Burdick from North Dakota and I'm trying to remember who the Democrat was.

CLARKSON: Well, from Arizona, we had Dennis DeConcini.

LEVIN: DeConcini became a senator later. It wasn't, it wasn't him. It was Marlow Cook of Kentucky.

CLARKSON: Okay.

LEVIN: There were also two judges appointed by the Chief Justice. Justice Burger appointed Judge Ed Weinfeld from the Southern District of New York. And there was a judge from Chicago, Hubert Will, who was appointed. And all these people were active participants in the Commission. In those days I think members of Congress were not spending most of their time raising money. They were focusing on substantive issues, spending more time on substantive issues. And so, they were involved in the Commission work, and certainly the judges were. The one thing the bankruptcy judges were strongest about was that there should be upgrades to the status of the court.

And, also the jurisdiction of the bankruptcy court. In fact, Judge Geraldine Mund and I made a video maybe twenty years ago about that whole process. I think it's in the NCBJ archives. It might be in the American College archives at the Biddle Law Library at the University of Pennsylvania Carey Law School, as well.

It was quite a battle with Judiciary over what status the bankruptcy judges and bankruptcy courts should have, including what their jurisdiction should be. So those were the Commission members. Frank Kennedy was Executive Director of the Commission. There were other staff members, also. Jerry Smith from Phoenix was a staffer; Bob Viles from New Hampshire was a staffer. I can't remember all the others, but there were a number of staffers.

CLARKSON: So, 1975 and 1976 started heating up interest in bankruptcy reform and raising its saliency around the country to both judges and academics.

LEVIN: Mostly because of our hearings.

CLARKSON: You started seeing people coming to Washington and discussing these matters even outside of the hearings. For instance, did you ever have any action any interaction with Harvey Miller?

LEVIN: Oh, yes, lots. Harvey Miller was a member of the National Bankruptcy Conference. Many other members of the NBC had been active in the work of the Commission. Harold Marsh was an NBC member. Frank Kennedy was an NBC member. And so, the NBC was heavily involved in that process, and they then became heavily involved in the legislative process as well.

Harvey Miller, Leonard Rosen, Larry King, professor at NYU, Vern Countryman, a professor at Harvard, Frank Kennedy, I already mentioned, Barney Shapiro, a practicing lawyer in LA. Norman Nachman, a practicing lawyer in Chicago, Bill Rochelle, Jr., father of Bill Rochelle III, editor of ABI's Rochelle Daily Wire. A number of significant cases by Rochelle from the 1960's and '70's come to mind.³ They were all very active in this whole process from the NBC.

The judges, too. There were a number of judges who were members of the NBC as well as the Judges Conference. They were active in coming to DC in discussing with us many provisions of the bill and how it should be drafted and written.

Oh, I forgot to mention Ron Trost, of course, who was at Sidley & Austin and before at Shutan & Trost in Los Angeles. He was very active in the National Bankruptcy Conference and very active generally in bankruptcy reform as well.

CLARKSON: What about judges like Conrad Cyr?

LEVIN: Yes, he was active in the judges' efforts. He was very well respected. People listened to him; a smart guy and a good judge who ultimately became a district judge and then a court of appeals judge.
He was active with the Judges Conference. We saw him a lot in DC. He was from Maine.

3. Rochelle as Trustee of *Gulf Southwestern Transportation Co.*, in 1966, the trustee (Rochelle) sought a refund of \$159,968.68, claiming it was improperly seized by the IRS to cover the bankrupt company's taxes. The Fifth Circuit ruled that such tax refunds could indeed be seized and applied to existing tax liabilities under the Bankruptcy Act. Rochelle in the 1975 *World's Fair Partnership Case*, acting as trustee, pursued a refund based on losses incurred from the 1964 World's Fair venture.

CLARKSON: How about Asa Herzog?⁴

LEVIN: We saw him a little less. He was kind of at the point of retirement. He had been on the bench for many, many years.

There was Bob Morton from Kansas, John Copenhaver, who later became a district judge in West Virginia, Clive Bare from the Eastern District of Tennessee, in Knoxville.

Judge Copenhaver is now a district judge on senior status.

CLARKSON: And he is, this year, a hundred years old.

LEVIN: Amazing.

CLARKSON: I've had several email communications with him, and we visited with respect to his activity because he was with the National Conference of Bankruptcy Judges as a vice president.

LEVIN: Well, let me tell you, that the quality of these individuals who were bankruptcy judges at the time made it easy to persuade us that the status of the bankruptcy court should be upgraded. These were all really excellent judges. They were smart, they were thoughtful, they were practical. And they showed what a bankruptcy court could be. No, I'm not saying that was true of all the bankruptcy judges at the time.

In fact, the reputation of the bankruptcy bench was not very strong at the time. But these individuals stood out and really helped persuade Congress to upgrade the status and importance of the bankruptcy court.

CLARKSON: Well, let me mention some names and see if I can get you to provide some reaction. Judge Joe Lee.

4. Asa S. Herzog, also known as Asa Shaffer Herzog, was a prominent figure in U.S. bankruptcy law. Herzog served as a referee in bankruptcy and then bankruptcy judge, in the Southern District of New York. He was a member of the Judicial Conference's Advisory Committee on Bankruptcy Rules, where he contributed significantly to drafting and interpreting rules, such as the Chapter X rules. He also co-authored a comprehensive treatise titled *Bankruptcy Rules* (with Lawrence P. King), published by Matthew Bender in 1993, offering extensive commentary on available bankruptcy procedures.

- LEVIN: Yes, he sat on the bench for, I don't know, forty, fifty years; a very long time. He was very well respected.
- He was from Lexington, Kentucky. He really knew his stuff. Really knowledgeable.
- CLARKSON: I will have to add that one day I'm sitting in my office in Longworth House Office Building and this gentleman walks in. And he says, "I'm Joe Lee." I had no idea who he was. And he didn't say I'm "Judge Joe Lee", just Joe Lee.
- He was truly a man of the people.
- LEVIN: Very down to earth, you know. The jokes they told about Article III judges back in the day were never told about bankruptcy judges.
- CLARKSON: What about Clive Bare?
- LEVIN: Yes, I mentioned him, from Knoxville, Tennessee.
- CLARKSON: Did you have any interaction with him?
- LEVIN: Oh sure. The best part about Clive Bare was his down-home deep Tennessee accent. Oh boy, did he have a drawl.
- CLARKSON: Well, he was from Knoxville. And Arthur Moeller?
- LEVIN: Yep, yep. Arthur Moeller from Houston, Yes. Another one who was very helpful in the process.
- All of these judges lent their expertise as to how things really worked in bankruptcy court and where the problems with the statute occurred that needed to be adjusted to make things work better.
- They were all incredibly helpful. Now obviously, like most people who lobby Congress, they have their own interests at stake as well. And so the judges were very much lobbying for their own jobs.
- And we respected that. That was fine because the Commission bill would have eliminated most of the bankruptcy judge jobs.
- And the Judges Bill not surprisingly would have preserved all or maybe even increase the number of bankruptcy judgeships around the country.

CLARKSON: Well, another Californian was Herbert Katz.⁵

LEVIN: From San Diego, yes. He was involved less so than some of the others. Same thing with Daniel Cowans⁶, a former referee who left the bench after they became bankruptcy judges by the rules change in 1973.

He was a former referee and the reason he was a little more involved was not only had he written a three-volume "Cowans on Bankruptcy" but also that he was from San Jose. And so he had contacts with the sub-committee chair, Congressman Edwards. And that is how Alan Parker got him involved.

CLARKSON: You mentioned Judge Geraldine Mund, who wrote a wonderful history of the creation of the Bankruptcy Code, and she has an interesting story about Judge James Moriarty, who was the chief bankruptcy judge of the Central District of California.

LEVIN: Yes, so what happened with Judge Moriarty was, you know, there wasn't any statutory provision for chief judge of the bankruptcy court at the time. He was sitting in LA, downtown. There were six or eight bankruptcy judges on the bench there at the time. And he was designated chief judge.

One of the issues that came up during the legislation was whether there should be separate clerks' offices for the bankruptcy court, or whether there should be a combined clerks office with the district court. It was a very hot issue at the time. I gather it's somewhat

5. Judge Herbert "Herb" Katz, a highly respected former U.S. Bankruptcy Judge who served in Southern District of California (San Diego). Appointed in 1972, Herbert Katz served as Chief Judge and on the Ninth Circuit Bankruptcy Appellate Panel. He also influenced national bankruptcy rulemaking via his membership on the Judicial Conference Advisory Committee. He retired in 1983 and returned to the practice of law.

6. Referee in Bankruptcy for the Northern District of California, San Jose division, he was President, National Conference of Bankruptcy Judges (1968-69) and later President of the National Bankruptcy Conference. He was also the author of *Cowans' Bankruptcy Law & Practice* (West Publishing, 1st ed. 1963; through 6th ed. 1994; still cited) and principal drafter of the "Dischargeability Bill," enacted in 1969, which became §17(c) of the pre-1978 Act, which laid groundwork for today's §523.

still a hot issue in some quarters. But it was a very hot button issue.

And the bankruptcy court, of course, wanted to have control over their clerk's office because the processing that the clerks do in the bankruptcy courts are very different from what the district court clerks do, and they felt that they wouldn't get adequate service from the clerk's office if the offices were combined under a single clerk. And so while the big bill was going on there was also a separate bill introduced to what I'll call deconsolidate the clerk's office. I think what had happened was, the Judicial Conference or the Administrative Office was looking to indicate that it was not going to upgrade the status of the bankruptcy courts against the wishes of most of the judiciary by sending out an administrative directive to consider consolidating the clerk's offices around the country. And so, Mr. Edwards got wind of this.

We wrote a short bill to make sure they weren't consolidated⁷, and Judge Moriarty came to Washington to testify in favor of that bill. He then went back to Los Angeles and one day he was out at lunch. When he returned, he saw some workmen working on his door. His door to his chambers was a wooden door with a big glass panel, a frosted glass panel with "Honorable James Moriarty, Chief Bankruptcy Judge."

And the worker was there chiseling off the word "Chief." The district court had gotten wind of his testimony opposing the consolidation of the clerk's office and demoted him from chief. We got into that in Washington and we very promptly obtained passage of that deconsolidation bill. I think it was in September 1976 or 1977. It was September 1976. Anyway, it went through very fast in that. And so that was the result of that insult to Judge

7. A note from the interviewer related to actions occurring throughout the first quarter of the 21st Century by the A.O.: This is the legislation that requires *congressional approval* prior to "consolidation" district court and bankruptcy court clerks. This law has been ignored by the AO on several occasions, forcing involuntary consolidation, including using leverage to obtain voluntary consolidation with threats of non-reappointment of bankruptcy judges in certain districts, or by refusing to appoint new clerks once a present clerk retires.

Moriarty. In 1975 and 1976 the National Conference of Bankruptcy Judges was very interested, of course, in the legislation.

CLARKSON: Did you recall, was Murray Drabkin at that point working for the National Conference of Bankruptcy Judges or were there other people involved?

LEVIN: He was the principal representative for the judges, and we had a lot of contact with him. I got friendly with him and got to know him reasonably well. He was a very constructive and cooperative guy. He had a client, of course, and we respected that. But he was good at his job. And the judges were very smart in hiring him, by the way.

CLARKSON: Okay. I have to say that when I became a chapter 7 trustee in Washington, D.C., appointed by Frank Dicello, Murray was the first person I was told to go see. And he told me all about his case Auto-Train⁸, which was the idea of putting your car onto a train in Virginia and having it taken down to Florida.

Do you recall any interactions within NCBJ and National Bankruptcy Conference? George Treister, I believe, was active.

LEVIN: In 1975 or 1976, we consulted with him all the time, and there were probably eight, ten or twelve individuals around the country that we consulted with on various aspects of bankruptcy law reform. We saw them and perhaps talked on the phone with them about issues as they arose.

George was one, and another leader was Vern Countryman. And, of course, Frank Kennedy and Judge Cyr of Maine. We were very actively involved with Clive Bare in Tennessee. And Barney Shapiro. Of course, Leonard Rosen, Harvey Miller and Professor Larry King from New York University. These were the folks that we talked to all the time, whenever we had a question, how something

8. The Auto-Train Corporation, a privately owned passenger and car transport service founded in 1971, filed for bankruptcy in September 1980. Ultimately, the company ceased operations in April 1981 after failing to secure necessary financing.

would work, whether it made sense and what a good policy would be. I mean, this bill was a 300 page bill, and so there was a lot of stuff to go through.

And, it's not nearly as long as the bankruptcy code is now because every amendment since 1978 has just added to the volume of the Bankruptcy Code, but it was still pretty big even then.

CLARKSON: A personal question. You have just graduated from Yale law school. You have just taken the bar. You were working with Ken Klee from Harvard, who had graduated from law school a year before. And now you are picking up the phone or being visited by some of the greats of bankruptcy law.

LEVIN: Right.

CLARKSON: Harvey Miller, Bernie Shapiro, George Treister, Trost, Bill Knox, Leon Forman, you're meeting these people on a daily basis. And you're a first- or second-year lawyer. What was your reaction to all this? Are you thinking, "How did I get here? What am I doing here, playing with live ammunition?"

LEVIN: Little of both, little of both. But you know, Ken and I, we both took our jobs very seriously. What you just described could easily have gone to our heads. I don't think it did. I think we mainly focused on the work at hand. And we focused on getting it right. It was bipartisan. Because the Democrats had such a heavy majority in the 95th congress, the ratio was two to one plus one. There were more than twice as many Democrats as Republicans, and so we certainly had the upper hand. And whenever there was a close call, the tie went to the Democrats, you know, the more liberal fiscal position. So, Ken didn't win many traditional fiscal battles, but on most of the policy issues we were able to reach compromise and agreement on almost everything. And that's where we focused our work.

We loved talking with these guys because they were so helpful and knowledgeable. But I don't think it made us think we were more important than we were. You know, we were staff, and we were the bottom of the bottom of the professional staff rung.

CLARKSON: In other words, you didn't eat in the Members Dining Room.⁹

LEVIN: We did not eat in the Members Dining Room. I don't think I was ever invited to eat in the Members Dining Room ever by a Member.

CLARKSON: There were other groups that had their own special interests, including the Commercial Law League, the National Consumer Law Center, the American Bankers Association, the National Association of Credit Managers.

LEVIN: Lots of them.

CLARKSON: And I know these names because they were all visiting me.

LEVIN: Yes. And don't forget the American Insurance Institute. Remember, Jack Forsyth, with his cigar, always with a cigar.

CLARKSON: You once explained to me that Chairman Edwards wanted to have the 1977 95th Congress's version of the Bankruptcy Reform to obtain the moniker "H.R. 1".

LEVIN: Right.

CLARKSON: But Congressman John Dingell, Jr. (D-Mich) had reserved H.R. 1 for his national health insurance bill. The bill sponsors wanted it to be the first bill of the 95th Congress, H.R. 1. Congressman Dingell "suggested" to the newly chosen Speaker of the House (Tip O'Neill) that his bill, "To Establish a Program of National Health Insurance" be placed as H.R. 1. Mr. Dingell had introduced H.R. 1 in nearly every Congress from the 1950s onward to advocate for national health insurance, a tradition that ultimately helped shape the Affordable Care Act decades later. Dingell's father, John Dingell, Sr. (D-MI 1933-1955) first introduced a national health care bill in 1939, then in 1943 and then in 1945. Dingell, Jr.

9. Interviewer's note. For almost eighteen months between 1977 and 1978, Richard Levin, Ken Klee, and other staff members of the Civil and Constitutional Rights Subcommittee and personal staff for Subcommittee Members (including the interviewer and the legislative assistant for Congressman Anthony "Tony" Beilenson (D-CA)) met almost daily for informal breakfasts prior to hearings and mark-up sessions in the Longworth House Office Building cafeteria.

continued, and for over twenty-seven consecutive Congresses (1957-2010), continued to have H.R. 1 designated for his legislation.

On another note, both Ken Klee and you visited me early in 1977, when my Congressman (Harold L. Volkmer (D-MO)) was appointed to the Subcommittee. You gave me a harsh lecture that we were going to be visited by a group of outside forces that are going to want to make self-interested changes. You said that I should listen to them carefully and then don't tell you about it.

LEVIN: I don't remember that conversation, but I will not deny that it occurred. I suspect we did give you some caution because we had already been visited by them many times during the 94th Congress.

CLARKSON: What was the philosophy of Mr. Edwards (D-CA) and Mr. Butler (R-VA) and the staff with respect to the self-interested groups coming in and having the legislation adjusted to their views?

LEVIN: You know, I think the way we looked at this legislation, which we got from Mr. Edwards and Mr. Butler, and from Alan Parker was "we're gonna try to do it right." This is good government in action. We want to try to not favor any one group or another group, but get something that works and accomplishes its stated objectives. And the perspective was just, as I said, good government.

That's what we were trying to do. So when a lobby group came and said, "you can't do this because with this or that or whatever," we tried to evaluate that somewhat objectively whether this was just a question of lining pockets or whether it was something that would work or would eliminate something whenever they were right. I'm sure all the judges listening to this fully understand that when something, a statute, is written, there's all kinds of unintended consequences.

I mean, you try to think through all the issues that might arise in a particular provision. But you can't think of them all. And one of the things the lobby groups did was to point out some of the consequences of what we were doing, and we often corrected for things that we didn't intend to happen.

What we understood was that this statute would be utilized hundreds of thousands, probably millions of times over the future years. It is a set of instructions on how things are supposed to work for each individual bankruptcy case. So, it's going to be used over and over. Complexity in the law many times comes not just from the law, but from the complexity of human behavior. And we had to try to account for as many aspects of human behavior as we could.

In doing this we obviously couldn't get them all. But when lobbyists called something to our attention that was thoughtful and made us aware of things that we hadn't thought of, we listened very carefully, and we tried to adjust and correct for it. But if it was just, you know, this is going to hurt my business, okay, well, gee, I'm sorry to hear that. But how does it help a good government? "Only to preserve your business?" That was in effect the question we were asking back. And if they couldn't answer that question, then we didn't pay a lot of attention to their suggestions. And it's true today. It was not anything we did that was unique. They were always trying to frame their arguments in terms of preserving jobs, making credit available, providing relief, simplifying the process, all of those things, but you have to take all those claims with a grain of salt when they particularly help the client of the lobbyist who's coming to talk to you.

CLARKSON: Let me give you an example of one of those issues, reaffirmation of debt by individuals.

LEVIN: Yes.

CLARKSON: One of the first introductions to the reform that I received was a proposal to simply terminate the ability to reaffirm a debt. I believe it was in one of the proposed drafts. And then I started receiving visits; lines of people at my door from various banking and financial institutions wanting to make changes to the elimination of the reaffirmation.

So, first of all, tell us about the theory of eliminating reaffirmation and then how it ended up with the final controls on reaffirmation.

LEVIN: The last prior reform of the bankruptcy laws was in 1938, Chandler Act. Consumer credit was in its infancy at the time. But over the post war years, consumer credit grew substantially. Particularly with consumer finance companies, the leaders at the time being Beneficial Finance and Household Finance. There are certainly many more today and there are many different flavors of consumer credit. Debtors are one-time players in the bankruptcy system. Creditors are repeat players, and being repeat players they learn how to protect themselves from losing money in bankruptcy.

And over the forty years since the Chandler Act, the consumer credit industry had figured out how to make bankruptcy completely ineffective for consumers who wanted to use it. What were those techniques? One of the leading ways was reaffirmation and how did you extract a promise to pay the debt that was discharged in bankruptcy. So, the lenders learned ways to, I'll be polite and simply say, encourage reaffirmations. For example, taking non purchase money security interest in all household goods including the baby's crib. They would threaten to take the crib.

They would also take financial statements which they knew to be incomplete or fraudulent. Requiring a listing of all current debts but only providing one line to list them or simply threatening dischargeability litigation under old section 17(a)(2) or threatening to foreclose on personal property and seize all of the household goods. "Well, but you know, we won't do that if you'll just reaffirm the debt and you can continue to pay it," they would say.

And what the Commission had found, and we found in our hearings, it was an enormous percentage of unsecured debt, or even the so-called secured debt, which really wasn't.

So, the consumer goes into bankruptcy, gets a discharge and comes out of bankruptcy with almost all the same debts they had going in. And I think that's true again today, forty years, forty-five years hence. Yes, forty-seven years hence.

The credit industry has once again figured out how to get around whatever's in the Bankruptcy Code that results in discharge of debt. And that's why one of the things that we believed at the time, once the 1978 code was enacted, it would need another major overhaul forty years down the road.

I think it did need it forty years down the road, and that was seven years ago. It still needs it now, but given the politics in Washington and the dynamics of lobbying groups participating in the bankruptcy world, I don't think it's foreseeable, but I hope it's going to happen.

There are really no debtor lobbyists; only creditors have lobbyists. So, you don't have advocates for debtors knocking on the door saying you need to provide a better bankruptcy system. The only way it can be done is when members of Congress think that it needs to be good for the country. Which it is. Reaffirmations were a very hot button, and all of the players in the consumer credit industry, the National Consumer Finance Council, Beneficial, Household, saw that the Commission bill had prohibited reaffirmations.

All the industry came down against that saying you got to permit reaffirmations, otherwise we'll lose a lot of money. And that was one of those where we thought that was just a question of making money for these folks rather than creating a better system. So we resisted that effort.

CLARKSON: Well, they ended up with a compromise that a reaffirmation agreement had to be in writing.

LEVIN: Yes.

CLARKSON: It had to be approved by a judge if the debtor's attorney didn't certify that it was in the best interest of the debtor.

LEVIN: That compromise came in the final negotiations with the Senate. Because many of these lobbying groups had much more impact on the Senate side. I don't remember the details, but the Senate bill had a much more permissive reaffirmation provision.

And I think the House bill actually provided for extinguishment under that as the commission had proposed.

CLARKSON: Do you recall when the idea of a national exemption system versus utilizing the state exemptions came into the thought process? And then finally, the result that we have today where the states can opt out of the federal system?

LEVIN: Yes, the opt out was again a compromise with the Senate version. I think the Senate wanted to preserve state exemptions and the House bill provided for federal exemptions. In those days, there were a large number of states who had very miserly exemptions. And we're talking about exemptions worth, even in 1975, hundreds of dollars, not thousands. There were no homestead exemptions in some states.

Debtors could lose everything, and we needed to create federal exemptions. I think I don't recall whether the House bill provided an option for state or federal. I think it might have. And it was the Senate that insisted on the provision that the states be entitled to opt out of the federal exemption scheme.

I don't think the House favored that at all. We were concerned that it would go back to the no exemption regime that had previously existed in some states.

CLARKSON: Could you describe for us the first mention of the absolute priority rule in the Code, and then what's the deal with not putting in the Code the exception to the absolute priority rule, the new value exception?

LEVIN: Yes, I don't remember why the new value exception was not put in. I'll have to pull that up from my memory banks.

Before the Code there were 3 reorganization chapters, X, XI and XII. And most folks agreed that they should be combined into a single chapter, chapter 11.

And one of the principal issues in combining the chapters was what the confirmation standard should be. Under old chapter XI, the standard was the best interest of creditors, and in chapter X, it was fair and equitable, or the absolute priority rule.

So, that's where the discussion started. How do you make, what confirmation standard do you create, for this

new combined chapter 11, and ultimately we came to the conclusion that if the all of the classes accepted. All that would be required would be the best interest rule. But if there were any dissenting class, the absolute priority rule would apply at any level below in the priority scheme that class.

Why we, why we didn't codify the new value exception. I don't, I have no recollection.

CLARKSON: Oh, maybe you thought it wasn't necessary since the Supreme Court had already ruled on it.

LEVIN: That could, that could be. The Supreme Court said it existed. So we tried to kind of, what we codified in the absolute priority rule was just the idea that the plan did not have to meet absolute priority from top to bottom. Just from the dissenting class down. And that required codification to clarify what we meant.

Short break.

CLARKSON: So, we're back now with part two of the oral history with respect to Rich Levin's activities on Capitol Hill. And what I'm going to ask Rich next about is this. In 1975 and 1976, the hearings were held with over a year of hearings and with over 100 witnesses, both live and with prepared testimony.

But in 1977 and 1978, which was the 95th Congress, the second half of the hard work had to take place.

And first of all, what I'd like you to do for the uninitiated is explain the difference between congressional hearings and markup sessions because again that's where I met Ken and you.

So, let me ask you, when did you start preparing for markup in 1977?

LEVIN: We started preparing for the 1977 markup in 1976, when we finished the hearings in May. We were trying to draft a unified bill, taking good points from the Commission's Bill and from the Judges Bill. Good points from issues had been raised during the hearings. And then we started drafting. As I said earlier, by typewriter, and then sent to the government printing office for cutting, pasting and hand-editing.

What we did from May until December 1976 was draft and draft and draft and draft. And I don't know how many versions we went through. I still, I think they're all at the Penn Biddle Library archives, all those versions. I saved all of them with the hand mark up on them. And we consulted with all of the dozens of people that I mentioned earlier.

On each of the drafts we had drafting sessions and people would come in from out of town on a Thursday evening and we'd draft on Friday, Saturday and Sunday and they go back home on Sunday.

This process went on from October through early December. Once Ken and I had drafts that we could start working with, we ultimately came up with the final result at the end of December, and it was what was introduced, as you mentioned. We tried to get it introduced as H.R. 1, but we were a little bit too exuberant.

I think we got it introduced as H.R. 6, on January 4, 1977, in the 95th Congress, and that was the bill that went public as the result of the hearings and all the work that we had done. And then we started the markup process.

So, to start the markup process, we brought in the staff of the subcommittee members. I think one of them was named Scott Clarkson from the Subcommittee member's office of Harold L. Volkmer (D-Mo).

CLARKSON: He never amounted to much of anything, you know. Never made anything of himself.

LEVIN: Did you know that guy? Yes, that's what I was afraid of. Yes. And then we had the staffers from the other members of the subcommittee.

CLARKSON: Well, there was Tony Beilenson from Beverly Hills, California.

LEVIN: That was the other Member from California, and on his staff was a young woman named Kathleen Bonfilio, who is now my wife.

CLARKSON: And just for academic regularity, I married Don Edward's legislative assistant, Cheryl Friedling.

LEVIN: So that worked out well.

We sat with the staff from early January once the committee and subcommittee got organized until early March and even during that period we were making edits to the draft.

We received comments, since it was a public document. We were now receiving comments from all assortments of people. And whenever you draft something, you find errors, you find inconsistencies, you correct them, you go on.

And we started, what amounted to, remind me here, was it twenty-one days of markup, Scott?

CLARKSON: At least.

LEVIN: Yes, I forgot the exact number, but from March.

CLARKSON: Well, that's not counting the ones when we couldn't get a quorum.

LEVIN: From early March until late May, the subcommittee would meet for two to two and a half hours in the morning, twice a week. We would sit with the subcommittee members on the dais and the committee counsels sitting at the table in front, going page by page, section by section, line by line, through the draft. And we asked the members if they had any questions or comments, and what changes they wanted to make. And we literally marked up the draft over that two-and-a-half-month period from early March to late May. And at the end of that process, we came out with a revised bill, which was introduced as H.R. 7330. That was the bill that was reported to the full Committee on the Judiciary for consideration over the summer. That's what the mark up process was.

CLARKSON: Well, I'm going to backtrack and get I want people to have a full flavor of what you've described.

You, you mentioned that you and Ken were sitting at the counsel table facing the Members.

The Chairman was Don Edwards, and M. Caldwell Butler, was the ranking member. Also, members were John F. Seiberling (OH), Robert F. Drinan (MA), Harold L. Volkmer (MO), Robert T. Matsui (CA), and F. James Sensenbrenner Jr. (WI).

John Seiberling of Ohio was so busy with other matters that he didn't attend much because he was involved in very big environmental matters.¹⁰

LEVIN: Ohio, Yes. Right, very active environmentalist.

CLARKSON: And then, and then was Father Robert Drinan. Would you care to tell our audience who Father Drinan was?

LEVIN: Yep, a real character. A Jesuit priest from the Boston area, Boston suburbs, who got himself elected to Congress very much as an anti-war Member. And very much a contributor to the process in the mark-up process. He was very active in it.

CLARKSON: He taught law at Georgetown Law Center.

And then there was, as you mentioned, Harold Volkmer from Hannibal, Missouri.

In the audience, the lobbyists of Household Finance and Beneficial Finance were there in every mark-up, no matter what.

LEVIN: The lobbyists came and watched.

CLARKSON: They not only watched. At breaks they would be tugging at my sleeves. I don't think they were tugging at your sleeves anymore. They were handing me amendments to propose to my boss. I found that they made good scratch pads.

LEVIN: No, not us. We usually had a quorum, but we did not have a hundred percent attendance. We had a pretty good attendance at these markup sessions.

10. During the 95th Congress (1977–1979): Seiberling chaired the House Subcommittee on General Oversight and Alaska Lands, which conducted key studies regarding Alaska lands and conservation policy, including during debates leading up to the 1980 Alaska National Interest Lands Conservation Act. The ANILCA, signed into law by President Jimmy Carter on December 2, 1980, was one of the most significant land conservation measures in U.S. history. It designated over 104 million acres of federal land in Alaska for conservation purposes, dramatically reshaping the nation's system of public lands. The legislation doubled the size of the U.S. national park system and it created the Denali National Park and Preserve.

CLARKSON: And you were doing a section-by-section markup throughout the entire bill.

LEVIN: Right. Line by line. 300 pages.

CLARKSON: What were some of the other issues that are in the back of your mind right now, including reaffirmation and exemptions?

LEVIN: Yes, we talked about those extensively during the markup. We talked about financial statements.

CLARKSON: False financial statements.

LEVIN: We talked a lot about the jurisdiction of the bankruptcy courts. In fact, we wrote a monograph called Article III bankruptcy courts to justify why it was necessary to have Article III bankruptcy courts if we were to give the bankruptcy courts the pervasive jurisdiction that everybody wanted to give them.

CLARKSON: Let's explain to our audience what the primary goal was of creating an Article III infrastructure for bankruptcy.

LEVIN: We could look at the law reports and see that there was not a bankruptcy reporter. The B.R. started in 1979 once there was a new code. One of the most frequent litigation issues in bankruptcy cases was the jurisdiction of the referee, and it was extremely wasteful and unnecessary. Now you can understand why people litigated based on what I told you about perception of lack of impartiality of the referees. So, jurisdiction was always litigated. It often went up to the district court, and if the bankruptcy judge didn't have jurisdiction, the case had to go to the district court, which was a slower process.

It was a more expensive process, and it resulted in the trustees and other parties representing the estate settling out a lot cheaper than they might have otherwise. And so, we wanted to provide the bankruptcy court with pervasive jurisdiction. That was the phrase we used, and when we looked at the constitutional issues, we were ultimately proven right by *Marathon* and *Stern vs. Marshall*.

If we were going to give them pervasive jurisdiction, they had to be Article III courts. So that's what we proposed, and the subcommittee was a hundred percent behind that.

CLARKSON: And that was in H.R. 6 and then 7330. And then what was the reaction of the Judicial Conference?

LEVIN: Not good. They were very opposed. Then, one of the subcommittees of the Judiciary Committee was the Subcommittee on Administrative Law and Governmental Relations. It was chaired by George Danielson (D-CA). The Administrative Office contacted Danielson, as his subcommittee had jurisdiction over the Judiciary. And so that was their main point of contact, and they came to him and said that you have to defeat this. They said "we can never live with Article III bankruptcy judges," and they gave lots of reasons. We all perceived their reason to be that it would dilute the prestige of the Article III district judges if there were another 200 or 250 Article III judges put into circulation. So, they fought hard against it. They also had on their side Tom Railsback (R-Ill), a member from Illinois on the Republican side.

And when H.R. 7330 went to the full House Judiciary Committee for consideration for markup and vote to vote the bill out to the House floor for consideration, Mr. Danielson proposed an amendment to eliminate the Article III status. And we defeated that amendment in the Judiciary Committee and brought the Article III bill to the floor of the House.

CLARKSON: What happened after that?

LEVIN: Well, they didn't stop there. We got to the floor in October of 1977, and they put the amendment to the full House. And we staff and the Members of our subcommittee did not do a great job of setting up that vote.

You know the rule in court is to never ask a question you don't know the answer to; in politics it's never take a vote that you don't know you're going to win. We did not know we weren't going to win that vote, and we lost it badly. And so, the bill was amended to eliminate the Article III court system and go to a court system that was again subservient to the District judges. We knew the Senate was going to head in that direction. And we knew we would have no negotiating leverage with the Senate in the conference if we didn't somehow rescue the Article III concept.

So we pulled the bill from the floor immediately after that vote. And we embarked on a new series of hearings in November and December of 1977.

One of our witnesses, if I remember correctly, was Antonin Scalia, who was an Assistant Attorney General in the Department of Justice at the time and testifying against Article III courts. Ultimately, we held the hearings, and the subcommittee concluded that we had the right answer in Article III. And then we did our lobbying job, and we took the bill back to the floor in February 1978. And we reversed the vote. And I will tell you. It is very rare to ever reverse a vote on the floor of the House.

And the lobbyist for the Judiciary; I can't remember his last name, but I can picture him.

CLARKSON: It was William (Bill) Weller, who was the Legislative Affairs Officer of the A.O. His boss was A.O. Director William E. Foley.

LEVIN: A very nice guy. I had a good relationship with him. He was just floored. No pun intended. And he was both upset and congratulatory for what we'd been able to accomplish. We put a full court press on all the Members. We had people calling from their districts. We had other Members talking to Members. We had Members stationed at the doors as other Members came in to vote. And we not only turned the vote, but we turned it by a substantial margin.

And with that, there were a couple of other amendments to be considered. And one of them was to make educational loans non-dischargeable for five years in the absence of undue hardship. You see where that led to; that was a slippery slope. That was one we couldn't win. So that failed, and then the bill ultimately passed the House and was sent to the Senate for consideration.

CLARKSON: On the lobbying job for the Article III amendment, I have to tell you that I personally visited more than fifty Members' offices, talking to staff who I believe frankly had absolutely no idea what I was talking about. But they promised to talk to their Members. Next door to our Longworth office on the seventh floor was Al Gore's

office. His wife at the time, Tipper, was his “de facto” Administrative Assistant, and I walked over to her desk unannounced with a coffee and the talking points page. I’m sure it wasn’t a trade, but I agreed to attend a charity bowling event in Arlington she was sponsoring a week later.

Harold Volkmer also talked directly to all the Missouri Members while on the House floor, and especially a friend of his from Iowa on the House Agriculture Committee, Charles (Chuck) Grassley. Grassley had the office on the other side of our offices in Longworth. And I personally visited most of the Members of the Missouri delegation, including Richard Gephardt, Bob Young, Bill Clay, Ike Skelton and Richard Ichord. I’m not sure they understood, or cared, either. But I’m sure we got all of their votes.

The fact is that I’ve never seen a turnaround like that, ever.

But I think that I have to say that it had to do with the image of the subcommittee’s integrity. Its members and staff. People believed that the subcommittee members had no agenda, no dog in the fight. When they saw the passion, and they saw that in the Chairman of the Judiciary Committee, Mr. Rodino and Mr. Edwards and the subcommittee members on the Republican side, as well.

Did the Judicial Conference bring out any heavy guns other than the lobbyist of the Administrative Office at that time?

LEVIN: They ultimately didn’t bring out any big guns until we got out of conference with the Senate and tried to pass the final bill. And then they brought out Warren Burger, who was at the time the Chief Justice of the Supreme Court.

CLARKSON: Hmm.

LEVIN: And also Bill Weller’s boss, William Foley, the Director of the Judicial Conference, as well as the Chief Justice. And he called Strom Thurmond to try to put a stop to the bill in the Senate. We had come up with a compromise with the Senate, which was not Article III, but was

much stronger than the system existing at the time. And that was even stronger than we have today. But Senator Thurmond put a stop to that. The bill was held up for about ten days.

Finally, it was ultimately passed about a week before at the end of the 95th Congress through a compromise. If it hadn't passed then, it would have been dead until the next year. And as we said at the time, is still true. There are two kinds of legislation, quick and dead. And we had to be quick, and we had to get it out. So our members made the deal, it got drafted, it got passed on October 5, 1978 by the House and on October 6, 1978 by the Senate.

Then it was sent to President Carter for signature. But the opposition didn't stop there. Chief Justice Burger still thought the courts were given too much and he sent a detailed message to President Carter.

The other veto message came from Harold Williams, who at the time was the chairman of the SEC.

The role of the SEC in corporate reorganization was substantially reduced, and so he had sent a veto message, but ultimately Carter's Attorney General, Griffin Bell, probably because of contacts from Peter Rodino, or maybe for some other reasons, went to bat for the bill and persuaded Carter to sign it.

And he had to sign it because Congress was then out of session, and if Carter had not signed, it would have been pocket vetoed. So it was signed at ten o'clock at night on the last day of the ten day period.

CLARKSON: Well, you've mentioned two names. First of all, Attorney General Griffin Bell, and he also was involved in the effort in support of the Danielson-Railsback Amendment.

LEVIN: He was.

CLARKSON: He opposed the move to Article III status of bankruptcy judges. He was a big player, and he visited the Hill several times. And then once they were successful the bill was pulled. They didn't think it would ever be revived, and so they stopped their effort. By the way, it was also interesting to note that Mr. Edwards changed his vote

to yes on the Danielson-Railsback amendment so that he could then raise a privileged motion to reconsider the vote.

LEVIN: Yes. And it was our lobbying was somewhat of a stealth effort. You know, it wasn't very public. A lot of it was going on. We knew who the opponents were, and we stayed away from them. We tried to get everybody else. As I said, we had well over the majority necessary to reconsider and defeat the amendment the next time around.

CLARKSON: Well, you also mentioned Strom Thurmond and so we should talk about the US Trustee program for a bit.

So let's talk briefly about the creation of the US Trustee pilot program and then how it ended up that not every judicial district has a U.S. Trustee.

LEVIN: So, the Senate did not want to see a US Trustee system. I think the Judges had more influence on the Senate side. The House really wanted to separate the administrative and judicial functions. I need to tell you about the Atlanta conference, which was before your time, Judge Clarkson. The NCBJ and the National Bankruptcy Conference were the two most influential organizations on the bills. You know, all the other organizations had narrow focuses, but those were the only two organizations that looked at the entire bills. And they had views on all aspects of them. And they were very much at odds on how the court system should be structured, and how the administrative system should be structured.

H.R. 31 had proposed the United States Bankruptcy Administration in the Executive Branch and substantially reducing the number of judges. The NBC favored that approach, and the Judges of course were very opposed to it. There was a conference of a dozen leaders of the NBC and the NCBJ in Atlanta in the summer of 1976. Ron Trost organized the conference, and I think he pretty much chaired the conference. And the result was a compromise proposal which did not exactly propose the US Trustee system. Ken and I developed that.

Ours was somewhat consistent with the compromise, which I don't recall the details of right now. But the

idea was to create an administrative structure, if you will, to do all the things that the referees did that did not have to do with dispute resolution. These included appointing trustees, appointing creditors' committees, supervising the trustees, and checking their financial accounts.

Another activity would be objecting to administrative sales and other things that a referee would have done. So, we set up this US Trustee system to do this, and we proposed that there be a US Trustee in each judicial district in the United States, somewhat parallel to the US attorney system, with Assistant US trustees parallel to the assistant US attorneys.

The Senate was very opposed to that. I don't remember exactly what administrative structure they proposed, but it was much more scaled down, and it was having the bankruptcy judges supervise individual officers who would perform the job. They would perform functions similar to the US Trustees, but they would be supervised by the bankruptcy judges, which we felt would create the same appearance of conflict that the old system had.

In conference, the compromise we came up with was a pilot program. We would set up twelve districts around the country to test out the US Trustee system. We did some on a regional basis, for example, the entire First Circuit was one region.

We did some on a local district basis. Central California, Southern District of New York. I think we did Northern District of Illinois.

We combined all the districts in Alabama, I think, because it was a heavy chapter 13 area, and we wanted to see how it would work in a chapter 13 environment.

And there were others around the country, regional and individual districts. And that pilot program was supposed to last for six years. And then the Justice Department was supposed to make a recommendation for the final structure of the program. And it lasted ultimately for eight years, until 1986. Then, the Justice Department hired a management consulting firm which

determined that the best way to approach this would be on a regional basis with twenty-one regions, and with Assistant US Trustees that would be financial and legal professionals within the US Trustee offices, as you see them now.¹¹

It was so much less powerful system than we had originally contemplated, but that was the compromise that arose with the Senate and through the pilot program.

CLARKSON: How did Strom Thurmond get involved?

LEVIN: Well, the Justice Department didn't oppose the US Trustee program in principle. But it was very much opposed to putting it inside the Justice Department. They wanted no part of this. They said this is not what the Justice Department does, and we should not do it. And we said, where else would it go? Nobody wants an independent agency. That had been lobbied against to death.

That's why there was no US Bankruptcy Administration in the legislation. So, we had to house it within some other place, and the Justice Department was the only place it made sense. Strom Thurmond, being close with Griffin Bell, did not like it either. So, he was opposed to it and that was one of his complaints as to why he held up the bill when it got to the Senate after the conference.

CLARKSON: We're almost out of time. You departed Washington DC for Stutman, Treister & Glatt in 1978.

LEVIN: 1978. Yep.

CLARKSON: Can you tell us what your journey has been like since then?

LEVIN: Okay. A journey I never could have imagined as a young lawyer. I was with Stutman for sixteen years.

I did some really interesting work, almost all on the Debtor side. A little bit of creditor work, and larger and larger cases.

11. Interviewer's note. As of July 2025, the DOJ has eliminated approximately one-third of the employees of the US Trustee system through the DOGE downsizing process.

The years went on. I remember my first really big case as an associate was called Itel Corporation¹², which was the first public company to file under chapter 11. I was the associate in the bankruptcy ranks on that case. I later wound up running Public Service Company of New Hampshire through its chapter 11 in 1988. It was the first public utility to file bankruptcy since the depression.

CLARKSON: And it operated a nuclear power plant.

LEVIN: The Seabrook nuclear power plant was heavily impacted by the bankruptcy of PSNH. PSNH was the lead partner in the Seabrook nuclear project.

And then I had two other big public utility cases. After that, I left the practice of law to become CFO and GC of a Midcap New York Stock Exchange Company in Los Angeles. I did that for a few years but decided it was not really my cup of tea and went back to practice law.

And have been at three law firms since then. I too can't seem to hold a job. And it's a great career. I've said many times that I practiced bankruptcy law for over forty-five years now, and in doing so I've never been bored.

It's always been interesting, always challenging, always with new issues. Always new ways to approach things with new ways to look at things.

You know, with that experience, I've become co-Editor-in-Chief of Collier on Bankruptcy with Henry Sommer, and then a number of other things of great interest to me and I hope of use to other people.

CLARKSON: Well, you certainly have dedicated your time to educating the National Conference of Bankruptcy Judges and the Federal Judicial Center. Our Judges are ever-so grateful for your efforts.

12. Itel Corporation, a once-prominent equipment leasing firm, filed for Chapter 11 on January 19, 1981. Its financial troubles mounted, with massive inventory losses in its computer leasing division, swelling debt (around \$1.3 billion), and a \$60 million quarterly deficit, which all led to the filing. After about two years and eight months in Chapter 11, Itel emerged dramatically downsized by mid-1983.

LEVIN: George Treister was one of the early teachers in the FJC with the judges' seminars starting in the eighties. And he taught until the early 2000's, and he asked me to join him on the presentations that he made.

And so from about 2000 to I guess the mid-teens, I taught at the FJC Bankruptcy seminars. About halfway through that, retired Judge Barbara Houser joined me in that. We taught the sessions together, mostly business bankruptcy issues. It was so very rewarding to be able to do that.

CLARKSON: Well, on behalf of the National Conference of Bankruptcy Judges, I want to thank you very much for all of your service and for the time you've taken today to provide us with an astounding appreciation of your efforts and the efforts of Congress in the creation of the Bankruptcy Code. Thank you very much, Rich.

LEVIN: You're very welcome and thank you for all the time you took in putting this together and all the good questions you asked.

CLARKSON: We'll sign off from here. Thank you very much and I want to thank the staff of the Bankruptcy Court for the Central District of California, and especially the IT department and Kathleen Campbell, the Chief Clerk of our Court, for providing the exceptional services and assistance to produce this oral history.



Bruce A. Markell*

RELICS REMEMBERED: CASES AND CONCEPTS THE 1978 CODE MADE REDUNDANT

I. Introduction

The 1978 Bankruptcy Reform Act,¹ which brought us the current Bankruptcy Code, revitalized and restructured bankruptcy. It did so by changing bankruptcy's overall architecture, but also by explicitly overruling or sidelining concepts that had been in the Code for almost 80 years. In this article, I wish to explore, using paired examples, various aspects of the current Code that relegated concepts and cases under the prior Bankruptcy Act² to the dustbin of history. I also want to highlight changes that fundamentally and structurally changed the way in which bankruptcy is practiced today versus the way it was practiced at the time the Code was enacted.

I hope to illustrate these dualities by showing two changes in emphasis, two explicit efforts to reverse existing precedent, and two subtle changes through a change in applicable standards.

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1. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978). I will refer to this legislation as the "Code" in this article.

2. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979). I will refer to this legislation as the "Act" in this article.

II. Two Changes in Emphasis — No More Bankrupts and a Statutory Stay

The Code wrought at least two changes in direction through subtle changes in approach. First, the Code changed the naming nomenclature from “bankrupt” to “debtor.” Second, it refined the operation of stays of competing litigation by changing the automatic stay from a rule-based doctrine to a statutory one.

A. Bankrupts Become Debtors

Under the 1898 Act, the entity or individual filing the bankruptcy case or that was the subject of a bankruptcy liquidation case was called the “bankrupt.”³ This was thought to be a pejorative term,⁴ the connotation of which was that those who filed bankruptcy were somehow morally or fiscally reprehensible. The drafters of the Code thus uniformly changed references to the bankrupt to references to the debtor as “a means of reducing the stigma connected with the term bankrupt.”⁵ This term now is uniform throughout the Code⁶ and also matches the term used by Article 9 of the Uniform Commercial Code with respect to secured transactions.⁷

B. A Statutory Automatic Stay

The Bankruptcy Act had no provision comparable to the automatic stay of Section 362.⁸ Rather, through a patchwork of statutes

3. Act § 1(4), 11 U.S.C. § 1(4) (repealed 1979).

4. *In re Hochdorf*, 25 B.R. 207, 208 n.5 (Bankr. S.D.N.Y. 1982).

5. H.R. Rep. No. 95-595, 1st Sess. 310 (1977). This still has not caught up with some modern regulators. The Illinois State Bar, for example, still asks, with respect to its standard form letter of academic reference, whether the recommender knows if the applicant ever was a “bankrupt” under bankruptcy laws.

6. This was another reason for standardizing the term. “This is a change in terminology from present law, which calls a person that is proceeding in a straight bankruptcy liquidation case the ‘bankrupt,’ and a person or municipality that is proceeding under a debtor rehabilitation chapter . . . a ‘debtor.’ The general term debtor is used for both kinds of cases in this bill, for ease of reference in chapters 1, 3, and 5” H.R. Rep. No. 95-595, 1st Sess. 310 (1977).

7. See U.C.C. § 9-102(a)(28).

8. 11 U.S.C. § 362.

tied to whether the debt was dischargeable,⁹ and a welter of differently worded rules¹⁰ for each chapter, the Act attempted to give a breathing spell to those who filed bankruptcy. Although this tracked the practice in equity receiverships, which routinely entered judicially crafted, broad-based stay orders, it still required judicial intervention, and also deprived the bankruptcy referee of the power to enjoin litigation in another court.¹¹ As noted in the House Report:

The provisions in the current Bankruptcy Act for a stay of actions against the debtor and his property upon the commencement of a bankruptcy, reorganization, or repayment plan case are inadequate, both from the standpoint of the debtor, who needs the protection that the automatic stay provides, and of the creditor against whom the stay is applied, who needs relief from the stay when collateral may be deteriorating in value.¹²

Aware of these weaknesses, Congress bolstered the protections of bankruptcy by elevating the injunction against proceeding on a pre-petition debt from a rule to a statute. It also created Section 105,¹³ bankruptcy's version of the All Writs Act.¹⁴ This section gave bankruptcy courts broad powers to protect their jurisdiction and orders, including the ability to stay actions in other courts.¹⁵

9. See, e.g., Act §§ 11, 77(j), 116(4), 314, 414, 614, 11 U.S.C. §§ 29, 205(j), 516(4), 716(4), 816(4), 1016 (4)(repealed 1979).

10. Bankruptcy Rules 401, 601, 10-601, 11-44, 12-43, and 13-401 (repealed 1983). These rules were designed to correct problems with the original 1898 Act, which had required separate court orders for stays rather than making them automatic. See, e.g., *United States v. Murdock Mach. and Eng'g*, 81 F.3d 922, 929 (10th Cir. 1996) (discussing rules under Bankruptcy Act)

11. Act § 2a(15), 11 U.S.C. § 11a (15) (repealed 1979).

12. H.R. Rep. No. 95-595, 1st Sess. 174 (1977).

13. "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

14. "Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651 The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute." H.R. Rep. No. 95-595, 1st Sess. 316-17 (1977).

15. See S. Rep. No. 95-989, 2d Sess. 29 (1978) ("[T]he limitation on the power of a bankruptcy judge (the power to enjoin a court being reserved to the district judge) is removed as inconsistent with the increased powers and jurisdiction of the new bankruptcy court.").

Part of this expansion was the extension to bankruptcy courts of the power to enjoin state court litigation. In 1941, the Supreme Court in *Toucey v. New York Life Insurance Company*¹⁶ had held the federal Anti-Injunction Act, which had been law since 1793, prohibited the creation of judicially-generated exceptions to the Act.¹⁷ After the 1948 recodification of title 28, the Anti-Injunction Act contained no explicit bankruptcy exception.¹⁸ As noted in the House Report, new Section 105 was to be “an authorization, as required under 28 U.S.C. 2283, for a court of the United States to stay the action of a State court.”¹⁹ As the Report concluded, “[a]s such, *Toucey v. New York Life Insurance Company*, 314 U.S.C. [sic] 118 (1941), is overruled.”²⁰

III. Two Explicit Changes — Exempt Property and Preferences

Toucey aside, the legislative history is somewhat barren with respect to those cases and concepts that the Code was supposed to specifically overrule. But at least in two other instances, the Code and its legislative history indicated that specific provisions were to be changed and practices overturned: the treatment of exempt property with respect to its status as property of the estate; and the status of preferences as being based in the subjective intent rather than objective factors determinable without the debtor’s cooperation.

A. Exempt Property as Estate Property

In 1903, the Supreme Court decided *Lockwood v. Exchange Bank of Fort Valley*.²¹ In that case, the court held that the Act did not include exempt property in the bankruptcy estate.²² Thus, when individual

16. 314 U.S. 118 (1941).

17. There actually was a bankruptcy exception in the statute at issue, as the Court noted: “This [exception], based upon § 21 of the Bankruptcy Act of 1867, 14 Stat. 526, was inserted in the Act of 1793 by the Revisors. R.S. § 720; see Proposed Draft of Revision of U.S. Statutes (1872), vol. 1, p. 418.” *Toucey*, 314 U.S. at 132-33.

18. Publ. L. 80-773, 62 Stat. 869, 968 (1948).

19. H.R. Rep. No. 95-595, 1st Sess. 317 (1977).

20. *Id.*

21. 190 U.S. 294 (1903).

22. *Lockwood* relied on an earlier case by Justice Bradley, sitting as a circuit judge, that held that under the 1867 Bankruptcy Act exempt property was not part of the bankruptcy. 190 U.S. at 299 (quoting *In re Bass*, 2 F. Cas. 1004,

debtors filed cases under the Bankruptcy Act, they retained control and possession of their exempt property. In 1970, the Court decided *Lines v. Frederick*, which determined that a bankrupt wage earner's accrued but unpaid vacation pay also was not property that would pass to the trustee in bankruptcy.²³

The drafters of the Code changed this outcome. Section 541(a)(1) provides that property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."²⁴ As drafted, that swept in even assets creditors could not reach under nonbankruptcy law.

This expansion was intentional. As stated in the legislative history:

Paragraph (1) has the effect of overruling *Lockwood v. Exchange Bank*, 190 U.S. 294 (1903), because it includes as property of the estate all property of the debtor, even that needed for a fresh start. After the property comes into the estate, then the debtor is permitted to exempt it under proposed 11 U.S.C. 522, and the court will have jurisdiction to determine what property may be exempted and what remains as property of the estate. . . . Paragraph (1) also has the effect of overruling *Lines v. Frederick*, 400 U.S. 18 (1970).²⁵

As revised, the Code brings in exempt property as property of the estate but keeps it there only for so long as parties might be able to contest the status of the property as exempt. Once that time period has elapsed, then the property comes out of the estate and reverts in the debtor.²⁶

1005 (C.C.S.D. Ga. 1877)(No. 1091)("In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy.")).

23. 400 U.S. 18 (1970) (per curiam).

24. 11 U.S.C. § 541(a)(1).

25. H.R. Rep. No. 95-595, 1st Sess. 368 (1977); S. Rep. No. 95-989, 2d Sess. 82 (1978).

26. There is a 30-day period for creditors to object to any claimed exemption. Fed. R. Bankr. Pro. 4003(b)(1). As stated in *In re Mwangi*, 764 F.3d 1168, 1176 (9th Cir. 2014), because property listed by the debtor on appropriate schedules "is only 'claimed as exempt' during this 30-day objection period [of Rule 4003], it may be inferred that the property is not deemed exempt, and therefore the property does not revert in the debtor, until the end of the objection period."

This inclusion has had some odd consequences. In *Mwangi v. Wells Fargo*,²⁷ for example, the two debtors were pharmacists who had healthy incomes and bank balances when they filed. Their bank, Wells Fargo, had internal practices by which the bank downloaded and scanned all bankruptcy filings throughout the country every night. After download, its computers identified the Mwangis as their depositors. They then put a freeze on the account but did not attempt to setoff funds in the account against debts the Mwangis owed to Wells Fargo.

The Mwangis complained that they could not access their money. Wells Fargo responded by saying the Trustee was the proper person to complain and that they would not release the funds unless and until the Trustee agreed. On the Trustee's side was the fact that the period for objection to exemptions had not yet passed, and thus the debtors had no interest in the funds until that deadline had expired. The Mwangis brought a motion for sanctions claiming the bank had violated the automatic stay. The trial court denied the motion for lack of standing.²⁸

After two appeals,²⁹ the Ninth Circuit essentially confirmed what the trial court had found: "Before the account funds revested in the Debtors, they remained estate property, and the Debtors had no right to possess or control them."³⁰ As a result, the debtors would not have had standing to contest Wells Fargo's action until the expiration of the objection period.

B. Objective Preferences

Preference law has its roots in English bankruptcy law.³¹ Under that law, a preference was a subjective matter. The Act borrowed this English perspective. For purposes of recovering preferences, Section 60b of the Act initially required the trustee to prove, as an element of the action, that "the person receiving [the transfer] or to be benefited thereby, or his agent acting therein, shall then have

27. 764 F.3d 1168 (9th Cir. 2014). Conflict of interest disclosure: I was the trial judge in this case.

28. *Id.* at 1170–71.

29. The Bankruptcy Appellate Panel initially reversed the trial court, finding among other things that the debtors had an inchoate reversionary right in the funds, and that such a right gave them standing to contest the freeze. *In re Mwangi*, 432 B.R. 812 (B.A.P. 9th Cir. 2010), *disapproved in later appeal*, 473 B.R. 802 (D. Nev. 2012), *aff'd*, 764 F.3d 1168 (9th Cir. 2014).

30. 764 F.3d at 1170–71.

31. 3 Collier on Bankruptcy, pt 2, ¶¶ 60.04-.05[1] (14th ed. 1977).

reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference.”³² This language was changed by the Chandler Act in 1938 to require reasonable cause to believe “that the debtor is insolvent.”³³ In both versions, the statute focused on the creditor’s state of mind rather than the debtor’s intent.³⁴

The words “reasonable cause to believe” received their initial construction in a case under the 1867 Bankruptcy Act. In *Grant v. First National Bank*, a case involving a mortgage given to secure a pre-existing debt, the Court said that the creditor “must have such a knowledge of facts as to induce a reasonable belief of his debtor’s insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule.”³⁵

This formulation was continued and adopted under the Act.³⁶ In essence, as stated in the first edition of the Collier treatise, “the expression reasonable cause is one difficult to explain. It is a question of degree rather than of quality; it admits more easily of determination by comparison than of exact definition.”³⁷

The “reasonable cause to believe” element was the most litigated and controversial requirement under the Act.³⁸ If the doctrine were based upon subjectivity, then debtors could almost always push the matter into a trial on the merits, as the intent would not be something

32. Act § 60b, 30 Stat. 544, 562 (1898), as amended, 11 U.S.C. § 96b (repealed 1979).

33. Act of June 22, 1938, ch. 575, § 60b, 52 Stat. 840, 870 (1938).

34. See Charles Seligson, *Preferences Under the Bankruptcy Act*, 15 Vand. L. Rev. 115, 120-21 (1961).

35. *Grant v. First Nat’l Bank*, 97 U.S. 80, 81 (1877).

36. See, e.g., Frank O. Loveland, *A Treatise on the Law and Proceedings in Bankruptcy* §194c (3d ed. 1907).

37. Wm. Miller Collier, *The Law of Bankruptcy and The National Bankruptcy Act of 1898*, § 60 at 317 (1st ed. 1899). That view did not change much over the next thirteen editions of the treatise: “It should be emphasized here that in any consideration of reasonable cause for belief in a debtor’s insolvency under § 60b, each case must, to a great extent be decided on its own facts.” 3 Collier on Bankruptcy, pt 2, ¶ 60.52, at 1055 (14th ed. 1977).

38. *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, pt. 1, at 203-04 (1973) [hereinafter *Commission Report*] (“That [intent] requirement, more than any other, has rendered ineffective the preference section of the present Act.”).

that would generally be able to be proved on summary judgment. As the House Report noted:

the requirement that the trustee prove the state of mind of his opponent is nearly insurmountable, and defeats many preference actions. The amount of litigation it causes is too great when the requirement itself does not further any necessary bankruptcy policy. It also defeats the policy of the preference section by limiting recoveries to only the most egregious cases.³⁹

To counteract this, the drafters “eliminate[d] the reasonable cause to believe requirement for transfers made during the 90-day period preceding bankruptcy and create[d] a presumption of insolvency during that period.”⁴⁰ *Coder v. Arts* and its progeny were thus put to bed.

IV. Two Implied Changes — Fees and the Absolute Priority Rule

In addition to explicitly overruling specific cases, there were two other shifts in language that have more radically reshaped the practice of bankruptcy as we know it today. These were the changes in which fees payable from the bankruptcy estate were to be paid and changes to the absolute priority rule.

A. No More “Economical” Spirit in Bankruptcy Fees

The Act imposed strict limitations on attorney compensation. The leading formulation appeared in *In re Consol. Metals Eng’g Co.*, which identified the elements as: “(1) the time spent; (2) the intricacy of the questions involved; (3) the size of the estate; (4) the opposition encountered; (5) the results obtained; and (6) the economical spirit of the Bankruptcy Act.”⁴¹

The “economical spirit” requirement was perhaps the most significant limiting factor. As the court explained in *In re Hardwick & Magee Co.*, “Attorneys’ fees in bankruptcy liquidation are governed by ‘the economical spirit of the Bankruptcy Act,’ and the amounts which

39. H.R. Rep. 95-595, 1st Sess., at 178 (1977).

40. *Id.*

41. *In re Consol. Metals Eng’g Co.*, 288 F. Supp. 672, 673 (E.D. Tenn. 1968).

'private clients are expected and wont to pay for similar services' are not determinative."⁴² This principle carried over into reorganizations under Chapter X: "[i]n any event, the [Chapter X] trustee and his counsel are officers of the court and are regarded as public servants, hence they should never expect to receive as much for the services as be in the case in private employment."⁴³ These principles meant that attorney's fees in bankruptcy were typically below market rates for other types of practice.

This limitation stunted the growth of bankruptcy practice. It led to what some might call a ghetto of small, boutique bankruptcy firms; no white-shoe firm (i.e., big law firm) had an appreciable bankruptcy practice prior to 1978.

As recounted by leading bankruptcy attorney Harvey Miller:

Embedded in bankruptcy proceedings was the spirit of economy that mandated that bankruptcy professionals be compensated at rates less than those prevailing in the private sector. Consequently, it was not considered to be a very desirable practice area. It was very localized. New York bankruptcy professionals were not welcomed in New Jersey or Connecticut and Manhattan bankruptcy professionals crossed the East River to Brooklyn with great trepidation and fear, as Brooklyn bankruptcy professionals likewise did when crossing to Manhattan.⁴⁴

Mr. Miller repeated this sentiment four years later, when he noted that "professionals' participation in bankruptcy cases [under the Act] was considered something akin to public service with an embedded spirit of economy. Professionals and, indeed, management of a debtor were to be compensated at rates less than those prevailing in the private sector. As a result, bankruptcy was not considered to be a very desirable practice area."⁴⁵

42. *In re Hardwick & Magee Co.*, 355 F. Supp. 58, 70 n.7 (E.D. Pa. 1973).

43. 6A Collier on Bankruptcy ¶ 13.03, at 562–63 (14th ed. 1977).

44. Harvey Miller, *Bankruptcy and Reorganization Through The Looking Glass Of 50 Years* (1960 – 2010), Keynote Address given at the American College of Bankruptcy Induction Ceremony for the Class of 2010, at 5 (March 12, 2010).

45. *Speech to Southeastern Bankruptcy Law Institute on its 40th Anniversary*, at 4 (March 2014), reprinted at <https://restructuring.weil.com/news/remembering-harvey-r-miller-the-evolution-and-changing-environment-of-bankruptcy-reorganization-law-and-practice/>

Congress took note of this when drafting the compensation provision of the Code.⁴⁶ Section 330(a)(3)(F) provides that a court should consider “whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.”⁴⁷

The legislative history behind this change clearly stated the intent to eliminate the “economical spirit.” The House Report stated that:

The compensation is to be reasonable, for actual necessary services rendered, based on the time, the nature, the extent, and the value of the services rendered, and on the cost of comparable services other than in a case under the bankruptcy code. The effect of the last provision is to overrule *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F. 2d 817 (9th Cir. 1976, as amended 1977), which set an arbitrary limit on fees payable, based on the amount of a district judge’s salary, and other, similar cases that require fees to be determined based on notions of conservation of the estate and economy of administration.⁴⁸

The reason stated was economics:

If that case [*Beverly Crest*] were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously, would be driven elsewhere, and the bankruptcy field would be occupied by those who could not find other work and those who practice bankruptcy law only occasionally almost as a public service. Bankruptcy fees that are lower than fees in other areas of the legal profession may operate properly when the attorneys appearing in bankruptcy cases do so intermittently, because a low fee in a small segment of a practice can be absorbed by other work.

46. It is notable that Congress, not the Bankruptcy Review Commission, initiated this change. In discussing professional fees, the Commission quoted *In re Paramount Merrick, Inc.*, 252 F. 2d 482, 485 (2d Cir. 1958), which stated that “the results obtained and the ‘economic spirit’ of the Bankruptcy Act” were among the principal factors necessary “to curtail unnecessary expenses.” *Commission Report*, *supra* note 39, pt.2, at 108, n.3.

47. 11 U.S.C. § 330(a)(3)(F).

48. H.R. Rep. No. 95-595, at 329–30.

Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.⁴⁹

The Senate initially disagreed,⁵⁰ but later withdrew its objection as stated in the final bit of legislative history:

Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11. Contrary language in the Senate report accompanying S. 2266 is rejected, and *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968) is overruled. Notions of economy of the estate in fixing fees are outdated and have no place in a bankruptcy code.⁵¹

49. H.R. Rep. No. 95-595, at 330.

50. S. Rep. No. 95-989, 2d Sess., at 40 (1978) ("The reference to 'the cost of comparable services' in a nonbankruptcy case is not intended as a change of existing law. In a bankruptcy case fees are not a matter for private agreement. There is inherent a 'public interest' that 'must be considered in awarding fees,' *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F. 2d 429, 432 (C.A. 5, 1968), *cert. denied*, 395 U.S. 906 () [sic]. An allowance is the result of a balance struck between moderation in the interest of the estate and its security holders and the need to be "generous enough to encourage" lawyers and others to render the necessary and exacting services that bankruptcy cases often require, *In re Yale Express System, Inc.*, 366 F. Supp. 1376, 1381 (S.D.N.Y. 1973). The rates for similar kinds of services in private employment is one element, among others, in that balance. Compensation in private employment noted in subsection (a) is a point of reference, not a controlling determinant of what shall be allowed in bankruptcy cases.").

51. 124 Cong. Rec 33,994 (1978) (statement of Sen. DeConcini). *See also id.* at 32,395 (almost identical statement of Rep. Edwards).

Although somewhat slow to come to the realization, large law firms eventually came to believe that this change meant that bankruptcy practice could now be applied to those who would otherwise want the monetary rewards available in transactional or litigation work. Indeed, since the funds were to be paid from the bankruptcy estate as an administrative expense, albeit on a somewhat delayed three-month schedule, the source and timing of repayment sometimes was more desirable.

When combined with the more favorable treatment of corporate debtors under current Chapter 11, not the least of which was the elimination of the mandatory Chapter X trustee, the continuing relationship between a business debtor and its large, outside firm was strengthened. This also facilitated those firms bringing in specialists, such as those practices developed at Kirkland and Ellis and others, to also handle matters of financial distress.

B. Absolute Priority Protection by Class, Not Individually

The absolute priority rule is assumed to be a bedrock principle in reorganizations, especially those in which confirmation is sought without the consent of all classes of creditors.⁵² The statutory development of the exact standards applicable to non-consensual confirmations, however, is somewhat murky. In particular, the status of the absolute priority rule, now a cornerstone of all non-consensual confirmations, is somewhat tortured.

First, the words “absolute priority rule” did not appear in the Act, and do not appear in the Code. They are derived from the words for “fair” and “equitable.” But even then, Congress did not add those words as a dyad; “equitable” was added first in 1933⁵³ and “fair” next in 1935⁵⁴ — although “fair” was added after, not concurrently with, the extension of reorganizations to all corporations in 1934 by Section 77B.⁵⁵

52. I have written on this topic before, and much of the following discussion draws from those writings. See, e.g., *Fair Equivalents and Market Prices: Bankruptcy Cramdown Interest Rates*, 33 Emory Bankr. Dev. J. 91 (2016); *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. Ill. L. Rev. 67; *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69 (1991).

53. It was added when Section 77 — related to railroad reorganizations — was added to the Act in 1933. Act of Mar. 3, 1933, ch. 204, § 77(g), 47 Stat. 1467, 1479 (1933).

54. Act of Aug. 27, 1935, ch. 774, § 77(e)(1), 49 Stat. 911, 918 (1935).

55. Section 77B was the first general reorganization statute applicable to business entities. Act of June 7, 1934, ch. 424, § 77B, 48 Stat. 911, 912–22 (1934).

In 1939, in *Case vs. Los Angeles Lumber*,⁵⁶ Justice Douglas gave “fair and equitable” the same meaning under the Bankruptcy Act that they had in equity receiverships. As he put it, “[t]he words ‘fair and equitable’ . . . are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations.”⁵⁷ He explained that the rule meant that:

If the value of the [debtor] justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.⁵⁸

In short, secured creditors were to be paid from their collateral before unsecured creditors share in collateral proceeds, and all creditors, secured or unsecured, were to be paid in full before any equity holder receives anything.

The Supreme Court, in a series of cases in the early 1940s, quickly confirmed that Case’s interpretation of “fair and equitable” governed railroad reorganization cases and Chapter X reorganizations.⁵⁹ Indeed, the absolute priority rule was initially applied even to Chapter XI cases up until 1952.⁶⁰

56. 308 U.S. 106 (1939).

57. *Id.* at 115.

58. *Id.* at 116 (quoting *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913)); *see also* *Kan. City Terminal Ry. v. Cent. Union Tr. Co.*, 271 U.S. 445, 455 (1926) (“Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lienholders are satisfied, whether this is present or prospective, for dividends or only for purposes of control.”).

59. *See* *Grp. Of Inst. Inv’rs v. Chi., Milwaukee, Saint Paul & Pac. R.R.*, 318 U.S. 523 (1943); *Marine Harbor Props., Inc. v. Mfr.’s Tr. Co.*, 317 U.S. 78 (1942); *Consol. Rock Prods. Co. v. Du Bois*, 312 U.S. 510 (1941).

60. Congress deleted the “fair and equitable” requirement from Chapter XI in 1952. Act of July 7, 1952, Pub. L. No. 82-456, § 35, 66 Stat. 420, 433 (1952). As the accompanying House Report stated, “the fair and equitable rule . . . cannot be realistically applied in a Chapter XI [action] Were it so applied . . . no corporate debtor where the stock ownership is substantially identical with management could effectuate an arrangement except by

It is important to note that this test was applied on an *individual* creditor basis much like the best interest test, found in Section 1129(a)(7),⁶¹ is today.

There was much debate in the drafting of the bankruptcy code about the appropriate role of the absolute priority rule. Practitioners and others, however, were concerned that such a broad understanding of the rule would frustrate many reorganizations.⁶²

Strong disagreement with the Commission's position arose among interested groups from business,⁶³ academic,⁶⁴ and governmental⁶⁵ quarters, over the need for, and the proper scope of, any reform, creating an impasse.

payment of the claims of all creditors in full." H.R. Rep. No. 82-2320, at 21 (1952); *see also* S. Rep. No. 82-1395, at 11-12 (1952).

61. 11 U.S.C. § 1129(a)(7).

62. The Commission found that "the rigidity of the [absolute priority] rule has frequently resulted in the destruction rather than the protection of interests of public investors [These investors] are frequently eliminated from participation in a reorganization by reason of the strict application of a statute designed primarily for their protection." *Commission Report, supra* note 40, at 256.

According to the Commission's proposal, equity owners could participate "if their future contributions, e.g., continued management, [were] essential to the business." *Id.*, pt. 2, § 7-303(4), at 258. This section was designed to "adopt the District Court's opinion which was reversed in Case." *Id.*, pt. 2, § 7-303(4), at 254. The Commission also suggested allowing delayed participation for equity holders when future increased performance so justified. *Id.*, pt. 2, § 7-303(3), at 241. Finally, it sought to streamline the type and amount of valuation evidence necessary to establish compliance with the absolute priority rule. *Id.*, pt. 2, § 7-310(2)(B), at 252.

63. *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236, Before the Subcomm. on Improvements in Judicial Machinery of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 459 (1975) [hereinafter *S. 235 and S. 236 Hearings*] (statement of Robert J. Grimmig, on behalf of the American Bankers Association); *id.* at 654-55 (statement of John J. Creedon, on behalf of American Life Insurance Association).

64. *Id.* at 1043-44 (subsequent statement of Vernon Countryman, December 19, 1975) (stating that the Commission proposal discusses the absolute priority concept with "weasel words" on valuation, and urging "the subcommittee to return to the original 'fair and equitable' test without the leeway-providing verbiage"); Victor Brudney, *The Bankruptcy Commission's Proposed "Modifications" of the Absolute Priority Rule*, 48 Am. Bankr. L.J. 305 (1974).

65. *S. 235 and S. 236 Hearings, supra* note 65, at 709-10, 716 (statement of Philip A. Loomis, Jr., Commissioner, Securities and Exchange Commission) ("We oppose the . . . modifications of the absolute priority rule.").

This deadlock broke in early 1976 through compromise.⁶⁶ The compromise called for two changes to the absolute priority rule. First, it proposed that only classes of creditors could invoke the rule. In this respect the compromise sought to overrule the procedural protections afforded by *Case*: under the compromise, an individual creditor who had been outvoted could not challenge a plan on absolute priority grounds.⁶⁷ Second, under the compromise, individual creditors, in lieu of the absolute priority rule, would receive the “best interest of creditors” test. As a consequence, each creditor would receive an amount at least equal to the liquidation value of its claim. From the debtor’s perspective, any allocation of the value in excess of liquidation value should be distributed by majority vote. An individual creditor could no longer bargain for every last dollar of going concern value. Once the creditor received its liquidation value, the Code allocated the surplus of going concern value over liquidation value by democratic vote within and among classes of creditors.⁶⁸ With the compromise in hand, the legislative process restarted.

66. The terms of this compromise were set forth in a letter to Congress from the respective heads of the National Bankruptcy Conference and the National Conference of Bankruptcy Judges. Letter from John Copenhagen, President, National Conference of Bankruptcy Judges, & Charles A. Horsky, Chairman, National Bankruptcy Conference, to Congress (June 12, 1976), reprinted in *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 94th Cong., 1st & 2d Sess. 1938 (1976) [hereinafter *Hearings on H.R. 31 and H.R. 32*].

67. According to the compromise:

[A] junior class may receive reorganization values even if a superior class receives less than its full priority interest (valued on a going concern basis) so long as the superior class consents and receives its liquidation value, i.e., best interest test. Under these circumstances the absolute priority rule does not apply.

Id. at 1941. This letter, together with the Commission’s work, formed the basis for the Code’s sections involving the absolute priority rule. *Subcommittee [sic] on Civil and Constitutional Rights of the Committee on the Judiciary, Table of Derivation of H.R. 8200*, 95th Cong., 1st & 2d Sess. 23 (Comm. Print 1977).

68. J. Ronald Trost, *Corporate Bankruptcy Reorganizations: For The Benefit of Creditors or Shareholders?*, 21 UCLA L. Rev. 540, 550-51 (1973). These changes obviated the need to debate the Commission’s proposed relaxation of the rule: “Because of the changes in the confirmation rules, the provisions of the pending bills which ‘relax’ the absolute priority rule standards, i.e., § 7-303(3) and (4) . . . are no longer necessary.” Letter from John Copenhagen, & Charles A. Horsky, *Hearings on H.R. 31 and H.R. 32*, *supra* note 66, at 1941.

The first bill introduced after the compromise, H.R. 6,⁶⁹ contained a simple statement of the compromise position: a court would confirm a plan “if such plan were fair and equitable with respect to all classes except any class that has accepted the plan.”⁷⁰ This bill was amended two and one-half months later to eliminate the simple injunction that the plan be “fair and equitable.” In its stead, the amended bill attempted to define fair and equitable treatment, but without using the words “fair and equitable.”⁷¹ Successive bills added to the statement of the rule.⁷² The House Report reflected these changes but categorized them as a “partial codification” of the absolute priority rule.⁷³

After some procedural wrangling with the Senate, the House’s version of the bankruptcy bill prevailed.⁷⁴ But it contained a drastically

69. As initially introduced on January 4, 1977, § 1129(b) of H.R. 6 read as follows:

(b) If all of the requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of such plan, shall confirm such plan notwithstanding such paragraph if such plan is fair and equitable with respect to all classes except any class that has accepted the plan and that is comprised of claims or interests on account of which the holders of such claims or interests will receive or retain under the plan not more than would be so received or retained under a plan that is fair and equitable with respect to all classes.

H.R. 6, 95th Cong., 1st Sess. § 1129(b) (Jan. 4, 1977).

70. *Id.*

71. H.R. 6, 95th Cong., 1st Sess. § 1129(b) (Mar. 21, 1977). This bill was the first to create different categories of fair and equitable treatment for different types of claims. For the background on this amendment, see Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. 941, 946 (1979).

72. See H.R. 7330, 95th Cong., 1st Sess. § 1129(b) (May 23, 1977); H.R. 8200, 95th Cong., 1st Sess. § 1129(b) (July 11, 1977); and H.R. 8200, 95th Cong., 1st Sess. § 1129(b) (Sept. 8, 1977).

73. H.R. Rep. No. 595, 1st Sess. 414 (1977). The report also confirmed the rule’s focus on returning only the reorganization value to creditors. It stated that “creditors are entitled to be paid according to the going-concern value of the business.” *Id.* at 223.

74. The Senate attempted to substitute a bill sponsored by the Securities and Exchange Commission in place of the House bill. See S. 2266, 95th Cong., 2d Sess. (1978). This bill proposed preserving a two-track reorganization system, and required a mandatory trustee for debtors whose equity interests were publicly held. *Id.* § 1130. Under this substitute bill, private companies would have been exempt from the fair and equitable rule. *Id.*

different treatment of nonconsensual reorganizations which implicated the absolute priority rule. Whereas the original House bill contained only one subsection on nonconsensual confirmation that did not use the words “fair and equitable,”⁷⁵ the bill that emerged for final consideration included two subsections on the topic, and explicitly incorporated the phrase “fair and equitable.”⁷⁶ The first subsection harkened back to H.R. 6 by providing that a court could cramdown a non-consensual plan over the dissent of any class only if the plan were, among other things, “fair and equitable.”⁷⁷ Although the bill did not attempt to define this concept explicitly, Congress’s prior efforts to define it were not lost. The second subsection on cramdown retained the various treatments developed in earlier bills as *examples* of fair and equitable treatment.⁷⁸ As the floor remarks made clear, the list of illustrations was not exhaustive; courts were not to exclude other components and interpretations.⁷⁹

The result was that individual creditors lost their veto over plans which did not adhere to absolute priority. That veto was transferred to the class in which they were a member. As a result, while the best interest test preserved individual right to a liquidation dividend, the allocation of going concern value above that minimum was transformed into a class-based right, thereby providing more flexibility through negotiation and other means to achieve reorganization.

75. H.R. 8200, 95th Cong., 1st Sess. § 1129(b) (Sept. 8, 1977).

76. H.R. 8200, 95th Cong., 2d Sess. § 1129(b), reprinted in 124 Cong. Rec. 32,350 (1978). Due to these changes, the statements on absolute priority contained in H.R. Rep. No. 595 are not as authoritative as they might otherwise be. Congress recognized this, and in lieu of a Conference Report, read virtually identical statements into both the House and Senate records on the bill. 124 Cong. Rec. at 32,392 (statement of Rep. Rousselot). As noted at the time, Congress believed that this procedure imbued such remarks with “the effect of being a conference report.” *Id.* at 32,391.

77. *Id.* at 32,376.

78. Technically, the bill stated that the fair and equitable treatment “included” the examples. *Id.*

79. *Id.* at 32,407 (statement of Rep. Edwards); *id.* at 34,006 (1978) (statement of Sen. DeConcini) (noting that “many of the factors interpreting ‘fair and equitable’ . . . , which were explicated in the description of section 1129(b) in the House report, were omitted from the House amendment . . . [T]he deletion is intended to be one of style and not one of substance.”).

V. Conclusion

The drafters of the 1978 Code obviously had in mind revision of various concepts and cases embedded in the 1898 Act. As shown above, sometimes this was directly indicated in the legislative history; other times it was effectuated through a simple change in orientation.

Regardless of the method of implementation, however, the changes outlined above - from the subtle changes to the nomenclature used to refer to the party initiating the bankruptcy to the shift in absolute priority from an individual-based right to a class-based right - the bankruptcy scheme implemented by the 1978 Code was designed to be different and more effective than under the 1898 Act. Different indeed, and expansive, if not effective.

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Douglas G. Baird*

BARGAINING, UNWRITTEN LAW, AND THE EMERGENCE OF THE MODERN LAW OF CORPORATE REORGANIZATIONS

The most memorable moment in Fernando Tatís Jr.'s rookie year was not his eighth-inning grand slam against the Texas Rangers that tied him for the league lead in home runs, but rather the public apology he had to give for it afterwards. In the Major Leagues, players are not allowed to swing away on a 3-0 pitch after the sixth inning when their teams are comfortably ahead. Tatís broke this rule when he swung on such a pitch when his team was already winning 10-3.¹ The apology was his only path to placating his mightily irritated teammates as well as his manager. In his apology, Tatís explained that he was still learning the rules and promised to do a better job going forward. The rules of baseball are complicated, and, to make matters worse, many, like this one, are unwritten.²

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1. JOMBOY MEDIA, *Fernando Tatís Jr. Apologizes for Hitting a Grand Slam Because of the Unwritten Rules, a Breakdown* (YouTube, Dec. 27, 2021), <https://www.youtube.com/watch?v=SaW5B2SEnXg>.

2. For an analysis of the unwritten rules of baseball, see JASON TURBOW, *THE BASEBALL CODES: BEANBALLS, SIGN STEALING, AND BENCH-CLEARING BRAWLS: THE UNWRITTEN RULES OF AMERICA'S PASTIME* (Anchor 2011). In his apology, Tatís admitted that he was still learning, "I've been in this game since I was a kid and I know a lot of unwritten rules, but I was kind of lost on this one. . . . Those experiences you just gotta learn from it."

Unwritten rules, whether in baseball or anywhere else, are mystifying to outsiders and often provoke criticism. Rules, it is often asserted, should be clear and plain for all to see. They should not be unwritten and accessible only to a few. This rule against swinging away on 3-0 pitches emerged a long time ago. Underpaid players spent six long months travelling in un-airconditioned trains, staying in cheap hotels, and playing double headers. Pitchers were expected to throw complete games. In this environment, players come to a mutual understanding that, after a certain point, it made sense for everyone to save their energy for their next game. The ability of pitchers to throw beanballs (i.e., throwing at the batter intentionally) kept everyone in line. Such unwritten rules of baseball persist, even though many of the rationales that brought them into being have disappeared.

Like baseball, bankruptcy has unwritten rules that also took shape in the distant past—rules that may seem like the unwritten rules of baseball. Baseball's rules once might have made life more comfortable for the players, but they no longer seem necessary and may never have been good for the game. Bankruptcy's unwritten rules have their own origin story, and even though the world from which they emerged is radically different from today's world of private equity and vulture investors, the need for them continues.

The principal problem arises from the way that bankruptcy judges are different from other judges. Outside of bankruptcy, the archetypal judge is someone who decides discrete cases. Ordinary judges basically just decide on winners and losers. Of course, bankruptcy judges fill this role as well, but in a corporate reorganization, the business of who has the superior legal claim often takes a backseat to a larger problem. Bankruptcy judges oversee the efforts of parties to make the best of a bad situation.

In a reorganization, the problem is not usually deciding whether *A* or *B* has a legally cognizable right. They both do. And they are not the only ones. There is a large collection of creditors, all of whom have valid legal rights. The principal challenge is not one of determining which claims are legitimate, but figuring out what to do when conflicting legitimate rights cannot all be honored. The debtor does not have assets sufficient to meet its obligations, and you cannot get blood from a stone. When the debtor is a viable business, there is the added challenge of ensuring that the business itself survives so that its assets are put to their best use and that jobs are preserved.

Sorting out such a mess requires fine business judgment best exercised by someone with skin in the game. Most bankruptcy judges are neither experts in corporate finance nor entrepreneurs. Also, there is none of their own money on the line. For these reasons, the most

sensible path forward is usually to let participants before the court bargain. The worst settlement they can reach among themselves is often better than the best decision that a judge can reach on their behalf. Negotiation is the lifeblood of corporate reorganizations, and the principal job of the bankruptcy judge is to ensure that these negotiations happen.

The primary mission of the bankruptcy judge is to bring the parties together and lead them to a bargain that is in their mutual interest. Judges are like referees in a soccer game. Those officiating ensure that the playing field is level and that the players stay within the rules. Referees are at their best when they are invisible. To be sure, they are called upon to make discrete decisions now and again, but they need to know when to stop play and call out misbehavior and when to tell everyone to play on. The measure of their success is whether, in the end, they have created an environment in which the players in their interactions with each other have come to a fair resolution.

Being an effective referee of this sort of game requires nuance and situation-sense of a sort that cannot be readily reduced to a rule book. There are inevitably open-ended standards that must be applied consistently, which in turn requires due regard for past practice. These customs and norms are part of the warp and woof of the rules of the game, and they are unwritten.

Part I of this essay explores how bankruptcy came to depend upon negotiations and how this dependency shaped the distinctive role that the judge plays. Part II asks whether these unwritten rules continue to make sense in a rapidly evolving world. It suggests that, although bankruptcy, like baseball, has rules that extend beyond those on the books, its unwritten rules rest on a different and more secure foundation.

I. The Historical Strands of Unwritten Law

Painting with a broad brush, two different sorts of businesses at the end of the nineteenth century came to the attention of two different groups of lawyers.³ The first involved small retailers who bought their inventory on credit and had trouble paying when their own customers faced hard times. The other concerned railroads that borrowed massively in the capital markets on the East Coast and in Europe and built lines that produced too little revenue to meet interest payments.

3. I discuss these two branches of reorganization law in DOUGLAS G. BAIRD, *THE UNWRITTEN LAW OF CORPORATE REORGANIZATIONS* 22–63 (Cambridge University Press 2022).

The law dealing with small retailers and giant railroads each occupied its own domain. The first tradition began with what were called “friendly adjustments.”⁴ At the end of the nineteenth century, wholesalers, such as Marshall Field and Carson Pirie Scott, sold dry goods to small retailers across the country on credit.⁵ Each wholesaler had a large management team, and this team included a new breed of professionals—those who specialized in approving and collecting the debts that these retailers owed. The credit men, as these professionals called themselves, formed a tight community. They were white collar, but not exactly upper crust.

When small retailers faltered, they often owed money to many different wholesalers. The credit men who worked for the wholesalers would coordinate their efforts to make the best of a bad situation. The credit men would shut down a dry goods business and liquidate its assets if the business had no future, but when the business was viable and the owner worthy, the credit men would agree to restructure the debt and give the business a second chance. Sometimes these professionals had to deal with holdouts: troublesome local creditors who sought to make side deals with debtors or otherwise take actions contrary to the interests of creditors as a group. The credit men therefore welcomed and indeed were largely responsible for the 1898 Bankruptcy Act, which allowed a majority of creditors to bind a dissenting minority.⁶

The 1898 Act empowered the credit men as a group to compromise their claims against a common debtor and compel dissidents to go along with them. These compositions depended upon the parties being able to bargain with one another and on cooler heads prevailing. The system worked because the credit men all belonged to the same club. In this environment, lawyers for the credit men developed their own set of norms about which debtors were entitled to a second chance and which were not.

Judges were called upon to determine whether a compromise upon a majority agreement was in the “best interests” of the creditors as a group. There were some hard edges to “best interests.” A plan was not in a creditor’s best interest if the creditor could have received more

4. See Thomas Clifford Billig, *What Price Bankruptcy: A Plea for “Friendly Adjustment,”* 14 CORNELL L. REV. 413, 429 (1929).

5. See DAVID SELLERS SMITH, *THE ELIMINATION OF THE UNWORTHY: CREDIT MEN AND SMALL RETAILERS IN PROGRESSIVE ERA CAPITALISM*, 9 JOURNAL OF THE GILDED AGE AND PROGRESSIVE ERA 197 (2010).

6. Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86 (1998).

from a liquidation. But “best interests” did not stop there, and judges needed to develop their own intuitions about when the dissidents’ bargaining posture was reasonable and when it was obstreperous.

The judge had to assess the deal that the creditors as a group struck with the debtor and ensure that the process through which it was reached was regular. To apply the law, the judge needed to understand the customs and norms of the credit men. Only if the debtor was sufficiently forthright in the negotiations could a plan be approved.⁷ Irregularities or suspect transactions alone were enough to prevent a judge from approving a composition.⁸

The second reorganization tradition in the United States came from the rise of giant railroads at the end of the nineteenth century.⁹ These railroads spanned the continent and were financed haphazardly with private capital, much of it from Europe. Many of these national railroads were buffeted by financial distress. When distress occurred, investment bankers, like the down-market credit men, worked collaboratively with one another. They too all belonged to a single club, albeit a much tonier one than the credit men’s. Investment bankers, like the credit men, could bargain with each other at low costs.

To put a railroad’s fiscal house in order, J.P. Morgan and other investment bankers chose the exchange offer as their first line of attack. When an exchange offer worked, bondholders from all parts of the capital structure found it in their self-interest to trade their old bonds for new ones. The simpler and more realistic capital structure left everyone better off. The new capital structure reflected reality. The new debt had a lower face amount, but it was worth as much or more.

But, sometimes, you could not get everyone to come along. You didn’t want a few malcontents to gum up the works and insist on being paid in full. Some coercion was necessary. The question was how to supply the necessary friendly persuasion. To solve this problem, the investment bankers appropriated an existing legal procedure: the equity receivership. The investment bankers would find a cooperative federal judge who would appoint someone friendly to act as a receiver of the railroad. The vast majority in every class would agree on a plan that looked very much like an exchange offer. Everyone would get new

7. See, e.g., *Dilworth v. Boothe*, 69 F.2d 621 (5th Cir. 1934).

8. See, e.g., *Adler v. Jones*, 109 F. 967 (6th Cir. 1901); *In re Jaffe*, 20 F.2d 370 (2d Cir. 1927).

9. For David Skeel’s masterful account of the equity receivership, see DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 73–100 (Princeton University Press 2001). For my account of this history, see BAIRD, *supra* note 3, at 22–45.

securities roughly equal in value to their old securities, but with viable interest and principal payments.

The investment bankers would then have the receiver conduct a foreclosure sale of the railroad. The investment bankers would credit-bid the senior bonds. At this point, the investment bankers would own the entire railroad. They would put the assets in a new corporation, and then they would distribute new securities according to the agreed-upon plan.

Everyone understood that the foreclosure sale at the heart of the nineteenth century equity receivership was a sham. The foreclosure sale was merely a useful legal fiction. The equity receivership solved a holdout problem. It was in effect a consensual and mutually beneficial exchange offer, supplemented with a little arm-twisting.¹⁰ But this method left open the question of what rules should govern the process of shaping the exchange offer. There was a range of possible deals, and each had its own distributional consequences.

The professionals who were involved in the reorganizations believed that their own norms and customs were sufficient to sort out the rights of players and temper the impulses of those who might otherwise take advantage of their bargaining power. Courts were there to provide what was largely window-dressing. Courts, however, pushed back, and this pushback gave rise to its own distinctive brand of unwritten law.

The receivership of the Louisville, New Albany & Chicago Railway Company, commonly known as the Monon, illustrates the point.¹¹ The Supreme Court held that courts had to exercise serious oversight in every restructuring. A court could “never rightfully become the mere silent registrar of the agreements.”¹² Once judges were called upon to oversee a receivership, they could not be idle spectators. It was not sufficient that the motive behind the transaction was benign. A judge supervising a reorganization had an affirmative obligation to ensure that everyone had a fair opportunity to participate. Judges could not assume that the investment bankers would themselves reach a deal that protected everyone. At this point, the judge had to understand what it meant to have fair opportunity to negotiate.

10. I discuss how the equity receivership should be seen as an exchange offer that overcomes a holdout problem in Douglas G. Baird, *Bankruptcy Minimalism*, 98 AM. BANKR. L.J. 493 (2024).

11. See *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.*, 174 U.S. 674 (1899).

12. *Id.* at 688.

In perhaps the canonical reorganization case, *Northern Pacific Railway Company v. Boyd*, the Supreme Court refused to bless a reorganization plan that, although otherwise regular, did not include one of the creditors in the negotiations.¹³ The court's objection was not to the substance of the plan, but rather to the process by which the plan was negotiated. The Court held that all affected creditors had to be included in the process. Everyone was entitled to a seat at the table.

Again, the court's responsibility was not limited to surveying the terms of the plan itself. The court's mandate extended to assessing the way that the parties had worked to reach the plan. The integrity of the process was what mattered, not just the substantive outcome of the negotiations. As the Court explained, "[i]f [a general creditor] declines a fair offer he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it."¹⁴ The Court did not reject the norms and conventions that the investment bankers developed that drove the reorganizations. Instead, courts embraced the norms and at the same time insisted on their ability to exercise oversight over them. The power to engage in this oversight became part of the fabric of the law without being explicitly incorporated into statutory text.

These two traditions—the tradition of the credit men bargaining effectively with each other over a friendly adjustment and the tradition of the investment bankers orchestrating the equity receivership—each relied on adherence to shared norms and the judge's willingness to call parties to account if the norms were violated.

During the 1930s, reformers confronted the role of the judge more explicitly when these two strands of bankruptcy law were tied together in the Chandler Act. The New Deal lawyers who shepherded this legislation—in particular, William O. Douglas—tied them together with a specific vision of the role that the judge was supposed to play. This vision, too, included a substantial role for judicial discretion and, with it, unwritten law.

As a Justice of the Supreme Court, Douglas grounded the judge's power explicitly on the fraudulent conveyance statute that Parliament enacted in 1571.¹⁵ As Douglas explained in *Pepper v. Litton*, the power to

13. *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913).

14. *Id.*

15. Douglas specifically invoked the Statute of 13 Elizabeth in *Pepper v. Litton*, 308 U.S. 295 (1939) ("The findings of the District Court, amply supported by the evidence, reveal a scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c.5 was designed to cope.").

oversee the bargaining process had to be “invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.” Hence, “[i]n the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.”¹⁶

In Justice Douglas’s view, the judge was required to scrutinize “the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, and the amount paid therefore, and the like.”¹⁷ He elaborated:

Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need. . . . It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy. The necessity for its exercise is based on the responsibility of the court . . . to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle.¹⁸

A court had to use its powers to ensure that those who engaged in bargaining did not engage in advantage-taking.

Of course, the bankruptcy judge has no “roving commission to do equity.”¹⁹ But when overseeing negotiations, there is no escaping the need to exercise judgment. A particular provision of the Bankruptcy Code, once again with a rich history, illustrates. The Bankruptcy Code explicitly empowers the bankruptcy judge to designate or disqualify votes for or against plans of reorganization that are not cast in “good faith,”²⁰ but what exactly does it mean to cast a vote in good faith?

16. *Id.* at 305, 307–08.

17. *Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 145 (1940).

18. *Id.* at 146 (internal citations omitted).

19. *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986).

20. *See, e.g., In re Figter, Ltd.*, 118 F.3d 635 (9th Cir. 1997).

Creditors do not owe fiduciary duties to one another. Each is allowed to look to its own interests. But what exactly does “looking to its own interests” mean? What if a creditor has claims in two different tranches of debt? What if someone votes in a particular way because the plan will advance its economic interest elsewhere? A judge needs more than unfettered intuition to oversee such players, especially in a world in which it is increasingly common for players in a reorganization to wear multiple hats. The most sensible course for a judge is to look to the past.

To anchor their intuitions for this particular problem, judges typically begin with *Texas Hotel Securities Corporation v. Waco Development*.²¹ *Waco* revolved around a fight over the Roosevelt Hotel in Waco, Texas. In the late 1920s, Conrad Hilton was beginning his career as a hotelier. He had already taken over several run-down hotels in Texas and successfully renovated them. A group of local businessmen in Waco acquired an old hotel and brought Hilton in to work his magic. Hilton bought the hotel from them, built a new tower, and added air-conditioning to public spaces. The renovated hotel opened in 1927.²²

The Great Depression hit the hotel business hard, however. Hilton had to sell the hotel property back to the businessmen. He retained a ninety-nine-year lease and remained responsible for paying off the mortgage. As bad economic times continued, business continued to decline. Under Hilton’s management, the hotel did make enough to meet the mortgage payments, but revenues were insufficient to make the lease payments. The Waco businessmen went to state court and were able to oust Hilton for his failure to pay the rent. But the local businessmen soon found themselves in an even worse position than Hilton himself was in. They could not even make the mortgage payments.

Hilton tried to regain control of the hotel while it was in a § 77B reorganization. He bought a blocking position in one of the impaired classes and voted against the plan, pressing instead for one that would return him to the management of the hotel. The Texas businessmen objected, arguing that Hilton should not be able to cast his vote that way. An appellate court rejected their argument.

William O. Douglas thought that this case was wrongly decided. In Douglas’s view, investors must cast their votes and otherwise

21. 87 F.2d 395 (5th Cir. 1936).

22. Amanda Sawyer, *Roosevelt Hotel*, BAYLOR UNIV. WACO HIST. BLOG (Aug. 12, 2021), <https://wacohistory.org/items/show/41>; Geoff Hunt, *Texas Over Time: The Roosevelt Tower, Waco, TX*, BAYLOR UNIV. TEX. COLLECTION BLOG (March 6, 2018), <https://blogs.baylor.edu/texascollection/2018/03/06/texas-over-time-the-roosevelt-tower-waco-tx/>.

conduct themselves in a fashion that advances only their interests as investors in the debtor. They had to cabin off their other interests. They must focus on their ownership stake. They cannot pursue some other agenda, such as their interest in managing the business.

Under Douglas's view, the judge must review the behavior of each of the parties at the bargaining table and ensure that each party is advancing only its own stake in the business and not some other goal. Douglas believed that Hilton's rights as a holder of debt of the hotel and his interest in managing the hotel were two different things. Hence, Hilton should not have been able to cast his votes in the former capacity to advance his interests in the latter.

Facts are never as easy for a judge to grasp as Douglas thought. Douglas failed to see that Hilton might have voted as he did because he believed that his management skills brought value. Hilton might well have believed that the Roosevelt might be worth more if he ran it than if the Waco businessmen did. Hilton's insistence upon being brought back to manage the hotel might be entirely consistent with maximizing the value of his stake in the business. Indeed, Hilton's subsequent success in moving beyond Texas and establishing a worldwide hotel empire is strong evidence to this effect.

Douglas expressed this view not in a Supreme Court opinion that bound lower courts, but rather in testimony before Congress that he made while he was still at the SEC.²³ But Douglas's view still holds considerable sway, and in all events, courts must continue to engage in the same sort of inquiry as Douglas did when deciding whether a creditor is voting in "good faith." Courts must determine whether the creditor is acting within permissible bounds by looking to established custom and practice.

This problem arises today when, for example, a firm undertakes to acquire a firm in Chapter 11 by acquiring control of a fulcrum class of its securities. How should the judge assess whether such a creditor is acting in good faith? One can say that the judge is merely interpreting the words "good faith," but to the extent one does this by calling upon practice and tradition, the judge is applying unwritten law.²⁴

23. See *Revision of the Bankruptcy Act: Hearing on H.R. 6439 Before the House Comm. on the Judiciary*, 75th Cong. 181–82 (1937) (statement of William O. Douglas, Commissioner, SEC)(Courts should have the ability "to affirm a plan over the opposition of a minority attempting to block the adoption of a plan merely for selfish purposes. The *Waco* case . . . was such a situation.").

24. See, e.g., *In re DBSD N. Am., Inc.*, 634 F.3d 79, 101 (2d Cir. 2011) ("The Code provides no guidance about what constitutes a bad faith vote to accept or reject a plan. Rather, § 1126(e)'s 'good faith' test effectively delegates to

Other parts of the Bankruptcy Code are similarly open-ended. Applying them requires the exercise of discretion as well. For example, in addition to the requirement that votes for or against a plan be cast in good faith,²⁵ plans themselves must be proposed in good faith,²⁶ and that plan can be approved over an objecting class only if it is “fair and equitable.”²⁷ These and other provisions provide an anchor for the judge’s oversight of negotiations, but do not spell out in any detail exactly what that oversight should look like.

For example, it is not permissible for a secured creditor—even one who is owed more than the firm is worth—to “gift” property of the estate to an equity-holder and skip over an intervening class.²⁸ But the difference between an impermissible gift and a reasonable “tip” that gets a deal over the line is a fine one. The case law is sparse, and the judge’s exercise of discretion must be anchored in customary practice if it is to be anchored anywhere. Often, the bankruptcy judge is not even issuing formal rulings but rather giving parties themselves a sense of what awaits if they do not come to a consensual resolution.

In short, whenever judges oversee negotiations in this environment, they look to customary practice and norms. They put significant weight on the parties’ shared understanding of what sorts of behavior are in and out of bounds. It is not written, but it is not made up out of whole cloth, either.

II. Unwritten Law Today

Today’s bankruptcy judges understand that their mandate is narrow and that their ambitions should be modest. They bring the parties together and ensure that the rights of all the stakeholders are protected at the same time that they push them to seek common ground. There are some clear landmarks. Bargaining that fails to include everyone is suspect. Disclosure is the order of the day. Parties do not have to behave altruistically, but they cannot pursue outside agendas. And if creditors deliberately throw sand into the gears of the reorganization, they can find their claims subordinated or even disallowed.

At the same time, however, judges do not fix the terms of the bargain. They are not themselves equipped to chart a new course for

the courts the task of deciding when a party steps over the boundary. Case by case, courts have taken up this responsibility.” (internal citations omitted)).

25. 11 U.S.C. § 1126(e).

26. *Id.* § 1129(a)(3).

27. *Id.* § 1129(b)(2).

28. *See, e.g., In re DBSD N. Am., Inc.*, 634 F.3d 79 (2d Cir. 2011).

a distressed business, nor is it their responsibility to protect sophisticated professionals. Professionals can look out for their own interests. The firm belongs to them, not the judge, and they are the ones who must chart its destiny. Again, bargaining is the lifeblood of corporate reorganizations.

A major part of each judge's job is to push the parties towards consensus, but how they go about doing this is left to their good judgment. One well-respected judge regularly tells parties when they find themselves at loggerheads that he stands ready to decide even existential questions according to the letter of the law, but they should know that, if they ask him to decide such a question rather than sorting it out among themselves, they are entrusting their fate to a monkey with a gun. This speech usually leads parties to forget about their lines in the sand and return to the bargaining table. And if they cannot settle, the judge decides the issue as best he can and still sleeps comfortably at night. He gave them fair warning.

An extreme example of how far a judge might go to bring parties to an agreement took place towards the end of the bankruptcy of the stockbroker Drexel Burnham. The parties were deadlocked over how to divide a large pool of junk bonds. Weeks of negotiation had left them at an impasse. The judge brought the parties together and told them that, given their inability to agree upon a deal, he had resolved to order the sale of the assets, even though he recognized that a sale of such highly illiquid assets would yield them relatively little. Their inability to reach agreement forced his hand.

The judge made it clear that he had made up his mind. He told them that he was ready to sign the appropriate order then and there, but other judicial business required him to take a phone call in his chambers. He promised the parties that he would return within the hour to sign the order. He left the courtroom, and the parties, after months of deadlock, sat down to negotiate one last time. Just before the judge returned an hour later as he had promised, they reached an agreement. One of them memorialized it in longhand on a yellow legal pad, and everyone initialed it.²⁹

When such efforts work and the parties reach unanimous agreement through an open process untainted by ulterior motives or side deals, there is little controversy. That a deal was struck is itself the measure of success. Matters become more complicated, however, when an agreement wins broad support, but support is not unanimous.

29. Nancy Miller, *Judge Rules with Rod, Impish Smile*, USA TODAY, March 25, 1992, at 5B. The lawyer who led the negotiations and wrote out the agreement kept the yellow sheet of paper and later framed it in his office.

The judge is in an even tougher spot when confronting an agreement that, although enjoying the support of all but a few quarrelsome, out-of-the-money dissidents, appears to stand in tension with an explicit statutory command.

In *Marvel Entertainment*, for example, the court had to decide whether the debtor could, as it requested, continue shipping product for which customers had already paid.³⁰ Prepaying buyers are general creditors who, in the statutory distribution scheme, are supposed to share *pari passu* with all the other general creditors. In this case, however, the cost of shipping was small, and the production costs were largely sunk. More to the point, a failure to ship would sow unhappiness in the customer base and lead to a loss of patronage in the future. And there was one more complication in this case. The products in question were comic books.

Apart from the sheer silliness of serving tens of thousands of twelve-year-olds with proper notice and inviting them to be heard as creditors in a large reorganization, demanding that the twelve-year-olds pay a second time for *Spiderman* and the *Fantastic Four* would undermine the future of the comic book business. Stopping the shipment of product would save little money and would do considerable reputational damage.

All the other stakeholders would be worse off if subscribers were treated like ordinary creditors. For these purposes, the twelve-year-olds were more sensibly treated as future customers rather than as prepetition creditors. What was valuable to the estate (the goodwill of the subscribers) was not something that the estate enjoyed as of right. The estate could continue to enjoy their goodwill only by servicing the subscriptions.

This decision to honor prepetition unsecured obligations, of course, stands in tension with the substantive right of each creditor to share *pro rata* with all the others. If a creditor objects, the judge is ordinarily bound to anchor the authority to issue the order in some part of the Bankruptcy Code. In a case like *Marvel Entertainment*, finding an anchor is tricky.³¹

It might seem that a party could reasonably ask that general creditors such as the subscribers not be paid in full ahead of other general

30. See DAN RAVIV, COMIC WARS: HOW TWO TYCOONS BATTLED OVER THE MARVEL COMICS EMPIRE—AND BOTH LOST 81–82 (Broadway 2002).

31. Some face-saving arguments are available. One can, for example, ground such critical vendor payments in the trustee's power to use or sell assets outside the ordinary course after notice and a hearing in 11 U.S.C. § 363(b)(2).

creditors, but it is unlikely that anyone will object even if objecting would appear to garner some strategic advantage. And in *Marvel Entertainment* itself there was no objection. Most experienced professionals understand better than to raise objections for their own sake. Raising an objection would likely be seen as disruptive. Creditors do not want to identify themselves as troublemakers at the very start of a case.

Making such an objection comes with risks similar to swinging on a 3-0 pitch late in the game when comfortably ahead. There may be no risk of a beanball, but the judge possesses many ways, large and small, to make life miserable for the party who makes such arguments. Judges rarely must stare such a troublemaker down in open court and ask point blank, “[a]re you trying to blow up my case?” But they will do just that, if pressed. A judge can suspend the hearing, leave the courtroom, and let the other professionals bring the miscreant back into line.

When exercising oversight, the judge needs to apply principles with an awareness of the parties and the conflicts between them. If the parties are repeat players who live by the same set of shared norms, there is comparatively less need to interfere. The judge will become more vigilant, however, if parties are slighting well-established norms. For example, reorganization professionals understand that you never send a threatening letter or file an aggressive pleading without giving opposing counsel the courtesy of a telephone call first. When you stab someone in the reorganization arena, you stab them in the chest, not the back.

The judge will not sanction a party for violating such a norm, but if such norms are being violated and the judge learns about these violations, the judge will be curious to know what else might be infecting the dynamics of the negotiations. The judge will become more apt to ask questions and insist more strongly that square corners be cut. There are many shared understandings of appropriate behavior that, if slighted, invite trouble. Parties cannot enter side deals that keep matters from being fully and fairly vetted before the judge. Process is what matters. Courts do not dictate the terms of the plan, but all stakeholders must have an opportunity to participate in addition to being given a “fair offer.”

The world today looks markedly different from the world of the small retailers and giant railroads of the early twentieth century. It might seem that the norms and customs that emerged then would not be well suited to the problems that exist today. There was homogeneity among the players. In the era of the credit men, those who approved the credit were the same as the ones restructuring it. The same investment bankers who raised the funds (and who would return to the same investors to ask them to back new ventures) oversaw the restructuring.

By contrast, those holding claims in today's reorganizations are often distressed debt professionals who bought their claims at a discount after the bankruptcy proceeding began. They have different agendas, some buying with a view to controlling the reorganization process and bending it to their advantage, not with a view to saving the business.

And there is another, more recent change that further complicates the picture. At the start even of this century, large reorganizations involved public corporations. The dispersed equity-holders tended to be relatively passive. By contrast, today's large reorganizations often involve private equity sponsors. They have large stakes in the firm, and the managers calling the shots are people beholden to private equity. These managers use their powers as debtor-in-possession to enter into coalitions with some investors to take advantage of other investors.

It might seem that the norms that emerged from the time of J.P. Morgan and Marshall Field would be singularly inapt to keep everyone in line. But even though the players are different, the essential problem—overseeing negotiations among parties pursuing their own economic interests—remains the same. Unwritten law is not a concrete doctrine, but rather a way of applying sound judgment.

To switch from baseball to soccer for a minute, soccer is played differently today from how it was played in the last century, but everyone continues to believe that the most important rule for referees to master is Rule 18.³² Of course, notwithstanding various amendments, there have long been only seventeen rules in the official regulations. But everyone accepts Rule 18, the name given to the unwritten rule that requires the referee to interpret and expand each of the other seventeen rules in a way that promotes fair play and the free flow of the game.

A radical change in the environment does not eliminate the need for unwritten law. Quite the contrary. The more heterogeneous the players and the more contested the game, the more level-headed the referee must be and the more that good judgment matters. One can ground the task of bringing common sense and good judgment on general terms that can be found in the books, but, at bottom, applying

32. The official rulebook has an oblique reference to this Rule 18 and the idea of unwritten law in its introduction, which provides that "[t]he Laws cannot deal with every possible situation, so where there is no direct provision in the Laws, The IFAB expects the referee to make a decision within the 'spirit' of the game and the Laws." INTERNATIONAL FOOTBALL ASSOCIATION BOARD, *Laws of the Game* 25/26, 11 (2025).

rules sensibly consists of exercising oversight based on what has worked in the past.³³ In this sense, there is no escaping unwritten law.

The same applies in bankruptcy. A judge cannot be the silent registrar of agreements. The question is not whether bankruptcy judges can apply unwritten law, but rather whether our restructuring regime would improve if the written law and binding precedent set out more tightly the way in which bankruptcy judges exercised their policing power over the parties' bargaining.

The history of bankruptcy in the Supreme Court continues to illustrate this idea. In the last century, the Supreme Court's opinion in *Boyd* modified unwritten law to ensure that every creditor had a seat at the table.³⁴ In our own time, the Supreme Court's opinion in *Czyzewski v. Jevic Holding Corporation* similarly put constraints on acceptable bargaining.³⁵

In that case, the bankruptcy judge approved the structured dismissal of a case even though the dismissal had the effect of giving extra value to some creditors and not others. The judge approved the unequal treatment because the alternative was one in which, given where the parties were in the bargaining, the extra value would have been lost completely. The favored creditors would get less, but the other creditors would get no more.

The Supreme Court rejected this deal, even though it recognized that the approved deal was, in the words of Justice Kagan at oral argument, "[p]areto-superior."³⁶ This is the economic term for a move that leaves some players better off without leaving anyone else worse off. The best understanding of the opinion is not that the Court was mindlessly tied to statutory text, but rather that it recognized that putting some deals out of bounds changed the negotiating environment for the better.³⁷ Better to lose a few desirable bargains in unusual cases in order to make the negotiations easier everywhere else.

33. Consider, for example, Rule 7. It provides that the referee should extend the duration of the match for "cause" as well as "wasting" of time by players on one side or the other. Neither of these words is defined. *See id.* at 87. Nevertheless, everyone has a shared sense of how much added time is appropriate in any given context.

34. *N. Pac. Ry. Co. v. Boyd*, 228 U.S. 482, 508 (1913).

35. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 987 (2017).

36. Transcript of Oral Argument at 44, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) (No.15-649).

37. For a full development of this line of thought, see Douglas G. Baird, A.J. Casey & Randal C. Picker, *The Bankruptcy Partition*, 166 U. PENN. L. REV. 1675 (2018).

There are times when tying a judge's hands is a good idea. A judge's inability to approve some bargains can be in everyone's interest. Some sorts of counterproductive bargaining strategies are not possible if a judge lacks the power to bless certain types of bargains. Denying the judge discretion is analogous to forbidding the payment of ransom. If you cannot pay ransom, someone may, on that account, be less likely to kidnap in the first place.

The best way to understand cases like *Jevic* is entirely consistent with the idea of unwritten law. The idea is not so much denying the efficacy or the role of unwritten law, but rather that judicial discretion, like good refereeing, is best done when the playing field is clearly marked. The question that is better asked is not whether there should be unwritten law, but rather how much. In all events, the need to understand bankruptcy law's customs, traditions, and history will persist.

Hon. Benjamin P. Hursh* and
M. Jonathan Hayes**



BANKRUPTCY APPELLATE PANELS: AN IDEA, EXPERIMENT AND INSTITUTION IN THE NINTH CIRCUIT, 1975–1994

I. Introduction

Bankruptcy Appellate Panels (“BAPs”)¹ are a unique appellate structure within the federal judiciary.² Initially authorized by the Bankruptcy Reform Act of 1978,³ BAPs serve as specialized-intermediate-appellate

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1. The terms “Bankruptcy Appellate Panel,” “Appellate Panel,” “Panel,” and “BAP” are used interchangeably throughout and generally refer to the same concept.

2. 28 U.S.C. § 158(b).

3. An Act to establish a uniform Law on the Subject of Bankruptcies, Pub. L. No. 95-598, 92 Stat 2549 (1978) (codified as amended at 11 U.S.C. §§ 101–1532).

bodies composed of three bankruptcy judges who review appeals from bankruptcy courts, subject to all parties' consent.⁴ While Bankruptcy Appellate Panels are present in five circuits today, this was not an inevitable outcome. Bankruptcy Appellate Panels were characterized as a "revolutionary proposal," in 1975 and enjoyed little support throughout the legislative process—only included in the Bankruptcy Reform Act of 1978 ("1978 Act") as an afterthought. Following passage of the 1978 Act, only the extraordinary efforts of the attorneys and judges of the Ninth Circuit—in particular, Chief Judge Browning—ensured the BAPs were not a minor footnote in bankruptcy history.⁵

In 1976, as Judge Browning began his tenure as Chief Judge of the Ninth Circuit, the court of appeals was "seriously understaffed."⁶ Appellate filings had steadily increased without any corresponding increase in new judges. In 1958, total court of appeals filings resulted in 55 filings per judgeship.⁷ By 1968, it was 93 filings per judgeship.⁸ And, in 1978, it was 195 filings per judgeship.⁹ In 1979, the Ninth Circuit Court of Appeals faced a backlog of 3,500 cases, and was hearing arguments in nonpriority civil appeals docketed in 1977.¹⁰ For the period from 1968 through 1977, bankruptcy filings averaged 204,000 per year.¹¹ These filings contributed to the backlog because prior to 1979, rulings of

4. 28 U.S.C. § 158(b).

5. Judge James R. Browning, from Belt, Montana sat on the Ninth Circuit Court of Appeals from 1961 until his passing in 2012. He served as Chief Judge of the circuit and a member of the Judicial Conference from 1976 to 1988. *Longtime Judge James R. Browning Dies*, UNITED STATES COURTS (May 9, 2012), <https://www.uscourts.gov/data-news/judiciary-news/2012/05/08/longtime-judge-james-r-browning-dies>.

6. James R. Browning, *Chief Judge James R. Browning Comments on What's New in the Ninth Circuit*, 5 MONT. LAW. 4, 4 (Sep. 1979).

7. REPORT TO THE FED. CTS. STUDY COMM. OF THE SUBCOMM. ON THE ROLE OF THE FED. CTS. AND THEIR RELATION TO THE STATES, pt. III, 31 (Mar. 12, 1990). This document was created as a report to the study committee for the Subcommittee on the role of the Federal Courts and their Relation to the States. The Study Committee was composed of Judge Richard A. Posner, Congressman Robert W. Kastenmeier, Chief Justice Keith A. Callow, and President Rex. E. Lee.

8. *Id.*

9. *Id.*

10. Hon. James R. Browning, *Chief Judge James R. Browning Comments on What's New in the Ninth Circuit*, 5 MONT. LAW. 4, 4 (Sep. 1979).

11. *Caseloads: Bankruptcy Cases, 1899-2017*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/work-courts/caseloads-bankruptcy-cases-1899-2017> (last accessed Jan. 26, 2026).

bankruptcy judges were appealed to the district court, and then to the court of appeals.¹² For Judge Browning, Bankruptcy Appellate Panels had the potential to “eventually save the overburdened courts of appeal from having much at all to do with this kind of litigation.”¹³

Judge Browning devoted himself to finding ways to reduce the backlog and improve the administration of the Courts.¹⁴ However, his interest and participation in the adoption and implementation of BAPs in all districts in the Ninth Circuit has received less focus than his other achievements. Appellate Panels represented a cost-effective-appellate-case-management solution. Assigning bankruptcy appeals to panels of bankruptcy judges would likely reduce the number of bankruptcy appeals considered by the district and courts of appeal. For a court of appeals suffering from a backlog of 3,500 cases, it was a welcome solution.

Despite the need for innovative solutions like this throughout the federal judiciary, with the exception of Judge Browning, few others were interested in BAPs. This article traces Appellate Panel history from its early consideration by Congress and the Ninth Circuit Judicial Council through passage of the 1978 Act, *Marathon*, and the Federal Judgeship Act of 1984.¹⁵ Throughout this period, Judge Browning’s commitment to the Appellate Panels never wavered. In 1994 Congress declared that circuit judicial councils “shall” establish BAPs, subject to two limited exceptions.¹⁶ As a result, BAPs are a feature of bankruptcy appellate practice in five circuits today.

II. The Origins of a Revolutionary Proposal, the “Appellate Panel”

It is often difficult to pinpoint with precision where and when an idea originated, particularly when it is buried in legislative proposals and counterproposals considered over the course of an eight-year

12. Louis W. Levit, *The New Bankr. Rules*, 57 MARQUETTE L. REV. 1, 20–21 (1973).

13. Letter from Chief Judge James R. Browning to Hon. William E. Foley and Hon. A. Leo Levin (Apr. 7, 1981) (on file with author).

14. Hon. James R. Browning, *Innovations of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 357, 357 (Winter 2000); Hon. Sidney R. Thomas, *Judge James R. Browning: His Legacy for Montana and the Future of the Federal Judiciary*, 76 MONT. L. REV. 207 (Summer 2015).

15. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U.S. 50 (1982).

16. 28 U.S.C. § 158(b).

legislative process.¹⁷ From 1970 to 1978, Congress grappled with how best to fundamentally rewrite existing bankruptcy law and restructure the bankruptcy courts. This legislative process was significantly influenced by the Congressional Commission established in 1970 “to study the bankruptcy laws of the United States”¹⁸ (the “Commission”) and the National Conference of Bankruptcy Judges (“NCBJ”), the proponents of two competing bills that ultimately resulted in the “composite bill” that was the 1978 Act.¹⁹

The Commission was necessary because bankruptcy filings had increased from 10,000 to over 254,000 over the prior thirty years, and legislative reform was needed to keep pace with changes in consumer and commercial credit.²⁰ The Commission produced a draft bill that proposed fundamental changes to existing bankruptcy law and the structure of bankruptcy courts (the “Commission Bill”).²¹ The NCBJ disagreed with significant portions of the Commission Bill and introduced their own bill (the “Judges’ Bill”).²² Consideration of the competing bills resulted in 35 days of hearings, over 100 witnesses, and over 2,700 pages of testimony before the House of Representatives.²³

17. Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 - Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1 (Winter 2007); Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 - Part Two: The Third Branch Reacts*, 81 AM. BANKR. L.J. 165 (Spring 2007); Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 - Part Three: On the Hill*, 81 AM. BANKR. L.J. 341 (Summer 2007); Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 - Part Four: The Separate Clerk’s Office*, 81 AM. BANKR. L.J. 515 (Fall 2007); Hon. Geraldine Mund, *Appointed or Anointed: Judges, Congress, and The Passage of the Bankruptcy Act of 1978, Part Five: Inside the White House*, 82 AM. BANKR. L.J. 175 (Winter 2008).

18. Joint Res. to create a comm’n to study the bankr. laws of the United States, Pub. L. No. 91-354, 84 Stat. 468 (1970).

19. See Hon. Joe Lee, *A Critical Comparison of the Comm’n Bill and the Judges’ Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1 (Winter 1975); Conrad K. Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141 (Spring 1978).

20. H.R. Rep. 95-595, pt. I, at 21 (1977).

21. *Id.*, pt. II.

22. *Id.*, pt. I, at 2. In the Senate, S. 235 was the Judges’ Bill and S. 236 was the Commission Bill. In the House of Representatives, H.R. 31 was the Commission Bill and H.R. 32 was the Judges’ Bill. Following the introduction of H.R. 31 and 32, the House introduced H.R. 6, which was later amended and reintroduced as H.R. 8200. The Senate’s counterpart to H.R. 8200 was S. 2266.

23. *Id.*, pt. I, at 2.

A significant point of divergence developed late in the legislative process over whether the new bankruptcy courts would be Article I or Article III courts.²⁴ This divergence has been attributed to existing Article III judges fearing that if bankruptcy judges were Article III judges, it “would have the untoward effect of diluting the prestige of the existing district court judges.”²⁵ Once this issue emerged, it cast a long shadow over other features of the competing bills because its resolution impacted other facets of the legislation, including the appellate process. As the end of the legislative process approached, S. 2266 provided that bankruptcy courts would remain “adjuncts of the district courts,” while H.R. 8200 created a separate bankruptcy court under Article III of the constitution.²⁶ Both bills proposed different appellate alternatives as well because an appeal from an adjunct of the district court was fundamentally different than an appeal from an independent court established under Article III.

Appellate Panels received little attention or support throughout this process. In the House’s final report, only three pages were directed to appellate issues, and Appellate Panels received merely cursory attention and a brief mention.²⁷ The National Bankruptcy Conference (“NBC”) voted against it.²⁸ NCBJ considered it, but never strongly lobbied for its inclusion in any bill. Harold Marsh, Chair of the Commission, characterized Appellate Panels as

24. A separate bankruptcy court independent of the district court was “universally supported,” by all those that appeared before the House and Senate. The singular source of opposition was the Judicial Conference. *Id.*, pt. I, at 18.

25. Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 Wash. and Lee L. Rev. 99, 101 (1983).

26. S. Rep. No. 95-1106, pt. II, at 4 (1978).

27. H.R. Rep. 95-595, pt. I, at 40–43.

28. According to its website:

The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation’s leading bankruptcy scholars and practitioners, who gathered informally in the 1930’s at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940’s and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978.

NAT’L BANKR. CONF., HISTORY, <http://nbconf.org/history/> (last visited Jan. 16, 2026).

"gimmicks."²⁹ Aside from one witness, a Los Angeles attorney who testified before Congress, appellate panels drew virtually no serious attention.

Francis F. Quittner had been a bankruptcy attorney in Los Angeles for nearly 50 years.³⁰ He had participated in the drafting of the Bankruptcy Act of 1938, joined the NBC in 1952, was appointed to the Bankruptcy Committee of the Ninth Circuit Judicial Conference in 1954, and was its chair from 1954 to 1964.³¹ He touted that he was responsible for approximately 17 Amendments to the Bankruptcy Act of 1938. Until 1973, he was a partner at Quittner, Stutman, Treister & Glatt.³² Quittner proved to be the Appellate Panels' biggest advocate during the legislative process.

A. The Commission's and Judges' Bills' Appellate Alternatives

Under the Commission Bill, appeal of a bankruptcy judge's decision, order, or judgment would continue to lie with the district court.³³ Opponents of this proposal generally argued that such an approach would undermine the independence of the new bankruptcy courts, provide for one trial court to review another trial court,³⁴ and compound the burdens of the district courts.³⁵ Additionally, in some instances, the district courts had no interest in serving in an appellate capacity.³⁶

The Judges' Bill directed appeal of a bankruptcy judge's decision or order to the courts of appeal.³⁷ Its proponents argued that in keeping

29. *Bankr. Act Revision: Hearing on H.R. 31 and H.R. 32 Before the H. Subcomm. on Civil and Const. Rights of the Comm. on the Judiciary*, 94th Cong. 575 (1975) [hereinafter *Hearing on H.R. 31 and H.R. 32*].

30. *Bankr. Reform Act of 1978: Hearing on S. 2266 and H.R. 8200 Before the S. Subcomm. on Improvement in Jud. Machinery of the Comm. on the Judiciary*, 95th Cong. 525–26 (1977) (statement of Francis F. Quittner) [hereinafter *Hearing on S. 2266 and H.R. 8200*].

31. *Id.* at 525.

32. *Id.* at 530.

33. *Hearing on H.R. 31 and H.R. 32*, *supra* note 29, at 518 (statement of Robert B. Morton, U.S. Bankr. Judge, D. Kan.).

34. *The Bankr. Reform Act: Hearing on S. 235 and S. 236 Before the S. Subcomm. on Improvements in the Jud. of the Comm. on the Judiciary*, 94th Cong. 55–56 (1975) [hereinafter *Hearing on S. 235 and S. 236*].

35. *Hearing on S. 2266 and H.R. 8200*, *supra* note 30, at 461.

36. *Id.*

37. *Hearing on H.R. 31 and H.R. 32*, *supra* note 29, at 518 (statement of Robert B. Morton, U.S. Bankr. Judge, D. Kan.).

with the existing structure of the federal courts, appeals from an independent trial court should proceed directly to the courts of appeal.³⁸ If the new bankruptcy court was going to be an Article III court, the court of appeals was the logical court to hear bankruptcy appeals.³⁹ Opponents of the Judges' Bill argued the courts of appeals' workload would increase 4.6% at a time when those courts were already overburdened and understaffed.⁴⁰

Finally, the costs and convenience of the parties weighed against direct appeal to the courts of appeal.⁴¹ The cost of appealing to the court of appeals would exceed the cost of appealing to a district court.⁴² District courts were typically adjacent to or near bankruptcy courts and critics argued that causing appellants to travel to the court of appeals in a distant location could not be justified.⁴³ As different proponents and opponents testified regarding the competing proposals, occasional references to an intermediate appellate alternative were made, but were never the focus.

38. Hon. Conrad J. Cyr, *Setting the Record Straight for a Comprehensive Revision of the Bankruptcy Act of 1898*, 49 Am. Bankr. L.J. 99, 125 (Spring 1975) ("We are convinced that no useful purpose would be served by having appeals from the decisions of a trial court specializing in bankruptcy jurisdiction proceed to a co-equal trial court of general jurisdiction. Not only is the district court not designed to function as an appellate tribunal, it will no longer be sufficiently involved in bankruptcy proceedings to warrant its establishment as a higher or appellate court of bankruptcy").

39. H.R. Rep. 95-595, pt. I, at 42 ("Moreover, an appeal to a district court would add nothing, because it is unlikely that the decision of a district court, at the bottom of the tier of federal courts and with limited geographical jurisdiction, will be any more authoritative or of greater precedential value than a decision of a constitutional bankruptcy court").

40. *Hearing on H.R. 31 and H.R. 32, supra* note 29, at 518 (statement of Robert B. Morton, U.S. Bankr. Judge, D. Kan.). Testimony regarding the increase in work for either the courts of Appeal or District Courts was mixed.

41. Transcript of the Thursday Session of the 1975 Conf. of the Ninth Jud. Cir., remarks of Judge Cowans, at 236 (July 24, 1975) [hereinafter Transcript of Thursday Session] (on file with author).

42. *Hearing on H.R. 31 and H.R. 32, supra* note 29, at 12 (statement of Berkely Wright, Chief, Bankr. Division, Admin. Office of U.S. Cts.) ("The cost of taking the appeal to the appellate court would necessarily be much greater (i.e., the cost of sending an attorney to a distant city to argue the case), which would have the practical effect of denying appeal in a substantial number of cases where the amount of money involved is not large").

43. *Id.*

In support of the Judges' Bill, many bankruptcy judges testified before Congress and addressed almost every facet of their bill and the Commission Bill, but little attention was given to an intermediate appellate alternative. On those occasions when a judge did make reference to an intermediate appellate option, it was in passing.⁴⁴ Further, the judges assumed that any intermediate appellate option would involve a court comprised of three bankruptcy judges, which under their bill would be Article III judges.⁴⁵ The Judges' testimony characterized an intermediate appellate court as "not . . . objectionable,"⁴⁶ and "worthy of consideration,"⁴⁷ but otherwise expressed no enthusiasm for the alternative.

While the Judges acknowledged the idea was worthy of consideration, the NBC membership unanimously voted against it. According to NBC Vice Chairman, George Treister, NBC rejected the intermediate Appellate Panel concept as an alternative to direct appeal to the court of appeals and reaffirmed its support for the Judges' Bill as drafted at their annual spring meeting.⁴⁸ He testified later before the House Subcommittee, "I personally voted to have an intermediate appellate step, but the NBC was otherwise unanimous that the appeal should go directly to the court of appeals."⁴⁹

B. A Third Alternative, the "Appellate Tribunal"

Unlike the judges or NBC, Francis F. Quittner advocated for an appellate tribunal. Quittner described the disputes over the appellate options as, "one of the major controversies existing between views of the Subcommittees on the Judiciary of both the House and Senate."⁵⁰

44. *Hearing on S. 235 and S. 236, supra* note 34, at 55, 116. Judge Cyr volunteered, "the initial position taken by the legislative committee of our conference was there be an intermediate court of appeals, comprised of sitting bankruptcy judges designated by the circuit councils on a revolving panel basis." *Id.* at 55.

45. *See* Hon. Conrad K. Cyr, *supra* note 19, at 141. This proposal assumed the bankruptcy judges would be Article III judges, and importantly he referred to it as an intermediate court, not a panel.

46. *Hearing on S. 235 and S. 236, supra* note 34, at 56.

47. Judge Robert Morton also acknowledged the Appellate Panel concept alternative in his testimony. *Hearing on H.R. 31 and H.R. 32, supra* note 29, at 518 (statement of Robert B. Morton, U.S. Bankr. Judge, D. Kan.).

48. *Id.* at 592 (Testimony of George M. Treister, Vice Chairman, the Nat'l Bankr. Conf.).

49. *Id.*

50. *Hearing on S. 2266 and H.R. 8200, supra* note 30, at 528 (supplementary statement of Francis F. Quittner).

As the legislative process was playing out in Washington D.C. in 1975, the Bankruptcy Committee⁵¹ of the Ninth Circuit Judicial Conference (the “Bankruptcy Committee”) was preparing for its Circuit Conference in San Francisco. The Bankruptcy Committee planned to introduce three resolutions for consideration by the Judges of the Ninth Circuit Judicial Conference. It reasoned that as the circuit with the most bankruptcy filings, any resolution it passed directed at a significant bankruptcy issue being considered by Congress should be entitled to some weight.⁵² One of these resolutions involved endorsing an “appellate tribunal” as an intermediate appellate alternative to the district court or court of appeals.⁵³

After being apprised of the arguments for and against the resolutions,⁵⁴ Judge Pierson M. Hall, a senior district court judge, characterized all three resolutions as “exceedingly revolutionary.”⁵⁵ After some discussion, the Judges of the Ninth Circuit Judicial Conference voted in

51. Members of the Bankruptcy Committee in 1975 included, District Judge Robert Peckham, Bankruptcy Judges Merlin S. Young and Hugh Caldwell, and attorneys, Francis F. Quittner, Hubert F. Laugharn, Daniel R. Cowans, Martin Gendel, Sharp Whitmore, Payton Smith, and Harold A. Block. University of California’s Boalt School of Law Professor William T. Laube, Jr. was also a member. See Transcript of the Thursday Session, *supra* note 41.

52. Transcript of the Thursday Session, *supra* note 41, at 224 (remarks of Chair Harold A. Block). For fiscal year 1975 there were approximately 28,000 bankruptcy filings in the Ninth Circuit. The Sixth Circuit had the second highest number of filings with approximately 20,000.

53. *Id.* at 234.

54. *Id.* at 236. The arguments for the intermediate Appellate Panels included, relatively quick, inexpensive, tribunal’s familiarity with specialized subject matter, and more uniformity in case law. Arguments opposing the intermediate Appellate Panels included, bankruptcy judges are likely to “rubber stamp” decisions by their colleagues, direct appeal to the court of appeals would be simpler, and it is a novel proposition with no precedent.

55. *Id.* at 243 (remarks of Judge Pierson M. Hall). First appointed to the bench in 1942, Judge Hall’s views were anchored in his experience. As Martin Gendel explained to those assembled in the Venetian Room, “the two new bills, both of which are intended to give a new bankruptcy structure to our legal community, may not be recognized by some of the old timers, who are still dealing with the 1898 Act, who are still thinking of Referees in Bankruptcy as high-class commissioners.” *Id.* at 239. Gendel further noted, “I w[e]ll remember the days in the Central District when he [Hall] kind of ran the Bankruptcy Court, and the appointment of the referees.” *Id.* at 239. For Judge Hall, the changes being proposed were simply too radical to permit informed discussion and consideration.

favor of adopting the resolution endorsing an intermediate appellate tribunal composed of three-judge panels of federal judges, including bankruptcy judges, selected by the Chief Judge of the Court of Appeal of the Circuit.⁵⁶ Notwithstanding its revolutionary character, the resolution was adopted.

Following the Ninth Circuit's conference, Quittner made the Ninth Circuit's resolution the centerpiece of a prepared statement and testimony he provided to Congress in 1977.⁵⁷ Quittner unequivocally endorsed the intermediate appellate tribunal as the best solution. He amplified his arguments that bankruptcy appeals would further burden the district and courts of appeal.⁵⁸ Bankruptcy appeals would face delay under this approach.⁵⁹ More so than any other witness, Quittner made the appellate tribunal and the Ninth Circuit's endorsement of the concept, the singular focus of his statement and testimony before Congress.

56. *Id.* at 247.

57. He had submitted a prepared statement initially in 1976 but did not have the opportunity to testify until 1977 at which time he submitted an additional prepared statement. *Hearing on S. 2266 and H.R. 8200, supra* note 30, at 528 (supplementary statement of Francis F. Quittner, Esq.). In his statement, he elaborates on the proposal that NBC rejected in April 1975. *The Bankr. Reform Act Revision of the Salary Fixing Procedure for Bankr. Judges Adjustment of Debts of Political Subdivisions and Public Agencies and Instrumentalities: Hearing on S.235, S.236, S.582, and on S.2597 Before S. Subcomm. on Improvement in Jud. Machinery of the Comm. on the Judiciary, 94th Cong. 1-2 (1977)* [hereinafter *Hearing on S. 235, S. 236, S. 582, and on S. 2597*]. It involved an Appellate Department of the new Bankruptcy Courts, consisting of one or more three member panels of Judges designated by the Chief Judge of the Circuit. *Id.* The Ninth Circuit resolution similarly relies on three judges to act in an appellate capacity. Given Treister and Quittners' long association, it is not surprising the proposal Treister supported but (NBC rejected), and Quittner's resolution are similar.

58. *Hearing on S. 2266 and H.R. 8200, supra* note 30, at 527 (statement of Francis F. Quittner).

59. *Id.* at 528 (Supplementary Statement of Francis F. Quittner). He emphasized that over the course of his 25 years as a member of the Ninth Circuit Jud. Circuit Conference Committee, he had come to learn that District Courts viewed review of bankruptcy court's orders and judgments with disfavor. *Hearing on S. 235, S. 236, S. 582, and on S. 2597, supra* note 57, at 2. He further opined, "Judges of the Court of Appeals are appalled at the idea that they would sit in judgment and hear almost every appeal from bankruptcy courts without an intermediate court eliminating the most substantial majority of complaints by litigants." *Id.* at 3.

C. Congress Provided Three Appellate Alternatives in the Final Bill

Despite Quittner's efforts, Congress showed little interest in an intermediate appellate tribunal or panel. Despite this lack of interest in October 1978, a series of amendments were introduced by unanimous consent and considered en bloc.⁶⁰ Under the final Congressional compromise, the new bankruptcy courts were "adjuncts of the district courts," not Article III courts.⁶¹ This conclusion influenced the appellate alternatives because the bankruptcy court was not an "independent" Article III court. To the extent any portion of the Commission or Judges' bills was dependent on an independent Article III bankruptcy court, those sections had to be revisited in the compromise.

As an "adjunct of the district court," the amendments provided that a bankruptcy appeal will be taken to the district court.⁶² It was subject to two exceptions. First, the circuit council for the circuit in which the bankruptcy court is located could order appeals to be taken to a panel of three bankruptcy judges, rather than the district courts.⁶³ Second, parties could stipulate to appeal directly to the court of appeals.⁶⁴

Years later, in a hearing to further consider the "new Bankruptcy Code,"⁶⁵ a prepared statement by Richard Levin explained how Congress addressed the competing appellate alternatives. "The sections governing appeals from the decisions of the bankruptcy court were hastily thrown together as a last minute compromise in the closing days of the 95th Congress."⁶⁶ It went on to explain the appellate sections are not entirely consistent and do not provide a coherent appellate structure."⁶⁷ In essence, Congress devoted little attention to

60. 124 CONG. REC. 33989-90 (1978).

61. *Id.* at 33990.

62. *Id.* at 34010.

63. *Id.* at 34010.

64. *Id.*

65. *Bankr. Reform Act of 1978: Hearings before the S. Subcomm. on Cts. of the Comm. on the Judiciary*, 97th Cong. 2-3 (1981).

66. *Id.* at 312 (Statement of Richard Levin). Levin was a familiar face to many Congressmen because he served during the 94th and 95th Congresses as counsel to the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee, and was responsible for the researching, drafting, and other staff tasks relating to Public Law 95-598, the Bankruptcy Reform Act of 1978. He was an attorney at Stutman, Treister & Glatt at the time of his testimony.

67. *Id.*

thinking through either the substantive or practical issues that would flow from this appellate scheme.

One month after the amendments were introduced, on November 6, 1978, President Jimmy Carter signed the 1978 Act.⁶⁸ The new law had an effective date of October 1, 1979.⁶⁹ In a legislative process that spanned eight years and resulted in a composite bill, it is difficult to attribute credit for a particular provision in the final legislation to any single individual. NCBJ considered a three-judge intermediate appellate court, but not seriously. Treister and likely others at NBC also entertained the concept, but Treister was the only one to vote for it, so it was not pursued. Conversely, the Ninth Circuit's resolution, combined with Quittner's advocacy ensured a novel idea that was dismissed as gimmick and characterized as "revolutionary," found its way into the 1978 Act.

III. Judge Browning's Experiment

With the passage of time and the existence of BAPs in five circuits today, it is easy to forget that following passage of the 1978 Act, Judge Browning's interest in a BAP made him an anomaly amongst his peers. With the exception of a brief test in the First Circuit, no one in the judiciary wanted to experiment with an intermediate Appellate Panel where trial court judges served as appellate judges.⁷⁰ Not afraid to swim against the current if it proved beneficial to overall court administration, Judge Browning wasted no time appointing a panel to implement the experiment.⁷¹

Judge Browning appointed a Committee on Bankruptcy Panels ("Panels Committee") just three months after President Carter signed the bill.⁷² Each member of the Panels Committee received a letter from Judge Browning that outlined his own thoughts regarding

68. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat 2549 (codified as amended at 11 U.S.C. §§101–1532).

69. *Id.*

70. REPORT TO THE FED. CTS. STUDY COMM., *supra* note 7, at pt. III, 356–59.

71. Judge Browning and others explicitly referred to these efforts as an experiment. *See* PRELIMINARY REPORT OF BANKR. APPEALS SUBCOMM. (Mar. 17, 1979) (on file with author); Letter from Judge James R. Browning to Judge William E. Foley and Judge A. Leo Levin (Apr. 7, 1981) (on file with author).

72. Letter from Richard Wieking to Judge Ferguson on the Comm. on Bankr. App. Panels (Mar. 7, 1980) (on file with author). Judge Browning tasked Circuit Judge Shirley Hufstedler with chairing the Panels Committee. Chief District Judge Robert Peckham, Bankruptcy Judge Lloyd George, and attorney

planning for the Panels.⁷³ Judge Browning likely could not have selected a more industrious group. Importantly, the Panels Committee was not directed to study whether or not to implement Appellate Panels, like in some circuits.⁷⁴ Instead, the Panels Committee was charged with implementing the Panels as soon as possible.⁷⁵

From March 1979, through August of that year, the Panels Committee worked tirelessly considering the range of issues necessary to implement the experiment. The experiment was “more than just individuals who are assigned to cases.”⁷⁶ The Panels Committee considered costs, space, personnel, the scope of the experiment, how judges would be selected, and funding.⁷⁷ The Panel Committee utilized the circuit’s resources, including its personnel.⁷⁸ Along with assisting the Panel Committee, these personnel regularly provided Judge Browning updates on the Panel Committee’s progress.⁷⁹

Judge Browning met with the Panel Committee just five months after its initial meeting and announced that he had selected the first five judges for service on the Panels.⁸⁰ He specifically designated

Treister rounded out the group. Preliminary Report of Bankr. Appeals Subcomm. (Mar. 17, 1979) (on file with author).

73. *Id.* Unfortunately, this letter may have been lost to history. Although it is referred to in a later memorandum as included with the memorandum, only the memorandum was recovered. Letter from Richard Wieking to Judge Ferguson, *supra* note 72.

74. Interview by Judge Newsome with Judge Hughes, at 116 (Jan. 20, 1996) (on file with author).

75. *Id.*

76. *Id.* at 111.

77. Memorandum from Judge Hufstedler to Judge Browning on Bankr. Appeals Project (Aug. 22, 1979) (on file with author).

78. Memorandum from Richard Wieking to Judge Browning on Bankr. App. Panels (May 2, 1979) (on file with author). Early on Judge Browning directed Richard Wieking and Richard Deane to call Judge Hufstedler and offer their assistance. At the time Wieking was Assistant Circuit Executive for Human Resources at the Office of the Circuit Executive for the Ninth Circuit and Deane was Clerk of Court for the Ninth Circuit Court of Appeals.

79. *Id.*

80. Minutes of the Meeting of the Comm. on Bankr. App. Panels (Aug. 27, 1979) (“Bankr. Comm. Minutes”) (on file with author). The judges selected included: Robert Hughes, N.D. Cal.; William Lasarow, C.D. Cal.; Herbert Katz, S.D. Cal.; Lloyd George, D. Nev.; and Edward Davis, D. Ariz. In part the judges were selected, “to preserve an appropriate geographical breadth of the panel members, both multi-district and multi-state.” Judge Hughes was chosen as the Administrative Judge based on seniority. Letter from Judge Hufstedler to

Judge Hughes as the “administrative judge,” but the precise scope of this role was not well defined.⁸¹ Along with this announcement, the Panels Committee and Judge Browning agreed the experiment should be limited to Arizona and Central California.⁸² Limiting the experiment to two districts would make it more manageable in the early phase. At this stage of the planning process, the Panels Committee was cognizant that, if at year end, the experiment “has got too many difficulties in it,” efforts would not continue.⁸³

Another immediate issue was the need for new rules of appellate procedure for the experimental Panel. New interim appellate rules being considered nationally did not contemplate an experimental Panel.⁸⁴ The Panel Committee was fortunate because Treister had served on the Advisory Committee on Bankruptcy Rules, which had completed new Bankruptcy Rules of Procedure in 1973.⁸⁵ He was familiar with the interim appellate rules and agreed to tailor existing rules to meet the needs of the Panels.⁸⁶

Early on, the Panels Committee and Judge Browning indicated the Appellate Panel’s Clerk’s office should be identified as an adjunct of the court of appeals, not the district court.⁸⁷ This recognition demanded the new bankruptcy Appellate Panel’s clerk’s office maintain a separate identity from the trial court and its clerk’s office,

Associates on Report of Bankr. Appeals Subcomm. (Aug. 29, 1979) (on file with author).

81. *Id.* Judge Hughes later speculated that Judge Browning’s use of “administrative judge” rather than chief judge reflected Judge Browning’s own effort to soft pedal the experiment at this stage because it was not popular in the judiciary. He further described the role of Administrative Judge as:

Basically, I was responsible to make sure that the whole apparatus functioned, but somebody had to push things along, to call meetings, and set up an agenda, and chart the progress that needed to be made. Basically, that was my role in the early days, and then later on it was my job to hound the judges just as it was my job to hound the trustees to get their work in.

Interview with Judge Hughes, *supra* note 74, at 117–18.

82. *Id.* The Central District of California and Arizona were chosen because of their “geographical closeness,” and each had a high volume of filings. Memorandum from Judge Hufstedler to Judge Browning on Bankr. Appeals Project, at 2 (August 22, 1979) (on file with author).

83. Bankr. Comm. Minutes, *supra* note 80, at 3.

84. *Id.*

85. *Id.*

86. *Id.*

87. Letter from Judge Shirley M. Hufstedler to Judge Robert F. Peckham on Bankr. Appeals Project (Aug. 29, 1979) (on file with author).

despite both being located in Los Angeles.⁸⁸ Finally, despite the significant work to be completed in the next 90 days, Judge Browning and the Panels Committee agreed that “the experiment will go forward as rapidly as possible, and it is the hope that by December 1, 1979, we shall have a functioning appellate project in two selected districts.”⁸⁹

On September 14, 1979, the Ninth Circuit Judicial Council passed a resolution authorizing Bankruptcy Appellate Panels in two districts, Arizona and Central California, for one year. Over the next ten weeks, the Panels Committee and the five new judges worked feverishly to ensure the December 1, 1979, goal was realized. A draft of the proposed Appellate Panel rules was completed.⁹⁰ Approximately 500–600 square feet in the Los Angeles Federal Building was identified for a clerk’s office.⁹¹ General orders outlining internal operating procedures and interim rules of appellate procedure regarding the Appellate Panels were completed.⁹²

As December 1, 1979, approached, the substantive work required to set up an intermediate Appellate Panel experiment had been completed. Twenty-four hours before the Appellate Panel went into effect in Arizona and the Central District of California, a mix of Panel judges, circuit personnel, and others met again.⁹³ While details related to personnel, funding, and equipment would require ongoing attention, Judge Hughes reported that Judge Browning was pleased operations would begin on December 1, 1979.⁹⁴

IV. Testing the Experiment, 1980–1982

If the Appellate Panels were an experiment, Judge Browning’s overarching hypothesis was that Appellate Panels would reduce bankruptcy appellate work for the district and court of appeals. The Appellate Panels were also expected to render decisions more quickly than a district court.⁹⁵ Initially, the experiment was approved for one year.

88. *Id.*

89. *Id.*

90. Minutes of the Meeting of Ninth Cir. Bankr. App. Panel Judges (Oct. 31, 1979) (on file with author).

91. *Id.* A clerk for the new appellate court was hired, David McNary.

92. *Id.*

93. Minutes of the Meeting of Ninth Cir. Bankr. App. Panel Judges (Nov. 30, 1979) (on file with author).

94. *Id.*

95. *Markup Session, Before the H.R. 8200 H. Comm. on the Jud.*, 95th Cong. (July 14, 1977). The district court’s indifference to bankruptcy appeals was well

However, to test the hypothesis, the sample size had to be larger. At the end of both 1980 and 1981, the Appellate Panel experiment was renewed for another year.⁹⁶

From the start, there were signs that the new Panel judges were having difficulty adjusting to their role as “appellate judges.” In an early decision involving the first appeal filed with the Appellate Panel, the BAP acknowledged it erred. The decision explains:

Having reexamined the record and reviewed applicable law, we conclude that by granting the second stay the panel departed from fundamental principles of appellate review and unnecessarily assumed responsibilities that ordinarily are reserved to the trial court.⁹⁷

For a new experiment, this initial effort was not the result anyone had wanted. Having to acknowledge a panel of judges charged with acting as appellate judges had acted as trial judges was likely uncomfortable for the Panel.⁹⁸

The Panel’s later decision on the merits did not fare much better.⁹⁹ It issued a split decision. The dissent begins, “[m]y principal quarrel with the majority opinion concerns what I perceive to be its futility In failing to decide the dischargeability question, it has decided nothing.”¹⁰⁰ While split panels are bound to occur, the opening remarks in the dissent declared the effort a failure, a “futility.” Collectively, both decisions

documented for Congress. In a “Markup Session” considering a draft of H.R. 8200, Congressman Cohen expressed a reluctance to characterize bankruptcy cases (and therefore appeals) as suffering from “benign neglect,” and suggested, “Would it not be more appropriate to suggest in our report that rather due to the complexity of the bankruptcy issues, the fact that the courts have been inundated with very complex antitrust litigation, very complex criminal cases now flooding the federal court of system that this really accounts for the inability the courts to handle the type of cases in bankruptcy” *Id.* at 34–35.

96. Memorandum from Judge Ferguson to Chief Judge Browning on Bankr. App. Panels (Sep. 30, 1981) with Resol. to Continue and Expand the Bankr. Appeals Panels (Oct. 17, 1980) (on file with author).

97. *In re Wymer*, 5 B.R. 802, 803 (B.A.P. 9th Cir. 1980).

98. The difficult start was likely compounded by Judge George’s concurrence to this decision which began, “I cannot bring myself to join in the reasoning of the instant order. I feel that it adopts an unwarranted, unjust, and dangerously inflexible procedural approach not intended by any of the federal rules cited by the majority.” *Id.* at 808 (George, J., concurring).

99. *Wymer v. Wymer*, 16 B.R. 497 (B.A.P. 9th Cir. 1980).

100. *Id.* at 507 (Hughes, J., dissenting).

reflect three judges taking on a completely new role, "appellate judge," and the challenges that accompanied it.

Many years later, Judge Hughes acknowledged the difficulty of being a trial judge one day and an appellate judge the next. He explained, "we had to remind ourselves every once in a while when we were getting into problems in deciding cases that we weren't trial judges in that sense . . . there wasn't one of the original five that didn't fall into the trap trying to second guess the trial judge."¹⁰¹ Each of the original five, "eventually realized that we got to take a different attitude altogether, and it's not one that is very natural for a trial judge."¹⁰²

As the five judges embraced this new role, Treister proved to be invaluable. According to Hughes, "[h]e knew procedure . . . He knew content . . . He knew substance. . . . He knew just everything."¹⁰³ He encouraged the judges to write out their decisions because, "sometimes these solutions that you think you have[,] don't write . . . they just don't write."¹⁰⁴ Treister would continue to advise the judges, formally as a Panel Committee member, and informally for years to come.

Statistics through September 1981 provided a larger sample and underscored Judge Browning's confidence in the experiment. The Appellate Panels were effectively reducing the number of appeals the court of appeals received from bankruptcy courts. For the 18-month period, July 1, 1980, through September 30, 1981, there were 252 appeals to Ninth Circuit district courts in non-Panel districts.¹⁰⁵ Of the 252-district court appellate decisions, 83 were appealed to the Ninth Circuit Court of Appeals, approximately 33%.¹⁰⁶ In stark contrast, in the Panel districts, 215 appeals were filed and only 9 Appellate Panel decisions were appealed to the Ninth Circuit Court of Appeals, approximately 4%. According to the statistics the experiment was a success.¹⁰⁷ With statistics like this, the Judicial Council readily adopted a resolution extending the life of the Panels through November 30, 1982.¹⁰⁸

101. Interview with Judge Hughes, *supra* note 74, at 113–14.

102. *Id.* at 112.

103. *Id.* at 111.

104. *Id.* at 112.

105. Letter from Judge James R. Browning to Judge Herbert Katz on Bankr. Appeals (Dec. 21, 1981) (on file with author); Letter from Judge Herbert Katz to Judge James R. Browning (Dec. 17, 1981) (on file with author).

106. Letter from Judge Katz to Judge Browning, *supra* note 105.

107. *Id.*

108. Resol. to Continue and Expand the Bankr. Appeals Panels, *supra* note 96.

While the statistics showed the Panels had effectively reduced the number of bankruptcy appeals reaching the court of appeals, there were other “major problems” confronting the BAP, that risked undermining the experiment.¹⁰⁹ In a memorandum Judge Browning received in early 1982, the problems included delay in decision making, a decline in the quality of the work, and frayed interpersonal relationships.¹¹⁰ Internal protocols needed improvement.¹¹¹ In essence, five trial judges accustomed to working independently were now tasked with acting collectively in an appellate capacity as a “panel,” with no clear chief and an “administrative judge” whose powers were not well-defined.¹¹²

Judge Browning considered a series of recommendations and approved each one.¹¹³ The Judicial Council would consider a new order that clarified the role of the “presiding” judge on the Panels.¹¹⁴ The Circuit Clerk of Court and Staff Attorneys’ Office would lend greater support to the fledgling Appellate Panels, assess present procedures, and assist with developing good internal protocols for the Panel Clerk’s office and judges.¹¹⁵ Additional staff and technology were important to meeting the increasing demands of the work and, subject to funding, would be pursued.¹¹⁶ Finally, a retreat at which other appellate judges would talk with the Panel judges would be organized.¹¹⁷

Recognizing that statistics alone did not tell the whole story, a survey for evaluating the Panels was developed.¹¹⁸ Working with the Panel Committee and Appellate Panel Judges, the Circuit Executive’s office authored and circulated a survey to members of the bar, bankruptcy judges, district court judges, and court of appeals judges.¹¹⁹ The results were unanimous, the Panels should continue and should be

109. Judge Hughes outlined these problems for Circuit Executive William E. Davis on March 22, 1982, and prepared a memorandum for Judge Browning, followed by his observations and recommendations. Memorandum from William E. Davis to Judge Browning (Mar. 31, 1982) (on file with author).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Memorandum from William E. Davis to Jud. Couns. (Apr. 16, 1982) (on file with author).

119. Memorandum from William E. Davis to Jud. Council on Evaluation of Bankr. App. Panels – Summary of Results (July 20, 1982) (on file with author).

expanded.¹²⁰ However, the survey results also highlighted where additional improvement was needed.

Attorneys recommended more judges be recruited for the Appellate Panels, decisions be issued more quickly, and better training of the Panel judges in appellate procedure and the scope of appellate review.¹²¹ District court judge responses reflected the view that “BAP judges have more familiarity with bankruptcy law and are therefore the most efficient means of handling bankruptcy appeals.”¹²² Additionally, themes in the court of appeals judge responses included the need for quicker decisions, closer adherence to circuit precedent, and “several judges noted the Ninth Circuit, not the BAP was responsible for establishing uniform bankruptcy law.”¹²³

As 1982 ended, the consensus throughout the Ninth Circuit was that the Appellate Panels had “save[d] the overburdened courts of appeal from having much at all to do with this kind of litigation.”¹²⁴ At the end of 1982, the Judicial Council of the Ninth Circuit expanded the Bankruptcy Appellate Panels to all districts within the circuit for an indefinite period of time.¹²⁵ Two new judges were appointed to the Panel.¹²⁶ Panels were now a permanent feature of the bankruptcy appellate process in the Ninth Circuit. However, their permanence and

120. *Id.* at 6. Approximately 100 attorneys completed the survey. *Id.* at 2. Half of the responding attorneys spent more than 50% of their time practicing bankruptcy law. *Id.* 88% voted in favor continuing the Panels and 85% voted for expanding the BAP to other districts. *Id.* at 4. Bankruptcy judges returned 38 of 48 circulated surveys. *Id.* Seventy nine percent and 84% were in favor of continuing and expanding the Panels, respectively. *Id.* at 6. Forty four out of 100 district court judges responded. *Id.* Seventeen circuit judges completed the survey. *Id.* at 7. Thirteen did not. *Id.* The reported survey results do not have the same specificity for district and circuit judge results. Instead, the report simply indicates the judges in both groups recommend continuation and expansion. *Id.* at 7–8.

121. *Id.* at 4.

122. *Id.* at 7.

123. *Id.* at 8.

124. Letter from Judge James R. Browning to Judges William E. Foley and A. Leo Levin, at 1 (Apr. 7, 1981) (on file with the author).

125. Order adopting the Charter of Bankr. App. Panels for the Ninth Cir. (Nov. 30, 1982) (on file with the author).

126. The new judges appointed to the BAP in December 1982 were Seymour J. Abrahams and Calvin K. Ashland. Prior to their appointment, Judges Davis and Lasarow had left the BAP, and were replaced by Sidney C. Volinn and Peter M. Elliott. Rob Leung. Ninth Circuit Bankruptcy Appellate Panel Listing Table (on file with the author).

endurance remained subject to a new legislative effort that commenced in July 1982, following the U.S. Supreme Court's decision in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("*Marathon*").

V. *Marathon* Threatens the Ninth Circuit's New Intermediate Appellate Panel, 1983–1984

The U.S. Supreme Court's decision in *Marathon* threatened the Ninth Circuit's implementation of Appellate Panels. In its simplest sense, the Supreme Court held that the broad jurisdiction granted to bankruptcy courts under the 1978 Act violated Article III of the constitution.¹²⁷ If the jurisdiction enjoyed by bankruptcy courts violated the Constitution, the authority of a bankruptcy judge to act in an appellate capacity on a panel was also in jeopardy. Recognizing the dramatic impact its ruling would have, the Supreme Court stayed its decision to afford Congress time to act.¹²⁸

When Congress was slow to act, the Judicial Conference directed the Administrative Office to provide each circuit with a proposed rule that would, "permit the bankruptcy system to continue without disruption in reliance on jurisdictional grants remaining in the law," subject to *Marathon*'s limitations.¹²⁹ The Judicial Council of the Ninth Circuit seized upon this life-line, and tailored it to fit the Appellate Panels. It entered an order directing the appellate panels to hear all appeals in which the order or judgment to be reviewed was entered before entry of a final judgment in *Marathon*.¹³⁰ This preserved the Appellate Panels, but it was not a permanent solution to the problems posed by *Marathon*.

In response to *Marathon*, Congress revisited the 1978 Act from July 1982 through July 1984, and proponents and opponents of the Commission and Judges' Bills had an opportunity to recast anew the same arguments that animated the prior legislative debates that produced the 1978 Act. By necessity, Congress was obliged to consider again whether bankruptcy courts should be Article I or Article III courts and the limits of bankruptcy court jurisdiction. Like the prior legislative effort, Appellate Panels were not the principal concern of legislators,

127. For a thorough discussion of *Marathon*, see King, *supra* note 25.

128. Vern Countryman, *Scrambling to Define Bankr. Juris.: The Chief Justice, the Judicial Conf., and the Legis. Process*, 22 HARV. J. ON LEGIS. 1, 18 (Winter 1985).

129. *Id.* at 19 (quoting JUD. CONF. OF THE U.S., REPORT OF PROCEEDINGS 91 (Sept. 1982)).

130. *Order Establishing Appellate Review Procedures in Bankruptcy Cases*, JUDICIAL COUNCIL OF THE NINTH CIR. (Dec. 28, 1982) (on file with author).

so retaining Appellate Panels afforded little attention in the legislative process, with some notable exceptions.

The Ninth Circuit's completion of its survey assessing the Panels in late June 1982 was fortuitous because it permitted witnesses from the Ninth Circuit to emphasize the survey's results, even though Congress was less concerned with Appellate Panels and more concerned with finding a solution to *Marathon*. In essence, the survey reflected a broad referendum from the Ninth Circuit in favor of Appellate Panels.¹³¹ In Judge George's testimony, he highlighted the survey results.¹³² Judge George also emphasized the Panels were of "great importance" to Judge Browning, and attributed other statements to Judge Browning, such as, "it would be a grave mistake to overlook the potential of the Appellate Panels in the handling of bankruptcy appeals."¹³³ Not only did Judge George testify as a Ninth Circuit Appellate Panel judge, he was also acting as Judge Browning's emissary.

Later in this same round of hearings, the NBC, which "unanimously voted against Panels"¹³⁴ in 1975, now expressed its support for the Panels with a slight variation, "NBC recommends that the panel system be continued in effect under a reconstituted Article III bankruptcy system."¹³⁵ Treister testified on behalf of NBC and specifically referenced the Ninth Circuit's experience with the Panels.¹³⁶ Levin also testified and submitted a prepared statement.¹³⁷ His statements not only endorsed the Panel concept, but favored its expansion nationwide and the elimination of the parties' ability to appeal to the district court.¹³⁸ Finally, he recommended that the "panel system be modified to make it a true court."¹³⁹

These early efforts proved fruitful because Appellate Panels were included in a bill introduced a month later in August.¹⁴⁰ However, as the

131. See Memorandum from William E. Davis to Jud. Council, *supra* note 119, at 8.

132. N. Pipeline Bankr. Decision: Hearings Before the S. Comm. on the Judiciary, 97th Cong. 9 (1982) [hereinafter N. Pipeline Hearings].

133. *Id.* at 9–10.

134. Hearing on H.R. 31 and H.R. 32, *supra* note 29, at 592.

135. Bankr. Ct. Act of 1982: Hearings on H.R. 6109 Before the H. Subcomm. on Monopolies and Comm. Law of the Comm. of the Judiciary, 97th Cong. 67 (1982).

136. *Id.* at 67.

137. N. Pipeline Hearings, *supra* note 132, at 338 (statement of Richard Levin).

138. *Id.*

139. *Id.* at 339.

140. Memorandum from Judge Lloyd D. George to Judge James R. Browning on an Excerpt of Cong. Rec. (Aug. 24, 1982) (on file with author)

legislative process continued through 1983, the prospect of a bill that retained the Appellate Panel option waxed and waned. Throughout this period, Judge Browning and others kept a watchful eye on the process and testified when afforded the opportunity. Additionally, they sought to educate legislators. Judge Browning's files included correspondence with legislators. In April 1983, a letter from Judge Browning to Senator Howard Heflin was included in the Congressional Record.¹⁴¹

The April 1983 letter explained, "from 1979 to 1982, bankruptcy appeals filed in the United States courts of appeal nationwide rose by 21 percent, while during the same period bankruptcy appeals in the Ninth Circuit fell by 12 percent."¹⁴² Judge Browning was packing the record with results from the Ninth Circuit's experience. It included the survey, which arguably reflected the subjective preferences of judges and attorneys. It also included statistics demonstrating utilization of bankruptcy judges in an appellate capacity reduced work for district and court of appeals judges. It included the testimony of witnesses, like Judge George, and others.

As the legislative process continued through 1983 and into 1984, Ninth Circuit staff attorney Thomas Carlson¹⁴³ was increasingly crucial to Judge Browning's lobbying efforts. From June 1983 through passage of the final bill, Carlson authored a series of memorandums to Browning that provided detailed updates on bills and his efforts. He advised,

[T]he bill is better than the Senate version. It does however eliminate the BAP's. Dave Beier, Kastenmeier's staff attorney on this bill told me that this was done at the insistence of someone on Trent Lott's staff. Apparently Lott himself has

(containing an excerpt of the Congressional Record reflecting introduction of the bills into the house).

141. Memorandum from Bob Lohn to Judge Browning on Floor Proceedings on S. 1013 (May 6, 1983) (on file with author). Senator Strom Thurmond's introduction of an amendment that would maintain rather than eliminate a circuit's ability to in its discretion create Appellate Panels.

142. *Id.*

143. From 1977–78 Carlson was Staff Attorney, then Assistant Director of Staff Attorneys, Ninth Circuit, 1978–84. In 1985 Carlson was appointed serve as Bankruptcy Judge Northern District of California. His publications include: *Are the Jurisdictional Provisions of the Bankruptcy Amendments of 1984 Constitutional?*, 9 NORTON BANKR. L. ADVISER 1 (Sept. 1984); *Distinguishing Core from Noncore Proceedings*, 1 NORTON BANKR. L. ADVISER 2 (Jan. 1985); *The Case for Bankruptcy Appellate Panels*, 1990 B.Y.U. L. REV. 545 (1990).

no strong opposition to the BAP's Kastenmeier would be willing to try to have the BAP's put back in when the bill comes to the floor, at which time the power of Lott's staff will be diminished.¹⁴⁴

In memorandum after memorandum from June 1983 to June 1984, Carlson provided Judge Browning updates on the competing bills.

Along with providing updates to Judge Browning, Carlson began drafting memorandums analyzing pending legislation. In some cases, these memorandums were provided to third parties.¹⁴⁵ In one memorandum, Judge Browning shared with Congresswoman Sala Burton,¹⁴⁶ Carlson described the competing options as appointment of bankruptcy judges under Article III of the Constitution or adoption of legislation like the Emergency Rule that provides for "closer district court control and review over bankruptcy judges' actions."¹⁴⁷ This memorandum expressed support for the Kindness Kastenmeier bill, even though the bill did not include Panels at that time.¹⁴⁸ Carlson and Judge Browning were relying on the assurance they received in June that the BAP would be "put back in when the bill reached the floor."¹⁴⁹

Carlson and Judge Browning proved to be astute political actors. Over the preceding months, Carlson and Judge Browning had established lines of communication with a broad cross-section of individuals involved in the legislative process affording them an opportunity to lobby for the Appellate Panels not in one bill, but in as many as possible.¹⁵⁰ In addition to maintaining contact with Congressman Kastenmeier's office, Carlson also communicated with Congressman Barney Frank.¹⁵¹ Carlson advised Browning, as H.R. 3 does retain the BAP, "I will let Barney Frank know that we will not need to have him

144. Memorandum from Tom Carlson to Judge Browning on Bankr. Legis. (June 14, 1983) (on file with author).

145. Memorandum from Judge James R. Browning to Rep. Sala Burton (Dec. 29, 1983) (on file with author).

146. *Id.*

147. *Id.* This alternative was sponsored by Congressmen Kindness and Kastenmeier, H.R. 3257.

148. *Id.*

149. Memorandum from Tom Carlson to Judge Browning, *supra* note 144.

150. Memorandum from Tom Carlson to Judge Browning on Bankr. Legis., Etc. (Jan. 26, 1984) (on file with author).

151. Memorandum from Tom Carlson to Judge Browning on Bankr. App. Panels (Feb. 24, 1984) (on file with author).

introduce an amendment.”¹⁵² Through these efforts, the odds BAPs were included in the new legislation increased.

Ultimately, on June 29, 1984, Congress passed H.R. 5174.¹⁵³ The Appellate Panel alternative remained an option under the new bill, with one caveat. According to the new legislation,

The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

28 U.S.C. § 158(b)(1). An appeal to a bankruptcy Appellate Panel was conditioned on “consent of all the parties.” Almost exactly nine years after the Ninth Circuit Judicial Council endorsed the use of Appellate Panels, President Ronald Reagan signed the bill on July 10, 1984, which once again codified the revolutionary proposal.¹⁵⁴

VI. *Post-Marathon*, defining Consent by rule and the Federal Courts Study Committee’s interest in the Ninth Circuit Appellate Panel

Congress’s inclusion of “consent of the parties,” required further action by Judge Browning and Carlson in the years that followed, when the Bankruptcy Rules Committee considered a rule that would require parties to “opt in” as a condition of the appeal being heard by the panel. Absent, “opt in” by both parties, the appeals would go to the district court. In the Ninth Circuit, an “opt-out” rule was in place. Bankruptcy appeals went to the Appellate Panel, unless a party opted out. If a party opted out, the appeal was heard by the district court.

A hearing in 1986 proved once again that Carlson, Browning, and others in the Ninth Circuit were committed to ensuring the success of their Appellate Panels was not imperiled by an opt in rule. The outline of testimony Carlson prepared for Browning emphasized the benefits of Appellate Panels, and an “opt-in rule would frustrate the experiment

152. *Id.*

153. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (codified at 11 U.S.C. § 101 *et seq.*) [hereinafter Bankruptcy Amendments and Federal Judgeship Act of 1984].

154. *Id.*

Congress intended.”¹⁵⁵ According to their statistics, an opt-in rule would reduce the number of appeals heard by the Appellate Panel to 10%.¹⁵⁶ They emphasized Congress empowered circuits to establish BAPs, so the manner of consent should also be left to the circuit.¹⁵⁷ Finally, they noted affirmative action is necessary to preserve other procedural rights, like a jury trial, so requiring affirmative action here was not without precedent.¹⁵⁸

In May of 1986, Judge Browning was informed that any new rule would allow the individual circuits to determine the method of “consenting to an appeal before the BAP.”¹⁵⁹ In the intervening time between May and September, the draft Committee Note to the new rule included the following:

This rule requires that the parties file an express consent to such an appeal with the clerk; however, the method of consenting to an appeal may be the subject of a rule promulgated by a circuit council under Rule 8018.¹⁶⁰

In a self-deprecating letter to the Advisory Committee on Bankruptcy Rules, its chair explained that he had received a call from Judge Browning explaining the last sentence of the Committee Note would invite confusion, and although “autocratic,” he and Judge Browning had decided to revise it as follows, “absent strenuous, serious, deep-seated conscientious objection”:

This rule requires that the parties ~~file an express~~ consent to such an appeal ~~with the clerk~~; however, the method of

155. Memorandum from Thomas E. Carlson to Chief Judge Browning on Outline of Testimony on the BAP Opt-In Rule (Feb. 6, 1986) (on file with author). Carlson was no longer a staff attorney. He was Judge Carlson, U.S. Bankruptcy Court, Northern District of California. Along with outlining Judge Browning’s testimony, Carlson’s memorandum outlined his testimony and the testimony of another witness. In addition, judges from all over the Ninth Circuit wrote letters to the Bankruptcy Rules Committee expressing their view that an opt in rule would not further the goals of the Appellate Panel experiment.

156. *Id.*

157. *Id.*

158. *Id.*

159. Letter from Judge Loyd D. George to Chief Judge James R. Browning (May 29, 1986) (on file with author).

160. Memorandum from Hon. Morey L. Sear, Chairman, to the Advisory Comm. on Bankr. Rules (Sep. 11, 1986).

consenting to an appeal may be the subject of a rule promulgated by a circuit council under Rule 8018.¹⁶¹

Appellate Panels had been included in two rounds of legislation in 1978, and 1984. Now, in 1986, circuits could determine the manner of consent required for Appellate Panel review. Judge Browning had prevailed once again.

In the years that followed, statistics continued to justify BAPs in the Ninth Circuit. In 1987 the BAP disposed of 902 appeals.¹⁶² In 1988 it disposed of 664.¹⁶³ By 1988, almost two-thirds of bankruptcy appeals were decided by the BAP in the Ninth Circuit.¹⁶⁴ According to a Federal Judicial Center Study, district court bankruptcy appellate decisions were three times as likely to be appealed to the circuit court than BAP decisions.¹⁶⁵ With consistent statistics like these, the Federal Courts Study Committee recommended Congress amend 28 U.S.C. § 158 to require each circuit to establish BAPs.¹⁶⁶

Congress adopted this recommendation in 1994 when it passed the Bankruptcy Reform Act of 1994 ("1994 Reform Act"). Under the 1994 Reform Act, circuit judicial councils "shall" establish BAPs composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council, subject to two exceptions.¹⁶⁷ First, if there are insufficient judicial resources in the circuit compliance with the mandate is excused.¹⁶⁸ Second, if establishing a bankruptcy appellate would result in undue delay or increased cost to parties in bankruptcy cases, compliance is not required.¹⁶⁹

In 1996, Appellate Panels were instituted in the First, Second, Sixth, Eighth and Tenth circuits. Notably, six of the eleven circuits operate without an Appellate Panel today. Despite the statistics and Congress's mandate, these circuit judicial councils remain unconvinced that Appellate Panels have benefits that outweigh costs and other considerations. This dichotomy between circuits with appellate panels and those without demonstrates the Appellate Panel

161. *Id.*

162. REPORT TO THE FED. CTS. STUDY COMM., *supra* note 7, pt. III, 360.

163. *Id.*

164. *Id.* at 360–61.

165. *Id.* at 361.

166. *Id.* at 369.

167. 28 U.S.C. § 158(b)(1).

168. 28 U.S.C. § 158(b)(1)(A).

169. 28 U.S.C. § 158(b)(1)(B).

experiment has produced a combination of critics¹⁷⁰ and champions,¹⁷¹ suggesting the results remain inconclusive, and additional experimentation is necessary.

VII. Conclusion

As Judge Browning's experiment continues to prove and disprove hypotheses today, it is important to remember that the introduction of this intermediate appellate option was neither inevitable nor a for-gone conclusion when Congress began initiating bankruptcy reform in 1970. The precise origins of the Appellate Panel concept are difficult to identify with certainty, but there is no doubt the Bankruptcy Committee of the Ninth Circuit Judicial Council's passage of its resolution endorsing Appellate Panels signaled to Congress it was an important appellate alternative favored by judges and attorneys in the Ninth Circuit. Its inclusion in the 1978 Act was a small victory for Quittner, the Bankruptcy Committee, and the Ninth Circuit.

From 1979–82, Judge Browning, the Panels Committee, the Panel Judges, and Treister made the experiment's success a priority and demonstrated that Appellate Panels were an effective means of managing bankruptcy appeals and reducing the burden on district courts and courts of appeal. Post-*Marathon*, Judge Browning did not wait for Congress to act. Instead, he actively educated and lobbied, for his preferred outcome. His efforts proved successful when BAPs were

170. See, e.g., Paul M. Baisier & David G. Epstein, *Resolving Still Unresolved Issues of Bankruptcy Law: A Fence or an Ambulance*, 69 AM. BANKR. L.J. 525 (Fall 1995). *Bank of Maui v. Estate Analysis Inc.*, 904 F.2d 470 (9th Cir. 1990) ("BAP decisions cannot bind the district courts themselves . . . [a]s article III courts, the district courts must always be free to decline to follow BAP decisions and to formulate their own rules within their jurisdiction"); and *In re Silverman*, 616 F.3d 1001, 1005 note 1 (9th Cir. 2010) ("A bankruptcy court is not bound by a district court's decision from another district Court of Appeals treats the Bankruptcy Appellate Panel's (BAP) decisions as persuasive authority given its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit").

Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 24 (2021) (discussion of rationales underlying whether the BAP is a unit of the district court, or court of appeals and problems with both rationales).

171. Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745 (Nov. 2008).

included in the 1984 Amendments. Finally, despite being the only circuit in the federal judiciary with a BAP, the Ninth Circuit experience served as the foundation for Congress' legislative effort to make BAPs the rule not the exception in the 1994 Reform Act. Without the Ninth Circuit's experiment, Judge Browning's dedication and deft hand, BAPs would have been a failed experiment rather than a Congressional mandate.



Hon. Elizabeth L. Gunn*

THE 1982 EMERGENCY RULE: HOW PRESCIENT FORESIGHT LEFT AN INDELIBLE IMPACT ON BANKRUPTCY JURISDICTION

Introduction

The March 2020 COVID-19 pandemic stay-at-home orders, closures of non-essential business, and social distancing required essential businesses and federal courts to find ways to safely “keep the doors open” and cases moving forward. During that unprecedented time, after passage of the Coronavirus Aid, Relief and Economic Security (CARES) Act, the Judicial Conference of the United States (the “JCUS”) authorized the temporary use by federal courts of remote video and audio hearings in most civil and criminal proceedings.¹

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The author would like to acknowledge that this article would not have been possible but for the extraordinary contributions of her 2025-26 law clerk Olivia Woodmansee. Judge Gunn also notes that much of the behind-the-scenes content is derived from her January 2026 interview with the Hon. Thomas Carlson, Bankr. N.D. Cal, Ret., whose time, expertise and historical knowledge of the Ninth Circuit’s task force is unparalleled. Judge Gunn expresses that both she, and the bankruptcy community at large, owe a huge debt of gratitude to Judge Carlson.

1. Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic, U.S. COURTS (Mar. 31, 2020), <https://www.uscourts.gov/data-news/judiciary-news/2020/03/31/judiciary-authorizes-video-audio-access-during-covid-19-pandemic>.

The authorization came on March 29, 2020, less than two days after Congress enacted the CARES Act and less than two weeks after the first shutdowns.

But the emergency authorization in 2020 was not the first time that the federal courts had to react in a short period of time. Just under 40 years prior, in 1982, the courts had to address the question of jurisdiction of the United States Bankruptcy Courts granted by the 1978 Bankruptcy Act. The 1982 Supreme Court decision in *Northern Pipeline Construction Company v. Marathon Pipe Line Company*² declared the 1978 jurisdictional grant to bankruptcy courts unconstitutional and provided Congress three months to pass legislation to resolve the issue. With Congress in a deadlock over an acceptable solution, and even after a two-month extension for consideration, in December 1982, the JCUS promulgated and recommended the “Emergency Rule” as a temporary solution until a more permanent legislative fix was passed.

Originating from a working group in the Ninth Circuit created by Circuit Chief Judge James R. Browning, the Emergency Rule called for United States District Courts to voluntarily delegate (i.e. refer) their authority in bankruptcy matters to the bankruptcy courts while retaining the right to withdraw such reference at any time. The Emergency Rule, for the first time, defined different types of jurisdiction including “arising in,” “arising under,” and “related to” jurisdiction. Once the JCUS recommended the approach with an example order, courts around the country quickly adopted the format, and the work of the bankruptcy courts continued thereunder until Congress finally passed a legislative fix in 1984.

Notwithstanding its uniform adoption, the Emergency Rule was not without initial controversy. It nonetheless formed the foundation for bankruptcy jurisdiction going forward. In Parts I and II, this paper reviews the historical landscape leading to the creation of the bankruptcy courts and the *Marathon* opinion. Part III examines the *Marathon* opinion and its impact on bankruptcy courts’ jurisdiction. Part IV reviews the impact of *Marathon* on bankruptcy courts. Parts V and VI discuss formation, implementation, and recommendation of the Emergency Rule. Part VII reviews the impact the Emergency Rule ultimately had on the Bankruptcy Amendments and Federal Judgeship Act of 1984. Finally, the article concludes.

2. 458 U.S. 50 (1982).

I. History of United States Bankruptcy: The Bankruptcy Act of 1898, Chandler Act of 1938, and the 1970 Commission on Bankruptcy Laws

The Bankruptcy Act of 1898 (the “1898 Act”) was in effect from July 1, 1898 until its repeal by the Bankruptcy Reform Act of 1978, and formed the basis for modern bankruptcy law under the Bankruptcy Code.³ Prior to the 1898 Act, there were three short-lived bankruptcy laws: the Bankruptcy Act of 1800 (repealed 1803), the Bankruptcy Act of 1841 (repealed 1843), and the Bankruptcy Act of 1867 (repealed 1878).⁴ The 1898 Act created bankruptcy referees, the predecessors to bankruptcy judges, who were tasked with the bulk of both the judicial and administrative work on bankruptcy cases, from holding substantive hearings to conducting the required meeting of creditors. Bankruptcy referees were appointed by district court judges for two-year terms. While referees had autonomy on many matters, the substantive matters were subject to review by the appointing district court.

One major delay under the 1898 Act was the limited jurisdiction of referees to controversies “involving property in the actual or constructive possession of the court.”⁵ Under the definitional restriction, law developed to hold that referees had summary jurisdiction over not just parties to the bankruptcy case but also third parties, so long as the court possessed the property involved or the third party consented. If the referee did not have jurisdiction, the matters were overseen by federal or state courts, whichever was the proper forum.⁶ The unclear

3. The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (repealed 1978). The Bankruptcy Act of 1898 stayed in effect longer than its three predecessors, combined. *See* Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1803); The Bankruptcy Act of 1841, 5 Stat. 440 (1841) (repealed 1843); The Bankruptcy Act of 1867, 14 Stat. 517 (1867) (repealed 1878). For an overview of bankruptcy laws prior to this, *see generally* CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935).

4. 2 Stat. 19, 5 Stat. 440, and 14 Stat. 521, respectively. After the repeal of the Bankruptcy Act of 1867 in 1878, state laws often operated in place of federal law. *See* Katie Drell Grissel, *Stern v. Marshall – Digging for Gold and Shaking the Foundation of Bankruptcy Courts (or Not)*, 72 LA. L. REV. 647 (2012).

5. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982).

6. Lawrence P. King, *The Unmaking of a Bankruptcy Court: Aftermath of Northern Pipeline v. Marathon*, 40 WASH. & LEE 99, 100 n.11 (1983).

division of jurisdiction led to a waste of both judicial resources and the time and labor of parties because the bankruptcy referee often had to wait for an appellate court to determine questions of jurisdiction before the referee could resolve any matters pertaining to whatever was defined as the bankruptcy estate.⁷ Legislative history reveals that the underlying assumption of the 1898 Act was that “the judges of the circuit and district courts were vested with jurisdiction over the administration of all cases filed and pending in their courts and of most of the controversies generated by them,” but the burden for cases filed pursuant to the 1898 Act would be assumed by the referees.⁸ Due to this interplay, the status of the referees grew over time, as did their responsibilities, despite no specific statutory mandate granting expanded authority.⁹

The 1898 Act originally was intended to address, primarily, individual bankruptcies, but over time was revised to add forms of relief for bankruptcies of railroads, corporations, and municipalities. Despite the additions, the 1898 Act remained largely unchanged until 1938 with the passage of the Chandler Act.¹⁰ The Chandler Act was the congressional response to a growing number of bankruptcy filings and a need to modernize the country’s approach to bankruptcy. The Chandler Act reorganized, for the first time, the previous amendments into “chapters,” each covering a specific area of reorganization.¹¹ Despite the practical impact of being almost a complete overhaul of the 1898 Act, the Chandler Act was proposed and passed as merely a “revision” and not a repeal of the 1898 Act.

In response to social and economic conditions since 1898, in 1970 Congress established the Commission to Study the Bankruptcy

7. *Id.* at 100.

8. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 93 (1973) [hereinafter REPORT OF THE COMMISSION].

9. *See id.*; *see also* REPORT OF THE COMMITTEE ON THE JUDICIARY, H.R. REP. NO. 95-595, at 4 (1977) [hereinafter COMMITTEE REPORT] (“The bankruptcy judges instead have taken over prime responsibility for the operation of the system, even though their offices are not designed statutorily to perform those duties.”).

10. Act of June 22, 1938, ch. 575, 52 Stat. 840 (1938) (repealed 1978). *See generally* Vincent L. Leibell, *The Chandler Act—Its Effect Upon the Law of Bankruptcy*, 9 FORDHAM L. 380 (1940). Much of the impetus of the enactment of the Chandler Act stemmed from the creation of the National Bankruptcy Conference in 1932, who crafted “a very comprehensive draft” of the Chandler Act. *Id.* at 386.

11. As a result, for example, references to “Chapter X” of the 1898 Act are (mostly) references to the post-Chandler Act reorganized 1898 Act.

Laws of the United States (the "Commission").¹² The Commission was designed to study, analyze, evaluate, and recommend changes in the bankruptcy system.¹³ The Commission held four public hearings and deliberated for forty-four days before submitting a two-part report to Congress (the "Report")¹⁴: Part I included recommendations and findings of the Commission and Part II was a proposed new bankruptcy code.¹⁵ The Commission emphasized in its Report that the types of cases then commenced under the 1898 Act far exceeded the sizes and scope of cases contemplated during the enactment of the 1898 Act, or even in the Chandler Act.¹⁶ Bankruptcy referees' duties and powers had informally correspondingly expanded to match the needs of the cases and parties, even though their statutory authority had not changed since the passage of the 1898 Act. Throughout the work of the Commission and congressional consideration, one salient theme emerged: "bankruptcy court[s] should have broad and pervasive jurisdiction to resolve any and all disputes related to a bankruptcy case pending before it."¹⁷

More than just recognizing the dichotomy between the grant of authority to bankruptcy referees and the statutory grant of authority, the Report found that the greatest hinderance in the administration of bankruptcy cases was the court system. The Commission specifically identified two core aspects of the issue: (1) the (then lack of) independence of the bankruptcy court; and (2) the perception that the bankruptcy system was unfair because the referee (by then sometimes referred to as "judge") served as supervisor, administrator, and judge of cases.¹⁸ Despite the 1898 Act's requirement that the bankruptcy system operate under the district court, the perception was that by the 1970s

12. Pub. L. No. 91-354, 84 Stat. 468 (1970). The Report of the Commission, filed in 1973, is in H.R. Doc. No. 93-137, at Pts. I & II (1973).

13. King, *supra* note 6, at 100; *see also* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1970).

14. REPORT OF THE COMMISSION, *supra* note 8. Beyond the great societal and technological changes, the widespread adoption of the Uniform Commercial Code (UCC) occurred in the 1960s significantly altered the consumer credit industry and required a revised bankruptcy code to respond to new processes and rights of creditors.

15. REPORT OF THE COMMISSION, *supra* note 8, pt. I, at 3.

16. *Id.*

17. King, *supra* note 6, at 100.

18. COMMITTEE REPORT, *supra* note 9, at 4.

bankruptcy referees and cases were operating “under the supervision of an unconcerned district court,” which “hampered bankruptcy court operations both administratively and substantively.”¹⁹ As a result, the Commission proposed through its legislation to create judicial independence for bankruptcy cases, including bankruptcy courts and bankruptcy judges. Second, to address the perceptions of fairness and impartiality, the new legislation proposed to relieve the administrative burden of the bankruptcy judge by first creating, then transferring, administrative duties to the either a case trustee or the proposed to-be-created United States Trustee system.²⁰ While the Commission’s initial draft legislation was modified prior to passage, it formed the foundation for the Bankruptcy Reform Act of 1978 and the modern Bankruptcy Code, as discussed in the next part.²¹

II. The Bankruptcy Reform Act of 1978 and the Bankruptcy Code

In a major shift from the 1898 Act, the Commission’s initial proposed legislation called for the creation of bankruptcy-specific Article III courts to include the broad jurisdiction that the Commission identified was needed for the court to resolve all disputes before it.²² In response to the recommendation, and taking into consideration the widespread support for bankruptcy courts to have expanded jurisdiction, a subcommittee of the House of Representative conducted a study on whether a granting bankruptcy courts Article III status was constitutional.²³ The Chairman of the House Judiciary Subcommittee reached out to several constitutional experts for opinions and ultimately nine responded. As with most major constitutional questions, the experts reached contradictory conclusions, and the results of the study were inconclusive.²⁴

Despite inconclusive findings as to the constitutionality of Article III status, the House Judiciary Commission found that “efficiency considerations mandated that the bankruptcy court should be an

19. *Id.*

20. *Id.* The United States Trustee Program was established by the 1978 Bankruptcy Act. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

21. 11 U.S.C. § 101 *et seq.* [hereinafter Bankruptcy Code].

22. H.R. 6, 95th Cong. (1st Sess. 1977).

23. King, *supra* note 6, at 101.

24. *Bankr. Act Revision: Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary*, 94th Cong., at 27 (1976) [hereinafter *Hearings on H.R. 31 & H.R. 32*].

Article III constitutional court,” and subsequently proposed that bankruptcy courts be given Article III status in its initial draft bill.²⁵ Perhaps unsurprisingly, the initial draft prompted widespread controversy, with district court judges voicing concern that “the addition of a number of bankruptcy judges as Article III judges would have the untoward effect of diluting the prestige of the existing district court judges.”²⁶ Eventually, two competing House bills were before the Subcommittee on Civil and Constitutional Rights: H.R. 31, representing the proposal of the Commission, and H.R. 32, representing a proposal created by the National Conference of Bankruptcy Judges, each containing the Article III status.²⁷ The Subcommittee on Civil and Constitutional Rights conducted thirty-five days of hearings on the two bills, producing over 2,700 pages of testimony from more than 100 witnesses.²⁸ Eventually, H.R. 6—a compilation of H.R. 31 and H.R. 32—was introduced in the House of Representatives containing several additional modifications to the original bills based on discussion and debate.²⁹ The largest debate throughout remained the jurisdictional question, with drafts of reports, resolutions, and position papers, each containing differing conclusions regarding the constitutionality of proposed jurisdictional bounds of bankruptcy courts, being circulated.³⁰ When the bill—then called H.R. 8200—was brought to the House floor, an amendment passed changing the proposed status of bankruptcy judges to Article I judges.³¹ However, that amendment was later reversed and the bill, including Article III status for bankruptcy courts, eventually passed in the House and was sent to the Senate.³²

During the House consideration, the Senate contemporaneously worked on its own bill, which almost always contained language granting bankruptcy courts Article I status.³³ While the Senate’s bill

25. King, *supra* note 6, at 101.

26. *Id.*

27. H.R. 31, 94th Cong. (1st Sess. 1975); H.R. 32, 94th Cong. (1st Sess. 1975).

28. *Hearings on H.R. 31 & H.R. 32, supra* note 24, at 27.

29. H.R. 6, 95th Cong., 1st Sess. (1977).

30. See STAFF OF THE SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., CONSTITUTIONAL BANKRUPTCY COURTS (Comm. Print No. 3 1977) [hereinafter STAFF REPORT] (concluding that bankruptcy judges would be exercising the judicial power of the United States under the proposed bill); H.R. Rep. No. 95-595, at 3 (1977) (establishing bankruptcy courts as Article III courts).

31. King, *supra* note 6, at 101.

32. *Id.* at 102; see also 124 CONG. REC. H472–74 (daily ed. Feb. 1, 1978).

33. King, *supra* note 6, at 102.

did pass both subcommittee review and the Senate Judiciary Committee, the Senate ultimately passed H.R. 8200 after substantial amendments, including removal of Article III status for bankruptcy courts. Amended H.R. 8200 then underwent debate between the House and Senate regarding the Senate's revisions, but the amended bill eventually passed both the House and the Senate. However, congressional approval was not H.R. 8200's last challenge. Consistent with positions taken against the bill by the Judicial Conference of the United States during each stage of consideration of the bankruptcy legislation, after the House and Senate approved the bill, the Chief Justice sought to have the President veto H.R. 8200.³⁴ Despite the Chief Justice's efforts, on November 6, 1978, the Bankruptcy Act of 1978 (the "1978 Act") was signed by President Carter, repealing the 1898 Act and putting into place the Bankruptcy Code.³⁵

The 1978 Act changed both substantive and procedural bankruptcy law, with the greatest change being the establishment of independent, but adjunct, Article I bankruptcy courts. Specifically, the 1978 Act repealed the referee system and established bankruptcy courts as "court[s] of record" in each judicial district, adjunct to the district courts.³⁶ As such, district courts were granted "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 in or related to cases under title 11."³⁷ The 1978 Act established bankruptcy courts as Article I courts, but 28 U.S.C. § 1471(c) provided:

The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all jurisdiction conferred by this section on the district courts.³⁸

34. Amongst other communications, the Chief Justice, as Chairman of the Judicial Conference, sent a message to the President that the Judicial Conference had unanimously voted to urge the President to veto the bill. See Ruggero J. Aldisert, *The Judicial Conference and the New Bankruptcy Act*, 65 AM. BAR ASS'N J. 229 (1979).

35. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978). Of import after the *Marathon* decision, the 1978 Act provided for a transition period through March 31, 1984, to allow the courts time to configure the procedural and jurisdictional changes mandated therein.

36. 28 U.S.C. § 151(a) (1978).

37. 28 U.S.C. § 1471(a), (b).

38. 28 U.S.C. § 1471; *see also* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 55 (1982) ("In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue

Thus, while the bankruptcy court was a division of the district court, the original statute nonetheless conferred expansive jurisdiction on the bankruptcy courts. The grant of jurisdiction codified in 28 U.S.C. § 1471 (§ 241(a) of the 1978 Act) came under intense scrutiny and made its way to the Supreme Court shortly after its enactment.

III. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*

In what began as a normal case under the Bankruptcy Code, in January 1980 Northern Pipeline Construction Co. ("Northern Pipeline") filed a Chapter 11 case in the Bankruptcy Court for the District of Minnesota.³⁹ In March 1980, Northern Pipeline filed an adversary proceeding against Marathon Pipe Line Co. ("Marathon") in the bankruptcy court, alleging state law causes of action including breach of contract and breach of warranty over which the bankruptcy court had jurisdiction under the grant in 28 U.S.C. § 1471.⁴⁰ Other than the new statutory grant of jurisdiction, Marathon had not consented to the jurisdiction of the bankruptcy court, or taken any action, such as filing a proof of claim, that would have implicitly consented to said jurisdiction. Marathon quickly filed a motion to dismiss, claiming that the 1978 Act "unconstitutionally conferred [Article] III judicial power upon judges who lacked life tenure and protection against salary diminution."⁴¹ The bankruptcy judge denied the motion, but the United States District Court for the District of Minnesota reversed, finding the delegation of authority under 28 U.S.C. § 1471 to be unconstitutional. The case was appealed to the Supreme Court.⁴²

While the *Marathon* appeal was pending at the Supreme Court, two other courts issued opinions on the constitutionality of the jurisdictional grant of 28 U.S.C. § 1471. In 1981, the Bankruptcy Court for

declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in the aid of the bankruptcy court's expanded jurisdiction, § 451; . . . and to issue any order process or judgment that is necessary or appropriate to carry out the provisions of title 11, 11 U.S.C. § 105(a).").

39. *Marathon*, 458 U.S. at 56.

40. *Id.*

41. *Id.* at 56–57.

42. In only a slight addition of irony, the direct appeal to the Supreme Court was authorized under another statute, since repealed, which allowed a direct appeal to the Supreme Court when the United States was a party and the decision held that an act of Congress was unconstitutional.

the District of Puerto Rico found it constitutional,⁴³ while in early 1982, the Bankruptcy Court for the Eastern District of Tennessee found it unconstitutional.⁴⁴ On June 28, 1982, at the end of the Supreme Court's term, the Court issued its 6-3 opinion, holding the grant of jurisdiction to bankruptcy courts in 28 U.S.C. § 1471 unconstitutional.⁴⁵ Justice Brennan wrote the plurality opinion of the Court,⁴⁶ joined by Justices Marshall, Blackmun, and Stevens. In broad strokes, the plurality held that the 1978 Act's system of non-Article III bankruptcy judges exercising broad judicial power over private rights violated Article III of the constitution—specifically that Congress had improperly vested bankruptcy courts with jurisdiction over state law claims that are traditionally reserved for Article III judges.⁴⁷ By creating judges under Article I and separately providing jurisdiction previously given only to Article III courts, the Court concluded:

28 U.S.C. § 1471 . . . has impermissibly removed most, if not all, of “the essential attributes of the judicial power” from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress’ power to create adjuncts to Art. III courts.⁴⁸

Encased in the broader question of whether Congress had exceeded the authority granted, the Court next considered whether the ruling of first impression should be retroactive, or only prospective. The plurality, recognizing the case addressed an unprecedented question of interpretation of Article III, determined that:

[R]etroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts.

43. *In re Segarra*, 14 B.R. 870 (Bankr. P.R. 1981).

44. *In re Rivers*, 19 B.R. 438 (Bank. E.D. Tenn. 1982).

45. 458 U.S. 50 (1982).

46. Justices Rehnquist and O'Connor joined the plurality as to the unconstitutional grant of authority but would have considered all power granted to bankruptcy judges in 28 U.S.C. § 1471 instead of limited just to the grant of plenary jurisdiction, finding that grant not readily severable from the remaining grants of authority in the Bankruptcy Code.

47. *Marathon*, 458 U.S. at 57–59.

48. *Id.* at 87.

We hold, therefore, that our decision today shall apply only prospectively.⁴⁹

The Court's ruling stipulated that it was prospective and stayed until October 4, 1982 to provide Congress with an opportunity to reconstruct the relevant bankruptcy provisions. Justice White, joined by Chief Justice Burger and Justice Powell, dissented, with the Chief Justice writing a short dissent and then joining in a longer dissent by Justice White, reviewing the constitutional questions and ultimately dissenting in the decision and deferring to congressional judgment. Thus, faced with a plurality opinion, conflicting extensive guidance on constitutionality given in the opinions, the question was sent back to Congress with just over three months to act.

IV. Legal Limbo Due to Congress's Failure to Act

By overturning the grant of authority to bankruptcy judges in the 1978 Act, the Supreme Court created waters muddier than the Potomac for bankruptcy courts and bankruptcy judges.⁵⁰ The *Marathon* Court gave Congress until October 4, 1982 to correct the constitutional deficiencies the Court identified in the 1978 Act.⁵¹ The metaphorical ball being back in Congress's court once again spurred discussions regarding granting Article III status to bankruptcy judges, with both the Senate and House conducting hearings in the summer of 1982.⁵² Once again, the JCUS, led by Chief Justice Burger, voiced its opposition—concerned over the dilution of district judge prestige. Additionally, Senate leaders saw the discussions as an opportunity to create omnibus judgeships and curated a proposal that created more district judges who could then be assigned either bankruptcy cases or other federal cases.⁵³ Ultimately, no action was

49. *Id.* at 88.

50. King, *supra* note 6, at 108 (opining that the *Marathon* opinion “created a mess”).

51. *Marathon*, 458 U.S. at 89.

52. *Bankruptcy Court Act of 1982: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong. (1982); *Northern Pipeline Bankruptcy Decision: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong. (1982).

53. This proposal essentially merged the bankruptcy system and district courts. See 128 CONG. REC. S13,050–51 (daily ed. Oct. 1, 1982) (remarks of Sen. Robert Dole).

taken, and the Supreme Court extended the deadline to December 24, 1982.⁵⁴

After the first deadline passed, Congress remained deadlocked on the various options regarding the jurisdiction of bankruptcy judges. The Supreme Court denied the Solicitor General's request to further extend the deadline, and the deadline ultimately lapsed on December 24, 1982, without any congressional action.⁵⁵ As a result, post-*Marathon* bankruptcy courts were about to find themselves in situations similar to a high school band conductor without a baton or a dog catcher without a leash—dealing with active and growing dockets without a clear tool or understanding of the scope of their authority to do so. Unfortunately, Congress would not act to remedy the situation until 1984, yet the courts needed to remain open. The judiciary had to take action to fill the void.

Shortly after *Marathon*, and with prescient foresight that Congress was unlikely to meet its October deadline, Ninth Circuit Chief Judge James R. Browning initiated a process to address the impact and how to move forward. After local meetings, a local task force of five members was formed including Northern District of California Chief District Judge Robert Peckham, Northern District of California Chief Bankruptcy Judge Lloyd King, local bar leader, attorney, and future bankruptcy judge Dennis Montali (Northern District of California), with aid of the then-Ninth Circuit law clerk and future bankruptcy judge Thomas Carlson (Northern District of California, Retired). The task force began with the presumption that the district courts had jurisdiction over bankruptcy cases, but there were political concerns against creating a situation where the president would nominate 300+ new Article III bankruptcy judges.

The task force focused on the presumption that the pre-1978 Code practice of referral of matters from district courts to bankruptcy referees was constitutional, even in light of *Marathon*. With that presumption, the task force considered how could the delegation be accomplished in bankruptcy cases while respecting the limitations set by the *Marathon* plurality. The task force focused on the voluntary nature of pre-Code referrals, contrary to the legislative referral held unconstitutional by *Marathon*. Thus, the suggestion was formatted as a proposed order pursuant to which district courts would voluntarily transfer (refer) all bankruptcy matters to bankruptcy courts, with the

54. United States v. Marathon Pipe Line Co., 459 U.S. 813 (1982) (extending stay of judgment to December 24, 1982).

55. United States v. Marathon Pipe Line Co., 459 U.S. 1094 (1982) (denying the Solicitor General's application to further extend the stay on December 23, 1982).

power to withdraw the case at any time. With a format for “how,” the task force next turned to the question of “what” after *Marathon*.

The key to “what” was in Justice Brennan’s language that the Article III courts must maintain the “essential attributes of the judicial power.”⁵⁶ In order to name what could be referred, the task force described the referable matters as those actions dealing with the bankruptcy estates as “core” and those not referable as “non-core” and “related to.” Bankruptcy courts would have final jurisdiction to enter orders in core matters and, like a traditional special master, would make proposed findings of facts and conclusions to the district court. Most importantly, on appeal on core matters, the district court would conduct a *de novo* review of the bankruptcy judge’s findings. This laid the foundation for the Emergency Rule.

V. The Emergency Rule

With Congress no closer to a solution and the December 1982 deadline looming, the Judicial Conference of the United States caught wind of the Ninth Circuit’s efforts and proposed format and order. Delegates from the Ninth Circuit task force visited Washington, D.C. to present their solution to members of the JCUS staff. As a result, the JCUS was persuaded to recommend the now-known “Emergency Rule” to the circuit courts to serve as the operational basis for bankruptcy courts until Congress acted to legislatively address the issue.⁵⁷ The Emergency Rule was recommended to take effect upon the December 24, 1982 expiration of the Supreme Court’s deadline, with the condition that the recommendation that the district court orders entered thereunder be effective until the earlier of (1) Congress passing post-*Marathon* action or (2) the expiration of the transition period set forth in the 1978 Act on March 31, 1984.⁵⁸ Ultimately, the Emergency Rule’s format, adopted by the district courts, provided a framework for the continued operation of bankruptcy courts without providing bankruptcy courts with power ascribed to Article III courts.⁵⁹

56. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57–59 (1982).

57. Model Rule for the Continued Operation of the Bankruptcy System (distributed on Dec 3, 1982 pursuant to the Sept 23, 1982 Resolution of the Judicial Conference of the United States), reprinted in 1 COLLIER ON BANKRUPTCY ¶ 3.10[2][b] n.15 (16th ed.).

58. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROCEEDINGS 91 (Sept. 1982).

59. King, *supra* note 6, at 115.

The Emergency Rule was based, in part, on the understanding that *Marathon* invalidated § 1471(c), not § 1471 in its entirety.⁶⁰ More specifically, the Emergency Rule provided for bankruptcy judges to handle most day-to-day bankruptcy matters. It also re-channeled authority previously granted to bankruptcy courts by § 1471 and held unconstitutional by *Marathon* back to the district courts in a variety of ways. First, all Title 11 cases and proceedings were referred to the bankruptcy judges by standing order, preserving filing in the bankruptcy court but clarifying that the power flowed from the district court's jurisdiction. Second, it provided that a bankruptcy court could retain jurisdiction in non-core proceedings, but only with the consent of all parties, and with a final order or judgment having to be issued by the district court.⁶¹ Third, the Emergency Rule established that all adversary proceedings could be withdrawn by the district court at any point, where it could then decide whether to hear the case or provide the bankruptcy court explicit instructions. Fourth, all jury trials were reserved to the district courts. Fifth, bankruptcy judges were prohibited from enjoining a court, punishing criminal contempt, or hearing appeals. Finally, the Emergency Rule allowed district courts to hold a hearing, reviewing all evidence it deemed necessary, where its final ruling did not have to give deference to the bankruptcy court's decision—in either core or related to proceedings.⁶²

In essence, the Emergency Rule preserved the rules established by the 1978 Act with a caveat for the jurisdictional oversight by district judges of bankruptcy judges. Specifically, the Emergency Rule gave bankruptcy courts jurisdiction over “core” matters but required *de novo* review and entry of the judgement by Article III district judges for final decisions in “related to” matters. The Emergency Rule was the first time the “related to” jurisdiction for bankruptcy courts appeared. The language of the proposed order defined “related to” proceedings as “those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court

60. Jack F. Williams, *The Aftermath of Marathon*, in *TAX ASPECTS OF BANKRUPTCY LAW AND PRACTICE* § 3:5 (3d ed., C. Richard McQueen ed., 2025).

61. See Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Judge, the Judicial Conference, and the Legislative Process*, 22 *HARV. J. ON LEGIS.* 1, 26 (1985) (opining that this provision was inspired by the language in the 1978 Act, along with a 1979 amendment to the Federal Magistrates Act).

62. But see Fed. R. Bankr. P. 810; 411 U.S. 1090 (1973) (requiring district courts to apply the “clearly erroneous” standard when reviewing a bankruptcy court's findings). Nothing in *Marathon* or subsequent action by either the Supreme Court or Congress rendered Bankruptcy Rule 810 inapplicable.

or state court”⁶³ and in which only a district judge could enter dispositive order or judgment, though on report and recommendation from a bankruptcy judge.

Alongside the transfer of the Emergency Rule to the circuits, the Director of the Administrative Office (the “Director”) included a memorandum, explaining that the “Administrative office conclude[d] that [the *Marathon* decision] did not invalidate” § 1471(a) and (b) and as such the Emergency Rule was designed to be an “interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges.”⁶⁴ Four months after the initial memorandum, the Director circulated a revised version of the rule, a supplemental memorandum, and a “Sample Order,” which the Judicial Council of each circuit was designated to instruct the district courts in its particular circuit to adopt.⁶⁵ At its core, the Emergency Rule was just that—a practical, interim solution from the courts to deal with the jurisdictional emergency created by the combination of the *Marathon* opinion and Congress’s inability to act within the short deadlines established by the Supreme Court.



1984 gem from political cartoonist Patrick Oliphant. © 2026 Patrick Oliphant / Artists Rights Society (ARS), New York.

63. Emergency Rule § (d)(3)(A), reprinted in 1 Collier on Bankruptcy ¶ 3.10[2][b] n.15 (16th ed).

64. Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the Judges of the U.S. Courts of Appeal, District Courts, Bankruptcy Courts, and the Clerks of the Bankruptcy Courts (Sept. 27, 1982).

65. Countryman, *supra* note 61, at 21.

VI. Implementation of the Emergency Rule

By December 24, 1982, the Emergency Rule was adopted, either in total or in essence, by all district courts. The creation and adoption of the Emergency Rule was not without controversy, specifically whether the JCUS had the authority to recommend the adoption of such a model order of referral and, and even if it did, whether the Emergency Rule served as a plausible and/or constitutional solution to the problems created by *Marathon*. Some critics argued that the Emergency Rule did not address constitutional issues identified in *Marathon*, particularly the assignment by district courts of jurisdiction to bankruptcy courts over a broad range of matters by defining types of jurisdiction as “core” or “related to.”⁶⁶

Another argument against the Emergency Rule was confusion. Despite the fact it was only a recommendation, critics reflected it was called a “rule.” JCUS had no bankruptcy rulemaking authority, and the Administrative Office was given no authority to make rules affecting bankruptcy above the administrative level. Critics pointed out the authorization of JCUS was limited, as it could only:

[M]ake a comprehensive survey of the condition of businesses in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary[,] . . . submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business . . . and carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court for the other courts of the United States⁶⁷

Critics thus argued that the JCUS overstepped its statutory grant of authority by essentially mandating the use and passage of the Emergency Rule. They argued that the JCUS should have instead submitted a recommendation to the Supreme Court, not draft and mandate

66. See King, *supra* note 6, at 116 (“The emergency rule has only two flaws: it is invalid (illegal); and it is unworkable.”); see also *The Constitutionality of Bankruptcy Courts Under the Bankruptcy Reform Act of 1978* [Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)], 9 WILLIAM MITCHELL L. REV. 458 (1983) (“[T]he emergency rule has created wide-spread confusion and disagreement.”).

67. 28 U.S.C. § 331.

their own rules or orders. Furthermore, the same critics argue that the Administrative Office is merely given authority over the *administration* of bankruptcy—nothing beyond—yet it was this very body that sent the memorandum recommending adoption of Emergency Rule by district courts to each circuit.⁶⁸

As set forth above, the validity of the Emergency Rule rested on a number of assumptions that began with the task force, any one of which would strip bankruptcy courts of *any* jurisdiction if proven untrue: (1) that *Marathon* only applied to subsection (c) of § 1471; (2) that the JCUS had the authority to recommend adoption of orders consistent with the rule; (3) that the Administrative Office had the authority to circulate and recommend adoption of the rule; and (4) perhaps most importantly, that the district courts had the ability to voluntarily transfer/refer jurisdiction to bankruptcy courts by a standing order, among others. These valid concerns that rippled from *Marathon* quickly began to impact the day-to-day aspects of bankruptcy proceedings. The issues manifested most in an environment of distrust of the authority of bankruptcy judges operating under jurisdiction granted to them by orders consistent with the Emergency Rule. This distrust manifested in existing debtors not being able to obtain post-petition credit because lenders were hesitant to loan new money to businesses where the approval the bankruptcy court might not be upheld. Further, bankruptcy judges hesitated to enter orders or judgments in cases in which they arguably had authority and, instead, deferred entry of such order to district judges upon report and recommendation.⁶⁹ In short, while the Emergency Rule sought to continue the work of the bankruptcy courts with as little interruption as possible after *Marathon*, it was not a failsafe solution.

In some courts, the Emergency Rule faced arguments challenging the local rules as “innovations” creating new courts and thus an excessive exercise of the district court’s powers.⁷⁰ Conversely, others

68. See 28 U.S.C. § 604(a)(13) (limiting the Director of the Administrative Office’s oversight of bankruptcy to “prepar[ing] statistical reports of business transacted by such courts”). But see *id.* § 604(a)(14), (e), (f) (allowed the Director to promulgate such rules “as may be necessary to carry out the Director’s functions,” including those approved by the Conference, and to perform “such other duties as may be assigned to him by the Supreme Court or the Judicial Conference”).

69. See *Bankruptcy Court Act of 1983: Hearings Before Subcommittee on Monopolies and Commercial Law of House Judiciary Committee* H.R. 3, 98th Cong., 59 (1983) (statement of Edward C. Schmults, Dep. Att’y. Gen.).

70. See *Braniff Airways Inc. v. Civil Aeronautics Board* (*In re Braniff Airways Inc.*), 27 B.R. 231, 236 (N.D. Tex. 1983).

claimed that the adoption of such a rule by district courts meant that jurisdictional grants remained viable, despite the plurality's holding that the "single statutory grant of jurisdiction" in bankruptcy was non-severable. But many (if not most) parties, seeking judicial efficiency and swift resolution of their disputes, decided not to challenge the Emergency Rule or its genesis.⁷¹

The first court to uphold the validity of the Emergency Rule was the Eastern District of Michigan, whose holding was twofold.⁷² First, the manifest intention of Congress in creating the transition period and retaining Title 11 jurisdiction in district courts, coupled with the continued enforcement of 28 U.S.C. § 1334, proved that there existed no "jurisdictional lapse" in a post-*Marathon* world.⁷³ Second, the court remarked that *Marathon* deemed the Article I judge jurisdictional grant non-severable, but district judges retained their authority, including the ability to delegate some of that power to bankruptcy judges. The court also looked to 11 U.S.C. § 105(a) as a basis for granting "courts of bankruptcy power" and the ability to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]."^{74,75}

The Sixth Circuit was the first circuit court to address the legal questions raised by the critics in *White Motor Corp. v. Citibank*.⁷⁶ Relying on the Judicial Conference's statutory authority under 28 U.S.C. § 331, the court referred to the Emergency Rule as a "suggestion, in the form of a model rule of procedure."⁷⁷ The court then described the authority of promulgating the Emergency Rule through each of the eleven Circuit's Judicial Councils, each of which directed their respective district

71. See Countryman, *supra* note 61, at 23 (noting that these parties "relied instead on the ancient doctrine that federal courts, while courts of limited jurisdiction, have jurisdiction to decide whether they have subject matter jurisdiction," which meant that "absent a direct attack, those judgments are res judicata on the jurisdictional issue and not subject to collateral attack").

72. *Northland Point Partners v. Stouffer Corp.* (*In re Northland Point Partners*), 26 B.R. 860 (E.D. Mich. 1983).

73. 26 B.R. at 861. But see *Braniff Airways Inc. v. Civil Aeronautics Board* (*In re Braniff Airways Inc.*), 27 B.R. 231, 236 (N.D. Tex. 1983) ("Congress clearly intended for both the old and new versions of 28 U.S.C. § 1334 to exist simultaneously.").

74. *In re Northland Point Partners*, 26 B.R. at 861.

75. An interesting aside, the District Judge deciding the case served as the Chairman of the Judicial Conference's Bankruptcy Committee at the time of the order. Countryman, *supra* note 61, at 25.

76. 704 F.2d 254 (6th Cir. 1983).

77. 704 F.2d at 262.

courts to adopt the model rule pursuant to 28 U.S.C..⁷⁸ Because the Judicial Councils had previously worked to avoid stopgaps and other “void[s] in institutional arrangements on which society has come to depend,” the purpose of § 332 was achieved by the Emergency Rule.⁷⁹ The Sixth Circuit then went even further, stating that, even without the Emergency Rule, under 11 U.S.C. § 105(a) the district courts had an “independent statutory authority to adopt such procedural rules in bankruptcy matters,” and were required to do so in a time of confusion and disarray, such as that left in the wake of *Marathon*.⁸⁰

Other courts found otherwise. In *In re Color Craft Press Ltd*, the United States Bankruptcy Court for the District of Utah attempted to determine whether the District Court of Utah had the authority to adopt the local rule (which mirrored the Emergency Rule in large part).⁸¹ The bankruptcy court found that the district court lacked jurisdiction to adopt the Emergency Rule for two reasons. First, it held, based on language in the plurality, concurrence, and Justice White’s dissent, that *Marathon* struck all of § 241(a) of the 1978 Act, not just the portion that related to § 1471(c).⁸² Without § 1471(c), the “statute [became] dysfunctional” because it left remaining subsections in “limbo,” and because the solution could not come from district courts, they were left “with a jurisdiction which is incomplete, rudderless, and in substantial measure, powerless.”⁸³ Even assuming in the alternative that § 241(a) was severable, the bankruptcy court held that based on the legislative history and meaning of § 1471, the Emergency Rule broadened the jurisdiction of district courts to an untenable level after *Marathon*.⁸⁴ The District Court of Utah reversed, determining that the jurisdictional grant between the district courts and bankruptcy courts

78. “Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.” 28 U.S.C. § 332.

79. 704 F.2d at 262.

80. *Id.*

81. *In re Color Craft Press, Ltd.*, 27 B.R. 392, 395 (Bankr. D. Utah), *vacated*, 27 B.R. 962 (D. Utah 1983).

82. *Color Craft*, 27 B.R. at 396–97.

83. *Color Craft*, 27 B.R. at 398 (“It seems improbable that the Supreme Court would expect district courts to handle bankruptcy cases and proceedings, many of which are complex and demanding, with such infirm and uncertain jurisdictional tools.”).

84. *Color Craft*, 27 B.R. at 399–405.

was not intertwined but was a two-step grant of power.⁸⁵ The district court then concluded that the bankruptcy court took *Marathon* too broadly, emphasizing that the *Marathon* opinion never “suggest[ed] that an Article III court could not exercise Article III power.”⁸⁶ Despite the district court’s reversal, the Bankruptcy Court for the District of Utah was not the only bankruptcy court to find that the Emergency Rule was unenforceable because it misrepresented the jurisdictional conclusions of *Marathon* and served as an unconstitutional exercise of judicial rulemaking authority.⁸⁷

Some courts, such as the United States Bankruptcy Court for the District of Maryland, agreed with the general principle that the Emergency Rule was not the perfect solution to *Marathon*, but held it to be a valid law because of the risk of “judicial anarchy” if each bankruptcy court were to invalidate a rule unanimously adopted by its judicial circuit.⁸⁸ Others emphasized that “safeguards” were implemented in the Emergency Rules to respond to the concerns of the *Marathon* plurality.⁸⁹

Even with growing bankruptcy court decisions invalidating the local rule adoptions of the Emergency Rule, in addition to the Sixth Circuit, each circuit court presented with the issue upheld the Emergency Rule.⁹⁰ Several opinions merely disposed of the argument that

85. *In re Color Craft Press Ltd.*, 27 B.R. 962, 963 (D. Utah 1983).

86. 27 B.R. at 964.

87. *See, e.g., In re Matlock Trailer Corp.*, 27 B.R. 318 (M.D. Tenn. 1983); *Warren v. Miami Valley Production Credit Assn.*, 27 B.R. 935 (Bankr. S.D. Ohio 1983); *In re Sentinel Energy Control Systems, Inc.*, 27 B.R. 795 (Bankr. D. Mass. 1983); *In re Jorges Carpet Mills, Inc.*, 27 B.R. 333 (Bankr. E.D. Tenn. 1983), *vacated*, 28 B.R. 616 (Bankr. E.D. Tenn. 1983).

88. *Stillman v. Gleicher (In re Stillman)*, 26 B.R. 834, 837 (Bankr. D. Md. 1983) (“Disobedience of the rule would be a dereliction of duty.”).

89. *In re Davis*, 730 F.2d 176, 182–83 (5th Cir. 1984).

90. *See, e.g., In re Pine Assocs., Inc.*, 733 F.2d 208 (2d Cir. 1984); *In re Davis*, 730 F.2d 176 (5th Cir. 1984); *Lindquist v. Metropolitan Bank Bloomington*, 730 F.2d 1204 (8th Cir. 1984); *Oklahoma Health Serv. Fed. Credit Union, v. Webb*, 726 F.2d 624 (10th Cir. 1984); *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 349 (1983); *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254 (6th Cir. 1983); *In re Hansen*, 702 F.2d 728 (8th Cir. 1983), *cert. denied*, 463 U.S. 1208 (1983); *In re Braniff Airways, Inc.*, 27 B.R. 231 (N.D. Tex.), *aff’d* 700 F.2d 214 (5th Cir. 1983), *cert. denied*, 103 S. Ct. 2122 (1983); *In re Northland Point Partners*, 26 B.R. 860, 1019 (E.D. Mich.), *aff’d by unreported order* (6th Cir.), *cert. denied*, 104 S. Ct. 151 (1983). *But see Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983),

Marathon invalidated all of § 241(a), and further stated that the jurisdictional grant of 28 U.S.C. § 1334 was effective and sufficient during the interim period without providing further justification or analysis.⁹¹ Despite the constitutional concerns and accusations that the Emergency Rule misstated the *Marathon* opinion, the Supreme Court denied certiorari on more than one instance.⁹²

Others within the bankruptcy system did voice concerns regarding the validity of the Emergency Rule. At a congressional hearing discussing a proposed bill to resolve the issues created by *Marathon*, a spokesman for the Department of Justice expressed that while the Department would not challenge the validity of the Emergency Rule "as a litigant," there was cause for concern over whether the Emergency Rule was "consistent with the requirements of the [*Marathon*] decision."⁹³ Due to the interim nature of the Emergency Rule, the ongoing challenges to its validity, and growing concerns with its impact on the day-to-day of bankruptcy courts, Congress knew it had to take action.

VII. Aftermath & the Bankruptcy Amendments and Federal Judgeship Act of 1984

The upheaval in the courts and questions as to the validity of the Emergency Rule were not the only problems faced by Congress post-*Marathon*. Following the standard rule-making procedures, the Supreme Court submitted proposed new bankruptcy rules crafted pre-*Marathon* (the "SCOTUS Rules") to Congress in April 1983, which took effect on August 1, 1983 after Congress failed to take any action.⁹⁴

cert. denied, 104 S. Ct. 427 (1983) (asserting that the plurality opinion held that bankruptcy court jurisdiction was unconstitutional).

91. *In re Hansen*, 702 F.2d 728; *In re Braniff Airways*, 27 B.R. 231.

92. *In re Hansen*, 702 F.2d 728 (upholding the emergency rule); *In re Braniff Airways*, 700 F.2d 214; *Coastal Steel*, 709 F.2d 190. The Supreme Court also denied petitions seeking writs of prohibition and mandamus challenging the Emergency Rule. See, e.g., *In re International Harvester Co*, 460 U.S. 1103 (1983); *In re Doan*, 460 U.S. 1074 (1983); *In re Keene Corp*, 459 U.S. 1228 (1983).

93. *Bankruptcy Court Act of 1983: Hearings Before Subcommittee on Monopolies and Commercial Law of House Judiciary Committee* Oil H.R. 3, 98th Cong., 62 (1983) (statement of Edward C. Schmults, Dep. Att'y. Gen. and Jonathon C. Rose, Ass't Atty Gen., Office of Legal Policy) (commenting that the Department of Justice could not recommend "any Article I solution that is either workable as a practical matter or sufficiently free of Constitutional doubt").

94. Countryman, *supra* note 61, at 27; see also 103 S. Ct. [No. 14] (May 15, 1982).

Not only were the rules crafted prior to the *Marathon*, they were also crafted prior to the widespread adoption of the Emergency Rule. As a result, a number of the new SCOTUS Rules differed significantly from the Emergency Rule, including the preservation of the “clearly erroneous” standard of review and a bankruptcy judge’s right to conduct jury trials.⁹⁵ As a result of the confusion that ensued, and trying to avoid further conflicts, the Administrative Office issued a memorandum detailing that “in instances of conflict, the Emergency Rule should prevail over the Supreme Court’s new rules.”⁹⁶ However, the memorandum had no legal effect and, while perhaps persuasive on courts, was not uniformly filed and, as a result, did not solve all points of contention.

During the period between the passage of the SCOTUS Rules and the 1984 amendments to the Bankruptcy Code, several bankruptcy judges held that the SCOTUS Rules controlled and, thus, they were allowed to conduct jury trials.⁹⁷ Further, the Third Circuit in *In re Morrissey*, emphasized that the standard of review in the SCOTUS Rules replaced the standard of the Emergency Rules because 28 U.S.C. § 2075 had “vest[ed] the exclusive power for promulgating rules of bankruptcy in the Supreme Court and Congress . . . and not in United States district courts,” so “any local rule governing *procedure* as distinguished from *jurisdiction*, in bankruptcy must yield to the Bankruptcy Rules duly promulgated under the Supreme Court’s statutory authority.”⁹⁸ In addition to the SCOTUS Rules versus Emergency Rules debate, another issue arose in 1984 when the Supreme Court decided *NLRB v. Bildisco & Bildisco*, which dealt with the bankruptcy court’s authority over collective bargaining agreements.⁹⁹ In the fallout from *Marathon*, something was rotten in the state of bankruptcy courts.¹⁰⁰

Despite the turmoil and need for a legislative solution, Congress remained at an impasse as to how, if at all, to respond to *Marathon*. Just as it did before the passage of the 1978 Code, the House of Representatives again considered a bill to make bankruptcy judges Article III judges.

95. Countryman, *supra* note 61, at 27.

96. *Id.* at 28.

97. See, e.g., *In re Paula Saker & Co.*, 37 B.R. 802 (Bankr. S.D.N.Y. 1984); *In re Martin Baker Well Drilling, Inc.*, 36 B.R. 154 (Bankr. D. Me. 1984); *In re O.P.M. Leasing Servs. Inc.*, 35 B.R. 854 (Bankr. S.D.N.Y. 1983). But see *In re Proehl*, 26 B.R. 86 (W.D. Va. 1984) (reversing the bankruptcy court’s ruling that it could conduct a jury trial).

98. 717 F.3d 100, 104–05 (3d Cir. 1983) (emphasis in original) (opinion written by the chairman of the Advisory Committee).

99. 465 U.S. 513 (1984).

100. See WILLIAM SHAKESPEARE, *HAMLET* act I, sc. 4, l. 100.

At a hearing on the bill, a spokesman for the Department of Justice outlined three possible solutions to the *Marathon* opinion: (1) return to the referee system of the 1898 Act; (2) create "Article I bankruptcy courts with limited original jurisdiction but with powers to act as adjuncts of the district court in other matters;" or (3) make all bankruptcy judges Article III judges.¹⁰¹ The spokesperson opined that "if it was thought to be important to retain all of the procedural reforms of the 1978 Act, the easiest and safest course was to grant Article III status to the bankruptcy judges."¹⁰² The Judicial Conference still vehemently opposed any proposals that gave bankruptcy judges Article III status, going so far as to have one proposal that eliminated bankruptcy judges completely and add additional district judges (somewhat inconsistent with its earlier position against "dilution" of district judge authority).¹⁰³

While the conversations and disagreements took place in the House and in the Senate, both the end of the 1978 Act's transition period and expiration of the Emergency Rule were looming.¹⁰⁴ Congress had to pass a series of extensions of the 1978 Act, which stipulated that "bankruptcy judges were to continue to function as courts of bankruptcy pending the appointment of new judges."¹⁰⁵ Ultimately, after a series of disagreements and amendments, a bill removing the Article III status for bankruptcy judges passed the House and addressed both concerns over labor contracts (the *Bildisco* problem) and the jurisdiction of bankruptcy courts and judges (the *Marathon* problem).¹⁰⁶ The bill then passed the Senate and was sent

101. *Bankruptcy Court Act of 1982: Hearings Before Subcommittee on Monopolies and Commercial Law of House Judiciary Committee on H.R. 6109, 97th Cong., 10 (1982)* (statement of Jonathan C. Rose, Ass't. Atty Gen., Office of Legal Policy).

102. *Id.* (quotation modified).

103. Countryman, *supra* note 61, at 29 (explaining that the Judicial Conference submitted a proposal to Congress after expressing concerns with the proposed bill at its September 1982 meeting). One such proposal of the Judicial Conference eliminated bankruptcy judges completely and replaced them with a "bankruptcy administrator" for each district, who would handle "administrative matters," leaving contested matters to district judges, of which 115 would be added. *Id.* at 30.

104. The Emergency Rule was also set to expire on March 31, 1984, requiring a supplemental solution.

105. See Bankruptcy Act, Extension, Pub. L. No. 98-325, 98 Stat. 268 (1984); Bankruptcy Act, Extension, Pub. L. No. 98-299, 98 Stat. 214 (1984); Bankruptcy Act, Extension, Pub. L. No. 98-271, 98 Stat. 163 (1984); Bankruptcy Act, Extension, Pub. L. No. 98-249, 98 Stat. 116 (1984).

106. H.R. 5174, 98th Cong.; 130 CONG. REC. H1727 (daily ed. Mar. 19, 1984).

President Reagan as the Bankruptcy Amendments and Federal Judgeship Act of 1984 (the “1984 Act”).¹⁰⁷ When signing the bill, President Reagan voiced his objection to the “provisions in the bills seeking to continue in office all existing bankruptcy judges” because he found it to be “inconsistent with the appointments clause of the Constitution.”¹⁰⁸ He noted that the Administrative Office had assured him that “bankruptcy cases may be handled in the courts without reliance on [the] invalid provisions.”¹⁰⁹

The 1984 Act resolved the *Marathon* problem by restructuring bankruptcy jurisdiction consistent with the second recommendation of the Department of Justice—it made bankruptcy courts “units” of the district court and allowed for district judges to refer any or all cases under the Bankruptcy Code to the bankruptcy courts.¹¹⁰ The 1984 Act also adopted parts of the Emergency Rule found in both 28 U.S.C. §§ 157 and 158. Sections 157(b) and (c) adopted the Emergency Rule’s description of categories of cases heard by bankruptcy courts as “arising under,” “arising in,” and “related to.”¹¹¹ The Emergency Rule’s authority for bankruptcy judges to issue final orders in core matters and in non-core matters upon consent were also key components to the 1984 Act.¹¹² The 1984 Act affirmatively defined what matters are core proceedings, and the genesis of the list contained therein was found in a list of matters in the Emergency Rule where it defined matters that

107. 130 CONG. REC. S8900, H7500 (daily ed. June 29, 1984).

108. President’s Statement Regarding H.R. 5174, 20 WEEKLY COMP. PRES. DOC. 1010, 1011 (July 10, 1984).

109. *Id.* (encouraging Congress to immediately “repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the bankruptcy system”).

110. 28 U.S.C. § 157(a).

111. 28 U.S.C. § 157(b), (c). The Emergency Rule referred to bankruptcy judges “All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11” Section 158(b) establishes that “Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11” while § 158(c) provides that a bankruptcy judge “may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.”

112. 28 U.S.C. § 157(b)(1) (the bankruptcy court “may enter appropriate orders and judgments” in core proceedings); 28 U.S.C. § 158(c)(2) (providing that with consent of the parties, the bankruptcy court may hear and determine and enter appropriate orders and judgments in related to proceedings).

were not “related to proceedings.”¹¹³ Appellate authority for bankruptcy cases was also established by the 1984 Act as codified in 28 U.S.C. § 158, based significantly on the section of the Emergency Rule establishing procedures for district court review of bankruptcy court orders.¹¹⁴

The 1984 Act caused the local orders issued under the Emergency Rule to be obsolete but necessitated the subsequent adoption of local “rules of reference” to refer bankruptcy cases to the bankruptcy court (similar to that portion of the Emergency Rule). While the 1984 Act addressed the constitutional issues decided in *Marathon*, its language opened the door to future jurisdictional challenges and has resulted in a number of further Supreme Court decisions further defining the jurisdiction of bankruptcy courts.

Conclusion

While the Emergency Rule began as, and was always intended to be, an interim, emergency remedy for the perfect storm faced by the courts post-*Marathon* and pre-congressional action, its impact reaches far beyond its purpose. The legacy of the Emergency Rule remains omnipresent today, as its language formed parts of the foundation of the 1984 Act and cemented in bankruptcy practice and hundreds of opinions the terms “core,” “non-core,” “related to,” “arising under,” and “arising in” jurisdiction. Notwithstanding whether the same result may have been reached otherwise, the incredible analysis and creativity of the Ninth Circuit’s task force, combined with the foresight and leadership of the Circuit’s Chief Judge, left an indelible impact on bankruptcy practice and jurisdiction.

It is yet to be seen how much the emergency authorization for the use of video and telephone conferencing by the courts after the CARES Act will have similar lengthy impacts. There is already one example: in September 2023, after the expiration of the emergency authorization, the JCUS approved a change to its broadcast policy that allowed the continued use of audio teleconferencing for public access to most non-evidentiary civil matters, including bankruptcy matters, and continues to evaluate further ways to expand remote public access to civil and bankruptcy proceedings.

113. Compare, Emergency Rule § (d)(3)(A) reprinted in 1 Collier on Bankruptcy ¶ 3.10[2][b] n.15 (16th ed), with, 28 U.S.C. § 157(b)(2).

114. Compare Emergency Rule § (e) reprinted in 1 Collier on Bankruptcy ¶ 3.10[2][b] n.15 (16th ed), with, 28 U.S.C. § 158.



Jared I. Mayer*

THE ENDURING CASE FOR BANKRUPTCY EXCEPTIONALISM

Nearly fifty years after Congress enacted the Bankruptcy Code, a debate has emerged over the existence and desirability of “bankruptcy exceptionalism”: the idea that bankruptcy law should utilize “flexibility, creativity, and pragmatism over technicalities of process and form” to “prioritize fidelity” to “the purposes for which it was created.”¹ This question is especially salient in the world of corporate reorganizations, where distressed companies and their investors retain counsel precisely for the purpose of hammering out deals in complex commercial settings. In this Essay, I defend bankruptcy exceptionalism in corporate reorganizations.² I show that bankruptcy exceptionalism

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1. See, e.g., Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1938–39 (2022) (decrying bankruptcy exceptionalism). See also Jared I. Mayer, *For Bankruptcy Exceptionalism*, 06/27/23 U. CHI. L. REV. ONLINE (defending it). But see generally Anthony J. Casey & Joshua C. Macey, *Purdue Pharma and the New Bankruptcy Exceptionalism*, 2024 SUP. CT. REV. 365 (defining it more as a canon of interpretation to avoid constitutional uncertainties with respect to bankruptcy courts’ Article I status and denying the “exceptionalness” of the definition provided above).

2. This is not to say that bankruptcy exceptionalism has no role in other kinds of bankruptcy cases, such as those involving individuals, municipalities, and family farmers and fishermen. In fact, bankruptcy exceptionalism might play an especially important role in cases featuring individuals, where bankruptcy law’s “fresh start” policy is most muscular and salient.

is a necessary and desirable response to the complex dynamics surrounding incomplete contracting, collective action problems, and opportunism that corporate distress can foment. Ignoring those dynamics when interpreting the Bankruptcy Code risks undermining corporate reorganizations' capacity for solving these problems in the first place. Rather than being a bug, bankruptcy exceptionalism has been a feature of the Bankruptcy Code and ought to be celebrated.

To get a sense of how the bankruptcy exceptionalism debate emerges in complex corporate bankruptcy cases, consider *In re Congoleum Corporation*.³ Facing a wave of asbestos claims, Congoleum filed for bankruptcy in the United States Bankruptcy Court for the District of New Jersey in 2003.⁴ Its plan of reorganization featured a settlement with an insurer under which the insurer bought back Congoleum's policy and obtained an injunction against any future claims arising out of the policy.⁵ The bankruptcy court determined that, under the settlement, the debtor was the only party that held claims under the policy.⁶ Eventually, the United States District Court for the District of New Jersey withdrew the reference and confirmed the plan. It explicitly stated that environmental claims would not be discharged and other named insureds under the policy, including Bath Iron Works Corporation (a one-time corporate sibling of the debtor), had "no responsibility for any of [Congoleum's] liabilities."⁷ The district court then referred the case back to the bankruptcy court in 2010, and the bankruptcy court closed the case soon thereafter.⁸

Years later, Occidental Chemical Corporation filed suit against Bath Iron Works in the United States District Court for the District of New Jersey for several environmental claims arising out of Congoleum's

See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (describing bankruptcy law as "giv[ing] to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"). I write with a focus on corporate reorganizations because much of the criticism of bankruptcy exceptionalism stems from corporate reorganization cases.

3. 149 F.4th 318 (3d Cir. 2025).

4. See *id.* at 325.

5. See *id.*

6. See *id.*

7. See *id.*

8. See *id.* at 326.

operations.⁹ Congoleum then filed for bankruptcy again in 2020, and the bankruptcy court held that Bath Iron Works was not liable for Congoleum's environmental liabilities pursuant to the plan of reorganization.¹⁰ Occidental would not let up, alleging that the plan of reorganization did not have preclusive effect on its litigation with Bath Iron Works, and what is more, the plan violated the Comprehensive Environmental Response, Compensation, and Liability Act such that it could seek recompense from Bath Iron Works.¹¹ Bath Iron Works then moved to reopen the 2003 bankruptcy case in order to obtain an order declaring that Bath Iron Works was not responsible for Congoleum's environmental liabilities.¹² The 2003 bankruptcy case was transferred to the bankruptcy court that presided over Congoleum's 2020 bankruptcy case and entered an order in Bath Iron Works' favor.¹³

Occidental appealed, and the district court reversed, holding (among other things) that the bankruptcy court was not best positioned to interpret the district court's order confirming the plan of reorganization.¹⁴ After all, it was the District Court that entered the order and the District Court that was presiding over the litigation between Occidental and Bath Iron Works.¹⁵ The District Court further held that the bankruptcy court erred in reopening Congoleum's 2003 bankruptcy case.¹⁶ Section 350(b) authorizes a bankruptcy court to open a bankruptcy estate "to administer assets, to accord relief to the debtor, or for other cause."¹⁷ The district court held that section 350(b) did not authorize the bankruptcy court to grant Bath Iron Works' motion because the motion failed to implicate Congoleum's bankruptcy estate and Bath Iron Works filed its motion nearly a decade after the bankruptcy court closed Congoleum's 2003 bankruptcy case.¹⁸

On appeal, the Third Circuit initially affirmed, but after Bath Iron Works moved for rehearing (with support from several amici law professors), the Third Circuit changed course, reversing its prior decision and the district court's decision.¹⁹ Occidental insisted that Bath Iron

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at 326.

14. *See id.* at 327.

15. *See id.*

16. *See id.*

17. 11 U.S.C. § 350(b).

18. *See Congoleum*, 149 F.4th at 327.

19. *See id.* at 327.

Works' motion did not meet section 350(b)'s requirements, but the Third Circuit disagreed. The motion was premised on interpreting the plan of reorganization and appreciating the long history of Congoleum's 2003 bankruptcy case.²⁰ While the district court presided over the litigation between Bath Iron Works and Occidental and confirmed the plan of reorganization, the Third Circuit held that the bankruptcy court was nevertheless well-positioned and well-equipped to reopen the 2003 bankruptcy case and interpret the plan of reorganization.²¹

Judge Matey disagreed. He interpreted section 350(b)'s "or for other cause" language as vesting "a limited authority to reexamine old estates consistent with the core principles of bankruptcy, not a general transfer of the judicial power to decide tangential cases and controversies."²² In his view, "for other cause" was limited to reasons substantially similar to "administer[ing] assets" and "accord[ing] relief to the debtor"—the first two grounds for reopening the case under section 350(b).²³ Pre-Bankruptcy Code practice, according to Judge Matey, also limited grounds for reopening the case to "provide relief to the debtor."²⁴

Judge Matey's interpretation, to be sure, was partly fueled by concerns about bankruptcy courts' Article I status. "Congress created the bankruptcy forum to assist federal judges, not usurp the Article III prerogative," he declared.²⁵ In his view, bankruptcy courts are ordinarily best suited to discerning their own orders when the alternative is "state courts understandably unfamiliar with federal regulatory law."²⁶ Things are different when the alternative is a federal district court that is vested with the "Judicial Power" under Article III of the Constitution.²⁷ The district court was all the more so the appropriate forum here, since it confirmed the plan of reorganization in question and presided over the dispute between the appellant and appellee.²⁸ Perhaps Judge Matey read section 350(b) under a kind of canon of constitutional avoidance, whereby he sought "to sidestep the underlying procedural concerns about the structural design of the bankruptcy courts."²⁹

20. *See id.* at 330.

21. *See id.* at 329–31.

22. *See id.* at 338 (Matey, J., dissenting).

23. *See id.*

24. *See id.* at 339.

25. *See id.* at 338.

26. *See id.* at 340.

27. *See id.* *See also* U.S. Const. art. III cl. 1.

28. *See id.*

29. *See* Casey & Macey, *supra* note 1, at 387.

Yet Judge Matey's dissent openly harbored skepticism about the claim that bankruptcy is exceptional in any way. In his view, the majority's decision would "stymie[] the District Court's constitutional and statutory authority while commanding future judges to make way for the 'experts.'"³⁰ Such a mandate would allow "bankruptcy exceptionalism," prompted by "a few academics [who] warned the sky was poised to fall," to fester.³¹

Judge Matey's attack on bankruptcy exceptionalism is part of a broader skepticism about bankruptcy exceptionalism. The thought goes like this: As Jonathan Seymour has pointed out, the textualist norms of today do not demand fidelity crabbed views of any statutory text, including the Bankruptcy Code.³² To the contrary, they allow judges to take stock of the Code's structure and policy commands within that structure to a fairly limited degree.³³ Nothing about bankruptcy makes it special or "exceptional" such that it is entitled to its own interpretive regimen. And so, to the extent that bankruptcy judges or practitioners seek to interpret the Bankruptcy Code with their own norms and practices in ways that defect from today's textualist norms, they ought to stop. In short, the bankruptcy world needs to get with the textualist program.

Perhaps the skepticism goes one level deeper. Bankruptcy law is in the business of handling and adjudicating nonbankruptcy entitlements. The Supreme Court long ago held that those entitlements ought to be preserved notwithstanding the commencement of the bankruptcy proceedings.³⁴ Unmooring bankruptcy practice from the Code's text jeopardizes those nonbankruptcy rights. After all, a corporate debtor (really, any debtor for that matter) can always use some additional assets, be it cash or time or equipment. Allowing the bankruptcy court to be "a roving commission to do equity" risks undercutting those nonbankruptcy rights in the name of debtor rehabilitation.³⁵

30. See Congoleum, 149 F.4th at 341 (Matey, J., dissenting).

31. See *id.* at 338, 340.

32. See Jonathan M. Seymour, *Bankruptcy in Conflict*, 98 AM. BANKR. L.J. 561, 597–98 (2024); Seymour, *Against Bankruptcy Exceptionalism*, *supra* note 1, at 1953–56.

33. See Seymour, *Bankruptcy in Conflict*, *supra* note 32, at 598–600.

34. See *Butner v. United States*, 440 U.S. 48 (1979).

35. See *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (observing that the Bankruptcy Code, and section 105(a) thereof, "does not . . . constitute a roving commission to do equity"). See also *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 386 (2019) ("The Code of course

Binding the bankruptcy courts to the mast of textualist norms helps them avoid the sirens of equity.

There is much that is right in this account. The Code's fixed distributional scheme and respect for property rights sets the right incentives both *ex ante* and *ex post*.³⁶ *Ex ante*, they allow parties to accurately price contracts in anticipation of possible business failure. *Ex post*, they help identify which investors have stakes in the distressed company and how to treat those investors when there is only a limited amount of consideration to go around. A court cannot then peddle its own policy preferences in lieu of the Code's clear command.³⁷

We must remember, though, that *Butner's* prescription was conditional: it demanded that bankruptcy courts respect nonbankruptcy rights unless bankruptcy policy counsels otherwise.³⁸ This mantra sounds tautological, as some have pointed out.³⁹ But it gets to a deeper point about what bankruptcy courts are doing, perhaps especially in Chapter 11 cases.

At its core, corporate distress presents a classic case of conflicting rights to the distressed company's assets.⁴⁰ Multiple unsecured creditors, for instance, might try to collect from the same pool of cash in a company's checking account. The problem gets deeper because many of the problems that companies face are polycentric ones, where resolving one part of a company's financial distress might affect another aspect of its distress.⁴¹ That is especially true when the company runs a deficit of a rivalrous resource like cash; every dollar that goes into one party's pocket necessarily does not go into another party's pocket. Imagine a company that has a limited pool of cash. Imagine as well that it licenses intellectual property from a licensor and is staring down a claim from a judgment creditor. Every dollar that

aims to make reorganizations possible. But it does not permit anything and everything that might advance that goal.”).

36. See Jared I. Mayer, *Bankruptcy's Equity Canon*, 30 AM. BANKR. INST. L. REV. 231, 236–37 (2022).

37. See *Law v. Siegel*, 571 U.S. 415, 421 (2014) (“[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions.”).

38. See *Butner*, 440 U.S. at 55.

39. See Anthony J. Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 120 COLUM. L. REV. 1709, 1727–28 (2020); Juliet M. Maringiello, *When Does Some Federal Interest Require a Different Result?: An Essay on the Use and Misuse of Butner v. United States*, 2015 U. ILL. L. REV. 657, 659.

40. See Mayer, *Bankruptcy's Equity Canon*, *supra* note 36, at 241–42.

41. See *id.*

goes to the judgment creditor does not go to the licensor. That might leave the company in a tough spot, especially if it thinks that short-changing the licensor will give the licensor grounds for terminating the license agreement.

These problems stem from the inherently incomplete contracts that parties inevitably create. Parties may try their best to account for contingencies, but contracts in the real world can fail to do so satisfactorily.⁴² The sheer variety of investors, operational concerns, investment instruments, and sources of distress practically prevent parties from drafting complete contracts.⁴³

These incomplete contracts, and the conflicting rights and polycentric problems they generate, set up two kinds of collective action problems.⁴⁴ The first is what is known as the commons problem, which is when parties overdraw from a resource. A company may have outstanding debts to several lenders and trade creditors. If any one of them enforces their nonbankruptcy rights and collects in full, the company may well survive, but the same cannot be said if *all* of them do the same. Some creditors or other investors may end up with nothing, even though the company could have made good on those investments had the creditors not pursued their nonbankruptcy rights. All of the investors are collectively worse off because some of them opted to pursue their nonbankruptcy remedies.

The second collective action problem is the anticommons problem. In a sense, the anticommons problem is the conceptual inverse of the commons problem. While the commons problem features parties who overuse a resource, the anticommons problem is a situation where parties *underuse* a resource because, in order to use it, each party must obtain the consent of (nearly) every other party. The company may have a great opportunity on its hands, but if it needs signoff from several different investors, one may worry that each one will withhold their consent in order to extract rents from the other investors and the company, too. Since any of the investors can make such a threat, the company will have to forego the lucrative opportunity.

As Thomas Jackson and Douglas Baird advocated long ago, bankruptcy law is designed to solve for collective action problems when investors to a firm seek to enforce their nonbankruptcy rights against

42. See Casey, *supra* note 39, at 1736–38.

43. See *id.* at 1738–41.

44. See Jared I. Mayer, *Control Rights and Chapter 11's Expanding Scope*, 98 AM. BANKR. L.J. 341, 364–65 (2024).

the firm.⁴⁵ To do so, the parties need a single, comprehensive forum designed to handle parties' competing claims. The collective proceeding is fundamental to bankruptcy and is part of what makes bankruptcy exceptional indeed.⁴⁶ Its jurisdiction is "principally *in rem*" in that it is "premised on the debtor and his estate, and not on the creditors."⁴⁷ That kind of jurisdiction is reflective of the fact that "[b]ankruptcy is not a cause of action," but "a mechanism to address the debtor's inability to meet its obligations to its creditors."⁴⁸

Several of the Code's hallmark tools are designed to preserve this forum and maximize the company's value. Chief among them are the automatic stay;⁴⁹ the trustee's (or debtor in possession's) power to assume or reject executory contracts;⁵⁰ their power to sell assets free and clear of any liens or encumbrances;⁵¹ and their power to avoid transfers of value away from the company on the eve of the bankruptcy filing.⁵² These tools jointly prevent parties from extracting value from the distressed company and authorizes the trustee (or debtor in possession) to put the company's assets to their highest and best uses.

Those tools, however, may not be enough to combat the collective action problems that exacerbate corporate financial distress. Recall how the collective action problems stem from parties insisting on their rights, which in turn leads to overconsumption (commons problem) or under-utilization (anticommons problem) of corporate assets. The Code is helpful in broadly outlining when those rights may be modified in order to maximize the company's value, but the Code may not be specific enough to help tackle the collective action problems in any given situation. Put differently, the Code's gaps might give rise to opportunism: "undesirable behavior that cannot be cost-effectively defined, detected, and deterred by explicit *ex ante* rulemaking."⁵³

45. See Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 105–09 (1984).

46. See *Allen v. Cooper*, 589 U.S. 248, 257 (2020).

47. See *Central Va. Community College v. Katz*, 546 U.S. 356, 369–70 (2006) (quoting *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)).

48. See Robert M. Lawless, *Reframing Arbitration in Bankruptcy*, 96 AM. BANKR. L.J. 701, 706 (2022).

49. 11 U.S.C. § 362(a).

50. See *id.* § 365.

51. See *id.* § 363(b), (f).

52. See *id.* §§ 544, 547, 548.

53. See Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1080 (2021).

Parties can capitalize on the Code's gaps, vagueness, and ambiguities in order to capture more value for themselves at the expense of others, and in so doing, essentially recreate the commons and anticommons problems that bankruptcy law was designed to solve in the first place.⁵⁴

To see this, consider the now-settled issue of critical vendor orders. Suppose a company has an essential vendor that sits beyond the United States' jurisdiction. The vendor conditions its future trade with the debtor on the debtor paying in full of all outstanding amounts the debtor owes it. The vendor, far away, is beyond the automatic stay's reach. The debtor company may be caught in something of a catch-22. On the one hand, refusing to pay back prepetition amounts to the vendor risks losing the vendor's ongoing cooperation. On the other, vendors both near and far might manufacture reasons for why they need to be paid in full now, lest they be unable to work with the debtor going forward. How are we to solve the debtor's dilemma?

The answer is for the debtor to have to show credible threats from a narrow list of creditors without whom the remaining creditors would be worse off.⁵⁵ Putting creditors' (and the debtor's) feet to the fire forces them to reveal whether the creditors will provide value to the debtor that inures to everyone's benefit. It also eliminates the risk of losing the far-away vendor whose goods indeed help maximize the company's value.

Critically, the Code provides little guidance on this score. It allows the debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate," but the text is otherwise silent.⁵⁶ To fill the gap, we need to have a sense of what corporate reorganizations are supposed to do and the risks attendant to them.

Here, the concerns about the commons and anticommons problems stand front and center. Allowing everyone to claim that they are a "critical vendor" who must be paid in full before they can continue to work with the debtor threatens to unravel the whole bankruptcy process (commons problem). But preventing the debtor from making *any* critical vendor payments, regardless of how critical the vendor is and how much the vendor needs the payments in order to continue working with the debtor, risks requiring unanimous consent among the other creditors and therefore an inability to procure goods from the necessary vendor (anticommons problem). A sensible solution to this dilemma hinges far more on bankruptcy law's purposes rather than the Code's thin text.

54. See Mayer, *Bankruptcy's Equity Canon*, *supra* note 36, at 242.

55. See *In re Kmart*, 359 F.3d 866, 872–73 (7th Cir. 2004).

56. See 11 U.S.C. § 363(b)(1).

This process of supplementing the Code's text with bankruptcy law's purpose also fueled one of the most important developments in corporate reorganizations since Congress enacted the Code in 1978: the so-called "363 sale." Through this mechanism, a debtor company can sell some or substantially all of its assets free and clear of any liens or encumbrances.⁵⁷ The challenge, of course, is for the court and the parties to craft a sale process that allows the company to get top dollar for the assets. At this point in time, though, navigating that challenge is a well-worn path. Courts routinely authorize such sales and craft auction mechanisms for marketing distressed companies' assets in bankruptcy.⁵⁸

The critical innovation in 363 sales has been conducting them prior to, and separate from, confirming plans of reorganization. A plan of reorganization is the core mechanism through which the parties allocate the debtor corporation's value. By decoupling the sale from the plan of reorganization, bankruptcy courts allow parties to first focus on maximizing the value of the assets for sale and then decide how to distribute that value in accordance with the Code's distributional rules.⁵⁹

Risks abound in this structure, however. One of them is that parties may use the 363 sale process to alter the distributional scheme.⁶⁰ Courts have thus rightly been wary of sales that attempt to smuggle distributive concerns into value maximization ones. Sales that dictate how the purchase price ought to be distributed among the creditors are lambasted as *sub rosa* plans of reorganization, which courts deem to be largely verboten.⁶¹

Note how this broad program dovetails with, but is in no way dictated by, the Bankruptcy Code. The Code does not specifically authorize a sale of substantially all the company's assets outside a plan of reorganization.⁶² Yet this structure helps maximize the size of the

57. See *id.* § 363(b), (f); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983).

58. See Ashley Suarez, Comment, *An Analysis of Section 363(b) Sales: Justified Deviations or Just Deviations?*, 22 U. PA. J. BUS. L. 988, 996–99 (2020).

59. See 11 U.S.C. § 1129(a)(7)-(8), (b).

60. See Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727, 734–36 (2010).

61. See, e.g., *PBGC v. Braniff Airways, Inc. (In re Braniff Airways, Inc.)*, 700 F.2d 935, 940 (5th Cir. 1983); *In re Iridium Operating LLC*, 478 F.3d 452, 466 (2d Cir. 2007).

62. See *In re White Motor Credit Corp.*, 14 B.R. 584, 588 (Bankr. N.D. Ohio 1981) ("There is no acknowledgement or recognition of the sale of all or

corporate pie, as it were, when each party has an incentive to jockey for a larger slice even of a smaller pie.

More broadly, harping on the Code's text threatens to miss much about what makes corporate reorganizations work and how they work. Many of the innovations in Chapter 11 since Congress enacted the Bankruptcy Code in 1978 stem from judges and practitioners who developed strategies in response to evolving capital markets.⁶³ It is no surprise, then, that both bankruptcy judges and practitioners have these developments, along with corporate reorganization's core goals, centrally in mind when interpreting the Code's text.

Market developments and the core goals of corporate reorganizations are more than mere window dressing. They are the very context against which the Code's commands make sense. That is all the more so the case because corporate reorganizations are almost always complex, multi-party disputes. The incomplete contracting problem and the collective action problems it generates makes corporate reorganizations rife with opportunistic behavior. Tackling these problems and facilitating dealmaking requires giving bankruptcy courts discretion, in part by affording them the discretion that already exists in the Bankruptcy Code.⁶⁴

So this is where the criticism of bankruptcy exceptionalism, including Judge Matey's dissent, goes wrong. If textualism demands a uniform approach to interpreting statutes, then bankruptcy is exceptional because the problems it faces are exceptionally complex. It trades in collective action problems that the parties need to solve to make all of them better off. Corraling the investors into a single forum is essential to making bankruptcy work. And as the *amici* in *Congoleum* pointed out, letting any of them peel off can unravel the corporate reorganization process entirely.⁶⁵ Even within the forum, the

substantially all of the property of a Chapter 11 debtor outside the provisions of Chapter 11 itself.”).

63. See Casey & Macey, *supra* note 1, at 387 (“Many bankruptcy practices exist because judges and lawyers responded creatively to changes in capital markets.”).

64. See Hon. Robert Drain (Ret.), 2023 Harvey R. Miller Lecture at Columbia Law School: Creativity in Bankruptcy, <https://www.law.columbia.edu/news/archive/retired-bankruptcy-court-judge-robert-ddrain-84-delivers-second-annual-harvey-r-miller-59-lecture> (September 20, 2023); Harvey R. Miller & Ronit J. Berkovich, *The Implications of the Third Circuit's Armstrong Decision on Create Corporate Restructuring: Will Strict Construction of the Absolute Priority Rule Make Chapter 11 Consensus Less Likely?*, 55 AM. U. L. REV. 1345, 1346–47 (2006).

65. See Brief of Six Law Professors as Amici Curiae in Support of Appellant's Petition for Rehearing or Rehearing En Banc at 4–5, *Occidental Chem. Corp. v. Bath Iron Works Corp.*, No. 23-1295 (3d Cir. filed Oct. 15, 2024).

bankruptcy judge must decide how to ameliorate the several collective action problems and opportunities for opportunism that lie in wait. Doing so requires capitalizing on the flexibility that the Code provides.

One scholar has noted that many different areas of law, in addition to bankruptcy, might claim to be exceptional; tax, family, antitrust, foreign relations, immigration, veterans, election, federal Indian, and criminal law, for instance, may each claim to be exceptional.⁶⁶ If all of these areas of law are exceptional, then one can be forgiven for thinking that none of them are. And if no area of law is exceptional, then the same set of textualist norms should govern them all.

This Essay's claim is not that bankruptcy law is exceptional relative to other domains of law, but rather that it is exceptional relative to a textualist baseline. Complex problems have always gone hand in hand with corporate distress and bankruptcy law must solve for them. The genius of the Bankruptcy Code and those who have worked within its confines has been their ability to provide both the stability and flexibility necessary to tackling those problems. It is that dynamic that has made the Bankruptcy Code a rousing success for nearly fifty years and one that will allow it to navigate ever more complex problems in the future.

66. See Alice Ristroph, *Exceptionalism Everywhere: A (Legal) Field Guide to Structural Inequality*, 65 ARIZ. L. REV. 921, 922–23 (2023).



J. Scott Bovitz*

THE CENTRAL DISTRICT OF CALIFORNIA BANKRUPTCY COURT IN CRISIS: LEADERSHIP, CONTINUITY, AND INSTITUTIONAL ADAPTATION DURING COVID-19

Public health crises have a way of revealing how institutions really work. They don't just test doctors and hospitals, they test whether systems of governance can make decisions quickly, coordinate across layers of authority, and maintain public trust while imposing limits that feel uncomfortable or disruptive. The influenza pandemic of 1918 is still the classic American example. Its lesson isn't primarily medical, because there was little medicine to offer. It is administrative. Cities that acted quickly, shut down large gatherings, and took responsibility for decisive actions saved lives. Cities that hesitated or tried to carry on as usual suffered devastating consequences.¹

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1. The contrast between Philadelphia and St. Louis during the 1918 influenza pandemic has become a canonical illustration of the consequences of delayed versus decisive public action. Philadelphia permitted a large public parade in late September 1918, drawing more than 200,000 spectators, and experienced a rapid collapse of hospital capacity within days. St. Louis, by contrast, acted swiftly under the leadership of its health commissioner, Dr. Max Starkloff, closing schools, theaters, and public gatherings shortly after the first reported cases. Mortality rates in St. Louis were less than half those of Philadelphia, demonstrating that outcomes turned not on medical intervention, which was unavailable, but on governance, timing, and institutional leadership. John M. Barry, *The Great Influenza: The Story of*

COVID-19 forced the same basic reckoning a century later, including for the federal courts.² Courthouses are built around people coming together: filing counters assume physical access, especially to pro se parties; and courtrooms assume proximity between judges, lawyers, staff, witnesses, and litigants.³ When those very spaces became unsafe, courts were forced to confront a simple but uncomfortable question: how do you keep the justice system functioning when the building itself becomes a public health risk?⁴

For bankruptcy courts, that question carried particular urgency. Bankruptcy is not a system that can simply pause until conditions improve. The automatic stay, emergency relief, debtor-in-possession financing, and court supervision of restructurings exist to prevent economic collapse from spreading. In times of widespread disruption, bankruptcy courts function as institutional shock absorbers, stabilizing relationships among debtors, creditors, employees, and communities at moments when instability threatens to cascade.⁵

Along with courts across the nation, the United States Bankruptcy Court for the Central District of California found itself squarely at the center of that challenge. Serving one of the largest and most economically diverse populations in the nation, the court had to respond quickly to overlapping public-health orders, operational disruptions, and unprecedented economic stress, all while continuing to perform functions essential to financial stability. Based on discussions with Chief Judges and Clerks of Court around the country, the Central District's response was notable not just in its speed, but also in an ability to adapt without waiting for the perfect guidance.⁶

the Deadliest Pandemic in History 370–71 (Viking 2004); see also Centers for Disease Control & Prevention, 1918 Pandemic (H1N1 Virus) (Mar. 20, 2020), <https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html>.

2. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

3. Julie M. Baldwin, John M. Eassey & Erika J. Brooke, *Court Operations during the COVID-19 Pandemic*, 45 Am. J. of Crim. Just. 743 (2020).

4. Michael Legg, *The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality*, Federal Law Review, 49(2), 161-184 (2021), available at <https://journals.sagepub.com/doi/abs/10.1177/0067205X21993139> (last visited Jan. 26, 2026).

5. Anthony J. Casey, *Bankruptcy and Bailouts, Subsidies and Stimulus: The Government Toolset for Responding to Market Distress*, 2021 U. Chi. Legal F. 63 (2021).

6. The author wishes to thank Bankruptcy Judge Maureen Tighe, former Chief Judge of the Central District of California, and Kathleen Campbell, Clerk of the Central District of California, for engaging in extensive conversations

That capacity for adaptation did not emerge in a vacuum. It was shaped by the institutional culture of the Ninth Circuit itself. As the largest and most geographically expansive federal circuit,⁷ the Ninth Circuit has long operated under conditions of scale, diversity, and distance that requires a degree of decentralization and local initiative to maintain coherence across vastly different regions and economic environments.^{8 9} The Circuit has also fostered regular communication among the Chief Judges across the Circuit.

That tradition has particular importance for bankruptcy courts. Bankruptcy practice demands speed, flexibility, and close familiarity with local economic realities. The Ninth Circuit's tolerance for procedural variation at the district and bankruptcy court levels has allowed courts like the Central District to develop administrative practices tailored to regional needs while remaining anchored to circuit-wide norms.¹⁰ In ordinary times, that decentralization can produce unevenness. In a crisis, it can produce resilience.

and email communications with the author. Further, the author relied extensively upon the fascinating details and timeline provided in the unpublished December 2025 court report, *Resilience in Action: Court Initiatives During the COVID-19 Pandemic*. The report was prepared at the direction of Judge Tighe and Kathy Campbell for the court's use and specifically for use in preparing this article, and the many Central District professionals involved in the creation of this report are acknowledged within the report. That report may be found at <https://perma.cc/FV88-YQLA>. Throughout this article, factual events and actions described by the Central District Report will be referenced as "CBCA Report"

7. United States Bankruptcy Court Central District of California, *About the Court*, <https://www.cacb.uscourts.gov/about-court> ("The Central District is part of the Ninth Circuit, which encompasses the federal courts of nine states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The Ninth Circuit also extends appellate services to the Territory of Guam and to the Commonwealth of the Northern Mariana Islands. The Ninth Circuit is the largest of the twelve federal circuits in size, population, number of federal judges, and volume of litigation. It includes fifteen federal district courts, thirteen bankruptcy courts, and a court of appeals.") (last visited Jan. 26, 2026).

8. UNITED STATES COURTS FOR THE NINTH CIRCUIT, *What is the Ninth Circuit?*, <https://www.ca9.uscourts.gov/judicial-council/what-is-the-ninth-circuit/> (last visited Jan. 14, 2026).

9. Significant studies have emerged regarding the positive aspects of government decentralization in times of crisis. See, e.g., Pietrangelo de Biase & Sean Dougherty, *FEDERALISM AND PUBLIC HEALTH DECENTRALISATION IN THE TIME OF COVID-19* (OECD, 2021).

10. The primary "procedural variance" for bankruptcy courts within the Ninth Circuit, as well as in other circuits, stems from the authority to establish

Formally, the Central District bankruptcy court operates as a unit of the United States District Court for the Central District of California, and it remains subject to district-wide administrative authority, facility constraints, and national Judicial Conference guidance. Emergency planning in the district courts naturally prioritizes criminal proceedings and jury trials, where constitutional concerns are most acute. Bankruptcy courts, however, confront a different set of imperatives. Their dockets involve time-sensitive decisions that directly affect liquidity, employment, and the survival of operating businesses. Delays carry real economic consequences.¹¹

That structural tension became impossible to ignore during the pandemic. The Central District entered the crisis acutely aware that waiting for traditional courthouse access to resume was not a viable option. The court was prepared to assert operational flexibility within institutional boundaries, drawing on long-standing Ninth Circuit norms that value practical problem-solving and trust in local leadership.¹²

Scale also mattered. Serving a population larger than that of many states, the Central District had already developed systems for managing high-volume dockets, including widespread electronic filing, telephonic appearances, and standardized procedures. Those tools were not designed for a public-health emergency, but they provided a foundation for rapid transformation when normal operations became impossible.

The Central District's experience underscores a broader lesson about judicial administration. Crisis response is not driven solely by written emergency plans or centralized directives. It depends just as much on institutional culture, accumulated experience, and the degree of trust placed in judges and administrators closest to the problem. The Ninth Circuit's comfort with decentralized problem-solving did not eliminate uncertainty, but it allowed courts to keep functioning when delay would have meant paralysis.

local rules, standing orders, and individual judicial policies that must be consistent with, but not duplicative of, the Federal Rules of Bankruptcy Procedure and Acts of Congress. *See* Federal Rules of Bankruptcy Procedure, Rule 9029 on adopting local rules and procedures.

11. James J. White, *The Virtue of Speed in Bankruptcy Proceedings*, 40 Law Quadrangle (formerly Law Quad Notes) - (1997), available at: <https://repository.law.umich.edu/lqnotes/vol40/iss3/10>.

12. CBCA Report, *supra* note 6, at 14 (For example, "leveraging technology ... to meet the needs of litigants, attorneys, and the public while adhering to public health guidelines, even during the 'Safer at Home' orders and strict limitations on leaving the home.").

The Scope of the Challenge in Early 2020

The sheer size and complexity of the Central District shaped everything about how it faced the pandemic. The court serves Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties, a region that includes the largest metropolitan economy in the country. Within that footprint are global entertainment companies, logistics hubs, aerospace firms, real estate empires, agricultural operations, manufacturers, and millions of small businesses and wage earners. Not surprisingly, the bankruptcy docket mirrors that diversity. On any given day, it ranges from complex Chapter 11 reorganizations to high-volume consumer cases, many involving debtors without lawyers.¹³

By February 2020, court leadership suspected that COVID-19 would hit the regional economy quickly, but not evenly. Some industries, particularly hospitality, retail, and entertainment, were already showing signs of serious distress even before official shutdowns began. Others, such as logistics and healthcare-related businesses, experienced volatility rather than immediate collapse. The court anticipated that all of these pressures would converge in the bankruptcy system at once, potentially driving up both the number of filings and the urgency of the relief being sought.

The court's physical layout made the situation even more complicated. Courthouses were spread across multiple counties, with each county issuing its own public-health orders on its own timeline. Some counties moved quickly to restrict public access, while others moved more slowly. The result was a patchwork of local rules and conditions that made a single, uniform courthouse policy difficult to maintain. At the same time, state and federal guidance was evolving rapidly, sometimes changing within days, leaving administrators to reconcile shifting directives with on-the-ground local realities.¹⁴

Unlike many civil courts, the Central District did not have the option of simply slowing down while waiting for clarity. Bankruptcy proceedings operate on statutory timelines designed to protect substantive rights. The automatic stay (11 U.S.C. §362(a)) takes effect immediately upon filing and requires active judicial oversight. Emergency motions, requests for financing, and disputes over adequate protection cannot wait weeks or months. Debtors-in-possession need

13. <https://ecf.cacb.uscourts.gov/ecfstatsdash> (case statistics, Central District Bankruptcy Court) (last visited Jan. 26, 2026).

14. CBA Report, *supra* note 6, at 2-5 (California response), 5-10 (county responses), 10-13 (Administrative Office of the U.S. Courts).

quick approval to keep paying employees and suppliers. Creditors, especially workers and small vendors, rely on court supervision to prevent disorderly collection efforts.

The court also faced a serious access-to-justice problem. A significant share of the Central District's consumer cases involves unrepresented debtors who depend on in-person clerk assistance, paper filings, and public counters. Closing courthouses overnight risked cutting those litigants off from the system entirely. Unlike represented parties, they could not easily shift to remote participation without institutional support and guidance.¹⁵

Early filing data confirmed these concerns. After a brief initial dip, as economic activity abruptly froze, filings rebounded quickly in the form of emergency motions and preemptive cases. Businesses sought protection in anticipation of collapsing revenue. Individuals who suddenly lost jobs turned to bankruptcy to stabilize housing and transportation. The court recognized that any prolonged interruption would not reduce harm, it would magnify it.

All of this reinforced a basic reality. During the pandemic, the bankruptcy court was not simply resolving disputes. It was helping maintain economic continuity and critical infrastructure. Continuing operations, even in a dramatically altered form, was not a discretionary choice. It was central to the court's statutory mission.

That understanding shaped the court's approach from the very beginning. The pandemic was not treated as a reason to suspend operations, but as a constraint that demanded rapid adaptation. The question was never whether the court would function, but how. That framing would guide decision-making in the crucial weeks that followed.¹⁶

Leadership at the Onset of Crisis

At the center of the Central District's early response was Chief Judge Maureen A. Tighe, who had taken on that role in 2019, less than a year before the pandemic began. Although her tenure as Chief Judge was still new, she brought decades of experience within the federal system. Before joining the bankruptcy bench in 2003, she served as a Deputy Chief in the U.S. Attorney's Office Major Frauds Section and later as United States Trustee for seven judicial districts across California and the Pacific territories. Those positions required managing large,

15. Interview with Bankruptcy Judge Maureen Tighe, former Chief Judge of the Central District of California, (Fall and Winter 2025).

16. *Id.*, Interview with Kathleen Campbell, Clerk of the Central District of California (Fall 2025).

geographically-dispersed systems under constant pressure, a background that proved invaluable in March 2020.¹⁷

As reports of viral spread intensified and public-health warnings escalated, Judge Tighe approached the situation not as an abstract emergency, but as a concrete management problem. Information was incomplete and conditions were changing daily, but her focus was clear. The court had to keep operating. It might not operate perfectly, but it could not stop.¹⁸

The timing of the crisis coincided with profound personal loss. In early March 2020, Judge Tighe was caring for her mother, whose health was rapidly declining. Her mother passed away on March 14, 2020, just as the emergency was accelerating and the scope of the pandemic was becoming unmistakable. Like many leaders during this period, Judge Tighe faced the collision of personal grief and institutional responsibility. There was no meaningful pause. Decisions affecting hundreds of employees and thousands of litigants had to be made immediately.¹⁹

Judge Tighe understood what was at stake. If the bankruptcy court ceased functioning, the consequences would ripple outward. Businesses would be unable to obtain emergency relief. Employees would lose wages. Creditors would act independently. Backlogs created in the early days of the crisis could take years to unwind. As she told members of the court's leadership team, "It is up to us to keep the court going so that people's lives can go forward."²⁰

Judge Tighe's leadership style during this period emphasized decisiveness and trust. Rather than attempting to centralize every decision, she relied on senior administrators and encouraged frank assessments and rapid feedback. She accepted that some decisions would need to be revisited as circumstances evolved. In Judge Tighe's view, waiting for perfect information posed a greater risk than making timely adjustments.²¹

Equally important was Judge Tighe's understanding of the court's relationship with the public. Maintaining confidence in the bankruptcy system required clarity and consistency, even amid disruption. Sudden closures without explanation, or shifting procedures without communication, would undermine trust. Judge Tighe therefore emphasized clear, frequent communication as an essential part of crisis

17. <https://www.cacb.uscourts.gov/judges/honorable-maureen-tighe> (last checked January 26, 2026).

18. *Tighe interview*, *supra* note 17.

19. *Id.*

20. *Id.*

21. *Id.*; *Campbell Interview*, *supra* note 18.

management.²² Relationships and regular meetings with bar association leaders proved invaluable in obtaining feedback about the needs of the attorneys and the public and how the court needed to address specific concerns.

The tone set during those early weeks proved lasting. By treating continuity as non-negotiable and adaptation as a professional obligation, Judge Tighe established a shared understanding that the court's mission did not pause in the face of crisis. That understanding became the foundation for the administrative coordination, technological change, and institutional resilience that followed.

Early Planning and the Architecture of Coordination

As the public-health crisis accelerated in early March 2020, the Central District quickly moved from talking about contingencies to actually running the court under emergency conditions. Although ultimate responsibility rested with the Chief Judge, the practical work of keeping the system functioning fell to a small group of senior administrators whose experience and institutional memory proved critical. At the center of that effort were Clerk of Court Kathleen J. Campbell, Chief Deputy of Administration John Hermann, and Chief Deputy of Operations Benjamin Varela.²³

By February 2020, Judge Tighe had already begun regular conversations with Campbell, Hermann, and Varela about what might be coming and how the court could respond. At that point, much remained uncertain. National guidance was thin, and it was unclear whether COVID-19 would require short-term adjustments or a wholesale rethinking of court operations. Still, leadership understood that waiting for definitive answers would leave the court exposed if conditions worsened quickly.

They did worsen. As counties across Southern California began issuing emergency orders and limiting public access to government buildings, Campbell moved quickly to impose structure on what could easily have become chaos. Around March 16, 2020, she established daily leadership conference calls that brought together roughly eighteen senior managers from across the court. These included leaders from operations, information technology, human resources, facilities, finance, courtroom services, and legal support.²⁴

22. *Id.*

23. *Id.*

24. *Id.*; CBCA Report, *supra* note 6, at 14

These calls became the court's operational nerve center. Each meeting followed a clear and disciplined format. Participants reviewed new public-health directives and building access rules, then moved through department-by-department reports on staffing, technology capacity, and emerging problems. Decisions were made in real time, documented, and quickly circulated so that all locations and divisions stayed aligned.

Meeting daily was not about bureaucracy, it was about speed. Conditions were changing too fast for weekly updates or layered approvals. Policies adopted one day sometimes had to be adjusted the next. Rather than seeing this as a failure of planning, court leadership accepted it as the reality of crisis management. The daily calls created a constant feedback loop that allowed the court to adapt without losing coherence.

Campbell played a central role in making this work. She acted as the bridge between judicial leadership and operational staff, translating judicial priorities into practical procedures and, just as importantly, explaining operational limits back to the judges. That two-way flow of information helped prevent decisions that sounded good in theory but were unworkable in practice, or overly cautious in ways that would slow the court unnecessarily.

Hermann focused on the nuts and bolts. He assessed what it would take to move large portions of the workforce off-site, identified gaps in equipment and secure network access, and coordinated with outside entities such as the General Services Administration. The court had no standing telework infrastructure designed for this scale, so laptops, secure connections, and remote communication tools had to be rolled out quickly, often with little precedent to draw on. As Judge Tighe recalls, "We invented telework for the court. We had to."²⁵

Beyond logistics, the coordination structure served an important cultural purpose. Bringing senior managers together on a regular basis reinforced a sense that this was a shared problem requiring collective solutions. Traditional departmental silos faded. Issues that cut across divisions, such as remote courtroom operations or employee safety protocols, were addressed holistically instead of being handed off sequentially.

Looking back, an internal retrospective concluded that many of the Central District's most important early decisions, including when to close courthouses, how broadly to expand telework, and how quickly to move to remote hearing platforms, flowed directly from this coordinated leadership process. As conditions stabilized, the meetings

25. Tighe Interview, *supra* note 17.

became less frequent, but the collaborative framework remained in place throughout the pandemic.²⁶

This architecture of coordination, built under intense pressure, reflected the court's broader approach to crisis management. Rather than relying on rigid hierarchies or static emergency plans, leadership emphasized communication, flexibility, and trust in professional expertise. That approach would continue to shape the court's response as new challenges emerged.

Navigating Layered Public-Health and Judicial Authority

From late January through mid-March 2020, the Central District found itself navigating a growing and often confusing stack of public-health and judicial directives. Authority flowed at the same time from federal, state, and local officials, each responding to fast-moving conditions on different timelines. For a court operating across multiple counties, making sense of these overlapping mandates quickly became one of the hardest administrative tasks.

At the federal level, the Secretary of Health and Human Services declared a public-health emergency on January 31, 2020.²⁷ That declaration triggered certain legal authorities, but offered little concrete guidance for day-to-day court operations. The Administrative Office of the United States Courts soon issued advisories on telework, courthouse access, and continuity planning, but those advisories were necessarily broad, reflecting the vastly different conditions facing courts across the country.²⁸

State and local governments moved on separate tracks. California's Governor declared a statewide emergency on March 4, 2020,²⁹ followed by executive orders that increasingly limited public gatherings and nonessential activities.³⁰ Counties within the Central District issued their own health orders, sometimes stricter than the

26. *Id.*; CBCA Report, *supra* note 6, at 14 Campbell Interview, *supra* note 18.

27. <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>, quoting from President Trump's March 13, 2020 *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*.

28. CBCA Report, *supra* note 6, at 10-13.

29. Proclamation of a State of Emergency at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf> (last visited Dec. 28, 2025).

30. CBCA Report, *supra* note 6, at 3-5.

state's and often different from one another.³¹ A courthouse in Los Angeles County could face tighter restrictions than one in Ventura or San Luis Obispo, even though all were part of the same federal district.

Layered on top of public-health mandates were judicial governance structures. Courthouse facilities were subject to General Services Administration requirements that imposed building-specific safety rules.³² District court general orders addressed courthouse operations, often with understandable emphasis on criminal cases and jury trials. The Bankruptcy Court had different demands and had two divisions where there was no District Court. The inconsistencies among the various directives needed to be reconciled. The result was a situation where complying with one directive could put the court in tension with another.

Court leadership came to describe this as a problem of synthesis rather than simple compliance. No single external directive could be adopted wholesale without considering how it interacted with bankruptcy-specific obligations. A county order restricting public access had to be reconciled with the court's duty to accept filings and hear emergency motions. District court orders suspending proceedings could not be applied mechanically to bankruptcy cases governed by strict statutory timelines.

The court addressed these conflicts through a combination of legal analysis and practical judgment. Daily leadership calls provided a forum for evaluating new directives as they emerged. Legal staff assessed the scope and applicability of each order, while operational teams considered what could realistically be implemented. The resulting policies were tailored to the court's unique role, aligning with the intent of public-health guidance while preserving essential judicial functions.

Clear communication was essential. The court issued frequent public notices explaining what was changing, why it was changing, and how long changes were expected to last. That transparency helped reduce confusion among litigants and the bar as procedures evolved. Internally, staff were kept informed not just of what to do, but why decisions were being made, reinforcing confidence that responses were thoughtful rather than improvised.

This approach reflected a deeper understanding of institutional legitimacy during crisis. Trust depends not only on outcomes, but on visible, reasoned decision-making. By explaining how it reconciled

31. *Id.* at 5-10.

32. *Id.* at 1 (access control, facility safety standards), 25 (cleaning protocols), 39 (health screenings).

competing authorities, the Central District maintained credibility while operating under unprecedented constraints. The experience highlighted a broader lesson for judicial administration: when emergencies produce overlapping and sometimes conflicting guidance, the ability to synthesize and explain may matter more than strict adherence to any single rule.

Closing Courthouses Without Closing the Court

As public-health orders tightened in mid-March 2020, simply postponing and rescheduling matters was not an option. The problem was most acute for self-represented debtors and small creditors. A significant share of the Central District's consumer docket involves individuals who file without lawyers and rely heavily on in-person help from the Clerk's Office, paper forms, and public filing counters. Many lack reliable internet access, familiarity with electronic filing, or the resources to pivot quickly to remote processes. An abrupt courthouse shutdown threatened to exclude these litigants entirely, at the very moment when job loss, housing instability, and financial crisis were driving them to seek bankruptcy relief.

Court leadership quickly concluded that closing buildings could not mean closing access.³³ Statutory deadlines did not disappear. The automatic stay still went into effect the moment a case was filed. Emergency motions still required judicial oversight. From the court's perspective, maintaining an open pathway into the system was essential to preserving economic stability.³⁴

The response was a series of fast, practical adaptations. Where public-health rules allowed, the court created limited document drop-off procedures, designed to minimize physical contact while preserving a way to file paper pleadings.³⁵ Mail-in filing options were expanded, and internal processing timelines were adjusted to reflect staffing disruptions and delays beyond anyone's control.

At the same time, the court pushed forward on electronic access in ways that had not previously been urgent. The electronic proof-of-claim system was expanded so that non-registered users could file claims without navigating the full CM/ECF registration process.³⁶ The court updated and highlighted online guidance aimed specifically at

33. Tighe Interview, *supra* note 17; Campbell Interview, *supra* note 18.

34. *Id.*

35. CBCA Report, *supra* note 6, at. 17.

36. <https://www.cacb.uscourts.gov/epoc-electronic-proof-claim> (last visited Jan. 26, 2026).

self-represented debtors, offering step-by-step instructions tailored to pandemic conditions.³⁷ Judge Tighe quips, “The world did not end.”³⁸

Making these changes required intense coordination inside the Clerk’s Office. Many staff members themselves were transitioning to remote work, all while fielding a surge of calls and emails from anxious litigants trying to understand rapidly changing procedures. Leadership emphasized consistent messaging, understanding that conflicting instructions would only deepen confusion and erode trust.

Judicial officers adapted as well. Deadlines were adjusted where the rules allowed. Hearings were conducted remotely. Judges exercised discretion to account for pandemic-related barriers faced by parties, while remaining mindful of statutory limits. There was a shared recognition that rigid adherence to pre-pandemic procedures could produce unfair results under extraordinary conditions.

Looking back, Judge Tighe later identified these access-focused decisions as among the most important made during the early weeks of the crisis. Keeping a visible, workable path into the court sent a clear message: the bankruptcy system was still open and responsive, even if it looked different. The experience reinforced a core principle, access to justice is not defined by a physical building, but by institutional commitment.³⁹

The process also brought long-standing inequities into sharper focus. The pandemic exposed disparities in digital access and legal representation that had always existed but were easier to overlook in normal times. Emergency solutions adopted under pressure would later inform broader discussions about permanent reforms to expand access well beyond the pandemic itself.

Remote Hearings, Trials, and Procedural Innovation

Once courthouses closed, the court had to confront a question that had lingered on the margins for years: could core bankruptcy adjudication really happen without everyone in the same room? Telephonic appearances were familiar for routine matters, but the idea of conducting contested hearings, evidentiary proceedings, or trials remotely raised serious procedural and cultural concerns.

The Federal Rules of Bankruptcy Procedure largely assume in-person testimony, physical exhibits, and direct courtroom control. While the rules allow flexibility, they had never been tested against

37. <https://www.cacb.uscourts.gov/esr> (last visited Jan. 26, 2026).

38. *Tighe Interview*, *supra* note 17.

39. *Id.*

a wholesale move to remote adjudication. Judges and administrators had to decide how far they could adapt procedures without compromising due process, the integrity of the record, or public confidence in the process.

In the earliest weeks, the court leaned heavily on telephonic hearings. Platforms like CourtCall were already familiar to the bar and required little technical sophistication. For many routine matters, phone hearings worked surprisingly well.⁴⁰ Attendance rates were high, scheduling conflicts dropped, and parties avoided the time and expense of travel. Those early successes encouraged broader experimentation.

Video proceedings soon followed as secure, approved platforms became available. Judges began conducting hearings that allowed visual participation by counsel, parties, and witnesses.⁴¹ The transition was not seamless. Bandwidth problems, audio glitches, and unfamiliarity with the technology caused occasional disruptions. Over time, judges and staff developed practical protocols, including pre-hearing testing, backup phone access, and clear written instructions for participants.⁴²

The most consequential step was the decision to conduct evidentiary hearings and trials remotely, at least with party consent. This required careful thought about witness credibility, exhibit handling, and preserving a clean record for appeal. After internal consultation and discussion with colleagues around the Ninth Circuit, judges concluded that remote trials were both permissible and necessary. Less than a month after the national emergency declaration, the Central District conducted its first fully remote trial.⁴³

Judges were careful to emphasize that this was not a rejection of traditional safeguards, but an adaptation to extraordinary circumstances. Parties were given opportunities to object, stipulate to procedures, and propose accommodations. Courtroom decorum was maintained through explicit rules governing participation and conduct. Even through a screen, the presence of the judge reinforced the seriousness and authority of the proceedings.

As experience accumulated, remote adjudication revealed unexpected advantages. Video appearances reduced travel costs and allowed easier participation by out-of-district counsel and witnesses. Scheduling became more flexible, enabling faster attention to urgent

40. CBCA Report, *supra* note 6, at 14-16.

41. *Id.* at 16, 31-32.

42. Interview with Hon. Scott C. Clarkson, Bankruptcy Judge, Central District of California ((Winter 2025-2026).

43. *Id.*

matters. Some judges even observed that video testimony offered a clearer view of witnesses than traditional courtroom seating.⁴⁴

Concerns remained, particularly about technological equity for self-represented litigants and those with limited internet access. Even so, the court's ability to conduct hearings and trials remotely demonstrated that procedural innovation could preserve, and in some respects improve, the administration of justice.

What began as an emergency response quickly became a proving ground. The Central District's early adoption of remote adjudication influenced broader judicial practice and laid the foundation for hybrid models that continue to shape bankruptcy proceedings today.

Chambers-Level Leadership and Early Technology Adoption

Although court-wide administrative decisions set the framework, the day-to-day success of remote adjudication depended heavily on what happened inside individual chambers. Judges varied in their prior use of technology, their comfort with remote proceedings, and their willingness to experiment under pressure. Within the Central District, some chambers naturally became early adopters whose practices informally guided others. Among those were the chambers of Judges Martin Barash and Scott C. Clarkson.

Well before the pandemic, Judge Clarkson regularly permitted telephonic appearances for non-evidentiary matters and occasionally conducted fully remote hearings when circumstances required. As a fortunate coincidence, six months prior to the pandemic, Judge Clarkson had instituted a national law clerk and intern lecture series about basic bankruptcy law that utilized the Zoom conference system. Both the court technical personnel and chambers personnel, as well as the judge himself, became experts in the use of this emerging technology. That experience proved invaluable in March 2020, when the court shifted almost overnight to remote operations. While some chambers faced a steep learning curve, Judge Clarkson's procedures required only modest adjustment.⁴⁵

His longtime law clerk, Eve Marsella, recalled that in the earliest phase of the shutdown, chambers relied primarily on CourtCall. Tentative rulings included dial-in information, and parties were instructed to appear by phone. At that moment, CourtCall temporarily suspended its usual fees, which eased access concerns and helped maintain broad participation during a period of uncertainty.

44. *Tighe Interview*, *supra* note 17; *Campbell Interview*, *supra* note 18.

45. *Clarkson Interview*, *supra* note 44.

Marsella noted that Judge Clarkson “was ahead of the curve,” explaining that chambers had already developed internal protocols for managing remote participation. As a result, “we did not struggle with the process as did some of the chambers.” When secure video platforms later became available, the courtroom transitioned smoothly to hybrid hearings that allowed appearances by phone, video, or, when permitted, in person.⁴⁶

This experience reinforced a broader institutional insight. Technology adoption during crisis was not driven solely by administrative directive. It also depended on judicial culture and individual leadership. Judges who were comfortable exercising discretion over courtroom procedures and who trusted their staff to manage new tools adapted more quickly and with less disruption.

The influence of early-adopting chambers extended beyond their own calendars. Judges shared techniques informally, accelerating learning across the court. Approaches to handling exhibits remotely, maintaining decorum in video hearings, and managing technical failures evolved through collaboration rather than top-down instruction. This peer-driven spread of innovation complemented the court’s centralized coordination efforts.

Over time, chambers-level experimentation helped normalize remote practice. What initially felt provisional became routine. Even as courthouses gradually reopened, judges reported greater confidence in hybrid hearings and increased willingness to allow remote participation when appropriate.

Judge Clarkson’s chambers illustrate how pre-pandemic experimentation, combined with decisive early adoption, helped the Central District maintain continuity during the most disruptive phase of the crisis. The lessons drawn from that experience would shape not only pandemic response, but the court’s long-term thinking about how technology can support fairness, efficiency, and judicial control.

Infrastructure, Culture, Reopening, and Institutional Lessons

As remote adjudication became routine and chambers-level experimentation spread across the court, it became clear that the Central District was no longer operating in emergency mode alone. What had begun as crisis response was evolving into something more durable. The later phases of the pandemic revealed that the court’s adaptations were not merely temporary accommodations, but indicators of deeper institutional change.

46. Interview with Eve Marsella, Law Clerk to Judge Clarkson (Fall 2025).

Technology as Emergency Infrastructure

One of the most consequential realizations to emerge from this period was that technology could no longer be understood as a supporting tool that made court operations more efficient. It had become essential infrastructure.

In the earliest weeks of the shutdown, the Central District had no luxury of phased rollouts or long procurement cycles. Administrators were forced to assemble a functioning telework and adjudication environment almost immediately, using whatever resources were available. Laptops were deployed on an emergency basis. Secure remote access and virtual private networks were expanded rapidly. Standardized communication platforms were adopted at scale.

The focus was not on creating an ideal system. It was on keeping the court operational. And yet, in the process, something fundamental shifted. Systems that had once been framed as conveniences suddenly revealed themselves as indispensable. Without secure remote access, chambers could not function. Without stable hearing platforms, adjudication would have stalled. Without electronic filing and digital communication, access to the court would have collapsed entirely.

The experience forced a recalibration of institutional assumptions. Technology was no longer an adjunct to the courthouse. It became the courthouse. Just as physical buildings require maintenance and investment, so too did digital infrastructure. The Central District's ability to continue functioning demonstrated that resilience in modern judicial administration depends as much on technological capacity as on bricks and mortar. That insight would shape planning, budgeting, and expectations long after the immediate crisis passed.

Workforce Morale and Institutional Culture

Technology alone, however, did not keep the court running. People did.

Extended telework, public-health anxiety, caregiving responsibilities, and personal loss placed extraordinary strain on court employees across all divisions. Clerk's Office staff fielded anxious calls from confused litigants. Information technology teams worked continuously to stabilize systems under unprecedented demand. Judges and chambers staff balanced professional obligations with disrupted personal lives.

Court leadership recognized early that morale and trust were not secondary concerns. They were operational necessities. Communication became a central leadership function. Regular updates explained

not only what decisions had been made, but why. Acknowledging uncertainty proved as important as projecting confidence.⁴⁷

Flexibility also mattered. Supervisors were encouraged to recognize that employees faced very different circumstances at home. Expectations were adjusted without abandoning standards. Productivity was measured realistically rather than mechanically. These choices reinforced a sense that the institution valued its workforce as human beings, not merely as functions within an organizational chart.

The pandemic underscored a fundamental truth about courts as institutions. Formal authority and procedural rules matter, but continuity ultimately depends on professionalism, trust, and institutional culture. The Central District's ability to sustain operations over many months of disruption reflected not only administrative competence, but a workforce committed to public service under conditions few had ever imagined.

Gradual Reopening and Enduring Change

As public-health conditions stabilized, the Central District began a cautious and incremental reopening process in late 2020 and into 2021. Intake areas reopened with safety protocols. Interim safety steps included: encouraging or requiring remote hearings (e.g., ZoomGov video and CourtCall teleconferences); negotiating reductions in Court-Call fees; adapting technology and training to allow digital capture of the court record by remote court staff; setting up virtual self-help desks; providing physical drop boxes for submission of documents (minimizing unnecessary contact); eliminating the duty to provide courtesy copies of filings; setting up centralized mail pickup; improving website content to reduce the need to contact court staff; installing temperature screening kiosks to identify COVID-19 symptoms; placing social distancing markers on the walls, seats, and the floor (to keep individuals at least six feet apart); arranging for enhanced cleaning of key courtroom surfaces; and setting up and refilling hand sanitizer stations.⁴⁸

In addition to face coverings, Campbell's team made a recommendation to install Plexiglas shields and place disposable covers on the microphones at the lectern and counsel tables. Judge Tighe laughed when she recalled this detail as, "There was no budget for microphone covers or any other safety gear, but we implemented safety measures

47. *Id.*; Campbell Interview, *supra* note 18.

48. CBCA Report, *supra* note 6, at 14-15, 17, 19.

anyway through the creative scrounging of Kathy Campbell and John Hermann."⁴⁹

But physical access returned gradually rather than all at once. Importantly, reopening did not signal a return to pre-pandemic norms. Remote hearings remained a central feature of practice. Hybrid proceedings, combining in-person and remote participation, became increasingly common. Judges exercised discretion in deciding when physical presence was necessary and when remote participation better served efficiency, access, and fairness.

Many measures originally adopted under emergency conditions proved durable. Expanded electronic access, flexible scheduling, and routine use of remote appearances continued even as health risks receded. What began as necessity evolved into normalization.

Experience explained this persistence. Judges, lawyers (including this author), and litigants had seen that many matters could be handled effectively without travel, congestion, or delay. For some participants, particularly those located far from courthouses or with limited resources, remote access improved participation rather than diminishing it. The reopening phase therefore marked not a reversal, but a transition. The court emerged with a broader set of tools and a more flexible understanding of how adjudication could occur without sacrificing judicial control or procedural integrity.

Lessons for the Ninth Circuit and Beyond

Taken together, the Central District's experience during the pandemic offers lessons that extend well beyond a single court or moment in time.

First, it demonstrates the value of decentralized leadership within a coherent institutional framework. Circuit-wide norms and national guidance provided boundaries, but local judgment enabled timely action. The ability to respond effectively depended on trust in judges and administrators closest to the problem.

Second, it underscores the importance of coordination without rigidity. Daily communication, cross-functional collaboration, and willingness to revise decisions allowed the court to respond to rapidly changing conditions without paralysis. Crisis governance proved to be an ongoing process, not a single decision.

Third, the pandemic reframed assumptions about access to justice. Physical buildings remain important, but they are not synonymous with access. Institutional commitment, procedural flexibility,

49. Tighe Interview, *supra* note 17; Campbell Interview, *supra* note 18.

and technological capacity can preserve access even when traditional pathways are disrupted. Judge Tighe is especially proud of the Central District of California bankruptcy court's commitment to equity, transparency, and innovation, including initiatives to support vulnerable populations and foster long-term organizational resilience during the COVID-19 crisis. At the same time, the crisis exposed persistent inequities in digital access that require continued attention.⁵⁰

Finally, the experience made visible the stabilizing role bankruptcy courts play during systemic disruption. When economic relationships are under strain, bankruptcy courts provide structure, predictability, and coordination. During the pandemic, that role became unmistakable.

The pandemic did not merely test the Central District's capacity to function under pressure. It reshaped how the court understood its mission, its tools, and its relationship to the public it serves. In that sense, the court emerged not only operationally intact but institutionally transformed.

While Judge Tighe is no longer the chief bankruptcy judge, she is confident about the future of the court. As her team summarized:

"The Court's focus on emergency preparedness during the pandemic has significantly improved its ability to respond to future crises. By refining its [Court's Continuity of Operations] Plan, fostering interagency collaboration, and conducting regular drills, the Court has established a robust framework for operational resilience."⁵¹

50. Tighe Interview, *supra* note 17.

51. CBCA Report, *supra* note 6, at 45.



THE HISTORY OF HEALTHCARE ENTITIES AND THEIR UNIQUE ISSUES UNDER THE BANKRUPTCY CODE

Introduction

The bankruptcy of healthcare institutions has long occupied an uneasy position within American insolvency law. Unlike most commercial enterprises, healthcare providers operate at the intersection of private finance and public obligation. Their financial distress implicates not only creditors and contractual counterparties, but also patients, families, communities, and government regulators charged with safeguarding public health. As a result, bankruptcy courts presiding over healthcare cases have repeatedly been required to reconcile competing imperatives: the Bankruptcy Code's traditional goals of value maximization, equality of distribution, and collective process, and the broader societal interest in maintaining access to essential medical services.

For much of the modern history of federal bankruptcy law, however, these distinctive features of healthcare enterprises received little explicit recognition in the statutory framework. Hospitals, nursing facilities, home health agencies, and other providers entered bankruptcy

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under a Code designed primarily for conventional commercial debtors. Until the early twenty-first century, healthcare entities were subject to the same provisions governing manufacturers, retailers, and real estate ventures, notwithstanding the pervasive regulatory environment in which they operated and the potentially life-altering consequences of financial failure. Courts were left to address healthcare-specific problems incrementally, through case-by-case adjudication, often with limited statutory guidance and with outcomes that reverberated far beyond the debtor's balance sheet.

This article traces the historical development of healthcare bankruptcy law from those early judicial encounters through the legislative reforms enacted in 2005. It begins by examining how bankruptcy courts struggled to adapt general insolvency principles to healthcare institutions, focusing particularly on disputes involving Medicare reimbursement, provider agreements, and the automatic stay. It then turns to the growing public-policy concerns triggered by high-profile nonprofit healthcare failures in the 1990s, which exposed structural deficiencies in the Code and sharpened tensions between bankruptcy law and state regulatory authority. These experiences ultimately informed Congress's decision to enact healthcare-specific provisions as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").¹ The article concludes by situating these developments within the broader evolution of healthcare delivery and insolvency practice, highlighting enduring doctrinal challenges that continue to shape healthcare restructurings today.

I. Early Judicial Encounters with Healthcare Bankruptcies

Long before Congress confronted healthcare insolvency directly, bankruptcy courts were forced to address issues arising from the unique regulatory and reimbursement environment in which healthcare providers operate. Among the earliest, and most consequential, cases were disputes involving the Medicare program, which quickly became the dominant payor for hospitals and other providers after its enactment in 1965. Medicare reimbursement was, and remains, central to the financial viability of many healthcare institutions, particularly acute-care hospitals and long-term care facilities. When such entities entered bankruptcy, courts were compelled to determine how Medicare payment mechanisms interacted with the automatic stay, setoff rights, and the treatment of executory contracts.

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

A. Medicare Provider Agreements and the Executory Contract Framework

One of the first cases to address what would later be recognized as a uniquely healthcare-specific bankruptcy issue was *In re Monsour Medical Center*.² There, the bankruptcy court confronted the question whether a Medicare provider agreement constituted an executory contract for purposes of the Bankruptcy Code. The federal government sought relief from the automatic stay to offset ongoing Medicare payments against alleged prepetition overpayments and to compel the debtor hospital to assume or reject the provider agreement under § 365 of the Bankruptcy Code.

Notably, the debtor conceded that the Medicare provider agreement was an executory contract, and the court proceeded on that basis. Having accepted that characterization, the court permitted recoupment of overpayments in connection with the debtor's assumption of the agreement.³ The decision resolved the immediate dispute, but its broader significance lay in the analytical path it set. By treating the provider agreement as an executory contract, without substantial examination of its statutory origins or regulatory character, the court established a template that would be followed, often uncritically, in subsequent cases, for decades.

A few years later, *In re Memorial Hospital of Iowa County, Inc.*⁴ addressed a similar issue but reached a different result. In that case, the Medicare program unilaterally offset ongoing payments to recover alleged overpayments without first obtaining relief from the automatic stay or requiring the debtor to assume the provider agreement. The court held that this conduct violated the automatic stay, emphasizing that the debtor had neither assumed the agreement nor consented to the offset.⁵ While the court again treated the provider agreement as an executory contract, it underscored that even within that framework, the government was bound by the constraints of bankruptcy procedure.

Together, *Monsour* and *Memorial Hospital* revealed early doctrinal uncertainty surrounding Medicare reimbursement in bankruptcy. They also foreshadowed the high stakes of provider-agreement characterization: whether ongoing Medicare payments could be withheld, whether overpayments could be recovered immediately, and whether a debtor's

2. *In re Monsour Med. Ctr.*, 11 B.R. 1014, 1016–18 (W.D. Pa. 1981).

3. *Id.* at 1018.

4. *In re Mem'l Hosp. of Iowa Cnty., Inc.*, 82 B.R. 478, 482–85 (W.D. Wis. 1988).

5. *Id.* at 485.

continued participation in Medicare depended on assumption of the agreement under § 365 of the Bankruptcy Code.

B. Recoupment, Setoff, and the “Same Transaction” Debate

Another foundational issue emerged in *In re Yonkers Hamilton Sanitarium Inc.*⁶, where the trustee challenged Medicare’s practice of withholding current payments to recover prior overpayments. The trustee argued that such withholding constituted an impermissible setoff subject to the limitations of § 553 of the Bankruptcy Code. The court rejected that argument, holding instead that Medicare’s actions amounted to recoupment rather than setoff, because the obligations arose from the same transaction.⁷

In reaching this conclusion, the court emphasized the integrated nature of Medicare reimbursement, characterizing it as a single, continuous relationship governed by a provider agreement and periodic cost reporting. By framing the relationship in transactional terms, the court effectively placed Medicare recoupment outside the scope of the automatic stay. This reasoning proved enormously influential, as it allowed the government to continue recovering overpayments during bankruptcy proceedings, often to the detriment of a debtor’s liquidity and reorganization prospects.

The district court in *Yonkers Hamilton* distinguished an earlier Medicaid case, *In re Dartmouth House Nursing Home, Inc.*⁸, which had reached a different conclusion.⁹ In *Dartmouth House*, the court held that the state Medicaid program’s offsets were subject to the automatic stay because each year’s participation constituted a separate transaction. The distinction turned on the structural differences between Medicare and Medicaid participation, particularly the existence of separate annual agreements in the Medicaid context.¹⁰

These early cases established analytical frameworks that would dominate healthcare bankruptcy litigation for decades.¹¹ Courts routinely

6. *In re Yonkers Hamilton Sanitarium Inc.*, 22 B.R. 427, 432–34 (Bankr. S.D.N.Y. 1982), *aff’d*, 34 B.R. 385 (S.D.N.Y. 1983).

7. *Id.*

8. *In re Dartmouth House Nursing Home, Inc.*, 24 B.R. 256, 259–61 (Bankr. D. Mass. 1982).

9. *In re Yonkers Hamilton*, 34 B.R. at 388.

10. 24 B.R. at 260–61.

11. *See also In re Monsour Medical Center*, 11 B.R. at 1018; *In re Berger*, 16 B.R. 236, 237 (Bankr. S.D. Fla. 1981).

invoked the recoupment doctrine to permit continued withholding of Medicare payments, while trustees and debtors struggled to limit its scope.¹² The resulting jurisprudence reflected an uneasy compromise: recognizing the government's interest in program integrity while often subordinating bankruptcy's goal of providing distressed debtors with breathing room.¹³

C. The Absence of Statutory Guidance

Many cases which arose in the Ninth Circuit later became catalysts for Bankruptcy Code amendments. For example, in 1996 Allen Care Centers, which operated nursing homes in Oregon, filed for bankruptcy protection.¹⁴ One of the facilities was a financial drain on the debtor, so the owners first sought assistance from the State of Oregon through the appointment of a trustee to manage the facility and either sell it or close it. Eventually Oregon appointed a trustee, who eventually closed the nursing home, at the expense of Oregon. The State then sought administrative expense priority for the costs it incurred in closing the facility and caring for its patients after Allen Care abandoned the property. The Ninth Circuit ruled against the state, denying administrative expense priority for the costs and holding that the state's costs were not "actual, necessary costs and expenses of preserving the estate" under the Bankruptcy Code.¹⁵ This case led to proposed legislation which eventually became section 503(b)(8) of the Bankruptcy Code.

12. See, e.g., *Sims v. U.S. Dep't of Health & Human Servs. (In re TLC Hosps., Inc.)*, 224 F.3d 1008 (9th Cir. 2000) (holding that Medicare offsets were recoupment without limitations); *In re University Med. Ctr.*, 973 F.2d 1065 (3d Cir. 1992) (holding that Medicare's right of recoupment is limited to overpayments arising in the same cost report year as the ongoing payments the government seeks to offset).

13. Government regulators continue to test the parameters of the recoupment doctrine. Recent litigation deals with states' efforts to offset payments owed to a debtor arising out of patient care payments against payments owed to the debtor for other reasons as an act of recoupment, with little success. *In re Gardens Regional Hosp. and Medical Ctr., Inc.*, 975 F.3d 926 (9th Cir. 2020); *In re Saint Catherine Hosp. of Ind., LLC*, 511 B.R. 117, 127 (S.D. Ind. 2014), *rev'd on other grounds*, *Saint Catherine Hosp. of Ind., LLC v. Ind. Family & Soc. Servs. Admin.*, 800 F.3d 312 (7th Cir. 2015).

14. *Oregon, Dept. of Human Resources v. Witcosky (In re Allen Care Centers, Inc.)*, 96 F.3d 1328 (9th Cir. 1996).

15. *Id.* at 1129–30.

Another case which provided significant fodder for those who wanted healthcare specific revisions to the Bankruptcy Code was the bankruptcy of the Reseda Care Center in California in 1997.¹⁶ In this case, a Chapter 11 trustee, unable to sell the facility and without sufficient cash to continue operations, concluded that closing the facility and transferring the patients was required. Residents, some in wheel-chairs or on hospital beds, were rolled out at night to be recorded by television cameras, which was shown on television nationally.¹⁷ The late-night transfers of patients drew outrage from consumer advocates and the bankruptcy judge overseeing the case. The incident received national press coverage and became a case study illustrating alleged problems with healthcare facility bankruptcies under the then-existing Bankruptcy Code, eventually contributing to various legislation proposals, including amendments to the Bankruptcy Code creating the role of a Patient Care Ombudsman (now codified in section 333 of the Bankruptcy Code), and establishing standards to be applied when transferring patients (now codified in section 704(a)(12) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2015.2).¹⁸

Another case in California brought to legislators' attention issues of how patient records are dealt with in a bankruptcy case. KPC Medical Management ran into financial trouble and filed for Chapter 11 bankruptcy in late 2000. All the debtors' clinics closed, patients were often turned away and found facilities locked up, including the medical records of 250,000 KPC patients which were sitting in the group's clinics or stored at a warehouse. There were concerns the records might be destroyed when clinics were closed or funding for storage ran out, but State regulators ordered health plans to ensure a smooth transition of care and access to medical records for affected patients. Initially, some patients reported being charged up to \$40 for copies of their records, which sparked controversy as well. Health plans eventually agreed to cover the costs of collecting the records and transferring records to providers.¹⁹

What is striking about these early cases is not merely their outcomes, but the context in which they were decided. At the time, the Bankruptcy Code contained no provisions specifically addressing

16. See Anna Kaluzny, *The Patient Care Ombudsman: Who Should It Be?*, 17 Elder L. J 343 (2010) (describing in detail the Reseda Care Center case).

17. *Id.* at 345–36.

18. See generally *id.* at 347–51.

19. Karen Karlitz, *Let My Medical Records Go*, Los Angeles Times (Feb. 24, 2001); Sharon Bernstein, *Patients Told to Retrieve Their Records*, Los Angeles Times (Feb. 2, 2003)

healthcare entities, Medicare reimbursement, or patient interests. Courts were forced to shoehorn healthcare disputes into general bankruptcy doctrines developed for commercial contracts and financial obligations. The result was a body of case law shaped as much by pragmatic necessity as by doctrinal coherence.

This judicial improvisation set the stage for later conflicts. As healthcare delivery became more complex, nonprofit systems expanded, and public reliance on institutional providers deepened, the limitations of a purely commercial bankruptcy framework became increasingly apparent. Those tensions would come to a head in the nonprofit healthcare failures of the 1990s, a turning point examined in Part II.

II. Nonprofit Healthcare Failures and the Emergence of Public-Policy Conflict

In the early 1990s, bankruptcies among nonprofit healthcare institutions attracted ongoing public and government attention. Unlike for-profit providers, nonprofit hospitals and health systems were often viewed as quasi-public institutions entrusted with charitable missions, community obligations, and public funding streams. When such entities failed financially, the consequences extended beyond creditors and bondholders to encompass patients, employees, municipalities, and state regulators. Bankruptcy courts increasingly found themselves adjudicating disputes that implicated public health policy as much as insolvency law.

A. United Healthcare Systems and the Limits of Value Maximization

One of the earliest cases to crystallize these tensions was *In re United Healthcare Systems, Inc.*²⁰ The debtor, a nonprofit corporation, operated both an adult acute-care hospital and the Children's Hospital of New Jersey in Newark. Prior to filing for Chapter 11, the debtor solicited bids for its assets and selected a purchaser whose offer, though not the highest in dollar terms, uniquely committed to continuing operation of the children's hospital and to investing additional capital in pediatric services.²¹

20. *In re United Healthcare Sys., Inc.*, 1997 WL 176574 (D.N.J. Mar. 26, 1997).

21. *Id.* at *1–3.

The bankruptcy court declined to approve the sale, emphasizing the primacy of maximizing value for the estate. On appeal, the district court reversed, relying heavily on determinations by state public-health authorities that closure of the children's hospital would create a public health emergency.²² The court concluded that the bankruptcy court "may not impede the State in its obligations to protect the health and safety of its citizenry," even if doing so resulted in a lower purchase price for the assets.²³

United Healthcare Systems marked an inflection point in healthcare bankruptcy jurisprudence. It underscored that nonprofit healthcare bankruptcies could not be evaluated solely through the lens of creditor recovery. At the same time, the decision exposed a doctrinal fault line: the Bankruptcy Code contained no explicit mechanism for reconciling state public-health mandates with federal bankruptcy objectives. The court's reasoning relied less on statutory text than on broader principles of federalism and police power, foreshadowing conflicts that would intensify later in the decade.

B. AHERF: Systemic Collapse and Legislative Attention

Those conflicts came sharply into focus with the 1998 bankruptcy of the Allegheny Health, Education, and Research Foundation ("AHERF").²⁴ At the time of its filing, AHERF was the largest nonprofit healthcare failure in U.S. history, with more than \$1.3 billion in debt, tens of thousands of employees, and a sprawling network of hospitals, physician practices, and academic medical centers across Pennsylvania.²⁵

AHERF's collapse was not merely a financial event; it was a systemic unraveling.²⁶ The bankruptcy led to the dismantling of a statewide healthcare system, the sale of major hospitals, and extensive litigation against executives and auditors for alleged financial mismanagement and fraud. The case also triggered a jurisdictional confrontation when the Pennsylvania Attorney General initiated proceedings in state court seeking oversight and remedies related to the nonprofit's charitable assets.²⁷

22. *Id.* at *5–10.

23. *Id.* at *1010 (relying on state public health determinations and emphasizing state obligations to protect health and safety).

24. *In re* Bankruptcy Appeal of Allegheny Health, Educ. & Research Found., 252 B.R. 309 (W.D. Pa. 1999).

25. *Id.* at 313–14.

26. Lawton R. Burns, et al, *The Fall Of The House Of AHERF: The Allegheny Bankruptcy*, *Health Affairs*, Vol. 19, No. 1 (Jan/Feb 2000).

27. *Id.* at 314–16.

The bankruptcy court held that the Attorney General's action violated the automatic stay and enjoined further proceedings.²⁸ The ruling provoked significant controversy. State officials and commentators argued that the Bankruptcy Code had been used to sideline traditional mechanisms of charitable-trust enforcement and public oversight. The AHERF case thus revealed a structural deficiency: the Code provided no clear guidance on the role of state attorneys general in nonprofit healthcare bankruptcies or on the treatment of assets impressed with charitable purposes.

C. Professional and Institutional Responses

The fallout from AHERF and the many healthcare cases before it reverberated beyond the courtroom. In 1994 the American Bankruptcy Institute ("ABI") established its Health Care Committee, reflecting growing recognition that healthcare insolvency presented recurring, industry-specific challenges. Practitioners, regulators, and scholars increasingly questioned whether the Bankruptcy Code adequately protected patient interests, respected state regulatory authority, or accounted for the distinctive governance structures of nonprofit healthcare entities.

The cases discussed above, among others, and the publication by the ABI of the first edition of its Healthcare Insolvency Manual highlighted concerns that the Bankruptcy Code did not adequately deal with the unique issues arising in healthcare industry bankruptcy cases generally, and nonprofit healthcare entities in particular, and got the attention of Senators Grassley and Durbin, who, at the time, were primarily responsible for proposing any legislative changes to the Bankruptcy Code. Keith J. Shapiro, the founding chair of the ABI Health Care Committee and by 1997 the Vice President of Education for the ABI, along with his partner Nancy Peterman, who in 1997 was the Co-Chair of the ABI Health Care Committee, assisted in drafting the proposed revisions to the Bankruptcy Code to deal specifically with the healthcare industry's unique issues and Keith Shapiro testified before Congress in connection with that proposed legislation.²⁹

28. *Id.* at 316–2020 (automatic stay / injunction discussion involving state attorney general action).

29. See U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts: Hearing Regarding S. 1914, "The Business Bankruptcy Reform Act," 144 Cong. Rec. 564-02, 105th Cong. (2d Session, 1998) (summary of key points in testimony of Keith J. Shapiro, on behalf of the American Bankruptcy Institute); see also *Prepared Statement of Keith J. Shapiro at the Hearing Regarding*

Another key figure in drafting the healthcare industry and nonprofit provisions of the Bankruptcy Code was the late Karen Cordry, who served as Bankruptcy Counsel for the National Association of Attorneys General for over three decades. Responding to outrage over the bankruptcy court's treatment of Pennsylvania's Attorney General in the AHERF bankruptcy, and cases of unique states' interest like *Allen Care Centers*, Cordry was instrumental in drafting provisions for the Bankruptcy Code that addressed the role of state attorneys general vis-à-vis bankruptcy sales of nonprofit assets.

Their efforts, and others, resulted in consideration in 1998 of legislation that addressed healthcare specific issues,³⁰ but while that legislation passed in the Senate in 1998, it was not enacted into law until passage of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").³¹ Although BAPCPA's impact on consumer bankruptcy issues was the focus of discussion on the legislation both prior to and after enactment, the provisions affecting the healthcare industry were also significant and laid the groundwork for reforms that would later be incorporated into BAPCPA.

III. Legislative Reform and the Healthcare Provisions of BAPCPA

A. Congressional Recognition of Healthcare Exceptionalism

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is most commonly associated with sweeping changes to consumer bankruptcy. Yet embedded within the statute are provisions

S. 1914, *The Business Bankruptcy Reform Act – Preserving The Quality of Patient Care In Health Care Bankruptcies*, before the U.S. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, 160–66 (June 1, 1998). This bill passed in the Senate unanimously as Amendment 1730 to S.625 in November 1999.

30. See Nancy A. Peterman, *Protecting Patients' Rights in Health Care Bankruptcies*, 17 Am. Bankr. Instit. J. 10 (Sep. 1998), available at <https://www.abi.org/abi-journal/protecting-patients-rights-in-health-care-bankruptcies> (last visited on Dec. 19, 2025).

31. Pub. L. 109–8, *supra*, note 3. At the time, the US Department of Justice described the evolution of the legislation by saying "The 1997 bill was unsuccessful but, like the phoenix, rose repeatedly from the ashes in some curiously creative ways." Judith Benderson, *Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, available at www.justice.gov/sites/default/files/usao/legacy/2006/09/07/usab5404.pdf (last visited on Dec. 19, 2025).

that reflect Congress's belated recognition that healthcare entities occupy a distinctive position within the bankruptcy system. These provisions were shaped in significant part by the experiences of the 1990s, particularly the public disquiet surrounding cases like *United Healthcare Systems* and *AHERF*.

The legislative history reveals a concern that bankruptcy proceedings had, in some instances, jeopardized patient welfare and circumvented traditional forms of state oversight.³² Congress responded by introducing definitions and procedural safeguards aimed at mitigating those risks, while stopping short of creating a separate bankruptcy regime for healthcare providers.

B. Defining the "Health Care Business"

One of the most consequential reforms was the introduction of § 101(27A), which defines the term "health care business."³³ For the first time, the Bankruptcy Code delineated a class of debtors subject to healthcare-specific provisions. The definition encompasses both public and private entities "primarily engaged" in offering facilities and services for "the diagnosis or treatment of injury, deformity, or disease," and expressly includes hospitals, hospices, home health agencies, and long-term care facilities.³⁴

Courts soon confronted threshold disputes over the scope of this definition. In *In re Medical Associates of Pinellas, LLC*³⁵, the bankruptcy court articulated a functional, multi-factor test to determine whether a debtor qualified as a health care business, focusing on the nature of the services provided rather than corporate form.³⁶ Still, two decades later controversy over this fundamental definition continues. For example, the bankruptcy court in *In re La Familia Primary Care*³⁷ dealt with two questions of statutory construction regarding the definition of § 101(27A), grappling with the definition's use of the word "and" instead of the word "or" between its subsections (A) and (B) and with the issue of whether healthcare entities that provided medical care without an overnight stay qualified as a healthcare business.³⁸

32. H.R. Rep. No. 109-31, pt. 1, at 21 (2005); *see also* 151 Cong. Rec. S2459-60 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch).

33. 11 U.S.C. § 101(27A).

34. *Id.*

35. *In re Med. Assocs. of Pinellas, LLC*, 360 B.R. 356 (Bankr. M.D. Fla. 2007).

36. *Id.* at 359-61.

37. Case No. 23-10566-t11, 2023 WL 5310817 (Bankr. D.N.M. Aug. 17, 2023).

38. *Id.* at *2-6.

These decisions illustrate both the flexibility and the indeterminacy of the statutory definition. While broad enough to capture evolving models of healthcare delivery, § 101(27A) left substantial interpretive work to the courts, a recurring theme in healthcare bankruptcy law.

C. Patients and Patient Records

BAPCPA also introduced definitions of “patient” and “patient records.”³⁹ Although these provisions were intended to protect confidential medical information and ensure continuity of care, commentators have noted their breadth. The definition of “patient” is not limited to individuals receiving medical treatment, and the definition of “patient records” extends beyond traditional medical charts. As a result, trustees and courts have sometimes struggled to delineate the scope of their obligations under these provisions.

Nevertheless, the inclusion of these definitions signaled a significant shift in legislative perspective. Patients, long absent from the Bankruptcy Code’s taxonomy of stakeholders, were now expressly recognized as parties whose interests’ warranted protection.

D. Jurisdiction, Exhaustion, and the Medicare Act

One area where Congress declined to act directly was the long-standing conflict between bankruptcy jurisdiction and the Medicare Act’s exhaustion requirement, codified at 42 U.S.C. § 405(h).⁴⁰ That provision bars judicial review of claims arising under Medicare absent exhaustion of administrative remedies. Because Medicare is the largest payor for many healthcare providers, disputes with the program frequently precipitate or accompany bankruptcy filings.

Courts have divided sharply on whether bankruptcy jurisdiction under 28 U.S.C. § 1334 permits adjudication of Medicare disputes notwithstanding § 405(h). The Ninth Circuit has held that bankruptcy courts may exercise jurisdiction without exhaustion, emphasizing the “special status” of bankruptcy jurisdiction and the need for centralized resolution of estate matters.⁴¹ The Third Circuit has adopted a similar approach.⁴² By contrast, the Eleventh Circuit has held that § 405(h) bars bankruptcy jurisdiction, characterizing Congress’s failure to

39. 11 U.S.C. §§ 101(40A)–(40B).

40. 42 U.S.C. § 405(h).

41. *Sullivan v. Town & Country Home Nursing Servs., Inc. (In re Town & Country Home Nursing Servs., Inc.)*, 963 F.2d 1146, 1154–55 (9th Cir. 1992).

42. *In re Univ. Med. Ctr.*, 973 F.2d 1065, 1072–75 (3d Cir. 1992).

reference § 1334 as a scrivener's error.⁴³ The Fifth Circuit addressed the issue in 2019 in *In re Benjamin*,⁴⁴ where it said "we reject the non-textual approach exemplified by the Eleventh Circuit and join the Ninth Circuit in applying the [statute]'s plain meaning—a meaning that, everyone agrees, does not bar §1334 jurisdiction."

A particular issue that is frequently debated is that all circuit courts to address the language of the exhaustion statute have held that other grants of federal jurisdiction that are not expressly mentioned in the statute are still subject to the requirement that a provider exhaust administrative remedies. The Ninth Circuit addressed this seeming inconsistency in 2010 in *Do Sung Uhm v. Humana, Inc.*,⁴⁵ where the Court reiterated that bankruptcy court jurisdiction is different, noting again the "special status" of bankruptcy court jurisdiction over bankruptcy issues. In *Do Sung Uhm*, Humana argued that Uhm's claims were subject to the exhaustion requirement, based on a prior decision of the Ninth Circuit entitled *Kaiser v. Blue Cross of Cal.*,⁴⁶ where the Ninth Circuit had held that "[j]urisdiction over cases 'arising under' Medicare exists only under 42 U.S.C. § 405(g), which requires an agency decision in advance of judicial review."⁴⁷ In a footnote the Ninth Circuit dealt with the seeming inconsistency in their approach to the impact of the statutory bar, saying this:

We note that, at first blush, *Kaiser's* rule might seem to conflict with our prior holding that: '[s]ection 405(h) only bars actions under 28 U.S.C. §§ 1331 and 1346; it in no way prohibits an assertion of jurisdiction under section 1334.' But upon closer reading, *Kaiser* and *In re Town & Country* can be reconciled. *In re Town & Country's* reasoning relies almost exclusively on the special status of § 1334's 'broad jurisdictional grant over all matters conceivably having an effect on the bankruptcy estate' Thus, its reading of 42 U.S.C. § 405(h) can reasonably be understood to apply only to actions brought under § 1334, while not bearing on the relationship between § 405(h) and other jurisdictional provisions such as § 1332.⁴⁸

43. *In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1314–22 (11th Cir. 2016).

44. 932 F.3d 293, 298 (5th Cir. 2019).

45. 620 F.3d 1134, 1141 n.11 (9th Cir. 2010).

46. 347 F.3d 1107 (9th Cir. 2003).

47. *Do Sung Uhm*, 620 F.3d at 1040–41 (*quoting Kaiser*, 347 F.3d at 1111).

48. *Id.* at 11411 n.11 (internal citations omitted).

The persistence of this circuit split underscores the limits of BAPCPA's healthcare reforms. While Congress addressed certain patient-centric concerns, it left unresolved fundamental questions about the relationship between bankruptcy courts and specialized regulatory regimes.⁴⁹

IV. Provider Agreements and the Nature of Healthcare Entitlements

Among the most persistent and consequential doctrinal disputes in healthcare bankruptcy is the proper characterization of Medicare and Medicaid provider agreements.⁵⁰ Outside bankruptcy, courts have long held that these agreements are not contracts. Rather, they create statutory entitlements that permit qualified providers to bill and receive payment under complex regulatory schemes.⁵¹ Inside bankruptcy, however, governmental agencies historically advanced the opposite position, contending that provider agreements should be treated as executory contracts subject to assumption and assignment under § 365 of the Bankruptcy Code.⁵²

This inconsistency generated substantial practical consequences. If treated as executory contracts, provider agreements could be assumed and assigned only *cum onere*, requiring the assignee to accept all attendant obligations, including successor liability for overpayments and regulatory violations.⁵³ By contrast, if treated as licenses or statutory entitlements, provider agreements could be transferred under § 363 of the Bankruptcy Code free and clear of claims and interests, significantly enhancing the value of distressed healthcare assets.⁵⁴

49. A comprehensive discussion of this issue can be found at Samuel R. Maizel and Michael B. Potere, *Killing the Patient to Cure the Disease: Medicare's Jurisdictional Bar Does Not Apply To Bankruptcy Courts*, 32 Emory Bankr. Dev. J. 19 (2015).

50. A comprehensive discussion of this issue which predates the two bankruptcy court decisions discussed herein can be found at Samuel R. Maizel and Jody A. Bedenbaugh, *The Medicare Provider Agreement: Is It A Contract Or Not? And Why Does Anyone Care*, 71 Business Lawyer 1207 (2016).

51. *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1221 (9th Cir. 2014) (Holding that “[u]pon joining the Medicare program, however, the hospitals received a statutory entitlement, not a contractual right.”) (quotation omitted).

52. *See, e.g., In re Vital Signs Homecare, Inc.*, 396 B.R. 232, 235 (Bankr. D. Mass. 2008) (“The United States ... alleges that the Medicare Provider Agreement is an executory contract.”)

53. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531-532 (1984).

54. Circuit courts, including the Ninth Circuit, have interpreted “any interest” expansively to include obligations that may arise from the property

For many years, bankruptcy courts largely accepted the government's executory-contract framing, often without extended analysis.⁵⁵ This acquiescence persisted notwithstanding binding circuit precedent, including in the Ninth Circuit, recognizing that Medicare participation confers a statutory entitlement rather than a contractual right.⁵⁶ The resulting doctrinal tension remained unresolved until 2019, when two high-profile bankruptcy cases squarely confronted the issue.

A. *Center City Healthcare (Hahnemann)*

In *In re Center City Healthcare, LLC*, the debtor sought to sell Hahnemann University Hospital's Medicare provider agreement, together with its valuable graduate medical education residency slots, to a consortium of health systems.⁵⁷ The Centers for Medicare & Medicaid Services ("CMS") argued that the provider agreement was an executory contract that could not be sold and that any transfer required assumption under § 365 with full successor liability.

The bankruptcy court rejected that position, holding that the Medicare provider agreement constituted a statutory entitlement, not a contract. The court emphasized that nothing in the Bankruptcy Code transforms a non-contractual relationship into a contract merely by virtue of a bankruptcy filing. Accordingly, the court approved the transfer under § 363, free and clear of successor liability,⁵⁸ saying the bankruptcy court expressly stated that "the provider agreement, which debtors seek to sell to the consortium, is a statutory entitlement and not a contract and, as such, debtors are entitled to sell the provider agreement pursuant to [Bankruptcy] Code Section 363. And the purchaser, Jefferson on behalf of the consortium, does not take with successor liability."⁵⁹

being sold. See, e.g., *In re Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC* (*In re Spanish Peaks Holding II, LLC*), 872 F.3d 892 (9th Cir. 2017).

55. Compare *In re Vitalsigns Homecare, Inc.*, 396 B.R. 232, 239 (Bankr. D. Mass. 2008) ("[M]ajority of bankruptcy courts considering the Medicare-provider relationship conclude that the Medicare provider agreement, ... is an executory contract.") with *In re B.D.K. Health Mgmt. Inc.*, Case No. 98-00609-681, 1998 WL 34188241 at *6 (Bankr. M.D. Fla. Nov. 16, 1998) (holding that a provider agreement is a statutory entitlement and not an executory contract).

56. PAMC747 F.3d at 1221.

57. *In re Center City Healthcare, LLC* (Hahnemann Univ. Hosp.), 2019 WL 12496342 (Bankr. D. Del. Sept. 10, 2019).

58. *Id.* at *4–55 (statutory entitlement characterization; transfer under § 363; successor-liability discussion).

59. Transcript of hearing held on Sept. 5, 2019 before the Honorable Kevin Gross in *In re Center City Healthcare, LLC*, Case No. 19-11466 (KG)

Although CMS obtained a stay pending appeal, the delay caused the proposed transaction to collapse. CMS subsequently redistributed Hahnemann's residency slots through administrative processes, resulting in a markedly lower recovery for creditors. The episode underscored both the economic stakes of provider-agreement characterization and the fragility of judicial gains absent appellate confirmation.⁶⁰

B. Verity Health Systems of California

Only weeks later, the bankruptcy court in *In re Verity Health Systems of California*⁶¹ addressed a similar dispute involving Medi-Cal provider agreements. The court held that the Medi-Cal provider agreement was likewise a statutory entitlement rather than an executory contract.⁶² The court approved its transfer under § 363 free and clear of alleged state-imposed liabilities.⁶³ Although the opinion was later vacated pursuant to a settlement,⁶⁴ its reasoning remains influential. Together, *Hahnemann* and *Verity* represent the most sustained judicial engagement with the nature of provider agreements in bankruptcy and highlight the unresolved tension between regulatory entitlements and bankruptcy doctrine.

V. Patient Protection Mechanisms and Regulatory Enforcement

A. The Patient Care Ombudsman

Perhaps the most visible healthcare-specific reform enacted in BAPCPA was the creation of the Patient Care Ombudsman ("PCO"). Section 333 of the Bankruptcy Code requires the appointment of a PCO in cases involving a healthcare business unless the court determines that such appointment is unnecessary.⁶⁵ The provision was modeled in part on state long-term care ombudsman programs and was prompted by widely publicized failures in earlier cases, most notably the forced late-night evacuation of residents in the Reseda Care Centers case discussed earlier.

60. See Nina Feldman, Judge puts freeze on sale of Hahnemann residency program - for now, WHYY (Sept. 16, 2019), <https://whyy.org/articles/judge-puts-freeze-on-sale-of-hahnemann-residency-program-for-now/>.

61. 606 B.R. 843 (Bankr. C.D. Cal. 2019).

62. *Id.* at 847–51.

63. *Id.* at 851–54.

64. 2019 WL 6519342 (Bankr. C.D. Cal. Nov. 13, 2019).

65. 11 U.S.C. § 333.

Courts have developed multifactor tests to assess whether appointment of a PCO is warranted, balancing patient welfare against the costs imposed on the estate. The seminal decision in *In re Alternate Family Care* articulated a non-exclusive set of considerations, including the debtor's history of care deficiencies, the extent of regulatory oversight, and the financial impact of a PCO on reorganization prospects.⁶⁶

Experience has shown that while PCOs can play a critical role in certain cases, courts frequently decline to appoint them where existing regulatory frameworks adequately protect patient interests. Nevertheless, § 333 represents a symbolic and substantive departure from prior law, placing patient welfare squarely within the bankruptcy court's purview.

B. Governmental Suspensions, Exclusions, and the Automatic Stay

Another recurring area of conflict involves governmental actions to exclude providers from participation in Medicare or Medicaid programs, or, if there are "credible allegations of fraud," to suspend payments.⁶⁷ Prior to BAPCPA, courts reached inconsistent conclusions regarding whether such actions violated the automatic stay.⁶⁸ In response, Congress added § 362(b)(28) to the Bankruptcy Code, expressly exempting exclusions from the stay.⁶⁹

66. *In re Alternate Family Care*, 377 B.R. 754, 758–61 (Bankr. S.D. Fla. 2007).

67. Medicare statutes and regulations allow its Medicare Administrative Contractors and Unified Program Integrity Contractors to suspend payments if there is a "credible allegation of fraud." 42 C.F.R. § 405.371.

68. Compare *In re Psychotherapy & Counseling Ctr., Inc.*, 195 B.R. 522, 533 (Bankr. D.D.C. 1996) ("If HHS had determined that the debtor should be excluded from the program by reason of some improper action, such as fraud or other criminal activity, then the court should not prevent HHS's exclusion of the debtor. In that circumstance, HHS would be properly exercising its regulatory authority over property of the estate.") with *In re Rusnak*, 184 B.R. 459, 464–66 (Bankr. E.D. Pa. 1995) (holding that exclusion for debtor's default on Health Education Assistance loans did not fall within section 362(b)(4) of the Bankruptcy Code); and *In re Richmond Paramedical Servs., Inc.*, 94 B.R. 881, 885–86 (Bankr. E.D. Va. 1988), (relying on 11 U.S.C. § 105 to stay criminally convicted debtor's exclusion for sixty days to permit sale of debtor's assets).

69. 11 U.S.C. § 362(b)(28). For a more in-depth discussion of this topic see Samuel R. Maizel and Rachel Caplin, *Chicken Little Comes to Roost in Bankruptcy: Why 362(b)(28) Doesn't Mean the Sky Is Falling*, 25 Am. Bankr. Inst. J. 22 (2006).

The exemption is narrowly drawn, however, and does not encompass all forms of payment suspension or regulatory enforcement. Allegations of fraud frequently trigger payment suspensions based on “credible allegations,” often without formal adjudication.⁷⁰ Such suspensions can devastate a provider’s cash flow and precipitate bankruptcy. One of the earliest cases involving such an approach was in a California bankruptcy case, *In re Medicar Ambulance Co., Inc.*,⁷¹ where the bankruptcy court ruled that such a suspension before a determination of liability and to enforce a prepetition obligation violated the automatic stay.⁷² Two recent decisions have agreed with this reasoning.⁷³

C. Anti-Discrimination Protections

Section 525(a) of the Bankruptcy Code prohibits governmental units from denying or revoking licenses or similar grants solely because of a debtor’s bankruptcy or dischargeable debts. Courts have applied this provision to Medicare and Medicaid provider agreements, recognizing their functional similarity to licenses.⁷⁴ These decisions underscore the Code’s effort, albeit limited, to prevent bankruptcy from serving as a basis for regulatory retaliation.

VI. Closure of Healthcare Facilities and the Costs of Exit

When healthcare businesses close in bankruptcy, the consequences for patients and communities can be severe. Recognizing this reality, the Bankruptcy Code imposes specific obligations regarding patient transfers and the disposition of medical records. Sections 351 and 704 of the

70. 42 C.F.R. § 405.371.

71. 166 B.R. 918, 923 (Bankr. N.D. Cal. 1994).

72. *Id.* at 922–28.

73. *Borrego Cmty. Health Found. v. Cal. Dep’t of Health Care Servs.* (*In re Borrego Cmty. Health Found.*), Findings of Fact & Conclusions of Law re: Emergency Motion to Enforce the Automatic Stay or for TRO, No. 22-90056, Dkt. No. 65 (Bankr. S.D. Cal. Oct. 26, 2022); *True Health Diagnostics LLC v. Azar* (*In re THG Holdings LLC*), 604 B.R. 154, 160–63 (Bankr. D. Del. 2019) (“[T]he Court finds that the Defendants’ withholding of post-petition reimbursement payments is a violation of the automatic stay as it does not fall within the police power exception.”).

74. 11 U.S.C. § 525(a); *Health Care Fin. Admin. v. Sun Healthcare Grp., Inc.* (*In re Sun Healthcare Grp., Inc.*), Nos. 99-3657, 99-3841, 2002 WL 2018868, at *4–5 (D. Del. Sept. 44, 2002) (treating provider agreement as license-like for § 525 purposes).

Bankruptcy Code establish procedures designed to ensure continuity of care and protection of confidential information.⁷⁵

Compliance with these obligations can be costly. Because courts held that expenses incurred by trustees or governmental entities in closing healthcare facilities, such as transferring patients and securing records, were not entitled to administrative expense priority⁷⁶ Congress added provisions expressly giving such costs administrative expense status.⁷⁷ These provisions reflect a legislative judgment that the social costs of healthcare failure warrant preferential treatment within the bankruptcy distribution scheme.

VII. State Oversight of Sale of Nonprofit Healthcare Entities

As discussed earlier, there was widespread dissatisfaction with the lack of deference shown to state Attorney Generals in cases like *AHERF*. As described, Karen Cordry drafted legislation to address those concerns, which eventually resulted in BAPCPA including three provisions that deal with the sale of not-for-profit assets.⁷⁸ Generally the intent was to clarify limits on bankruptcy court oversight of the sale of nonprofit assets. There were very few cases⁷⁹ discussing the implications of these provisions until the *Verity* case in Los Angeles in 2019.⁸⁰ Outside of bankruptcy the California Attorney reviews the sale of nonprofit healthcare entities and can approve, disapprove, or approve with conditions, and those conditions can include financial conditions, operational conditions, and contractual obligations, some lasting for

75. 11 U.S.C. §§ 351, 704 (a)(12).

76. *In re Allen Care Ctrs., Inc.*, 96 F.3d 1328, 1332–33 (9th Cir. 1996)

77. 11 U.S.C. § 503(b)(8).

78. 11 U.S.C. § 363(d) (a trustee may use, sell, or lease property of a nonprofit “only in accordance with nonbankruptcy law applicable to the transfer of property by a [nonprofit] debtor”); 11 U.S.C. § 541(f) (“property that is held by a [nonprofit] debtor ... may be transferred to an entity that is not [a nonprofit] corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title”); 11 U.S.C. § 1129(a)(16) (“All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a [nonprofit] corporation or trust”).

79. *See, e.g., In re Seven Counties Services, Inc.*, 511 B.R. 431, 471 (Bankr. W.D. Ky. 2014).

80. *In re Verity Health Sys. of Cal., Inc.*, No. 2:18-BK-20151-ER, 2019 WL 5585007 (Bankr. C.D. Cal. Oct. 23, 2019), vacated by 2019 WL 6519342 (Bankr. C.D. Cal. Nov. 13, 2019).

many years.⁸¹ In *Verity*, the debtor sought to sell nonprofit hospitals, and the Attorney General approved the sale but imposed conditions that the buyer was unwilling to accept. In a comprehensive decision, the bankruptcy court in *Verity* determined that conditions imposed on a sale by the California attorney general were an interest in property and that the debtor could sell free and clear of those interests.⁸²

Conclusion

The history of healthcare entities in bankruptcy reflects a gradual, often reactive process of legal adaptation. For decades, courts attempted to reconcile healthcare insolvency with a statutory framework designed for commercial enterprises, producing a body of case law marked by doctrinal tension and pragmatic compromise. High-profile nonprofit failures in the 1990s exposed the limitations of that approach and spurred legislative reform.

BAPCPA's healthcare provisions represent an important, if incomplete, acknowledgment that healthcare entities occupy a distinctive position within the bankruptcy system, one shaped by public reliance, pervasive regulation, and ethical obligations that extend beyond ordinary market relationships. Yet many fundamental questions remain unresolved, including the proper characterization of provider agreements and the boundaries of bankruptcy jurisdiction in the face of specialized regulatory regimes.

As healthcare delivery continues to evolve and financial pressures persist, bankruptcy courts will remain central forums for mediating the competing demands of insolvency law, regulatory oversight, and public health. Understanding the historical development of this field provides essential context for those future challenges and for ongoing efforts to align bankruptcy law with the realities of healthcare in America.

81. See *Prime Healthcare Services, Inc. v. Harris*, 216 F.Supp.3d 1096, 1101–02 (C.D. Cal. 2016).

82. *In re Verity Health Sys.*, 2019 WL 5585007, at *22.



A BRIEF HISTORY OF THIRD-PARTY RELEASES UNDER THE BANKRUPTCY CODE

Introduction

The early 1980s witnessed a seismic shift in U.S. business bankruptcy law.¹ A business bankruptcy filing was no longer something to be avoided or a last resort by which to resolve an embarrassing financial downfall. Rather, voluntary Chapter 11 bankruptcy filings increasingly and unhesitatingly were used to address not just financial failures but mass tort claims arising from regulatory failures, both internal and external, and to pursue corporate strategies, even for relatively healthy enterprises.²

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The author would like to express thanks to Judge Scott C. Clarkson for inviting him to submit this article, Judge Martin R. Barash, whose invitations to speak on this subject to the bankruptcy judges' law clerks led me to the history of the third-party releases in bankruptcy cases, and Judge Robert D. Drain (Ret), who handled admirably one of the most difficult third-party release cases in the history of bankruptcy law, and whose thoughts on the subject were invaluable.

1. © Bruce Grohsgal 2026 – Images subject to copyrights, if any, of third parties.

2. See, e.g., KEVIN J. DELANEY, *STRATEGIC BANKRUPTCY: HOW CORPORATIONS AND CREDITORS USE CHAPTER 11 TO THEIR ADVANTAGE* 3, 57 (Berkeley: University of California Press, 1992). Delaney, one of the first academics to appreciate these developments, emphasized that the sweeping legal reform in 1978 altered what we may consider 'economically rational behavior' by a firm."

A key component of many, though far from all, of these new kinds of bankruptcy cases was the third-party release, effectuated by the court-ordered Chapter 11 plan. Under such a plan, non-debtor tort claimants, often without their consent, released their claims, not just against the debtor company but against third-party defendants including the company's officers, directors, owners, and/or insurers. Punitive damages on claims in the bankruptcy case might also be barred. The first of these cases was filed in 1982 by Johns-Manville, then the leading U.S. asbestos manufacturer. The *Johns-Manville* Chapter 11 plan resolved the mass tort claims that had arisen from more than a half-century of failure to protect workers from lung disease caused by breathing asbestos. It did so by establishing trusts funded by insurance policies and other company assets into which claims were channeled and administered, releasing the insurers from further liability, and disallowing punitive damages.³

More than 100 asbestos company bankruptcy cases were filed in the decades that followed.⁴ Soon, debtors in non-asbestos cases were also using third-party releases to address a range of regulatory lapses, both before and after 1994 when Congress enacted Code section 524(g) that embraced the judicially-created *Johns-Manville*-type bankruptcy procedure, but for asbestos cases only.⁵ The Chapter 11 plans that followed typically were strongly supported by creditors, both secured and unsecured, including those forced to give the third-party releases.⁶ Prominent non-asbestos *Johns-Manville*-type case filings over the past 40 years include: *A.H. Robins* in 1985 (unregulated intra-uterine devices which caused infection, infertility, and death)⁷; *Dow Corning* in 1995 (unregulated silicone breast implants the safety of which had not been shown)⁸; numerous child sex-abuse cases including the *Archdiocese of Portland* in 2004, *USA Gymnastics* in 2018, and the *Boy Scouts of America*

3. *Matter of Johns-Manville Corp.*, 68 B.R. 618, 621–622, 624 (Bankr. S.D.N.Y. 1986).

4. Wikipedia, *Asbestos bankruptcy trusts*, https://en.wikipedia.org/wiki/Asbestos_bankruptcy_trusts (as of Nov. 27, 2024, 08:56 UTC).

5. The special provisions for asbestos cases were enacted as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 111, 108 Stat. 4106, 4113–17 (1994), and were codified as 11 U.S.C. § 524(g).

6. See, e.g., *In re Boy Scouts of America & Delaware BSA, LLC*, 642 B.R. 504, 597 (Bankr. D. Del. 2022); *In re Purdue Pharma LP*, 633 B.R. 53, 60 (Bankr. S.D.N.Y. 2021); *In re Johns-Manville Corp.*, 68 B.R. at 621.

7. See *infra* Section III for *A.H. Robins Co. Inc.* (filed Aug. 21, 1985).

8. See *infra* Section VI for *Dow Corning Corp.* (filed May 15, 1995).

in 2020 (in which trusted religious, athletic and youth organizations, and government, all failed to institute or enforce policies and rules that might have protected children from sexual abuse by the leaders and employees of such organizations)⁹; and *Purdue Pharma* in 2019 (FDA-approved labelling of highly-addictive pain killer for broad use while understating the addictive risk).¹⁰

Some courts, including the Ninth Circuit, rejected the notion that one non-debtor could be forced to release its claim against another non-debtor in a Chapter 11 case, other than in an asbestos case as authorized by Congress.¹¹ The Supreme Court recently embraced this view, in a 5-4 decision that struck down on statutory grounds the third-party releases in the *Purdue Pharma* opioid plan.¹² But third-party releases remain and likely will remain a feature of U.S. bankruptcy law for the reasons considered in the conclusion to this article.

This article briefly considers the history of third-party releases in Chapter 11, from *Johns-Manville* to the present, and the regulatory failures that these releases and bankruptcy law have sought to address over the course of that history.

I. The 1978 Bankruptcy Code

The 1978 Bankruptcy Code gave corporate managers the authority and tools with which to pursue new kinds of bankruptcy resolutions and strategies. The possibility of this development was not foremost in the minds of those in Congress at the time, nor likely was it even foreseen by them.

The Code was the first major enactment of U.S. bankruptcy legislation that was *not* in response to a financial panic or downturn.¹³ The legislative process began with Senate and House hearings in 1968 and 1969, organized and led by Senator Quentin Burdick of North Dakota,

9. See *infra* Section VII for Roman Catholic Archdiocese of Portland in Oregon (filed July 6, 2004), Boy Scouts of America (filed Feb. 18, 2020), and USA Gymnastics (filed Dec. 5, 2018); see also “Settlements and bankruptcies in Catholic sex abuse cases,” WIKIPEDIA, https://en.wikipedia.org/wiki/Settlements_and_bankruptcies_in_Catholic_sex_abuse_cases (last visited Jan. 7, 2026).

10. See *infra* Section VIII for *Purdue Pharma LP* (filed Sept. 15-16, 2019).

11. *Resorts Int’l, Inc. v. Lowenschuss* (*In re Lowenschuss*), 67 F.3d 1394 (9th Cir. 1995).

12. *Harrington v. Purdue Pharma L. P.*, 603 U.S. 204 (2024).

13. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995).

chair of the Senate Judiciary Committee's Subcommittee on Bankruptcy.¹⁴ The primary concerns expressed at the 1968-1969 hearings were the effects of easy consumer credit in the new "credit card society," an increase in consumer bankruptcy filings, the recognized weakness of consumer discharge orders, and the need to strengthen the judicial authority of the bankruptcy courts.¹⁵ Far less attention was given at first to any overhaul of the business reorganization chapters of the bankruptcy law.

Yet the legislative process that culminated in the 1978 Bankruptcy Code did more to revolutionize business reorganizations than it did to address the problems of consumer bankruptcies. A key feature of the old Chapter X, designed by Congress in 1938 for the reorganization of a large, corporate enterprise, was that in almost all cases the debtor's managers were unceremoniously ousted and replaced by a disinterested trustee who operated the company and negotiated the reorganization.¹⁶ The stated purpose of removing them was to protect public investors against self-dealing by managers and other insiders.¹⁷ The rule was different in Chapter XI, enacted for smaller, typically family-owned companies, under which the managers almost always remained in charge.¹⁸

Congress in 1978 decided that a large bankrupt company, as well as a smaller one, was better off if reorganized by its existing managers, as debtor in possession.¹⁹ It reasoned that the debtor benefited from

14. Hearing on S.J. Res. 100: A Bill to Create a Commission to Study the Bankruptcy Laws of the United States Before the Subcomm. on Bankruptcy of the Comm. on the Judiciary, United States Senate, 90th Cong., 2nd Sess. (1968); Hearing Before Subcomm. No. 4 of the Judiciary, House of Representatives, on S.J. Res. 88, to Create a Commission to Study the Bankruptcy Laws of the United States, H.R. 6665 and H.R. 12250 to Amend the Bankruptcy Act with respect to the Dischargeability of Debts and for Other Purposes, 91st Cong., 1st Sess. (1969). ("Burdick Hearings.").

15. Regarding easy consumer credit and the rise in bankruptcy filings, see, e.g., Burdick Hearings, *supra* note 10 at 5 (testimony of Asa Herzog, July 16, 1968); regarding the weakness of discharge orders, see, e.g., Burdick Hearings, *supra* note 10 at 21 (testimony of Clive W. Bare, Oct. 1, 1969); and regarding the need to strengthen the bankruptcy courts, see, e.g., Burdick Hearings, *supra* note 10 at 49 (testimony of Conrad Cyr, July 16, 1968).

16. Chandler Act of 1938, Pub. L. No. 75-696, § 156, 52 Stat. 840, 888 (1938).

17. Vincent L. Leibell, Jr., *The Chandler Act – Its Effect Upon the Law of Bankruptcy*, 9 *FORD. L. REV.* 380, 395 (1940).

18. Chandler Act, *supra* note 12 §§ 332, 342.

19. 11 U.S.C. § 1101(1).

the managers' expertise; their institutional memory; and their relationships with suppliers, customers, employees, and other constituencies. In addition, managers did not like to give up control, and would elect Chapter XI (which allowed them to remain in place as debtor in possession) even if eligibility for that chapter was weak at best. Too much wasteful litigation on the issue was occurring.²⁰

The Code also gave the officers and directors, as debtor in possession, powerful new tools by which to more easily achieve their goals. They could modify and cram down secured debt, borrow new funds on a secured or unsecured basis, assume and assign advantageous contracts (even if prohibited from doing so under those contracts), reject those which were burdensome, and obtain confirmation of a "consensual" Chapter 11 plan (even if significant minorities in each consenting class opposed) or a "cramdown" plan if some classes opposed.²¹ The Code also dispensed with the requirement that the business be insolvent.²²

By leaving corporate managers in place and creating mechanisms better equipped to restructure even a solvent company, the Code radically empowered the use of bankruptcy by a large enterprise to achieve strategic goals. The Code became effective on October 1, 1979. It is no coincidence that the *Johns-Manville* case was filed less than three years later.

II. *Johns-Manville*

The term "asbestos" comes from a Greek adjective meaning inextinguishable. It is a miraculous mineral, because it is a fiber that resists, and can protect against, fire and heat.²³

Inspired by an encyclopedia article on asbestos, Henry Ward Johns, who founded what would become the Johns-Manville Corporation, began experimenting with asbestos in 1858, when he was twenty-one. With the help of the household tea kettle in the basement of his New York City tenement, he invented a roofing material, "by running burlap, jute, asbestos, and pitch" through his wife's new clothes wringer. By 1868, having been awarded his first patent for an

20. See e.g., *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434 (1969).

21. 11 U.S.C. §§ 364, 365, 506, 1126, and 1129(a) and (b).

22. Compare 11 U.S.C. § 109(b), (d), with Chandler Act § 130(1).

23. PAUL BRODEUR, *OUTRAGEOUS CONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 10 (1985).

asbestos product, he was manufacturing his asbestos-based goods in lower Manhattan.²⁴

In 1886, Charles B. Manville and his sons founded a pipe insulation company in Milwaukee, named the Manville Covering Company. The Manville company soon became a sales agent for the products manufactured by Johns' company.²⁵

Henry Ward Johns died in Yonkers in 1898. His death certificate listed the cause as "'dust phthisis pneumonitis' – a diagnosis that was probably a medical euphemism for asbestosis."²⁶ In 1901, the Johns and Manville companies merged and became the Johns-Manville Corporation. In 1927, the company went public on the New York Stock Exchange, and J.P. Morgan bought the controlling interest.²⁷ In January, 1930, Johns-Manville was included in the Dow Jones Industrial Average.²⁸

By the late 1800s and until the 1980s, myriad products contained asbestos. It was used "extensively to insulate boilers, steam pipes, turbines, ovens, kilns, and other high-temperature equipment."²⁹ In time, ships, building panels, concrete, floor tile, insulation, paint, curtains, gaskets, and automobile brake pads all used asbestos. Blended with plastic, asbestos was even used to make telephones and buttons.³⁰

The dangers of asbestos were soon recognized, even as its use increased. As early as 1900, two years after the asbestos tinkerer and founder Henry Ward Johns died of lung disease, a hospital-based London physician established a presumptive connection between a 33-year-old man's occupation, in the carding room of an asbestos factory, and the disease that killed him.³¹ In the U.S. in 1917, the chief

24. *Id.* at 11–12; *History and Heritage*, JOHNS MANVILLE: A BERKSHIRE HATHAWAY COMPANY, <https://www.jm.com/en/our-company/HistoryandHeritage/>.

25. *History and Heritage*, JOHNS MANVILLE: A BERKSHIRE HATHAWAY COMPANY, <https://www.jm.com/en/our-company/HistoryandHeritage/>.

26. BRODEUR, *supra* note 19 at 12.

27. Wikipedia, *Johns Manville*, https://en.wikipedia.org/wiki/Johns_Manville (as of Aug. 31, 2024, at 06:58 UTC); *History and Heritage*, JOHNS MANVILLE: A BERKSHIRE HATHAWAY COMPANY, <https://www.jm.com/en/our-company/HistoryandHeritage/>.

28. Wikipedia, *Johns Manville*, https://en.wikipedia.org/wiki/Johns_Manville (as of Aug. 31, 2024, at 06:58 UTC).

29. BRODEUR, *supra* note 19 at 11.

30. James E. Alleman & Brooke T. Mossman, *Asbestos Revisited*, 277 SCIENTIFIC AMERICAN No. 1, 70, 72 (July 1997).

31. BRODEUR, *supra* note 19 at 11.

radiologist at the University of Pennsylvania School of Medicine documented lung scarring seen in x-rays of asbestos-factory workers.³² In 1918 a study by a consulting statistician for the Prudential Insurance Company, published by the United States Bureau of Labor Statistics, noted “that American asbestos workers were experiencing unusually early deaths” and “it had become the practice of some American and Canadian insurance companies not to issue life-insurance policies to asbestos workers because of the ‘assumed health-injurious conditions’ that existed in the asbestos industry.”³³ In 1924, in England, the lung disease “asbestosis” was given its name.³⁴ In 1927, the year Johns-Manville went public, the first workers’ compensation claim for asbestosis, filed by a foreman in the weaving department of an asbestos-textile mill in Massachusetts, was upheld by the Massachusetts Industrial Accident Board.³⁵

Yet there remained a deep and widespread appreciation of the benefits of the mineral. Johns-Manville and the asbestos industry prospered. A huge art deco bas relief, “Asbestos Man,” graced the exterior façade over the entrance to the Johns-Manville pavilion at the 1939–1940 New York World’s Fair. Asbestos Man was clothed from head to toe in an asbestos suit, helmet, gloves, and boots, his arms outstretched and his back to flames. Johns-Manville proudly proclaimed asbestos’s “service to humanity.”³⁶ At Asbestos Man’s feet was inscribed: “Asbestos – The Magic Mineral.”³⁷ The World’s Fair’s builders paid homage by using asbestos from the fair’s rooftop coverings to its underground pipelines.³⁸

32. BRODEUR, *supra* note 19 at 14; Wikipedia, *Henry Pancoast*, https://en.wikipedia.org/wiki/Henry_Pancoast (as of May 28, 2025, 18:16 UTC).

33. BRODEUR, *supra* note 19 at 14.

34. P.W.J. Bartrip, *History of Asbestos Related Disease*, 80 POSTGRADUATE MED. J. 72, 72 (Feb. 2004).

35. *Id.*

36. Alleman & Mossman, *supra* note 26 at 72; *New York 1939 World’s Fair: Johns-Manville Building, Flushing, NY – Entrance façade*, INTERNATIONAL HILDRETH MEIÈRE ASSOCIATION INC., <https://www.hildrethmeiere.org/commissions/new-york-1939-worlds-fair-johns-manville-building-entrance-facade>.

37. *New York 1939 World’s Fair: Johns-Manville Building, Flushing, NY – Entrance façade*, International Hildreth Meière Association Inc., <https://www.hildrethmeiere.org/commissions/new-york-1939-worlds-fair-johns-manville-building-entrance-facade>.

38. Alleman & Mossman, *supra* note 26 at 72.



"Asbestos Man" – Johns-Manville Pavillion, New York World's Fair, 1939-1940
Courtesy of the Hildreth Meière Family Collection

The need in World War II to protect war materiel from fire and extreme heat, and soldiers and civilians from horrible and immediate injuries, likely increased a disregard for the dangers to asbestos workers. Millions of tons of asbestos were mined throughout the war and the products incorporating it were used daily, from ships' insulation to army jeep parts, parachute flares, bazooka shells, and torpedoes. Battlefield medics used it as an easily sterilized surgical dressing.³⁹

The "big" company at the end of the war was Johns-Manville Corp.⁴⁰ Manville and the asbestos industry participated in a post-war construction boom that saw the widespread renewed peacetime uses of asbestos, including for insulation and schools. It was sprayed onto structural steel in high-rise buildings to protect against fire-induced buckling. The U.S. Postal Service had it woven into mailbags to make them fireproof. Fruit juice, wine, and sugar producers used it to filter their products.⁴¹ Asbestos was the "snow" that fell in the 1954 Bing Crosby musical, "White Christmas" (among other movies).⁴²

About 30 million tons of asbestos were used in the U.S. from 1900 to 1980, in ships, commercial and residential buildings, chemical plants, refineries, powerhouses, and factories.⁴³ Sorting out the

39. *Id.* at 73.

40. *Economic Concentration and World War II*, Sen. Doc. No. 206, 79th Cong. 2nd Sess., 292 (1946).

41. Alleman & Mossman, *supra* note 26 at 73.

42. Sean Marchese, 8 Movies You Didn't Know Used Asbestos, *Endangering Cast and Crew*, THE MESOTHELIOMA CENTER, <https://www.asbestos.com/blog/2023/04/03/movies-used-toxic-asbestos/>.

43. Irving J. Selikoff, *Twenty Lessons from Asbestos*, 10 EPA J. 21, 23 (May 1984).

human and financial cost was not so simple. In the end, much of that work would be done in the bankruptcy courts.

The August 26, 1982 Chapter 11 bankruptcy filing of the Johns-Manville Corporation and 20 of its subsidiaries, the world's largest asbestos company, "made the front page of virtually every major newspaper in the country," when newspapers were widely read and the big stories were on the front page. The filing was prompted by asbestos-disease law suits that kept coming, and were expected eventually to require the company to create a reserve fund approximately equal to its net worth.⁴⁴ The company was the largest American industrial company, and one of the most financially healthy companies, ever to file for bankruptcy.⁴⁵

The next day, the Johns-Manville Corporation published in national newspapers a full-page ad in the form of an interview with John A. McKinney, the company's chief executive officer. "Nothing is wrong with our businesses," McKinney said. His company was not to blame or ashamed: "Not until 1964 was it known that excessive exposure to asbestos fiber released from asbestos-containing insulation products can sometimes cause certain lung diseases."⁴⁶ This was a brittle argument at best, given that the company's founder, Johns, had died of what was likely asbestosis, that the risks of asbestos to workers had been identified by medical scientists and actuaries on both sides of the Atlantic for more than 50 years, and that the U.S. Public Health Service since 1938 had set recommendations for safe and unsafe levels of asbestos particles per cubic foot of air for workers, including in the shipyards.⁴⁷ McKinney blamed the bankruptcy on the federal government, for refusing to take responsibility for affected World War II shipyard workers. He reproached the government for not acting to replace the tort system, which he called a "nightmare" and "unworkable," with a statutory compensation program for asbestos workers.⁴⁸

The lawyers who represented tens of thousands asbestos workers, mostly on a contingency fee basis, expressed outrage. They called

44. BRODEUR, *supra* note 19 at 3–4.

45. *Id.*

46. Advertisement, "Despite Strong Business, Litigation Forces Manville to File for Reorganization," N.Y. TIMES, (Aug. 27, 1982) at D3.

47. BRODEUR, *supra* note 19 at 4. 35–36.

48. BRODEUR, *supra* note 19 at 4; William E. Schmidt, *Manville Asserts U.S. Must Share Costs of Asbestos Damage Claims*, N.Y. TIMES, Aug. 28, 1982, <https://www.nytimes.com/1982/08/28/business/manville-asserts-us-must-share-costs-of-asbestos-damage-claims.html>.

the filing “fraudulent” and “a perversion of the bankruptcy laws.”⁴⁹ One said he would ask the S.E.C. and the U.S. Department of Justice “to investigate Manville’s move.”⁵⁰

The case was assigned to U.S. Bankruptcy Judge Burton Lifland. Lifland had gone from practicing in New York bankruptcy boutiques to the mega-firm Finley, Kumble. He left to join the bankruptcy bench in 1980, shortly after the new Bankruptcy Code became effective.⁵¹

The significance of the *Manville* case would not be lost on Judge Lifland. The parties and the court, he would observe, “had to address societal, legal and economic issues on a scale heretofore unknown” in bankruptcy proceedings.⁵² Lifland would later say that Johns-Manville was like the proverbial camel that gets its nose in the tent. “The first look at that nose never lets you size up the rest of it as it squeezes its way inside.”⁵³

Little progress toward a plan was made at first. Two years into the case, Lifland denied motions to dismiss the case as a bad faith filing, and “despite authority to the contrary” recognized that future victims whose disease was not yet manifest were “parties in interest,” setting the stage for the appointment of a future claims representative.⁵⁴

Judge Lifland described the “largely consensual” plan that eventually emerged as “the product of more than four years of effort to grapple with a social, economic and legal crisis of national importance within the statutory framework of Chapter 11” that was, of necessity “both creative and pragmatic.”⁵⁵ It established two trusts. The first, for the present and future personal injury claims, was funded with cash, receivables, insurance proceeds, post-confirmation payments from Manville for 24 years, 80% of Manville’s common stock, and up to 20% of its profits. The second trust, for property damage claims,

49. *Lawyers Plan Strategy*, N.Y. TIMES, Aug. 30, 1982, <https://www.nytimes.com/1982/08/30/business/lawyers-plan-strategy-against-manville.html>.

50. Barnaby J. Feder, *Manville Submits Bankruptcy Filing to Halt Lawsuits*, N.Y. TIMES, Aug. 27, 1982, <https://www.nytimes.com/1982/08/27/business/manville-submits-backruptcy-filing-to-halt-lawsuits.html>.

51. Douglas Martin, *Burton R. Lifland, Bankruptcy Judge in Big Cases, Dies at 84*, N.Y. TIMES, Jan. 14, 2014, <https://www.nytimes.com/2014/01/15/business/burton-r-lifland-bankruptcy-judge-dies-at-84.html>.

52. *In re Johns-Manville Corp.*, 68 B.R. 618, 624–625 (Bankr. S.D.N.Y. 1986).

53. James H.M. Sprayregen, et al., *In Memoriam: Bankruptcy Judge Burton Lifland*, LAW360 (Feb. 19, 2014), <https://www.law360.com/articles/510985/in-memoriam-bankruptcy-judge-burton-lifland>.

54. *In re Johns-Manville Corp.*, 66 B.R. 517, 526 (Bankr. S.D.N.Y. 1986).

55. *Matter of Johns-Manville Corp.*, 68 B.R. at 621.

was funded with cash and any insurance settlement proceeds above a floor.⁵⁶ The confirmation order permanently enjoined actions which directly or indirectly sought payment on asbestos-related claims from the debtor, its officers, directors, and subsidiaries, and the settling insurance companies, effectively channeling all present and future claims against the debtor and those non-debtors to the trusts. It also barred punitive damages.⁵⁷

Lifland relied on both statutory and equitable authority to confirm the *Johns-Manville* plan in December 1986. Under Bankruptcy Code § 105(a), he opined, a bankruptcy court could issue permanent, post-plan confirmation injunctions when necessary to effectuate reorganizations. He likened his channeling injunction to a bankruptcy sale of property free and clear of liens, in which liens are stripped from the property sold and then channeled and attached to the proceeds of sale, citing Supreme Court cases for such authority since the 1800s.⁵⁸ Without the permanent injunction, a central purpose of bankruptcy, “preventing the inequitable piece-meal dismemberment of the debtor’s estate,” would not be achieved, and the plan’s beneficiaries would suffer.⁵⁹ The bar on punitive damages did not offend tort policy because the trusts were not tortfeasors to be punished or deterred from future wrongful conduct. In any event, the punitive damage claims could be equitably subordinated under Code § 510, effectively leaving them unpaid.⁶⁰

Regardless of how Judge Lifland got there, the camel’s nose was definitely inside the tent, and the rest of it was squeezing its way inside. And *A.H. Robins*, filed a year before the *Manville* plan was confirmed, would show how far inside it was.

III. *A.H. Robins*

A.H. Robins’ history dated to 1866. Around the time when Johns was experimenting with asbestos in the basement, Albert Harley Robins, an ex-Confederate soldier, opened an apothecary in Richmond, Virginia. Thirty years later his son, Claiborne, formed A.H. Robins Company as a separate business, selling a remedy for stomach disorders. When Claiborne died, his widow and then his son, E. Claiborne Robins,

56. *Id.* at 621–622.

57. *Id.* at 624.

58. *Id.* at 625. See 11 U.S.C. § 365(f) for the current authority to sell free and clear.

59. *Matter of Johns-Manville Corp.*, 68 B.R. at 626.

60. *Id.* at 627–628.

took over operating the business. The company went public in 1963, though the Robins family retained the controlling interest. By the 1980s, A.H. Robins Company was one of the 400 largest corporations in the U.S. Its best-known products were the over-the-counter cold remedies, Robitussin and Dimetapp, and Chapstick lip balm.⁶¹

A.H. Robins was a major economic force in the city of Richmond, employing thousands. The Robins family was a major donor to local charities and institutions, including the University of Richmond, at which several buildings still carry the Robins name.⁶²

In 1968, two men, a Johns Hopkins Medical School gynecologist and a part-time inventor who had trained as an electrical engineer, designed the Dalkon Shield intrauterine device (IUD) to prevent pregnancy.⁶³ A big problem with existing IUDs was that women's uteruses expelled them.⁶⁴ The Dalkon Shield had prongs around its perimeter to resist expulsion, and a one-to-two-inch long string, by which a woman could check that the device remained in place.⁶⁵ The inventors formed the Dalkon Corporation to produce and sell their product.⁶⁶



Dalkon Shield Intrauterine Contraceptive Device Dittrick Medical History Center (CWRU), used with permission

61. RICHARD B. SOBEL, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* 4 (1991). Sobel, a civil litigator, based his excellent book on his attending the proceedings, on public court documents, and on interviews with many of those involved in the case, including U.S.D.J. Robert R. Merhige, Jr. SOBEL, *BENDING THE LAW* at xi.

62. Wikipedia, *University of Richmond*, https://en.wikipedia.org/wiki/University_of_Richmond (as of Sep. 29, 2025, 23:44 UTC); SOBEL, *supra* note 56 at x.

63. SOBEL, *supra* note 56 at 1–2.

64. *Id.* at 1.

65. *Id.* at 1–2.

66. *Id.* at 2–3.

The Dalkon Corporation began selling its IUD in February 1970. FDA approval was not required because IUDs were classified as unregulated "devices." Robins bought the rights in May 1970. It had no experience with contraceptive devices and the only study it read on the Dalkon Shield was written by one of the co-inventors. That study used a different version of the IUD than the one being sold, and considered its efficacy but not its safety.⁶⁷

A.H. Robins vigorously promoted its new product from the start, notwithstanding its soon apparent defects and dangers to women.⁶⁸ Because of the prongs, the device could become embedded in the uterine wall or even perforate the uterus. The string created a path for bacteria to pass from the vagina through the cervix into the uterus, causing an inflammatory disease that could result in infertility and require a hysterectomy.⁶⁹ Women also became pregnant with the device in place and suffered spontaneous, septic abortions.⁷⁰

Tort suits followed, against A.H. Robins, its officers, directors, employees, insurer (Aetna Casualty), hospitals, physicians and others.⁷¹ Trial on the first suit began in 1974. Robins' in-house defense counsel would later admit that, around the same time, Robins had incinerated incriminating documents, including those taken from the files of senior officers showing that they knew of the IUD's dangers.⁷² A.H. Robins withdrew the Dalkon Shield from the market in 1975, after it had distributed almost 5,000,000 in the U.S. and abroad.⁷³

The suits dragged on. By 1984, Robins had determined that its survival depended on the elimination or reduction of the punitive damage claims.⁷⁴ By August 21, 1985, when it filed Chapter 11, it was defending almost 6,000 lawsuits and claims and, with Aetna Casualty, had already paid about \$530 million.⁷⁵ Robins' managers also came to think, as had Manville's McKinney, that the company was unfairly disadvantaged by having to defend itself in myriad often hostile venues.⁷⁶

U.S. District Judge Robert Merhige (E.D. Va.) was a practical, hard-working judge, and proud of his ability to solve problems. Born in

67. *Id.* at 4–5.

68. *Id.* at 6–9.

69. *Id.* at 2.

70. *Id.* at 8.

71. *In re A.H. Robins Co., Inc.*, 88 B.R. 742, 743 (E.D. Va. 1988).

72. SOBEL, *supra* note 56 at 12, 21.

73. *A.H. Robins Co., Inc.*, 88 B.R. at 743.

74. SOBEL, *supra* note 56 at 37.

75. *A.H. Robins Co., Inc.*, 88 B.R. at 743.

76. SOBEL, *supra* note 56 at x.

Brooklyn, he both trained and then practiced law in Richmond.⁷⁷ Appointed in 1967, he had ordered the desegregation of Richmond's schools in 1970.⁷⁸ He was presiding over several of the Dalkon Shield tort suits prior to A.H. Robins' filing Chapter 11. Merhige would later say that he might have retired but for his challenging cases.⁷⁹

On August 21, 1985, two lawyers, A.H. Robins' Richmond counsel and its recently retained out-of-town bankruptcy counsel, walked into the bankruptcy court in Richmond and asked to see District Judge Merhige. The lawyers had with them Robins' bankruptcy petitions and a nine-page proposed administrative order, a key provision of which withdrew the reference of the not-yet-filed Chapter 11 case from the bankruptcy court and assigned it to District Judge Merhige. The Clerk and the bankruptcy judge, Blackwell N. Shelley, then spoke with Merhige, who said to send the lawyers over. Merhige, who knew no bankruptcy law, convinced (or ordered) Bankruptcy Judge Shelley (who the district court had appointed in 1976) to sit beside him on the bench throughout the proceedings, so that Shelley could advise him on the law. With that, Merhige signed the administrative order.⁸⁰ Merhige would later say that Shelley thought this unusual procedure proper because it was "primarily a tort case" where a district judge was "going to be required in the majority of it."⁸¹

At the first hearing in the case, Merhige spoke bluntly about the shortcomings of the tort system. "There are women who have been injured—they haven't received anything in ten years. Doesn't do people much good to be compensated if you are too old to enjoy it. I am going to put a stop to it."⁸² A.H. Robins and its counsel surely had their own reasons for wanting the bankruptcy case in front of Merhige. They expected to benefit from his well-known loyalty to his adopted city, in which the company and its owners played a prominent role. They especially hoped that with the case in front of Merhige the

77. *Id.* at 30–31.

78. *Id.* at 25, 37.

79. *Id.* at 37.

80. *Id.* at 60–61; "Blackwell N. Shelley," *VIRGINIA LAWYERS WEEKLY* (March 5, 2001), available at <https://valawyersweekly.com/2001/03/05/blackwell-n-shelley/>.

81. SOBEL, *supra* note 56 at 61. As peculiar as the arrangement was, Shelley was on firm ground regarding the authority of the bankruptcy court to determine personal injury claims, which cannot be tried by a bankruptcy judge, but must proceed before the U.S. district judge or in state court. 11 U.S.C. § 157(b)(5).

82. SOBEL, *supra* note 56 at 62.

company would survive and emerge from bankruptcy under existing ownership.⁸³

A month later, A.H. Robins asked the court to enjoin the ongoing suits against non-debtors, including E. Claiborne Robins, Sr. and Jr., other officers and directors, its outside counsel, and Aetna. Merhige entered the injunction, saying that all such suits would be enjoined during the pendency of the case.⁸⁴

The releases and permanent injunction found their way into the plan. A.H. Robins had insisted from the start on plan releases for all potential co-defendants, including members of the Robins family, calling it a "super discharge." Its first proposed plan, filed in April 1987, contained such releases as did every amended plan which followed.⁸⁵ The tort claimants' committee and others opposed it. But in the end, American Home Products, which was buying the company and assuming liability for the claims, insisted that the releases be included. Future claimants were given limited rights to recovery. Under the deal struck, Robins Sr. and Jr. would contribute \$10 million toward compensating the victims, without admitting liability, while the Robins family would receive \$300 million of American Home Products stock.⁸⁶ The plan was confirmed on July 26, 1988.⁸⁷

IV. The Circuit Split: The Ninth Circuit Weighs In

Not all courts thought that the Bankruptcy Code permitted them to order one non-debtor to non-consensually release another non-debtor, just because both happened to be involved in the same bankruptcy case. A circuit split developed in 1990, which the Supreme Court would not resolve until *Purdue Pharma* more than thirty years later.

The split began with the Ninth Circuit's decision in *In re American Hardwoods, Inc.*, in which the debtor sought by motion to permanently enjoin, following plan confirmation, any recovery from non-debtor guarantors.⁸⁸ The Ninth Circuit reasoned that under Code § 524(e), only a debtor was discharged, which the bankruptcy court could not alter in the exercise of its equitable power under § 105(a).⁸⁹ The court took pains to distinguish *A.H. Robins*, emphasizing its 195,000 tort claimants

83. *Id.*

84. *Id.* at 63–64.

85. *Id.* at 220.

86. *Id.* at 221–22.

87. *A.H. Robins Co., Inc.*, 88 B.R. 742.

88. *In re American Hardwoods, Inc.*, 885 F.2d 621 (9th Cir. 1989).

89. *Id.* at 624–626.

and the need in that case to release the debtor from its indemnification and contribution obligations to the non-debtor defendants.⁹⁰

The Tenth and Fifth Circuits would follow the Ninth, holding that non-consensual third-party releases were not permissible.⁹¹ Eventually, the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits would hold that they were.

V. Congress Acts – The Special Asbestos Case Provisions of Code § 524

Congress enacted section 524(g) of the Bankruptcy Code on October 22, 1994, as part of the Bankruptcy Reform Act of 1994.⁹² Section 524(g) enables “channeling injunctions” in Chapter 11 asbestos cases, such as the injunction ordered in *Johns-Manville*. It removed any doubts about the validity of such injunctions and thus facilitated asbestos-company reorganizations and the ability to raise needed capital after bankruptcy.⁹³

Entry of the injunction is authorized if several requirements, similar to those in the *Manville* plan, are satisfied, including: establishment of a trust to pay the claims (funded with income, assets, and a majority of the debtor’s securities); and the likelihood of future claimants and the fair treatment and appointment of a legal representative for them.⁹⁴ The § 524(g) injunction effectuates releases of non-debtor third-parties with past connections with the debtor, including the company’s managers and lenders.⁹⁵

A few years after enactment, one commentator called § 524(g) the “current nirvana for distressed asbestos defendants.”⁹⁶ Bankruptcy, the writer continued, “is the only generally recognized legal vehicle that is currently available for imposing finality on a defendant’s asbestos liability.”⁹⁷

90. *Id.* at 626–627.

91. *In re Western Real Estate Fund, Inc.*, 922 F.2d 599–600 (10th Cir. 1990); *In re Pacific Lumber Co.*, 584 F.3d 229, 252–253 (5th Cir. 2009).

92. Pub. L. No. 103-394, 108 Stat. 4106.

93. 4 COLLIER ON BANKRUPTCY ¶ 524.07 (16th ed. 2025). Section 524(g) was retroactively applicable to existing Chapter 11 plan injunctions in asbestos cases, to the extent set forth in section 524(h). 11 U.S.C. § 524(g).

94. 4 COLLIER ON BANKRUPTCY ¶ 524.07 (16th ed. 2025).

95. *Id.*

96. Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1754 (2002).

97. *Id.*

VI. Dow Corning

In 1943, The Dow Chemical Company and Corning Glass Works formed Dow Corning Corporation for the purpose of developing and manufacturing products based on silicone chemistry. In the early 1960s, a duo of plastic surgeons developed a surgical breast implant of silicone gel placed inside a sealed packet. They collaborated with Dow Corning, which began selling the product in 1964.⁹⁸

Breast implants, like IUDs, were classified as unregulated medical devices” until 1976 when the Medical Devices Amendment to the Food, Drug and Cosmetic Act (MDA) became law. Even then, the MDA permitted such devices to remain on the market until the FDA could classify and regulate them.⁹⁹

Women affected began suing in the 1980s. Dow Corning, after losing one of these suits, modified its package inserts in 1984 to acknowledge the possible dangers. It ceased marketing the implants in 1992. Later that year the FDA ordered that silicone gel implants be taken off the market, and the suits against Dow Corning and the other manufacturers dramatically increased.¹⁰⁰



Dow Corning 120cc Anatomical Breast Implant BAPRAS/140
1972 Courtesy of The BAPRAS Collection at the British
Association of Plastic, Reconstructive and Aesthetic Surgeon

98. *In re Dow Corning Corp.*, 255 B.R. 445, 461 (E.D. Mich. 2000).

99. David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 463 (1999).

100. *Dow Corning Corp.*, 255 B.R. at 461–62.

In 1992, the Judicial Panel on Multidistrict Litigation (MDL) consolidated all the federal breast implant litigation for pre-trial matters. Efforts to achieve a global settlement followed. But the 440,000 claims filed against the global settlement fund caused the estimates of recoveries to sink to a small percentage of what had been promised to victims, and more than 15,000 class action members opted out of the proposed settlement. The settlement efforts failed in early 1995.¹⁰¹

By May 15, 1995, Dow Corning was facing 19,000 individual suits, 45 putative class actions, 90 state trials with overlapping dates, and litigation costs of \$200 million a year. It concluded that it was financially and logistically impossible to defend itself, and filed Chapter 11.¹⁰²

The bankruptcy court ordered the appointment of several official committees including a tort claimants' committee. The debtor proposed two plans of reorganizations which were "vigorously opposed" by the tort claimants' committee. A mediator was appointed to assist in the negotiation of a consensual plan among the debtor, the committees, the UST, and the debtor's owners. The parties reached agreement on the terms of a plan that was jointly filed by the debtor and the tort claimants' committee.¹⁰³

The plan established a \$2.35 billion fund for the payment of claims asserted by personal injury claimants and others. The funds were provided by the debtor's products liability insurers and owners and by its operating cash reserves. "As a *quid pro quo* for making proceeds available for the \$2.35 billion fund," the plan released the insurers and shareholders from all liability on personal injury claims and permanently enjoined claimants from bringing an action against the debtor's insurers or shareholders.¹⁰⁴ The claims of settling claimants were channeled to a settlement facility, which was authorized to negotiate payments out of funds set aside for that purpose. Claimants who chose to litigate were channeled to a litigation facility. The complexity of the problems resolved by the plan was underscored by the complexity of the plan itself, including that it divided claims and equity interests into 33 classes and subclasses.¹⁰⁵

The plan's third-party release and injunction provisions proved ambiguous. The bankruptcy court confirmed the plan but construed

101. *Id.* at 462.

102. *Id.*

103. *Id.* at 463. The mediator, the late Prof. McGovern, wrote the article on asbestos bankruptcies cited *supra* at note 96.

104. *In re Dow Corning Corp.*, 280 F.3d 648, 654–55 (6th Cir. 2002).

105. *Id.* at 655.

those provisions to apply only to consenting creditors. The district court affirmed the bankruptcy court's confirmation but determined instead that those provisions applied to all creditors, consenting and non-consenting.¹⁰⁶

The Sixth Circuit ruled, first, that the bankruptcy court had the authority to permanently enjoin a non-consenting creditor's claims against a non-debtor to facilitate a Chapter 11 reorganization plan. The court recognized that there was no specific Code provision to this effect. Yet, the bankruptcy courts "as courts of equity," had "broad authority to modify creditor-debtor relationships," including pursuant to Code § 105(a).¹⁰⁷ The court also interpreted Code § 1123(b)(6) to give it some leeway to include in the plan any "appropriate provision not inconsistent with the other applicable provisions" of the Code, including, "if there were unusual circumstances," non-consensual releases of non-debtors by other non-debtors.¹⁰⁸ It affirmed its "substantial power to reorder creditor-debtor relations" to resolve large and complex mass litigation, if needed to achieve a successful reorganization.¹⁰⁹ The Sixth Circuit affirmed, while remanding for further findings regarding "unusual circumstances."¹¹⁰ And on remand, that district court found "unusual circumstances" and that the release and injunction provisions in the plan were appropriate.¹¹¹

VII. The Child Sex Abuse Cases: the Archdiocese of Portland, Oregon, USA Gymnastics, and the Boy Scouts of America, et al.

The greatest harms, inflicted by regulatory failures, that have fallen to the bankruptcy courts to resolve are those resulting from the sexual abuse of children by trusted institutions. These regulatory failures were especially abhorrent because authorities could have stopped perpetrators but instead protected those institutions without regard for the children who would carry the harm throughout their lives.

106. *Id.* at 655–56.

107. *Id.* at 656 (quoting *United States v. Energy Resources Co.*, 495 U.S. 545, 549, 110 S. Ct. 2139 (1990)).

108. *Id.* at 658.

109. *Id.* at 656.

110. *Id.* at 663.

111. *In re Dow Corning Corp.*, 287 B.R. 396, 416 (E.D. Mich. 2002).



Boy Scout Saluting (Image from Shutterstock, modified by author)

The first to draw national attention was the Archdiocese of Boston in 2002, when the *Boston Globe* reported of widespread sexual abuse of children by priests, and the enormous lengths to which the Church hierarchy had gone to hide the scandal from the faithful and the public.¹¹² The Archdiocese considered but chose not to file for bankruptcy. Commentators speculated that it resisted because it “would open up the archdiocese’s tightly held financial records and give a federal judge control over whether any of its multimillion-dollar holdings would be sold to pay to the plaintiffs.” And in a city “simmering with outrage” over the sex abuse scandal, it was likely to face the unflattering image of trying to escape from liability and fully compensating its victims. The Archdiocese also had \$100 million in insurance and real estate holdings, which was expected to be sufficient to resolve its liability without its becoming insolvent. Moreover, an archdiocese or diocese had never filed for bankruptcy. One commentator thought a diocese somewhere might sometime declare bankruptcy, but not New York or Boston. It would be “a small diocese with many claims and few assets.”¹¹³

But the walls erected by trusted institutions to shield themselves from scrutiny and responsibility were soon further breached, and bankruptcies followed. At last count, more than twenty diocesan and other

112. THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* 3 (2002).

113. Pam Belluck & Adam Liptak, *For Boston Archdiocese, Bankruptcy Would Have Drawbacks*, N.Y. TIMES, Dec. 3, 2002, <https://www.nytimes.com/2002/12/03/us/for-boston-archdiocese-bankruptcy-would-have-drawbacks.html>.

religious organizations have filed bankruptcy petitions, beginning with the Archdiocese of Portland (Oregon) in 2004, as have prominent athletic and youth organizations, including USA Gymnastics and The Boy Scouts of America.¹¹⁴

In many jurisdictions in which these cases filed, non-consensual third-party releases of the kind struck down in *Purdue Pharma* in 2024 were not permitted under circuit court precedent. Bankruptcy offered, nonetheless, a proceeding by which the mass torts could be addressed so the institution could move forward. The Archdiocese of Portland confirmed its plan in 2007, notwithstanding that non-consensual releases were not permitted under Ninth Circuit law. Bankruptcy Judge Elizabeth Perris, confirming the plan, said that all known child sexual abuse claims had either been disallowed or settled and would be paid in full on the plan effective date. The plan was overwhelmingly approved by creditors.¹¹⁵

The Boy Scouts of America perpetuated child sex abuse for a century. As early as the 1920s, it maintained a secret “red flag” list of offenders and possible offenders. A top scouting official in 1922 wrote: “There are all too many cards with those red flags on them in the file.” Time and again, it had a man’s name from one city that had been “red-flagged in another, 2,000 miles away.”¹¹⁶ Hardly a day passed, he said, that there did not come to his desk “something concerning this sort of situation.”¹¹⁷

The Boy Scouts of America filed for Chapter 11 on February 18, 2020.¹¹⁸ Victims’ lawyers urged their clients to write letters to the

114. *Catholic dioceses and orders that filed for bankruptcy and other major settlements*, NATIONAL CATHOLIC REPORTER, May 31, 2018, <https://www.ncronline.org/news/catholic-dioceses-and-orders-filed-bankruptcies-and-other-major-settlements>; Wikipedia, *Settlements and bankruptcies in Catholic sex abuse cases*, https://en.wikipedia.org/wiki/Settlements_and_bankruptcies_in_Catholic_sex_abuse_cases (as of Aug. 3, 2025, 07:28 UTC).

115. *Oregon archdiocese ends bankruptcy with abuse deal*, REUTERS (Aug. 9, 2007) <https://www.reuters.com/article/world/us/oregon-archdiocese-ends-bankruptcy-with-abuse-deal-idUSN13214421/>; Wikipedia, *USA Gymnastics sex abuse scandal*, https://en.wikipedia.org/wiki/USA_Gymnastics_sex_abuse_scandal (as of Oct. 7, 2025, 05:51 UTC); Wikipedia, *Boy Scouts of America sexual abuse settlement* (2022), [https://en.wikipedia.org/wiki/Boy_Scouts_of_America_sexual_abuse_settlement_\(2022\)](https://en.wikipedia.org/wiki/Boy_Scouts_of_America_sexual_abuse_settlement_(2022)) (as of Sep. 2, 2025, 19:17 UTC).

116. KIM CHRISTENSEN, *ON MY HONOR: THE SECRET HISTORY OF THE BOY SCOUTS OF AMERICA* 47 (2025).

117. CHRISTENSEN, *ON MY HONOR* at 47.

118. *In re Boy Scouts of America*, 137 F.4th 126, 143 (3rd Cir. 2025).

Bankruptcy Judge Laurie Silverstein, and they did, describing how their abuse, from a single instance of fondling to multiple rapes over several years, had affected their lives.¹¹⁹ Men as old as their 90s and 80s wrote in painful, personal and graphic terms of their abuse and the years that followed. Many said their lives had been forever diminished.¹²⁰

Years of plan negotiations followed, by parties seeking a global resolution of the over 82,000 tort claims and other claims against the debtors and related persons. The *Boy Scouts* Chapter 11 plan was confirmed, and became effective in April 2023, prior to the Supreme Court's decision in *Purdue Pharma*. The plan provided for the creation of a settlement trust to pay distributions to abuse claimants, funded primarily by the proceeds of the insurance companies' buying back their insurance policies and the debtors' sale of other assets, and by contributions from the debtors and related non-debtors.¹²¹

Some abuse victims appealed because, by then, the Supreme Court in *Purdue Pharma* had held impermissible the "so-called 'nonconsensual third-party releases.'" Some insurers also appealed, seeking clarity regarding their protections under the plan.¹²²

Emphasizing that the relief sought by the appealing victims would send the debtors and the "over 82,000 abuse claimants back to square one and would almost certainly unleash years of litigation in the wake of the vacated Plan," the Third Circuit held that Code § 363(m) (which provides for the finality of bankruptcy sales) barred invalidating the sale of the policies and dismantling the plan or the more limited relief sought.¹²³ One judge on the panel concurred, reasoning that § 363(m) did not apply to a sale pursuant to a plan, but that the appeal was equitably moot.¹²⁴ On October 13, 2025, the abuse claimants filed a petition for certiorari with the U.S. Supreme Court, asking: (1) whether § 363(m) applies to asset sales under reorganization plans, "and if so, whether § 363(m) immunizes *Purdue*-forbidden releases;" and (2) whether "equitable mootness" exists, and if so, whether it "shields unauthorized practices."¹²⁵ But certiorari was denied on January 12, 2026.¹²⁶

119. CHRISTENSEN, ON MY HONOR at 197.

120. CHRISTENSEN, ON MY HONOR at 197–206.

121. *Boy Scouts of America*, 137 F.4th at 142.

122. *Id.*

123. *Id.* at 158–59.

124. *Id.* at 177.

125. Petition for Writ of Certiorari, No. 25-490, *Lujan Claimants v. Boy Scouts of Am., et al.* (Oct. 13, 2025).

126. *Lujan Claimants v. Boy Scouts of Am.*, No. 25-490, 2026 WL 79599 (Mem.) (U.S. Jan. 12, 2026)

VIII. Purdue Pharma

The opioid crisis was brought on by yet another regulatory failure which began years before it became a bankruptcy problem. A school of academic literature emerged in the 1980s which asserted that pain could be safely eradicated by pharmaceuticals.¹²⁷ Regulatory authorities were quick to embrace the view. States and then the federal government enacted pain legislation, acknowledging a patient's right to pain treatment, shielding physicians from liability if addiction resulted, and increasing acceptance of prescription painkillers.¹²⁸ The FDA, when it approved OxyContin in 1995, allowed Purdue Pharma to claim that delayed absorption of the drug reduced the potential for abuse, which the company immediately capitalized on in its marketing. In 1996, the year Purdue Pharma began selling OxyContin, the American Pain Society promoted the absence of pain as a fifth vital sign, the other four being the long-adopted body temperature, pulse rate, respiration rate, and blood pressure.¹²⁹ By 2000, when OxyContin's sales reached \$1 billion (accounting for 80% of Purdue's revenues),¹³⁰ the U.S. Department of Veterans Affairs had adopted that position, and The Joint Commission (JCAHO), which accredits hospitals in the U.S., included it among its accreditation standards. The consumption of opiates per patient materially increased.¹³¹ Critics of this new approach were called "opioiphobic."¹³² Federal investigations into the drug's use and abuse began in the 2000s, but charges against Purdue and its officers were repeatedly reduced and settled, and the marketing and sale of OxyContin continued.¹³³

127. BARRY M. MEIER, *PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA'S OPIOID EPIDEMIC* 29–30 (2018).

128. GERALD POSNER, *PHARMA: GREED, LIES, AND THE POISONING OF AMERICA* of 366–367 (2020).

129. See DEP'T OF VETERANS AFFAIRS, *PAIN AS THE 5TH VITAL SIGN TOOLKIT* (Oct. 2000, rev. ed.), <https://www.va.gov/painmanagement/docs/toolkit.pdf>; see also *Vital Signs*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/10881-vital-signs>.

130. MEIER, *supra* note 120 at 70–71.

131. David W. Baker, *The Joint Commission's Pain Standards: Origins and Evolution* 3, THE JOINT COMMISSION (2017).

132. Baker, *The Joint Commission's Pain Standards* 4.

133. BETH MACY, *DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA* 69, 79–84 (2018).



OxyContin Dosages from
<https://www.dea.gov/factsheets/oxycodone#>

OxyContin soon became the most prescribed brand-name narcotic medication in the United States notwithstanding its dangers.¹³⁴ By 2019 approximately 247,000 people in the United States had died from prescription-opioid overdoses.¹³⁵

Seeking to resolve “a veritable tsunami of litigation,”¹³⁶ Purdue Pharma, the Sackler family which owned the company, and other parties “agreed that in exchange for Purdue filing for bankruptcy, the Sacklers would personally contribute billions of dollars to the bankruptcy if all civil claims against them were released.”¹³⁷ The company filed its Chapter 11 petition on September 19, 2019 intending “a ‘Manville-style’ bankruptcy.”¹³⁸ Ultimately, roughly 618,000 claims were filed, which the bankruptcy judge thought might be “a record.”¹³⁹

The key provision of the *Purdue* plan gave the Sacklers consensual and non-consensual releases from opioid liability of other non-debtors. In exchange, the Sacklers agreed to make a \$4.3 billion contribution to the plan.¹⁴⁰

Bankruptcy Judge Robert Drain stressed that bankruptcy courts “resolve the collective problem presented by an insolvent debtor and a

134. *Harrington*, 603 U.S. at 210 (2024).

135. *Id.* at 204.

136. *In re Purdue Pharma*, L.P., 635 B.R. 26, 35 (S.D.N.Y. 2021).

137. *In re Purdue Pharma* L.P., 69 F.4th 45, 56 (2nd Cir. 2023).

138. *Purdue Pharma*, 635 B.R. at 35.

139. *Purdue Pharma*, 633 B.R. at 58.

140. *Purdue Pharma*, 69 F.4th at 70.

large body of creditors competing for its insufficient assets,” especially where mass torts were committed. Bankruptcy, he continued, focuses “the solution away from individual litigations to a fair collective result subject to the unique ability under bankruptcy law to bind holdouts under well-defined circumstances who could not otherwise be bound under non-bankruptcy law.”¹⁴¹ The bankruptcy court approved the settlement and confirmed the plan.¹⁴²

The district court reversed, on an appeal filed by the U.S. Trustee, seven states, and other claimants.¹⁴³ To reach a consensual settlement with more plan objectors, the Sacklers improved their settlement payment to \$5.5 to \$6.0 billion.¹⁴⁴ The Second Circuit reversed the district court and affirmed the bankruptcy court’s approval of the settlement and confirmation of the plan.¹⁴⁵

The Supreme Court, in a 5-4 decision, reversed the Second Circuit, striking down the non-consensual releases given to the Sacklers. Justice Gorsuch, writing for the Court, found no statutory authority in the Code. Section 1123(b)(6), which permits the inclusion of other “appropriate” provisions in a Chapter 11 plan, was not enough. “When faced with a catchall phrase,” Gorsuch reasoned, “courts do not necessarily afford it the broadest possible construction it can bear.”¹⁴⁶ Had Congress meant to reshape bankruptcy law “so profoundly,” it would have done so more specifically, as it did by enacting § 524(g) for asbestos cases in 1994.¹⁴⁷

Justice Kavanaugh, in a sharply-worded dissent, called the *Purdue* plan “a shining example of the bankruptcy system at work.”¹⁴⁸ The releases facilitated a fair settlement and significantly increased the value of the bankruptcy estate.¹⁴⁹ Kavanaugh stressed that “virtually all” of the opioid victims and creditors in the case “fervently” supported the plan (the remaining holdouts being “a small group of Canadian creditors and one lone individual”).¹⁵⁰ Allowing Americans’ deep hostility toward the Sacklers to “infect” the case, he continued, was

141. *Purdue Pharma*, 633 B.R. at 53, 58.

142. *Harrington*, 603 U.S. at 213.

143. *Purdue Pharma*, 635 B.R. at 35.

144. *Purdue Pharma*, 69 F.4th at 67.

145. *Purdue Pharma*, 69 F.4th at 85.

146. *Harrington*, 603 U.S. at 205.

147. *Id.* at 223–224.

148. *Id.* at 228.

149. *Id.* at 277.

150. *Id.* at 228.

“misdirected and counterproductive.”¹⁵¹ With the current plan gone, and releases categorically prohibited, the consequences would be severe. There would be no nearly \$6 billion settlement payment and “no viable path to any victim recovery.”¹⁵² Turning to the Code’s text, Kavanaugh noted that the term “appropriate,” as used by Congress in section 1123(b)(6), had been interpreted by the Court to confer broad authority.¹⁵³ In a stinging rebuke to Gorsuch he called his fellow textualist’s approach “atextual and ahistorical.”¹⁵⁴ Gorsuch countered that Kavanaugh was playing “word games” and elevating the law’s purpose over its text.¹⁵⁵

When the rancor subsided and the dust settled, though, the Court’s holding remained. The Bankruptcy Code, except in an asbestos case, “does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.”¹⁵⁶

IX. Conclusion

Third-party releases remain and likely will remain a feature of U.S. bankruptcy cases, notwithstanding the Court’s decision in *Purdue Pharma*.¹⁵⁷ There are several reasons for this, even if Congress, in the exercise of its express constitutional power to enact uniform bankruptcy laws, does not opt to amend the Code to permit non-consensual releases in a non-asbestos case.¹⁵⁸

First, the Court in *Purdue Pharma* confirmed that a Chapter 11 plan may provide for *consensual* third-party release.¹⁵⁹ The Court did not establish what constitutes consent (e.g., whether failing to vote on or

151. *Id.* at 229.

152. *Id.* at 230.

153. *Id.* at 257.

154. *Id.* at 258.

155. *Id.* at 226.

156. *Id.* at 206.

157. In addition, some companies might take a strategic bankruptcy a step too far, as with Johnson & Johnson’s recently failed “Texas two-step,” by which its consumer subsidiary used a Texas reverse merger to isolate its talc-related liabilities in a new entity which then filed Chapter 11. The talc, it turned out, contained asbestos as result of the mining process. The Third Circuit dismissed the case because LTL was not facing “apparent” and “immediate” financial distress.” *In re LTL Management, LLC*, 64 F.4th 84, 92–93, 102 (3rd Cir. 2023).

158. *Harrington*, 603 U.S. at 226.

159. *Id.* at 226.

voting to confirm a plan, or failing to opt out of or affirmatively opting in to a release is sufficient), leaving open a vast area for litigation.¹⁶⁰ But tort claimants typically give consent, in one form or another. Those seeking releases in these cases before the Court's ruling in *Purdue Pharma* typically negotiated from the position that they would not settle and make their plan contributions unless the court ordered releases by non-consenting holdouts. But they may have protested too much. In October 2025, the members of the Sackler family agreed to settle with the consenting states and victims for \$7.4 billion, *without* the non-consensual releases, which is *more* than they would have paid under the non-consensual release plan that the Supreme Court struck down. The plan confirmation hearing began on November 12, 2025. Every major organized creditor constituency backed the plan. Only about two dozen self-represented opioid injury claimants opposed, a liability risk that was acceptable to the Sackler family, "given the broad support from all other stakeholders."¹⁶¹ After a three-day plan confirmation hearing at which 19 witnesses testified in support and 13 pro-se parties were heard, the bankruptcy court confirmed the new plan.¹⁶² Justice Kavanaugh's prediction of dire consequences appears unfulfilled. For alleged tortfeasors, such as the Sacklers, who previously sought court-ordered releases from holdouts, the perfect may have been the enemy of the good. More Chapter 11 plans that reserve for the holdouts the decision of whether to pursue their personal day in court are likely to follow.

Second, non-consensual third-party releases are permitted in Chapter 15, the bankruptcy chapter designed for multi-national debtors. If non-consensual releases are permitted under the bankruptcy law of the foreign jurisdiction where the main bankruptcy case is pending, then those non-consensual releases will be enforceable under U.S. bankruptcy law because Chapter 15 requires comity, or deference, to the foreign law unless it is "manifestly contrary to the public policy of the United States."¹⁶³ Third-party releases have been held not manifestly contrary to U.S. public policy because the Code

160. *Id.*

161. Vince Sullivan, *Purdue Expects Smooth Confirmation Of New \$7.5B Plan*, LAW 360, Nov. 7, 2025, <https://www.law360.com/bankruptcy-authority/articles/2409024/purdue-expects-smooth-confirmation-of-new-7-5b-plan>.

162. *In re Purdue Pharma*, 675 B.R. 632, 656, 675-676 (Bankr. S.D.N.Y. 2025). In March 2026, the district court denied an appellant's request for a stay pending appeal. *In re Purdue Pharma*, 2026 WL 658460 (S.D.N.Y. 2026).

163. 11 U.S.C. § 1506.

allows consensual releases in all cases and non-consensual releases in asbestos cases.¹⁶⁴

Third, current bankruptcy law still gives debtors, and their managers, owners, and insurers the best procedural path toward consolidating and then resolving mass torts, in a manner more likely to succeed than class actions or MDL proceedings. The tools provided to corporate managers by the 1978 Code, acting in the interest of their company (and their own self-interest, whether we like it or not), and the immediate consolidation of all claims in one court (the bankruptcy court) by the mere filing of a bankruptcy petition, facilitate global resolutions. Victims, admittedly, might not always be well served. Much of bankruptcy is about money, and much of the bankruptcy pot goes to states, agencies, and administrative costs in a mass tort case, rather than to the victims most harmed. Many victims, especially of institutional child abuse and opioid misinformation, have stated a desire for those who harmed them to accept responsibility, apologize, and be held to account by authorities.¹⁶⁵ Bankruptcy law does not readily facilitate any of this. Nevertheless, the victims usually strongly support the plan, even if it provides for releases to tortfeasors. More than 95% and 98% of the two classes of personal injury claimants who voted in *Purdue Pharma* in 2021 voted for confirmation of the non-consensual release plan, and more than 99% of personal injury claimants voted for the most recent, 2025 amended plan, which did not contain non-consensual releases.¹⁶⁶

Finally, though disappointingly, regulatory failures are likely to continue to cause damage to far too many people. The Dalkon Shield and silicone gel breast implant cases can be characterized as short-term, if material, failures which showed the need for Congress and the FDA to catch up, and begin to regulate medical devices generally, which they did. Both the asbestos and institutional sex abuse cases involved many decades in which trusted institutions and policing authorities

164. See, e.g., *In re Crédito Real, S.A.B. de C.V.*, SOFOM, E.N.R., 670 B.R. 150 (Bankr. D. Del. 2025) (Mexican bankruptcy law); *In re Odebrecht Engenharia e Construção S.A.*, 669 B.R. 457 (Bankr. S.D.N.Y. 2025) (Brazilian bankruptcy law); and *In re Sino-Forest Corporation*, 501 B.R. 655 (Bankr. S.D.N.Y. 2013) (Canadian bankruptcy law).

165. See, e.g., Marci A. Hamilton, Andrew J. Ortiz & Carter E. Timon, *Roman Catholic Dioceses in Bankruptcy: An Exploratory Study of Victims' Experiences*, 30 *NORT. J. BANKR. L. & PRAC.* NL ART. 2. no. 6 (2021).

166. *Purdue Pharma*, 633 B.R. at 61; see also Decl. of Craig E. Johnson, *In re Purdue Pharma L.P., et al.*, No. 19-23649 (Bankr. S.D.N.Y. Oct. 21, 2025), Dkt. No. 8068.

looked the other way while irreparable damage was being done to victims. And the regulators of addictive pharmaceuticals, including the FDA, the Veterans Administration, state legislatures, and the Joint Commission (JCAHO) that accredits hospitals, appear in many ways to have smoothed the way for, rather than prevented, the opioid crisis.

Bankruptcy law, bankruptcy courts, and the statutory framework of Chapter 11 will likely continue, in Judge Lifland's words, to be used to "address societal, legal and economic issues" of national importance, on a scale unknown before the Code.¹⁶⁷ In final analysis, as distasteful as third-party non-debtor releases of alleged tortfeasors may sometimes be, it is not bankruptcy law or bankruptcy judges or bankruptcy lawyers who caused the problems that these releases address. Legislatures, regulators, and the trusted institutions themselves could easily have prevented most of these harms. Bankruptcy court is just the place where these problems are too often resolved, albeit imperfectly, but with significant success.

167. *Johns-Manville Corp.*, 68 B.R. at 624–25.



*Hon. Robert H. Jacobvitz**

FROM REFEREES TO THE MODERN BANKRUPTCY BENCH: A HISTORY OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES

Introduction

The federal judiciary of the United States is a constitutional pillar of national governance, vested with the solemn responsibility of interpreting and applying the laws enacted by Congress and the rights secured by the Constitution. Within this structure, bankruptcy judges occupy a distinctive and indispensable role. Charged with administering the nation's insolvency system, they oversee matters that touch nearly every sector of the economy and every stratum of society, including consumer financial distress, business reorganization, municipal fiscal stability, and complex international restructurings.

Although appointed under Article I rather than Article III, bankruptcy judges exercise profound judicial authority, balancing efficiency, equity, and due process in cases that are often economically and emotionally consequential. Consistent with the traditions of the federal bench, bankruptcy judges, like their district and appellate counterparts, have long recognized the importance of professional self-governance, education, collegiality, and principled engagement

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with the legislative and public spheres. To that end, several national organizations of federal judges have emerged over time, each with distinct but complementary missions devoted to judicial education, institutional independence, ethics, public outreach, and the improvement of federal practice. Among these, the National Conference of Bankruptcy Judges (“NCBJ”) stands apart as the sole organization with a dedicated focus on the professional, educational, and institutional needs of the bankruptcy judiciary and as well as a commitment to the improvement of the practice of bankruptcy law. Founded in 1926 and now marking a century of continuous service, the NCBJ has evolved alongside the modern bankruptcy system itself. This history traces the origins, development, and enduring influence of the NCBJ as the central professional voice of the United States bankruptcy bench for the past one hundred years.

The National Conference of Bankruptcy Judges today stands as the institutional successor to the National Association of Referees in Bankruptcy (“NARB”), a professional organization founded in 1926 in Detroit by eighty-two referees seeking fellowship, uniformity, and ethical standards. The NCBJ’s evolution is inseparable from the broader trajectory of American bankruptcy law and the federal judiciary itself.

From its origins in the Bankruptcy Act of 1898, the referee system was plagued by isolation, uneven practices, and reputational challenges. The NARB, and later the NCBJ, became both a clearinghouse of professional standards and an advocate for the bench during successive crises: the Depression-era scandals and reforms of the 1930s, the transformations of the Bankruptcy Reform Act of 1978, the constitutional crisis of *Northern Pipeline v. Marathon* in 1982, and the jurisdictional and institutional settlement embodied in the Bankruptcy Amendments and Federal Judgeship Act of 1984. In the twenty-first century, the Conference has expanded its role in judicial education, public engagement, and international exchange, while continuing to reflect the centrality of bankruptcy adjudication to the federal docket.

The following history, built upon the author’s prior surveys written for the Conference’s ninetieth anniversary ten years ago, offers a narrative of the NCBJ from its earliest antecedents to its contemporary missions.

I. The First Attempt at National Organization (1899–c.1904)

Barely a year after Congress enacted the Bankruptcy Act of 1898, which created the office of referee in bankruptcy, referees attempted to organize nationally. In July 1899, thirty referees from fourteen states

gathered at the Chicago Beach Hotel for the first National Convention of Referees in Bankruptcy.¹ They adopted rules declaring that the objects of their association would be “to promote the purposes of the National Bankruptcy Law, by making practice in bankruptcy more uniform, and suggesting desirable and proper amendments.”² Charles A. Hawley of Seneca Falls, New York, was elected as the association’s first president.³

Despite its aspirational start, the organization became inactive within five years.⁴ When the second-generation association was formed in 1926, its founders received \$118.04 in funds turned over by the former secretary-treasurer of the defunct 1899 group.⁵

The failure of the first association highlighted the challenges of uniting a bench of geographically dispersed referees who, though appointed by district judges, operated in relative isolation. Still, the 1899 effort foreshadowed many of the themes that would define the later NCBJ: the desire for uniformity, the exchange of professional knowledge, and the development of ethical norms.

II. The Founding of the National Association of Referees in Bankruptcy (1926)

By the early 1920s, conditions in the bankruptcy system had once again spurred calls for organization. More than 500 referees served across 84 judicial districts, yet they largely worked alone, consulting little with one another and subject to criticism that they were inefficient, prone to conflicts of interest, and excessively reliant on estate assets to pay administrative costs.⁶ Referee Herbert M. Bierce of Winona, Minnesota, feared that congressional support for the Act of 1898 might erode, even leading to repeal.⁷

Bierce found a collaborator in Referee Paul H. King of the Eastern District of Michigan, whom he described as “a man of personal magnetism, high ideals and splendid organizing ability.”⁸ Together they set in motion plans for a national meeting. King compiled a roster of

1. Robert H. Jacobvitz, NCBJ *Celebrates its 90th Year—Part I*, NCBJ CONFERENCE NEWS, Fall 2016, at 1, 10.

2. *Id.* at 10.

3. *Id.*

4. *Id.*

5. Russell L. Hiller, *A Conference Anniversary—Fifty Years in Retrospect*, 51 AM. BANKR. L.J. 31, 31 n.1 (Winter 1977).

6. Jacobvitz, *supra* note 1, at 10.

7. *Id.*

8. *Id.*

referees nationwide, with support from district clerks and colleagues, and began personally recruiting potential attendees.⁹

On July 9–10, 1926, eighty-two referees from twenty-four states and the District of Columbia gathered at Detroit's Book-Cadillac Hotel.¹⁰ They adopted a constitution; elected King as president, Watson B. Adair of Pittsburgh as vice president, and Bierce as secretary-treasurer; and created four standing committees: Ethics, Legislation, Resolutions, and Uniformity of Practice.¹¹ They also established the *Journal of the National Association of Referees in Bankruptcy*, with Bierce as its first editor.¹²



The First Annual Conference of the National Association of Referees in Bankruptcy at the Cadillac Hotel in Detroit, Michigan, July 9-10, 1926. The photo was originally published in 1 J. Nat'l Ass'n Ref Bankr. (Dec. 1926).

9. *Id.*

10. *Id.* at 11.

11. *Id.*

12. *Id.*

The founders envisioned their new association as a clearinghouse for knowledge and experience, a promoter of collegial fellowship and ethics, and a force for greater uniformity in administration.¹³ In Hiller's retrospective judgment, the Detroit meeting successfully remedied the isolation that referees had long experienced, inaugurating a rhythm of annual meetings and publications that would define the Conference for decades.¹⁴

III. Early Years, Scandals, and Reform (1926–1941)

The fledgling association quickly set about professionalizing its members. At its second annual meeting, held in Buffalo in August 1927, the NARB adopted a Code of Ethics for Referees.¹⁵ Concise but comprehensive, it required courtesy, impartiality, efficiency, and the avoidance of conduct harmful to the bankruptcy courts' reputation.¹⁶

Educational programming became a hallmark of the early conferences. At Buffalo in 1927, Referee Thomas W. Shelton of Norfolk delivered a historical study on English bankruptcy law, while Referee Morgan F. Jones of Jacksonville presented a resume of American bankruptcy history.¹⁷ Referee Paul H. King shared comparative observations from his travels to French, Italian, and English bankruptcy courts.¹⁸ Such offerings gave early promise that the Conference's meetings would combine substantive instruction with fellowship.

Yet the late 1920s also brought scandal. In 1928, the default of David Steinhardt, a receiver in numerous New York cases, led to the so-called Irving Trust investigation. United States Attorney Charles H. Tuttle and Judge Thomas D. Thacher uncovered widespread abuses in receivership appointments, leading to reforms that concentrated interim receiverships in the Irving Trust Company.¹⁹ The scandal underscored the need for stronger ethical and administrative standards, which NARB was poised to provide.

The onset of the Great Depression magnified bankruptcy's importance. In fiscal year 1930, over 60,000 cases were filed with nearly one billion dollars in scheduled obligations—staggering figures for the

13. *Id.*

14. Hiller, *supra* note 5, at 33–34.

15. Jacobvitz, *supra* note 1, at 11.

16. *Id.*

17. Hiller, *supra* note 5, at 32–33 n.4.

18. *Id.*

19. *Id.* at 34–35.

time.²⁰ Judge William O. Douglas, then a Yale professor, appeared at the 1932 annual meeting to emphasize empirical research as a basis for reform, urging the referees to situate bankruptcy within broader social and economic structures.²¹

During this period, the Donovan Report (1930), commissioned by the New York Bar and led by Colonel William J. Donovan, broadened into a nationwide investigation of bankruptcy practices.²² Soon thereafter, the Justice Department, under Lloyd K. Garrison, undertook its own national study, relying heavily on data and cooperation from referees themselves.²³ The NARB, initially hesitant to engage in legislation lest it compromise judicial neutrality, gradually shifted toward offering expertise and testimony.²⁴

By 1932, with reform bills such as the Hastings Bill under consideration in Congress, the NARB had emerged as a recognized institutional interlocutor in bankruptcy policy. Its transformation from a social and ethical society into an organization with legislative presence was emblematic of the broader professionalization of the bankruptcy judiciary in the interwar period.

IV. World War II and the Postwar Era

The entry of the United States into World War II reshaped the nation's economic and legal landscape, and bankruptcy was no exception. Filings declined during the war years, as wartime production absorbed labor and capital, though the Conference continued to meet annually, except in 1943 and 1945. Attendance at meetings was often reduced due to travel restrictions or members who were serving in the armed forces, yet the organization persevered, maintaining professional fellowship even under difficult circumstances.²⁵

The postwar years brought renewed vitality. In 1946, Congress enacted significant amendments to the Bankruptcy Act, increasing compensation for referees, streamlining certain procedures, and updating administrative practices.²⁶ These reforms reflected both the heightened demands on the bankruptcy system and the influence of a more professionalized national organization of referees.

20. *Id.* at 36.

21. *Id.* at 37.

22. *Id.* at 35–37.

23. *Id.* at 38–39.

24. *Id.*

25. Jacobvitz, *supra* note 1, at 11–12.

26. *Id.* at 12–13.

By the mid-1960s, the Association had also embraced a new identity. In 1965 the Association changed its name from the National Association of Referees in Bankruptcy to the National Conference of Referees in Bankruptcy, and eventually to the National Conference of Bankruptcy Judges in 1973 corresponding with the adoption of new Bankruptcy Rules in 1973 that employed the term “bankruptcy judge” interchangeably with “referee” in recognition of the stature of the position.²⁷ The separate development of *The American Bankruptcy Law Journal* and *Conference News* in 1971 gave the Conference enduring platforms for scholarship and communication.²⁸

During this period, the Conference deepened its connections with academic voices, echoing a commitment first signaled by the presence of William O. Douglas in the 1930s.²⁹ Such ties helped situate the bankruptcy judiciary not merely as administrators of cases but as participants in shaping the intellectual and policy frameworks of insolvency law.

V. The Long Road to the Bankruptcy Reform Act of 1978

By mid-century, bankruptcy had established itself as a fixture of the federal judicial system, but the referee system continued to draw criticism. Referees exercised both administrative and judicial functions, raising questions about independence and accountability.³⁰ Calls for reform grew more insistent in the 1960s and early 1970s.

The National Bankruptcy Conference and the NCBJ played visible roles in this period. Referees-turned-judges, including the legendary Judge Joe Lee of Kentucky, combined judicial service with scholarship and legislative engagement.³¹ Judge Lee, who became Editor-in-Chief of the *American Bankruptcy Law Journal* and testified repeatedly before Congress, was a key participant in shaping bankruptcy reform debates.³²

The Commission on the Bankruptcy Laws of the United States, established in 1970, undertook a comprehensive review of the system, producing recommendations that paved the way for the Bankruptcy

27. *Id.* at 13.

28. *Id.* at 13–14.

29. *Id.*; Hiller, *supra* note 5, at 50–52.

30. Hiller, *supra* note 5, at 40–42.

31. Jeffrey A. Deller, *Dedication to the Memory of the Honorable Joe Lee*, 89 AM. BANKR. L.J. vii (Summer 2015).

32. *Id.* at vii–viii.

Reform Act of 1978.³³ Among those contributing to the Commission's work and the drafting of legislation were members of the NCBJ and its allied institutions. The so-called Judges' Bill of 1974, which Judge Lee helped draft, also reflected the bench's engagement with reform.³⁴

The Bankruptcy Reform Act of 1978 replaced the patchwork of chapters under the 1898 Act with the modern Bankruptcy Code. It created bankruptcy courts in each district, vested them with jurisdiction over bankruptcy cases, and contemplated a bench with fourteen-year terms appointed by the President and confirmed by the Senate.³⁵ For the NCBJ, the Act represented both culmination and commencement: culmination of decades of advocacy for modernization and commencement of a new era of constitutional and institutional challenge.

VI. The Constitutional Crisis: *Marathon* (1982) and *Stern* (2011)

Less than four years after the Bankruptcy Reform Act took effect, the Supreme Court delivered a seismic ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). The Court held that the broad grant of jurisdiction to bankruptcy courts—staffed by judges without Article III protections—was unconstitutional.³⁶

The decision threatened to dismantle the new system. Recognizing the crisis, the Judicial Conference and local district courts adopted “emergency rules” that attempted to maintain continuity by referring bankruptcy matters to district judges while permitting bankruptcy judges to act as adjuncts.³⁷ The NCBJ played a crucial role in this fraught period. Its leadership coordinated communications among judges, provided a forum for strategy, and represented the bankruptcy judiciary in discussions with Congress and the Judicial Conference.³⁸ The NCBJ argued that bankruptcy judges should be elevated to full Article III status; others favored a model of adjunct jurisdiction tethered

33. ABI, Enactment of the Bankruptcy Code in 1978, A Short History <https://www.abi.org/feed-item/enactment-of-the-bankruptcy-code-in-1978-a-short-history>

34. Deller, *supra* note 31, at viii.

35. Robert H. Jacobvitz, NCBJ Celebrates its 90th Year—Part II, NCBJ CONFERENCE NEWS, Winter 2016–17, at 19.

36. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

37. Jacobvitz, *supra* note 35, at 19–20.

38. *Id.*

to the district courts.³⁹ The NCBJ advocated vigorously for the former, underscoring its belief that bankruptcy was central to the federal judicial mission.⁴⁰ Although Congress opted for a model of derivative jurisdiction, the NCBJ's ability to mobilize during this constitutional crisis solidified its identity as the organized voice of the bankruptcy bench.

Later, finding unconstitutional aspects of the Congressional fix to bankruptcy court jurisdiction made in response to *Marathon*, the Supreme Court ruled in *Stern v. Marshall*, 564 U.S. 462 (2011) that the bankruptcy court, as a non-Article III court, lacked constitutional authority to enter final judgments on bankruptcy estate asserted state law counterclaims not resolved in adjudicating a creditor's proof of claim. The NCBJ again advocated to Congress for Article III status for bankruptcy judges, this time as the best option for resolving the uncertainty and extensive litigation that ensued following *Stern's* bifurcation of authority to adjudicate disputes; and in the alternative the NCBJ suggested further statutory fixes. At the end of the day, the crisis was averted by further bankruptcy legislation and Supreme Court decisions. Through its Legislative Committee, the NCBJ has emerged as a major player in giving Congress input from the bankruptcy bench on important bankruptcy legislation, having fostered relationships with members of Congress and their staffs.



Administrative Office Director L. Ralph Mecham presenting five NCBJ members with a framed "red line" copy of House Bill 3660 for the role they played in enactment of this legislation giving federal judicial officers a significant salary increase. From left: Judge Ralph H. Kelley, Judge Arthur B. Briskman, Judge Charles N. Clevert, Judge William C. Anderson, Judge George C. Paine II, and L. Ralph Mecham. NCBJ records, NBA.012, National Bankruptcy Archives, University of Pennsylvania Carey Law School, Philadelphia, PA.

39. *Id.*

40. *Id.*

VII. The Bankruptcy Amendments and Federal Judgeship Act of 1984

The congressional response to *Marathon* came with the Bankruptcy Amendments and Federal Judgeship Act of 1984 (“BAFJA”).⁴¹ Rather than granting bankruptcy judges Article III status, BAFJA restructured jurisdiction. Bankruptcy judges were vested with jurisdiction to enter final judgments in “core proceedings” while acting as adjuncts without the consent of the parties in “non-core proceedings” subject to de novo review by district judges.⁴²

The Act also codified fourteen-year terms for bankruptcy judges, clarified grounds for removal, and enhanced their administrative support by guaranteeing law clerks and secretarial staff.⁴³ In addition, BAFJA gave courts of appeals, rather than district courts, the power to appoint bankruptcy judges.⁴⁴

Yet the transition was not without turbulence. In July 1984, the Director of the Administrative Office of the U.S. Courts, William E. Foley, issued a memorandum refusing to pay bankruptcy judges on the theory that BAFJA’s retroactive continuation of their service violated the Appointments Clause.⁴⁵ Outrage followed. Six bankruptcy judges, including Keith Lundin and George Paine, filed suit in the District of Columbia in *Lundin v. Foley*.⁴⁶ The same day, the AO rescinded its directive.⁴⁷

The NCBJ was again at the center of the storm. Its leadership denounced the AO’s actions, organized collective responses, and communicated with Congress.⁴⁸ Though the Conference lost the fight for Article III status, it gained recognition for its advocacy on behalf of the institutional integrity and independence of bankruptcy judges.

VIII. Maturation, Education, and Global Engagement (1984–2000)

Following the constitutional crisis and the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the

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

42. *Id.* §§ 101, 104.

43. *Id.* §§ 104–05.

44. *Id.* § 104(a).

45. Jacobvitz, *supra* note 35, at 20.

46. *Lundin v. Foley*, No. 84-2237 (D.D.C. July 20, 1984).

47. Jacobvitz, *supra* note 35, at 21.

48. *Id.*

NCBJ entered a period of consolidation and growth. The Conference embraced its role as the principal professional association of the bankruptcy judiciary, expanding its educational offerings, cultivating international engagement, and developing programs of recognition and mentorship.⁴⁹

Annual meetings became the centerpiece of this maturation. They grew in size and scope, attracting not only bankruptcy judges but also lawyers, academics, and policymakers. Panels combined doctrinal analysis with practical instruction, and keynote addresses offered broader reflections on the judiciary's place in American governance.⁵⁰ In a series of NCBJ Annual Conferences, NCBJ presented programs involving educational and exchange experiences, with bankruptcy judges from foreign countries hosted and sponsored by NCBJ, including judges from Canada, Hong Kong, Malaysia, Thailand, India, Russia, and various European countries.⁵¹



Attendees at the National Conference of Bankruptcy Judges 74th annual conference held in Boston, MA in October 2000. NCBJ records, NBA.012, National Bankruptcy Archives, University of Pennsylvania Carey Law School, Philadelphia, PA.

49. *Id.* at 24–26.

50. *Id.*

51. NCBJ Conference News, Jan 1996 at 15

The NCBJ's publications also flourished. The *American Bankruptcy Law Journal*, which had been established earlier in the century, became one of the most cited specialty journals in American law.⁵² It reflected the Conference's enduring commitment to scholarship and its recognition that the development of bankruptcy law required the collaboration of bench, bar, and academia.

Recognition programs also emerged in this period. Awards honoring service and scholarship underscored the Conference's dual commitment to professional excellence and collegial fellowship. Mentoring programs for new judges ensured continuity of institutional knowledge and culture.⁵³

In sum, the late twentieth century was a period of consolidation: the NCBJ established itself as a permanent and indispensable feature of the federal judiciary, an institution dedicated to education, dialogue, and the defense of the bankruptcy courts' legitimacy.

IX. The Twenty-First Century: Reform, Crisis, and Pandemic

The twenty-first century presented new challenges and opportunities for the NCBJ. Legislative reform, economic crisis, and public health emergency tested the adaptability of both the bankruptcy courts and their professional association.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") imposed significant new burdens on debtors, trustees, and judges.⁵⁴ The NCBJ responded with targeted educational programming concerning BAPCPA, ensuring that judges and practitioners alike understood the statute's complex provisions, including statutory construction and constitutional issues, provisions curtailing repeat individual filers, new means testing and credit counseling requirements, and BAPCPA's impact in Chapter 11 cases.⁵⁵

The 2008 financial crisis brought a surge of large, complex Chapter 11 filings, including filings by Lehman Brothers (then the largest bankruptcy in U.S. history), Washington Mutual, CIT Group, and Thornburg Mortgage.⁵⁶

The COVID-19 pandemic beginning in 2020 accelerated these trends. The NCBJ shifted its annual meeting in 2020 to virtual platforms, making 2020 only the third time in its history that the NCBJ had

52. Jacobvitz, *supra* note 35, at 24-26.

53. *Id.* at 26.

54. *Id.*

55. NCBJ *Conference News*, Summer 2006 at 1, 4 and Winter 2007 at 6

56. Forbes, August 10, 2011

to cancel its annual conference. The NCBJ took advantage of enhanced video opportunities by using those virtual platforms to present its planned conference education sessions remotely and by expanding webinars.⁵⁷ The NCBJ also facilitated the sharing by judges and courts of emergency orders entered to deal with unique issues courts faced during the pandemic. In doing so, the Conference demonstrated the adaptability that had characterized its history since 1926.

X. The NCBJ Today (2010-2025)

The NCBJ remains a custodian of professional identity and development and an advocate for the integrity of the bankruptcy system. It is a dynamic organization with many moving parts.

In the past fifteen years, the NCBJ has continued to sustain its broad portfolio and has embarked on a significant number of new initiatives. These range from continuing to produce its Annual Conference, expanding its commitment to diversity and inclusion; nurturing a new generation of bankruptcy lawyers and judges; educating members of Congress about bankruptcy legislation; engaging in public outreach; sponsoring a scholarly publication; engaging in international judicial exchanges; awarding research grants; promoting cost containment for bankruptcy courts; providing input to the Judicial Conference; and commenting on proposed rule changes. The Conference also increased its digital presence, streaming portions of its educational content and developing online platforms for judicial and practitioner dialogue.⁵⁸

The NCBJ's initiatives reflect the ingenuity, dedication and hard work of its member judges.

The NCBJ Annual Conference

The NCBJ's four-day Annual Conference, which is inextricably intertwined with the NCBJ's history and identity, requires significant year-round effort on the part of its president and a select group of its member judges. The Conference furthers the NCBJ's mission to provide a forum for the exchange of ideas and the fostering of interpersonal connections among the nation's bankruptcy judges; provides cutting edge legal education to judges, lawyers, and other bankruptcy professionals; is a forum for business meetings of the NCBJ and the American Bar Association, American Bankruptcy Institute, American

57. Cite to NCBJ Conference News Spring 2021 at 2; NCBJ Conference News 2022 Spring at 11.

58. NCBJ *Conference News*, 2023 Summer at 2; 2022 Spring at 11.

College of Bankruptcy, Association of Insolvency and Restructuring Advisors, Commercial Law League of America, and International Women's Insolvency and Restructuring Confederation, each of which present educational programs at the Conference; and provides many fun and interesting opportunities at Conference social gatherings and within the host city for social interactions that foster collegiality.

In furtherance of its public outreach mission, the NCBJ gives back to the community during its Annual Conferences. Examples in recent years include making donations to shelters that serve the homeless population in Washington, donating bus passes to an organization that equips youth and young adults experiencing homelessness to achieve stability and life transformation, assembling and donating kits of socks and other items of clothing to the needy, and donating hundreds of backpacks filled with school supplies and hand-knitted winter hats to inner-city public school children in Chicago.

The NCBJ Annual Conference attracts a large audience. For example, there were 1231 registered attendees at the 2025 NCBJ Annual Conference in Chicago, including 175 NCBJ member bankruptcy judges.

NextGen

The NCBJ created its NextGen program in 2011. Each year, NCBJ selects as "Next Gen'rs" up to forty bankruptcy practitioners with between three and ten years of legal experience who have demonstrated legal excellence in the practice of bankruptcy law and display a serious commitment to principles of civility, ethics, and professionalism. The program hosts NextGen'rs at NCBJ Annual Conferences for exclusive NextGen events and encourages younger attorneys to share their fresh ideas and become leaders of the bankruptcy bench and bar. Exclusive NextGen events include Dine-Around Lunches, a NextGen alumni dinner, roundtable discussions on bankruptcy topics hosted by bankruptcy judges, and events sponsored by law firms. NextGen alumni network and create lasting professional connections with their peers. At least ten NextGen alumni are now bankruptcy judges.

Diversity Initiatives

The NCBJ has a strong commitment to promoting full and equal participation in the bankruptcy legal profession and on the bench, through the encouragement and inclusion of women, diverse ethnicities, persons with disabilities, and persons of differing sexual orientations. That commitment was the driving force behind the NCBJ's Blackshear Fellowship Program founded in 2004 in honor of

Cornelius Blackshear (S.D.N.Y.). The Program recognizes and provides special programming at the NCBJ Annual Conference for up to five diverse bankruptcy lawyers who deserve special recognition for their professional accomplishments and who show the potential to distinguish themselves in future years as highly respected members of the bankruptcy or debt-restructuring bar. Like NextGen alumni, Blackshear Presidential Fellows network and create lasting professional connections with their peers. To date, there are more than seventy Blackshear Presidential Fellows, three of whom have become bankruptcy judges.

The NCBJ's diversity efforts have accelerated considerably since 2019, in recognition of the fact that at that time people of color comprised only seven percent and women only a third of the bankruptcy bench. Among those efforts, the NCBJ created its annual Diversity, Equity & Inclusion Leadership Award that recognizes present or former bankruptcy judges who have demonstrated a commitment to promoting full and equal participation in the bankruptcy legal profession. In 2020, the NCBJ forged a relationship with Just the Beginning – A Pipeline Organization to encourage students from socioeconomic, ethnic, and cultural backgrounds that have been traditionally under-represented in the legal community to intern in judges' chambers. In connection with that relationship, the NCBJ created the NCBJ Fellows Program to provide a stipend for some of those students during their internships and a subsidy for those students to attend the Annual Conference

Behind the Bench Online Education

Early in 2022, the NCBJ launched Behind the Bench programs presented by bankruptcy judges and practitioners, without cost to attendees, on both consumer and commercial bankruptcy law topics to serve the NCBJ's mission of providing insightful education to the bench and bar. The NCBJ involves Blackshear Presidential Fellows and Next-Gen alums as moderators. In the first year alone, some 2,500 persons attended the programs.

International Judicial Exchange

The NCBJ has a long history of encouraging contact and dialogue between United States bankruptcy judges and insolvency judges from foreign jurisdictions. Toward that end, the NCBJ invites one or more foreign judges to attend NCBJ Annual Conferences and present programs involving insolvency systems in other countries.

At NCBJ's 2024 Annual Conference in Seattle, judges and insolvency professionals from Canada teamed up with United States bankruptcy judges and lawyers to produce three world-class programs discussing similarities and differences in insolvency laws and practice in the two countries.

The efforts of Michael G. Williamson (M.D. Fla.), Charles G. Case (D. Az), Martin Glenn (S.D.N.Y.), and Scott C. Clarkson (C.D. Cal) are particularly notable. Michael Williamson tirelessly donated his time and considerable talents to legal reform abroad, travelling to 14 countries, including lending his expertise to Afghanistan's nascent bankruptcy system. He travelled to Afghanistan 10 times, is the principal drafter of its bankruptcy law, and along with Charles Case and Nancy V. Alquist (D. Md.), trained users of the new Afghan bankruptcy law.

In honor of Judge Williamson's efforts and in his memory, the NCBJ created the Williamson International Rule of Law Award, awarded posthumously to Judge Williamson after his death in 2022 and subsequently to Judge Case and Judge Glenn. Judge Case has made presentations at workshops for judges, lawyers, government officials and business people and/or consulted in bankruptcy, commercial and tax law in more than a dozen countries. Judge Glenn has worked with many judges from Azerbaijan to Tunisia.

Judge Clarkson is an ambassador for the American judiciary. During his many trips to Afghanistan, Albania, France, Israel, Jordan, Kashmir, Pakistan, and Ukraine, Judge Clarkson met with members of their judiciaries; and he has co-hosted many foreign judges visiting the Central District of California. Judge Clarkson is also an accomplished photojournalist and author. His many photos documenting life, culture, and historical events in more than 10 countries are remarkable. The author of this article would be remiss by failing to recognize the collaboration between the author and Judge Clarkson that produced this Article.

Legislative Affairs

The NCBJ actively engages in outreach efforts to educate members of Congress about aspects of bankruptcy legislation and the administration of the bankruptcy system. In the last ten years, the NCBJ Legislative Committee has worked with the Senate and House Judiciary Committees, and its members have testified in Congress on a variety of issues, including extending or making temporary bankruptcy judgeships permanent, raising the debt limit in subchapter V and chapter 13 cases and reinstating increased debt limits after they

expired, addressing Chapter 7 trustee compensation in no-asset cases, supporting bifurcated fees for Chapter 7 debtors' lawyers, and urging study of reforms to the student loan discharge. The Legislative Committee stays in close communication with members of Congress and their staffs, as well as the Office of Legislative Affairs at the Administrative Office of the Courts, to be alert to any new legislation that may affect bankruptcy laws or the administration of the bankruptcy system. The NCBJ has also been active, through its Fiscal Improvement Committee, in assisting its various constituencies on cost containment efforts in bankruptcy courts to further the bankruptcy court's mission of being a good steward of public funds.

Public Outreach

Although the NCBJ has engaged in public outreach for many years, in 2018, the NCBJ established its Public Outreach Award to increase bankruptcy judges' awareness of the importance of public outreach and to honor individual bankruptcy judges and courts for outstanding work. To that end, the NCBJ also created a public outreach Handbook for bankruptcy judges.

Among the NCBJ's many public outreach efforts, NCBJ judges have hosted various events in courthouses or in schools for school children, Girl Scouts and others. For example, in 2017, 50 students from Canfield Elementary School participated in a *SpongeBob Squarepants v. Abercrombie & Fish* mock trial; 100 third graders from Chime Elementary in Woodland Hills in three separate groups participated in mock trials of Goldilocks, who was charged with breaking and entering and vandalism in the home of the Three Bears. In 2022, the NCBJ participated in a literacy and inspiration project with three Orlando, Florida schools to educate a significant number of students displaced from Puerto Rico after Hurricane Maria in 2017. High school students were given copies of *My Beloved World* by Justice Sonia Sotomayor, and six students were given the opportunity to interview Justice Sotomayor.

Schwartz Roundtable

The Schwartz Roundtable, patterned after a judicial roundtable program that Judge Schwartz created in 1990, is the only educational component of the NCBJ Annual Conference limited to bankruptcy judges. It presents a unique opportunity for bankruptcy judges to explore legal issues of particular concern to the bankruptcy bench and decisional approaches in an atmosphere that builds camaraderie.

American Bankruptcy Law Journal and the NCBJ Conference News

The NCBJ publishes the American Bankruptcy Law Journal—the oldest continuing scholarly publication on the topic of bankruptcy and insolvency law. The Journal's editorial staff is comprised entirely of sitting bankruptcy judges, and the Journal is double blind peer reviewed by bankruptcy judges. When launched in 1926, the Journal, then known as the Journal of the National Association of Referees in Bankruptcy, focused largely on the Association's proceedings and annual conference with few articles of academic interest. It was not long before the Journal expanded its scope and its readership to include referees, federal judges, and bankruptcy academics. In 1971, the academic and news aspects of the Journal were separated into two publications: the American Bankruptcy Law Journal and the Conference News. "The exceptional quality of the Journal and its meaningful coverage of cutting-edge issues in bankruptcy and related legal fields continued. Its prominence also grew in academic circles for being not only the sole peer-reviewed bankruptcy journal, but also the primary journal read by bankruptcy judges and professionals."⁵⁹ In 2023, the Journal transitioned to an all-digital platform, after which it went from several hundred subscription readers in hard copy to over 13,000 users on the digital platform. Today, the Journal hosts live symposia in addition to its written publication

The quarterly 35-to-40-page NCBJ Conference News is a lifeline of information for bankruptcy judges. Replete with photographs, it is a major publication targeted at bankruptcy judges with articles discussing NCBJ's varied activities and its meetings, judicial ethics, bankruptcy legislation, judicial security, judging, and much more.

XI. Portraits in Leadership: Joe Lee and Conrad Cyr

The NCBJ's institutional history is also a history of the individuals who shaped it. Two figures, Judge Joe Lee of Kentucky and Judge Conrad Cyr of Maine, illustrate the qualities of scholarship, advocacy, and leadership that defined the Conference.

Judge Joe Lee, appointed in 1961, served for over fifty years and became a towering figure in the bankruptcy community.⁶⁰ He testified before Congress on bankruptcy reform no fewer than fourteen times,

59. *History of the American Bankruptcy Law Journal*, NCBJ: AM. BNKR. L.J., ablj.org/history-of-the-american-bankruptcy-law-journal (last visited Jan. 21, 2026).

60. Deller, *supra* note 31, at vii–viii.

authored more than forty publications, and served as Editor-in-Chief of the *American Bankruptcy Law Journal* from 1982 to 1990.⁶¹ He drafted the “Judges’ Bill” of 1974 and was the principal author of the Bankruptcy Study Plan published by the Senate Judiciary Committee in 1971.⁶² His advocacy for debtor counseling and financial education anticipated reforms later enacted in BAPCPA.⁶³ Judge Lee embodied the NCBJ’s scholarly and reformist ethos.

Judge Conrad Cyr followed a different path. Appointed a referee in bankruptcy at the age of twenty-nine, he later ascended to the U.S. Court of Appeals for the First Circuit.⁶⁴ His early involvement in the NCBJ, alongside colleagues such as Joe Lee and Homer Drake, reflected a generation of judges who transformed the referee system into a respected judiciary.⁶⁵ His leadership helped shape the Conference’s advocacy during the 1970s and 1980s, and his judicial career symbolized the elevation of bankruptcy judging to the highest ranks of the federal judiciary.⁶⁶

Together, Lee and Cyr demonstrate that the NCBJ’s durability rests not only in constitutions and bylaws, but also in the leadership, scholarship, and example of its members.

Conclusion

From the Chicago Beach Hotel in 1899 to the virtual conferences of the 2020s, the history of the NCBJ reflects the broader evolution of bankruptcy law and the federal judiciary. The Conference began as a response to isolation and inefficiency among referees. It matured into an organization that provided ethical standards, professional fellowship, and educational resources. By the late twentieth century, it had become an indispensable advocate during constitutional crises and legislative debates.

In the twenty-first century, the NCBJ continues to adapt, embracing diversity, digital education, and international engagement. Its journals remain central to scholarly discourse, its conferences are essential to professional education, and its leadership continues to shape the trajectory of American bankruptcy law.

61. *Id.*

62. *Id.*

63. *Id.*

64. Jeffrey A. Deller, *Dedication to the Life and Legacy of the Honorable Conrad K. Cyr*, 90 AM. BANKR. L.J. 501, 501–02 (2016).

65. *Id.*

66. *Id.*

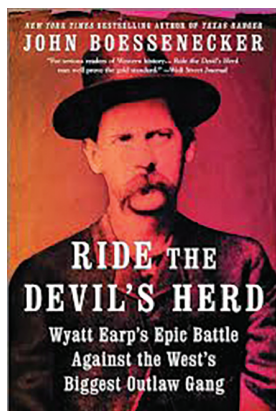
The “dash” between the founding of 1926 and the present reflects not only institutional growth but also the lives and legacies of the judges who built and sustained the Conference. The NCBJ’s history is thus both institutional and personal, a testament to the resilience of a judiciary that has weathered scandal, depression, constitutional uncertainty, and the pandemic, and emerged with enduring strength.

In a letter to the editor of the *Journal of the Association of Referees in Bankruptcy* on the occasion of the Association’s 25th Anniversary in 1951, Judge Learned Hand wrote a message to the *Journal’s* editor in which he said:

The Bankruptcy Act has now become a permanent feature of our National Code; it will never be repealed, and our commercial life would be vastly prejudiced without it. I need not tell you that the key to its success lies in its administration and that the referees are not only the key to that administration, but nearly the whole substance of the system itself. This becomes more and more true as the details of the law get worked out in the courts, as they so largely have now been. It should therefore be with the greatest satisfaction that your association looks back upon its past achievements; it is of the utmost importance that those who have by far the greater responsibility for the operation of the law, should continue to be in constant mutual contact. The absence of such cooperation was for long a defect in our whole judicial system. It has now been in part remedied as to judges by statute, but your voluntary association is in some ways a better method.... I know that you will not flag continuing your good work; and I prophecy that you will go on to even greater service than has already been your fortune to render.⁶⁷

Truer words could not be said about the Bankruptcy Code, the United States Bankruptcy Judges, and the NCBJ, as the NCBJ celebrates its 100th Anniversary.

67. Twenty-five Years of Association Activity: In Retrospect, by Referee Herbert M. Bierce, 25 *J.Nat’lAss’nRef.Bankr.* At 84 (1951).



Ride the Devil's Herd: Wyatt Earp's Epic Battle Against the West's Biggest Outlaw Gang, by John Boessenecker, Hanover Square Press, 2020. 512 pp.

The story of Wyatt Earp and what has become known as “The Gunfight at the O.K. Corral” occurring in Tombstone, Arizona Territory in October 1881 has fascinated me for over six decades. I have read everything available on the subject, including dozens of books and hundreds of magazine articles (written by me and friends at *True West*) and watched several movies and a TV show or two. All of this led me to miles of travel to walk where he walked and indeed to writing three books on the subject. One might be tempted to ask what anyone, at this late date, could bring to the subject that is new or different?

In *Ride the Devil's Herd: Wyatt Earp's Epic Battle Against the West's Biggest Outlaw Gang*, my friend and historian John Boessenecker re-enters the contested terrain of the violence surrounding Wyatt Earp, the Cowboys, and the events culminating in the gunfight. The Earp saga has been repeatedly told, dismantled, romanticized, and reconstructed for nearly a century. From the lionizing narratives of the early twentieth century to the revisionist critiques of the 1960s and 1970s, scholars and popular writers alike have alternately cast Wyatt Earp as heroic lawman, opportunist, or outright criminal.

What Boessenecker accomplishes, which few historians have, is to dig into the disparate elements of the Cowboys prior to the events in Tombstone, arguing that they were not merely a loose band of rustlers and opportunists, but constituted the largest outlaw gang in the Old West, responsible for at least thirty-five murders, extensive stock theft,

* Bob Boze Bell is the author of three books on the Tombstone troubles, and he is the executive editor of *True West* magazine, a position he has held for the past 27 years.

and the terrorizing of the ranchers and settlers of southern Arizona and northern Mexico. Boessenecker marshals a substantial array of court records, newspaper accounts, and archival materials to reconstruct the gang's evolution, leadership, and operations.

John Boessenecker's background must have informed his approach. Trained as a historian and later serving as both a police officer and trial attorney, he realized early on that the motivations and personalities of modern offenders often resemble those of nineteenth-century outlaws. The criminals he met in the 1970s seemed little different from the outlaws he read about who rode in the 1870s.

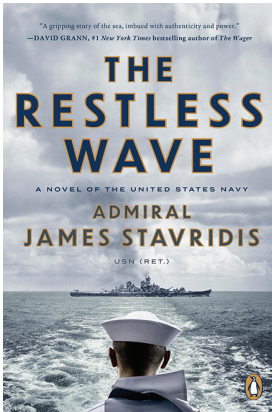
That experience gives him insight to America's most conflicted lawman and the Cowboys he and his brothers met up with that fateful day. The Cowboys were not just local scoundrels itching for a fight with local lawmen.

Boessenecker looks at the historical record with a cop's intuition and an attorney's skepticism. The result is a narrative that treats the Cowboys less as folkloric villains and more as a functioning criminal organization. His research shows how the Cowboys' origins predate Tombstone and that their leadership initially coalesced around figures such as John Kinney. By tracing their activities in New Mexico before coming to Cochise County, Boessenecker dismantles earlier depictions of the gang as merely local scofflaws antagonistic to the Earps. Through his accounting, the Cowboys emerge as the criminal gang they were.

The beginnings of the telling of the Wyatt Earp story seem to start with Walter Noble Burns's 1927 book *Tombstone*, which labeled Earp as "The Lion of Tombstone." Burns was able to interview Wyatt, still alive and reportedly angry at not being paid. From there, Stuart Lake defined Earp in the 1931 book "Frontier Marshal," a title downgraded from "Frontier Gunfighter" at the insistence of Sadie Marcus Earp, Wyatt's common-law wife. The story jumped to television in 1955 with "The Life & Legend of Wyatt Earp," starring Hugh O'Brien as Wyatt. In the early 1960s, some revisionism of Wyatt's image surfaced when researchers tracked down the coroner's report on the death of Wyatt's second wife who, dying from a drug overdose, testified "Wyatt Earp ruined my life."

Boessenecker is careful not to perpetuate the over-glamorized image that time and modern media have bestowed upon the Earps. Here, in a damning summation, is some of the new information he has uncovered about the Earp brothers: "All had seen the inside of a jail. Wyatt in Arkansas and Illinois, Jim in Montana, Virgil in Iowa, Morgan in Illinois and Missouri. Wyatt and Jim were jail breakers. Wyatt, Jim and Morgan had all been pimps. Virgil had been charged with arson and fraud."

The persistence of the Earp legend underscores the stakes of this inquiry. The simultaneous production of the films *Tombstone* and *Wyatt Earp* in the early 1990s demonstrated the enduring marketability of the story. Even when these films incorporated elements of vice, addiction, and opportunism, audiences continued to respond to narratives of courage under fire. Boessenecker's analysis implicitly engages this phenomenon, suggesting that the appeal of Earp lies less in moral purity than in perceived bravery amid chaos. "Courage, never goes out of style."



Review of *The Restless Wave*, by James Stavridis. Penguin Press, 2024. 400 pp.

In *The Restless Wave*, Admiral James Stavridis offers a work of historical fiction that is as much a meditation on institutional service as it is a narrative of World War II in the Pacific. While the novel follows the wartime career of a young naval officer, Scott Bradley James, its deeper ambition lies in examining how large, tradition-bound institutions shape individual moral judgment during periods of existential national crisis. In this respect, Stavridis's novel speaks not only to the past, but also to the present, engaging issues that resonate sharply amid today's geopolitical instability, renewed great-power competition, and debates over military professionalism and democratic accountability. It is with true anticipation that the sequel to the Admiral's novel, entitled "The Turning Tide," is forthcoming through Penguin Press this November.

Stavridis's authority as a storyteller derives in no small part from his professional biography. A graduate of the U.S. Naval Academy and a retired four-star admiral who served as both Commander

* John W. Holcomb is a United States District Judge for the Central District of California, Southern Division, in Santa Ana, California. Judge Holcomb was nominated for that position by President Trump and confirmed by the U.S. Senate in September 2020. Before his appointment to the bench, Judge Holcomb practiced intellectual property litigation in Southern California where he tried major, complex litigation matters involving patents, copyrights, and trade secrets. Judge Holcomb earned an S.B. in civil engineering from the Massachusetts Institute of Technology, an M.B.A. from Harvard Business School, and a J.D. *cum laude*, from Harvard Law School. Between college and graduate school, Judge Holcomb served as a commissioned officer in the United States Navy, including assignments aboard the battleship U.S.S. New Jersey (BB-62) and with the Joint Staff at the Pentagon.

of U.S. European Command and NATO Supreme Allied Commander in Europe, he writes with intimate familiarity with naval culture, hierarchy, and operational reality.¹ That experience informs *The Restless Wave* at every level. The novel is not content merely to dramatize naval combat; it seeks to explain how navies think, adapt, and endure under pressure. As a result, the Navy itself emerges as the book's central character, an institution whose norms and expectations exert constant gravitational pull on the individuals who serve within it.

The narrative centers on Scott Bradley James, whose early life in Key West, education at Annapolis, and wartime service place him at many of the Pacific theater's pivotal moments. Scott's repeated proximity to historical figures such as Ernest Hemingway, Doris Miller, Joe Taussig, Bull Halsey, Raymond Spruance, Arleigh Burke, and Chester Nimitz, occasionally harkens back to story lines in films such as *Zelig* or *Forest Gump*, but this narrative device allows Stavridis to weave together disparate strands of naval history into a coherent and magnificent whole. Scott becomes a kind of composite officer, a vessel through which the reader experiences the Navy's institutional learning curve from Pearl Harbor through Guadalcanal and beyond.

What distinguishes *The Restless Wave* from more conventional historical novels is its sustained attention to professional development rather than battlefield spectacle. The Admiral devotes considerable space to the emergence of new command concepts—particularly the development of the Combat Information Center (CIC) aboard surface ships. This emphasis reflects a central theme of the book: wars are won not solely through courage or firepower, but by organizations that can absorb information, learn from failure, and adapt faster than their adversaries. That insight, grounded in hard-earned World War II experience, has obvious relevance in an era defined by cyber warfare, autonomous systems, and information dominance.

Equally important is Stavridis's refusal to portray his protagonist as morally uncomplicated. Scott is diligent, intelligent, and committed, but he is also vulnerable to jealousy, ethical compromise, and emotional conflict. His struggles at Annapolis, his uneasy reactions

1. Retired four-star U.S. Navy Admiral James Stavridis (b. 1955) is a distinguished naval officer, author, and diplomat who served as the 16th Supreme Allied Commander at NATO (2009–2013) and commander of U.S. Southern Command. A 1976 US Naval Academy graduate with a PhD in international relations, he commanded forces in combat and led The Fletcher School of Law and Diplomacy before becoming an executive at The Carlyle Group. In May 2021 he was named Chair of the Board of Trustees of the Rockefeller Foundation on which he had served since 2017.

to the success of his peers, and his fraught romantic relationship with Kai Wallace, prevent the novel from sliding into institutional nostalgia. Stavridis makes clear that devotion to service carries costs, particularly for personal relationships, and that loyalty to an institution can collide with loyalty to individuals. These tensions give the novel its moral weight.

The parallel treatment of friendship and rivalry among Scott and his classmates, most notably Joe Taussig and Sean Kelley, underscores another central theme: military professionalism is inherently collective. Individual achievement matters, but it is always embedded in a network of shared sacrifice and mutual dependence. Stavridis's portrayal of Taussig's grievous wounds at Pearl Harbor, and Taussig's subsequent insistence on continued active service despite catastrophic injury, serves as a powerful reminder of the Navy's culture of endurance and obligation. The institution rewards such sacrifice, but it also demands it.

The symbolic role of the sea further reinforces the book's thematic ambitions. Ernest Hemingway's recurring presence is not incidental. As in *The Old Man and the Sea*, the ocean in *The Restless Wave* is not merely a setting but an active force that shapes character, humility, and resolve. Stavridis uses the sea to emphasize uncertainty and scale, reminding the reader that human plans and hierarchies operate within an environment that resists control. This sensibility stands in contrast to the illusion of mastery that sometimes accompanies modern technological warfare.

It is precisely here that the novel's relevance to contemporary world events becomes most apparent. In an era marked by renewed naval competition in the South China Sea, Russia's maritime posture in the Black Sea, and persistent instability in the Red Sea and Eastern Mediterranean, *The Restless Wave* offers a timely reminder of how quickly maritime order can fracture. The Pacific War began not with a formal declaration but with a sudden, shocking strike that exposed institutional complacency and strategic miscalculation. The lesson is uncomfortable but enduring: large organizations often fail at the moment they most believe themselves prepared. Readers desiring more of Stavridis's expert understanding of these matters should follow-up by reading his earlier titles, including the U.S. Navy's definitive handbook, *Command at Sea*, several volumes on leadership and diplomacy and recently *2034—A Novel of the Next World War* and its aftermath in the novel 2054.

Moreover, Stavridis's emphasis on institutional learning speaks directly to current debates about military readiness in democratic societies. Today's armed forces operate under intense political scrutiny,

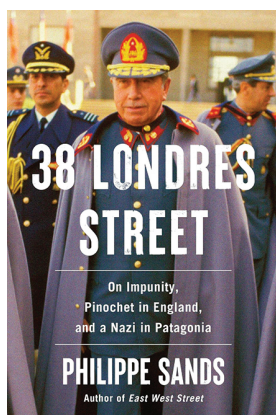
constrained budgets, and rapidly evolving threat environments. The novel's depiction of early wartime adaptation, learning to fight carrier battles, integrating intelligence more effectively, and decentralizing command authority, mirrors contemporary challenges faced by modern navies confronting hypersonic weapons, space-based surveillance, and artificial intelligence-driven decision systems. Stavridis suggests, implicitly, that adaptability is not merely a technical problem but a cultural one.

The book also resonates with current concerns about civil-military relations. Scott's near-total identification with the Navy, with his sense that his service defines his moral worth, raises questions about the proper balance between institutional loyalty and personal autonomy. In democratic systems, armed forces must remain apolitical while still cultivating deep professional identity. *The Restless Wave* portrays this tension without resolving it, acknowledging both the necessity and the danger of institutional devotion. In a moment when military leaders are increasingly visible in public discourse, this ambivalence feels particularly apt.

Ultimately, *The Restless Wave* succeeds as a serious work of historical fiction that bridges past and present. Its appeal to naval officers, veterans, and students of World War II is obvious, but its broader insights into leadership, institutional ethics, and adaptation under pressure extend well beyond that audience, including national policy makers within the federal government and those interested in the direction of our military and diplomatic presence. Stavridis does not romanticize war, nor does he indulge in cynicism. Instead, he offers a sober account of service as a moral practice, shaped by history, constrained by institutions, and tested most severely when certainty disappears.

As contemporary geopolitics once again turn toward the sea, *The Restless Wave* reads less like an exercise in nostalgia than a cautionary reflection. The restless seas of the twenty-first century, like those of the twentieth, will reward preparedness, humility, and learning, and will punish complacency. Stavridis's novel reminds us that these lessons are written not only in strategy documents and after-action reports, but in the lived experience of those who serve.

Hon. M. Margaret McKeown* and
Ezra Louvis**



38 Londres Street: On Impunity, Pinochet in England, and a Nazi in Patagonia, by Philippe Sands, Knopf, 2025. 453 pp.

Following World War II and the Nuremberg trials, considered the origin of modern international criminal law, there was a certain euphoria about the rule of law. The 1948 Genocide Convention formalized the introduction of the crime of genocide, though prosecutions were few and far between, and universal justice was more aspirational than a reality. Phillippe Sands, an internationally known human rights lawyer, brings these themes to light in *38 Londres Street*, the third of his trilogy of books on Nazi war crimes, which earlier included *East West Street* and *The Ratline*. Impeccably researched, the book reads as much like a detective thriller as a serious scholarly work about international law. Sands brings to life impunity, international law, and imperfection in the international justice system.

The story follows two seemingly disconnected threads—the rise and fall of former President Augusto Pinochet of Chile and the life of Walter Rauff, an SS Commander who oversaw the development of mobile gas vans in Germany during World War II and later settled in

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Chile. The title comes from the address of a building that was the former headquarters of the Socialist Party in Santiago, but later became a center for torture under Pinochet. Sands deftly moves between the histories of Pinochet and Rauff, who became friends following the war and were rumored to have crossed paths several times after.

In 1973, a military coup overthrew Salvador Allende, the democratically elected President of Chile. Pinochet was installed as president and ruled as a dictator until the transition to democracy in 1990. Those years were dark and brutal, with the persecution of political critics, socialists, and leftists. Estimates are that the regime interned as many as 80,000 people, tortured tens of thousands more, and was responsible for thousands of executions and forced disappearances of many others.

Years earlier in 1958, Pinochet encouraged Rauff—with whom he was socially close—to emigrate to Chile. Rauff would do so, spending most of his time running a crab cannery in Punta Arenas in Patagonia in the far south of Chile. In a precursor to Pinochet's own proceedings, Rauff was arrested on charges of murder and genocide pursuant to an extradition request from West Germany. But those proceedings floundered; the Chilean courts determined that Rauff had committed the charged acts yet could not be prosecuted due to Chile's statute of limitations.

Early efforts to hold Pinochet accountable stumbled, too. While investigations began to crop up in the 1990s, Pinochet was protected by a Chilean amnesty statute that staved off both domestic prosecution and extradition. The purportedly universal reach of international law meant little, as long as Pinochet remained in Chile.

Pinochet's fortunes changed when he was arrested during a visit to England in 1998. He faced an arrest warrant issued by a Spanish magistrate, Baltasar Garzón, who sought his extradition to Spain. In high drama, the case zig-zagged between the lower courts of England, the House of Lords, which at the time was the highest court of the country before the Supreme Court was created, and the Home Secretary of the United Kingdom.

Sands, who was involved in briefing the case before the House of Lords, paints a riveting picture of the proceedings. He expertly covers the jurisdictional turf war that led Garzón to issue the warrant and chronicles its path through layers of politics and international machinery, all the way to Room 801 of the London Clinic where Pinochet was sleeping—days before he was scheduled to return to Chile.

Later on, Sands breaks down the spectacle that played out in court. As a former head of state charged with crimes based on acts committed in office, Pinochet claimed that he was entitled to immunity

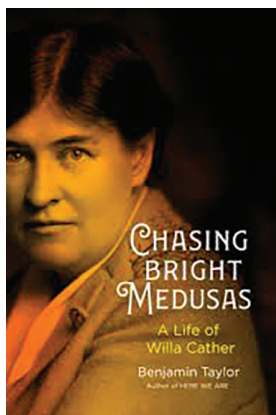
from prosecution. A House of Lords panel declined to apply immunity, only for that judgment to be thrown out because—astoundingly—one of the judges was affiliated with a participant in the case. A second panel reached a similar result but on a much narrower basis, kicking off another round of warrants and investigation.

One of Sands's strengths throughout this saga is the way he balances the procedural drama with the personal. Discussion of the arrest warrant, for example, is coupled with reflections from Jean Petras, the interpreter who accompanied the arresting officers from Scotland Yard. Later chapters covering the contested topic of Pinochet's health include conversations with Peter Dean—one of the doctors who examined Pinochet regularly during his time on house arrest in the rather luxurious setting of an English country house. And, perhaps most interesting, the description of proceedings before the House of Lords comes with commentary from Miguel Schweitzer—one of Pinochet's lead advisors—whom Sands serendipitously sat next to during argument. These interludes provide rare insight and remind the reader that law is a fundamentally human endeavor.

Pinochet's legal saga ends as it started—with intrigue. Sands adds substance to a previously rumored deal between the British and the Chilean governments to end the extradition proceedings and send Pinochet home for medical reasons, even though many thought him competent to stand trial in Spain. Despite some fits and starts, Pinochet would never stand trial upon his return. The back and forth underscores the fragility of international law and the enduring difficulty of holding those in power to account.

Amid the gripping legal drama, Sands's detours into the life of Walter Rauff in Patagonia can feel somewhat distracting. His thorough effort to ferret out ties between Pinochet and the Nazi-in-exile merits respect. But that parallel story never quite sticks a landing.

What the two stories do deliver on, however, is the tension animating much of the book: the promise of international law in addressing universally reviled crimes and the practical reality of holding principals to account. As Sands stresses, with figures like Pinochet and Rauff ultimately going unpunished, one can meaningfully question whether accountability can ever emerge. But Sands is not entirely pessimistic. Indeed, as Sands stresses, Pinochet's arrest was itself a watershed moment. Through that episode, among others, the book demonstrates in a textured, and deeply personal way that promoting the rule of law is "a long game." Michael Steinberger, *"This Could End Very Badly": A Human Rights Lawyer Fears a New Age of Impunity*, N.Y. Times (Jan. 19, 2026).



Review of *Chasing Bright Medusas: A Life of Willa Cather*, by Benjamin Taylor. Viking, 2023. 180 pp.

Benjamin Taylor describes his biography of Willa Cather as a “debt of love.” And it reads as such. In a 2023 interview with Library of America, he explains: “She was for me what Hemingway, or Fitzgerald or Faulkner have been for other writers: the criterion.”¹ Taylor is an accomplished and award-winning author of several novels and other works, including a biography of Proust, and a memoir of his friendship with Philip Roth. *Chasing Bright Medusas* is grounded in Taylor’s impressive research of Cather’s life and works, the connections he provides between the two, and his literary analysis and descriptions of her novels. While Taylor’s biography of Cather is slim, it is comprehensive, and, above all, it is discerning, reflecting deep and respectful insights about Willa Cather’s complexity, her unconventional and life-long female relationships, her heartbreak over negative reviews, and

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1. Library of America, “*Extremely Orderly and Uncrazy*”: Benjamin Taylor on His Revelatory New Biography of Willa Cather (Dec. 6, 2023), <https://www.loa.org/news-and-views/extremely-orderly-and-uncrazy-benjamin-taylor-on-his-revelatory-new-biography-of-willa-cather/>.

her determination to achieve literary immortality. Cather ran counter to her times as a woman and a writer, and Taylor's intent is "to frame the story as driven by Cather's antagonism to the times in which she lived. She alone among the moderns wrote with unguarded admiration about the antique virtues: valor, loyalty, fulfillment of some high destiny." (8)

For those familiar with Cather, Taylor's biography provides an opportunity to revisit her novels within the timeline and context of her life, including the real places and people in her life who served as inspiration for each novel. Taylor's is the first biography to be able to quote directly from Cather's letters since the restriction against quoting from them was lifted, and their inclusion adds a rich, personal dimension to the biography.² *Chasing Bright Medusas* was published in 2023, the Year of Cather, marking her 150th birthday, and the 100th anniversary of her winning the Pulitzer Prize. The renewed interest in her and recognition of her status as one of America's foremost authors comes at a time when her celebration of America, its historical frontiers, and the proud and determined immigrants and natives who settled them, offer a poignant reminder of who we were . . . and are. She was in contrast to her modernist contemporaries then and, perhaps, even now in celebrating the opportunities of life in America.

The settings in Willa Cather's life would become the heart of most of her novels. She was born in Virginia's Shenandoah Valley where she lived until the age of nine when her father took the family west to Nebraska and the town of Red Cloud. The frontier land of the American West became her new home, the settlers her neighbors. "More profoundly, there were Swedes, Czechs, Norwegians, Russians, French Canadians, Mexicans, and more on the sparsely settled plains." (3) The new languages and way of life, proposes Taylor, "seem one key to her deeper theme: the nation as a gathering of peoples from elsewhere, adding Americanness to some earlier identity." (3) She would later tell a Nebraska journalist, "All my stories have been written with the material that was . . . absorbed before I was fifteen." (4) And so her life in Red Cloud, the people within it and the country around it, "would be transubstantiated into Hanover in *O Pioneers!*, Moonstone in *The Song of the Lark*, Black Hawk in *My Ántonia*, Frankfort in *One of Ours*, Sweet Water in *A Lost Lady*, and Haverford in *Lucy Gayheart*." (16)

Cather enrolled at the University of Nebraska, and Taylor describes her years there as "trying on various identities." (22) "At this time she was acting and dressing more like a boy than a girl, cropping

2. WILLA CATHER, *There is no God but one God*, in *THE SELECTED LETTERS OF WILLA CATHER* (Andrew Jewell and Janis Stout eds., New York: Alfred A. Knopf 2013).

her hair short, going to class in starched white shirts and suspenders and affecting a low voice." (22) She had her first essay published and was "bedazzled by the sight of her name in print. The dream of being a physician perished in a day. She would be a writer instead." (22) Upon graduation, Willa worked as a journalist for the Nebraska State Journal and Lincoln Courier and subsequently the magazine *Home Monthly*. As she began to publish some of her own stories, her talent as a writer was recognized, and "the intelligentsia of Lincoln knew they were in the presence of a phenomenon." (24) During this period, "well over a million words of journalism flowed from her pen." (34)

In 1897, Cather was hired by the *Pittsburgh Leader* and moved to Pittsburgh where "she met her great love, Isabelle McClung, daughter of Samuel McClung, a wealthy and prominent Pittsburgh judge." (34) Willa lived with the McClungs over the next four years, writing in their sewing room and later teaching at Central High School. During this time Willa and Isabelle traveled to Europe, spending time in France, expanding the places and experiences that would enrich her novels. Isabelle would be Willa's lifelong muse, and they exchanged more than 300 letters over the years. "Willa would declare, following Isabelle's death in 1938, that all her novels and stories had been written for Isabelle." (35) Isabelle's letters were destroyed upon Willa's death as specified in her will.

In 1903, Cather met S.S. McClure, editor of *McClure's Magazine*—"one of the most exciting publications of the day." (41) He began publishing her work and then convinced her to come to New York and become *McClure's* managing editor. Cather brought Edith Lewis, a young Smith graduate she had met earlier, as the magazine's proof-reader, and "Edith would be first mate to Willa's captaincy for four decades." (52) While Isabelle would marry Jan Hambourg, a concert violinist, six months after mourning her father's death in 1915, "[s]till, Isabelle was the great love of [Willa's] life—Edith being but the other love—and she continued for some years to regard the marriage as a personal misfortune." (69)

In 1912, Cather went to visit her brother in Winslow, Arizona for six months. Taylor describes the trip as transformational for her as an author. "She was captured for good and all by the harsh beauty of the Southwest." (7) While in Winslow, she traveled to the Painted Desert, Grand Canyon, and to Walnut Canyon where she discovered the cliff dwellings of the ancient native American Anasazi people. She writes back to S.S. McClure, "I feel as if my mind had been freshly washed and ironed, and were ready for a new life." (5) And upon returning to Pittsburgh, and the sewing room at the McClung's, she finally was able to finish *O Pioneers!* Set in Nebraska, the story is about a love triangle

that ends in two deaths and imprisonment. Alexandra Bergson, a strong and successful Swedish farm owner, is one of her most memorable heroines, and Taylor describes *O Pioneers!* as “vivid and profound, a new level of achievement, and drawn from the deepest stratum.” (56) The book came out in 1913 to exceptionally strong reviews. “At forty, Willa had arrived.” (58)

Whether in New York with Edith or visiting her brothers in Taos or Santa Fe or Wyoming, Cather continued working on her next novel, *My Ántonia*. The setting is the Nebraska Divide, and the novel is a progressive set of stories about immigrant settlers. The story focuses on memories of a beautiful and charismatic Bohemian girl and the nostalgic and unrequited love of the narrator Jim for his friend, Ántonia. Taylor describes the narrator as “a male double” of Cather whose final words are “[w]hatever we had missed, we possessed together the precious, the incommunicable past.” (72) *My Ántonia* was broadly recognized as a success. H.L. Mencken called it “not only the best done by Miss Cather herself, but also one of the best that any American has ever done.” (76)

In 1918, Cather began a World War I novel she would develop over the next four years. *One of Ours*, published in 1922, tells the story of Nebraska farm boy Claude Wheeler as he grows from an uncertain idealistic youth into a man of purpose on the battlefields of France. Critics of *One of Ours*, many, like Mencken, very important to her, called it too long (459 pages), too dogged, a flat failure, and unoriginal. While critics were divided, and there were more positive than negative, the opinions Cather cared about were negative, and some even brutal. Ironically, she would be awarded the Pulitzer Prize in 1923 for *One of Ours*, and it became a best seller. But it was hardly a sweet victory. In a letter to her sister Elsie, she says, “Well, we never get anything for nothing, in life or in art. I gained a great deal in mere technique in that book—and I lose my friends.” (89)

Taylor divides Cather’s creative life in two. “At forty-nine she’d come to full creative self-awareness, a new aesthetic from which she would not veer.” (92) She had come to believe the novel, her own included, was “over furnished” with the result that detail was confused with art, and “we take it for granted whoever can observe and can write the English language, can write a novel.” (61) The task she set out for herself in her essay “The Novel Demeublé” was to create meaning “evoked but not belabored.” “Whatever is felt upon the page without being specifically named there—that, one might say, is created. It’s the inexplicable presence of the thing not named, of the overtone divined by the ear but not heard by it, the verbal mood, the emotional aura of the factor or the thing or the deed.” (92) Taylor sees the works that came in the second half of her career, including *A Lost Lady*,

The Professor's House, and *Death Comes for the Archbishop*, as fulfilling this task. She moved as an artist "from strength to strength into middle and old age." (93)

Taylor provides literary analyses of these later novels, including passages of the descriptive and sensory prose that is Cather's genius, and portraits of her complex and heroic characters. In his description of *The Professor's House*, Taylor retells the story of Tom Outland, the professor's student, and St. Peter, the professor who ultimately becomes "the young man's student." (101) Tom's story of discovering Cliff House at Mesa Verde and its revelation is central to his transformation (as it was to Cather's). "In stopping to take breath, I happened to glance up at the canyon wall, I wish I could tell you what I saw there, just as I saw it, on that first morning, through a veil of lightly falling snow. Far up above me, a thousand feet or so, set in a deep cavern in the face of the cliff, I saw a little city of stone, asleep." (101) Taylor adds, "Here is the essence of Cather's far-reaching humanism: a reverence for the conquest of barbarous existence by beauty-making civilization." *The Professor's House* received "an overwhelmingly enthusiastic press." Speaking at this time at the University of Chicago, Cather in describing the modern novel said, "There is such a thing in life as nobility, and novels which celebrate it will always be the novels which are finally loved." (104)

Just as Cather was different from her modernist contemporaries as an author, she was unconventional as a woman in her "strong preference for her own gender." (7) In her writing she was able to be androgynous, developing both compelling male and female protagonists. Taylor notes that throughout her novels, while love is described as exalted, "sexual need is the flaw in human nature . . . her great protagonists rise above it . . ." (57) He believes she likely would not necessarily have seen herself as homosexual so much as exceptional. While she and Edith lived together over decades, viewed perhaps as "two spinsters," he suggests for most people "that the bond was conubial simply did not occur." (52) Whatever the relationship, Cather would travel to stay by Isabelle's side, alongside her husband Jan, as she was dying, and Edith, who continued to work and live with Cather over some forty years, is buried at the foot of Cather's grave.

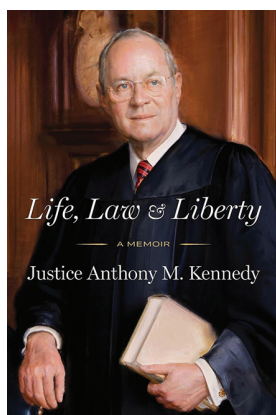
For Taylor, what makes Cather the most important anti-modernist American author is that "ideals were what were most real to her." (4) He compares her to the men who wrote *The Sun Also Rises*, *The Sound and the Fury*, and *The Great Gatsby*—"men who wrote mockingly about the illusoriness and deceptiveness of ideals." (4) She calls ideals in *The Song of the Lark* "instinctive standards for which one is bound to suffer." (4) And everywhere in her novels are American citizens, many new and hailing

from other countries, idealists working hard and believing there is reason to do so.

Taylor's biography provides a compelling case for why Willa Cather is one of our foremost American authors and remains relevant and worth reading or rereading. *Chasing Bright Medusas* captures the full of Cather's life in a slim volume, includes a rich portrait of turn of the century America that was backdrop to Cather's life and novels, and offers a discerning literary essay on her works. Throughout, Taylor emphasizes the attributes she valued that ran so counter to her contemporaries: a strong belief in the nobility of people, the assurance of religion, and the grand possibilities of the country and its people. This resulted in distinctive and memorable characters at the heart of her novels who feel deeply real, heroic, and reverent and faithful to the land and the native and immigrant Americans who were its past and are its future.

On a personal note, I was delighted to discover Cather's 1912 visit to her brother in Winslow, the little western town where I was born and raised. Winslow was the doorway for Cather to her exploration of northern Arizona and her subsequent life-long love of the Southwest, "her adopted landscape." (110) The Southwest remains my home, and I share her love of it, and deeply appreciate her capturing its beauty, history, and people in some of her finest novels. As well, I recommend Taylor's biography as a roadmap for understanding and appreciating Cather and her immense contribution as an American author. Especially as we celebrate our 250th anniversary as a country, this book is a prescient gift and reminder of the deepest held American values captured so vividly by Willa Cather.

Lisa Manheim* and Madeline Cochran**



Review of *Life, Law & Liberty*, by Justice Anthony M. Kennedy. Simon & Schuster, 2025. 352 pp.

Does Justice Kennedy intentionally remember at least one fact about every person he's about to meet? It sure seems like he does. A steady stream of strangers and acquaintances pass through his days, typically a bit starstruck. Most are people he'll never see again and has no need to impress. Still, the Justice connects with each through some commonality he's already identified. The fiancé of a clerk, here to tour the Supreme

Court, works at a law firm Kennedy knows well; the cousin of an administrative assistant hails from his home state of California; a visiting scholar works with a professor the Justice once met. The effort puts people at ease and allows a natural conversation to flow. It is a distinctive approach: earnest, thoughtful, and empathic, driven by a commitment to civility and shared norms. And it bolsters the institutions the Justice represents. It is, in other words, quintessentially Kennedy.

These traits are on full display in *Life, Law & Liberty*, a memoir chronicling Kennedy's half century on the bench and the youth that brought him there. The memoir describes how the values instilled in Kennedy's foundational years in California shaped his legal philosophy and practice, and ultimately, affected some of the most influential decisions of this generation. In this way, the book reflects on a life and

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legal legacy driven by Kennedy's faith in institutions, commitment to civil discourse, and dedication to shared norms. The vision serves as a quiet but meaningful retort to modern democratic fractures, even as the Justice's memoir does not directly address these growing frissons.

Life, Law & Liberty advances this vision by painting a portrait of a thoughtful and empathic man fully devoted to his family, his community, and a job that he loves. To this end, it is interesting and entertaining to read about the rich and varied life that Justice Kennedy has led. Peppering his memoir are amusing anecdotes, such as the time the Justice brought the Internal Revenue Code to Fenway Park, hoping to catch Ted William's last game but not fall behind in his schoolwork, only to find his aghast tax professor was sitting directly behind him (49). It is also fascinating to learn how the Justice lost his eyesight for three months due to surgical complications and, undeterred by this long recovery period, still spent his days learning from audiobooks. Notably, these listening sessions took place at his mother's house; a chief concern of the Justice during this time was preserving the peace and comfort of his household for his wife and children (84).

The memoir's opening anecdotes help to set the stage for Kennedy's childhood, one dominated by a warm and successful family that prioritized civil involvement. His father, dedicated to his family and deeply embedded in his Sacramento community, ran a legal practice supporting local lawmakers and small businesses. His mother, the first woman to win Sacramentan of the Year, cheerfully managed the household while working hard to improve community infrastructure and raise funds for the local children's hospital (18-19). His parents' connections to powerful players in California translated into a job for young Kennedy as a page for the state senate. In this role, the future Justice reflected, with admiration, on the sincere and passionate policy debates being "expressed with respect for all," no doubt shaping his future commitments to civility in his own practice (23). Throughout this narrative of his youth, the Justice explains how his early exposure to law, politics, and oppression shaped his later views: he was, for example, impressed with the outcome and rhetoric in *Brown v. Board of Education* (31-31); deeply unsettled by the internment of a young friend during World War II (11); and intrigued but also alienated by the idea of civil disobedience as a tool for seeking change (78-79).

These early intuitions remained influential throughout Justice Kennedy's long and impactful career. And, of course, Kennedy's family connections and community ties would help to elevate him first to the Ninth Circuit and later to the Supreme Court. There, Kennedy's values and temperament translated into a jurist devoted to his institutional role, even in the face of its many expectations and restrictions.

Principal among the expectations that Kennedy held dear was an unwavering commitment to ethics, which required him to avoid even a hint of the appearance of impropriety. He describes how his wife, having relocated across the country for his job at the Court, declined a job with the Department of Education to preempt any accusations of undue favor (153). He explains his own refusal to discuss cases outside of chambers, even with his wife and other close family members. He also notes his insistence on avoiding any sort of political conversation at dinner parties—a significant sacrifice, one would assume, for this gregarious extrovert who so clearly revels in thoughtful discourse (154). Tellingly, Kennedy devotes precious space in his narratives to anecdotes surrounding his decision to recuse himself from cases where his impartiality might possibly be questioned (122).

In the memoir, these longstanding ethical commitments show no cracks. Even the FBI is enlisted in support: learning that agents have been tasked with unearthing the intimate details of his life during the nomination process, the Justice tells them they are “in for a boring few hours” (145). On this front, by all accounts, the Justice is who he says he is. The memoir reveals no skeletons in his closet, likely because no skeletons exist.

Still, amid the Justice’s discussions of judicial ethics, Chekhov’s gun sits prominently on the mantle. Who, in the mid-2020s, can consider these sorts of issues—the ethics of recusal, the propriety of jurists getting involved in politics, the roles played by justices’ spouses—without thinking of the Supreme Court’s recent controversies? On this point, Kennedy does take time to lament “modern, fractious discourse,” explaining that members of the legal community have a heightened responsibility to combat this downward trend and conduct themselves with “discipline, moderation, and restraint” (261). Here, the discussion is a bit pointed. But while this gun commands attention throughout the book, it never goes off. Even when the Justice’s discussions are most evocative of contemporary challenges to the Supreme Court and the nation more broadly, Kennedy does not make these connections explicit.

A comparable dynamic plays out in response to other qualities that the Justice espouses and illustrates. The memoir convincingly demonstrates that Kennedy’s dedication to respectful discourse and dissent, over many decades, has been as steadfast as his commitment to ethics. He describes, for example, a “two-justice civility committee” he informally formed with Justice John Paul Stevens, in an effort meant to temper the tone of his colleagues (264). Similar values are on display in an anecdote regarding Kennedy’s reconciliation with Justice Antonin Scalia. Following a “rare personal attack” in Scalia’s

sharp dissent to *Obergefell v. Hodges*, Kennedy was troubled by the fracture in their relationship and hoped for reconciliation with the colleague whom he so respected. Eventually, Scalia notes his regret; the men hug, smile, and go back to work (226-227). This anecdote helps to illustrate an idea central to Kennedy's approach and identity: that ideological disagreement need not and should not metastasize into institutional dysfunction.

The Justice's longstanding commitment to thoughtful decision-making is another throughline of the memoir. With admiration, the Justice describes the "slow pace of justice" (118), characterizing the deliberate pace as a feature, not a bug, of the judiciary. To illustrate, he describes decades-long litigation over treaty-based fishing rights in the Pacific Northwest (118), where "generations of judges" worked together over time to develop an important and complicated body of law (122). It is here, on the topic of judicial decisionmaking more broadly, that Justice Kennedy comes closest to giving direct advice to current and future jurists. Judges, he states, should set aside their own personal and political ideologies, and they should "struggle against deciding cases based on what seems popular" (125). In addition, judges must translate this work into decisions that are accessible and compelling to the public; a court must "strive" to show "principled reasons for its rulings" (125).

While the Justice is discussing these virtues—relating to ethics, respectful discourse, and thoughtful decisionmaking—one might expect him to lament the state of unfolding affairs. But, as noted, what does not appear in *Life, Law & Liberty* is explicit commentary on current problems. Take, for example, the so-called shadow docket. This approach has come to dominate Supreme Court decisionmaking in recent years, and it stands in obvious contrast to Kennedy's commitment to a slow and contemplative style of justice. But the Justice does not address this newer trend. As for President Donald Trump, he appears only once in the memoir. And this appearance is not in conjunction with these discussions of ethics, civility, and thoughtful decisionmaking. Instead Kennedy mentions the President in connection with a development the Justice identifies as a highlight of his career: the decision to appoint Kennedy's former clerk, Brett Kavanaugh, to succeed him (288).

Perhaps this reticence—this quiet refusal to discuss growing dysfunction affecting American governance—reflects Kennedy's frustration with recent developments at the Court, which has struggled to handle challenging political tensions since Kennedy's departure. Or perhaps it reflects his desire to center the people and attributes he admires, rather than those he disagrees with, in his narrative.

When writing majority opinions, after all, the Justice long ago adopted a strategy of not acknowledging dissenting opinions directly. Instead, he responds only to the substance of the arguments, hoping that this approach will allow the majority opinion to stand on its own. It is also possible, of course, that the Justice's diplomatic tone is meant to further effectuate his longstanding commitment to restraint, civility, and the slow process of justice.

Whatever the explanation, an important development affecting Kennedy's own three-decade term on the Supreme Court—from 1988 through 2018—was a pronounced increase in the ideological polarization of lawmakers as well as the affective polarization of the general public. Rather than leaning into this polarization, Kennedy sought out compromise. Where possible, he identified areas of commonality in an effort to bridge seemingly incompatible positions. As a result of this approach, Kennedy served as a deciding vote in landmark decision after landmark decision, a role he shared with Justice Sandra Day O'Connor until her retirement in 2006. All told, Kennedy voted with the majority in close decisions 76 percent of the time over his career, far more than most of the other justices he served with.¹

Justice Kennedy's compromise-driven voting record was, in this sense, profoundly impactful. And as substantiated by his memoir, it consistently reflected earnest, thoughtful, and empathic decisionmaking, driven by a commitment to institutionalism, civility, and shared norms. What effect, if any, did the Justice's insistence on this approach have on the rise of polarization? Perhaps it helped to delay, at least to some extent, its ascent, including with respect to its effect on the Supreme Court itself?

These questions are empirical and, perhaps, impossible to answer. What is clear, however, is that the Court has struggled in important ways since Kennedy's retirement in 2018. Sharp criticisms now come at the Court from all quarters, left and right, high and low. Among the public, supportive views of the Supreme Court are near a historic nadir, with half of Americans expressing an unfavorable opinion.² Even within the judiciary, infighting has emerged, with internal disputes emerging in unprecedented ways into public view.

1. Alicia Parlapiano and Jugal K. Patel, *With Kennedy's Retirement, the Supreme Court Loses Its Center*, N.Y. Times (Jun. 27, 2018), <https://www.nytimes.com/interactive/2018/06/27/us/politics/kennedy-retirement-supreme-court-median.html>.

2. Joseph Copeland, *Favorable Views Of Supreme Court Remain Near Historic Low*, Pew Research Center (Sep. 3, 2025), <http://pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/>.

Meanwhile, since Kennedy's retirement, the Court continues to overrule—whether explicitly or indirectly—decisions that had marked some sort of compromise between competing ideological factions. Take an opinion that Kennedy discusses at length in the memoir: *Planned Parenthood v. Casey*. Kennedy coauthored *Casey* in 1992 in an attempt to temper the profoundly controversial holding of *Roe v. Wade* without overruling the case in either name or substance (228). In 2022, of course, the Supreme Court struck it all down.

Despite the memoir's failure to engage directly with these sorts of developments, Kennedy provides the readers with stories—stories that span five decades of judicial decisions and nearly ninety years of judicious behavior. These stories combine to demonstrate how, in many respects, Justice Kennedy's judicial temperament has been impeccable. In this way, *Life, Law & Liberty* is a compelling read—one that presents ethics, collegiality, and thoughtful decisionmaking as essential to the effectiveness and legitimacy of the courts.

Still, lurking in the background of so many scenes, particularly the more recent ones, is a foreshadowing of what is to come in later acts—of what will confront the institutions to which Kennedy has devoted his life. In the hope of providing the public with an accessible and compelling narrative, the Justice appears to have decided it was best to focus on the positive rather than confront and integrate these concerns. What the effect of this sort of approach will be, with respect to a figure who has had such an impact on American jurisprudence, is not yet clear. Even outside of *Life, Law & Liberty*, these scenes are still being written.

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