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# FOREWORD: A BRIEF HISTORY OF THE BANKRUPTCY REFORM ACT

FRANK R. KENNEDY†

## I. PUBLIC LAW 95-598

Public Law No. 95-598, enacted on November 6, 1978,<sup>1</sup> has been most frequently identified as the Bankruptcy Reform Act.<sup>2</sup> The Bankruptcy Act of 1898,<sup>3</sup> as overhauled in 1938<sup>4</sup> and frequently amended since that date,<sup>5</sup> was officially rechristened the "Bankruptcy Act" in 1950,<sup>6</sup> and that Act was repealed by the Bankruptcy Reform Act insofar as cases filed on and after October 1, 1979, are concerned.<sup>7</sup> Title I of the Bankruptcy Reform Act includes a codification of substantive and procedural law of bankruptcy, which was enacted as Title 11 of the

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1. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C.A. (West 1979), in scattered sections of 28 U.S.C.A. (West Cum. Supp. 1979), and in scattered other titles).

2. "The Bankruptcy Reform Act" was the name originally given the proposed legislation in the hearings conducted by the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee on bills proposed by the Commission on Bankruptcy Laws of the United States and the National Conference of Bankruptcy Judges. *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 before the Subcomm. on Improvements in Judicial Machinery of the Sen. Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) (2 parts). Kenneth Klee, one of the principal draftsmen of the new Act, has suggested that it is commonly known as the "Edwards Act." See Klee, *The New Bankruptcy Act of 1978*, 64 A.B.A.J. 1865 (1978). While it would be entirely appropriate to recognize Congressman Don Edwards' role in the formulation and management of the legislation by giving the Act his name, the suggested designation does not seem thus far to have caught on.

3. 11 U.S.C. §§ 1-1103 (1976) (repealed 1978).

4. Revisions were made through the Chandler Act, Pub. L. No. 75-696, 52 Stat. 840 (1938). The Chandler Act amended all sections of the Bankruptcy Act of 1898 except §§ 75 and 77 and added Chapters X, XI, XII, XIII, and XIV.

5. Seventy amendments of the Bankruptcy Act were enacted between July 1, 1938, and July 2, 1976. See *Supplemental Appendix to the Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 1162-2417 (1976) (Pts. 1 & 2). In addition, an amendment of § 62a of the Bankruptcy Act was passed on the eve of the enactment of the Bankruptcy Reform Act. Act of Sept. 23, 1978, Pub. L. No. 95-383, 92 Stat. 929.

6. Act of Dec. 20, 1950, Pub. L. No. 81-879, ch. 1138, 64 Stat. 1113. See S. REP. NO. 1495, 81st Cong., 2d Sess. (1950).

7. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 401(a), 402(a), 403(a), 92 Stat. 2549.

United States Code.<sup>8</sup> These provisions frequently are referred to as the Bankruptcy Code. Title II of the Bankruptcy Reform Act includes amendments of Title 28 of the United States Code, which create the bankruptcy courts, define the jurisdiction of these and other courts with regard to the administration of bankruptcy law, establish the office of United States trustee, and contain provisions governing removal, venue, and procedure under the Bankruptcy Code.<sup>9</sup> Title III includes a medley of amendments to titles of the United States Code other than Titles 11 and 28.<sup>10</sup> Title IV of the Bankruptcy Reform Act contains transitional sections that include effective dates of various provisions of Public Law No. 95-598<sup>11</sup> and provisions governing the interim between November 6, 1978, the date of enactment, and April 1, 1984, which marks the end of the transitional period.<sup>12</sup>

The Bankruptcy Reform Act contains more than 300 sections and amends more than half the titles of the United States Code.<sup>13</sup> It repealed all of the nearly 400 sections of Title 11 of the United States Code as it existed on November 6, 1978.<sup>14</sup> While Congress has enacted comprehensive bankruptcy legislation on at least five previous occasions,<sup>15</sup> those enactments all occurred in the wake of economic dislocations of national scope and severity.<sup>16</sup> The Bankruptcy Reform Act of 1978 did not conform to that pattern. Why did Congress, which certainly did not suffer from lack of other serious concerns during the years of gestation of the Bankruptcy Reform Act, take the time and trouble in 1978 to overhaul the bankruptcy laws of this country? A review of the legislative history of the Bankruptcy Reform Act of 1978 does not yield a satisfactory answer to this question, but it does throw

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8. *Id.* § 101, 92 Stat. 2549 (codified at 11 U.S.C.A. § 101 (West 1979)).

9. *Id.* §§ 201-252, 92 Stat. 2657 (codified in scattered sections of 28 U.S.C.A. (West Cum. Supp. 1979)).

10. *Id.* §§ 301-338, 92 Stat. 2673 (codified in scattered titles of U.S.C.A. (West 1979)).

11. *Id.* § 402, 92 Stat. 2682 (codified at 11 U.S.C.A. § 101 (West 1979)).

12. *Id.* §§ 401-411, 92 Stat. 2682 (codified in scattered titles of U.S.C.A. (West 1979)).

13. Proposed amendments of Title 26 of the Internal Revenue Code have been delayed pending resolution of controversies generated by the proposals. *See* 124 CONG. REC. H11,115 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *id.* S17,432 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

14. Bankruptcy Reform Act, Pub. L. No. 95-598, § 401(a), 92 Stat. 2549 (1978).

15. Chandler Act, ch. 575, 52 Stat. 840 (1938) (repealed 1978); Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed as amended 1978); Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878); Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

16. *See* C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY 12-13, 52-56, 105-06, 134-37 (2d ed. 1972); Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 228, 229 (1976).

light on some of the operative factors and influences that were at work. It also should aid those engaged in a search for authoritative evidence of the congressional intent in the myriad provisions of the new law.

## II. A MODEL OF THE LEGISLATIVE PROCESS

Congressman Caldwell Butler of Virginia observed in 1978 that the Bankruptcy Reform Act was a product of a model legislative process.<sup>17</sup> That process began in the 1960s when three forces began to prod Congress for reform:

(1) The National Bankruptcy Conference, which owed its origin to the interest and energies of Professor James McLaughlin and others who organized themselves to prepare and support proposals to improve bankruptcy law and administration,<sup>18</sup> had been working for years on a proposed new bankruptcy court and other less sweeping reforms of bankruptcy law and administration.<sup>19</sup>

(2) Referees in bankruptcy had spearheaded efforts in Congress to improve the quality of the fresh start supposedly obtained by consumer bankrupts and to elevate the status of the bankruptcy

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17. This observation was made at a luncheon held on April 7, 1978, in Washington, D.C., that was attended by participants in an institute on the proposed new bankruptcy law sponsored by the American Law Institute-American Bar Association Committee on Continuing Professional Education. As pointed out hereinafter, the final enactment of the Bankruptcy Reform Act of 1978 is due in major part to the bipartisan support given this legislative reform; Congressman Don Edwards, chairman of the subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, and Congressman Caldwell Butler, ranking minority member of that committee, provided critical leadership in the effort, which extended over the five years 1973-1978.

18. The origin, purposes, composition, and activities of the National Bankruptcy Conference can be found in H.R. REP. NO. 2320, 82d Cong., 2d Sess. 2 (1952), reprinted in [1952] U.S. CODE CONG. & ADMIN. NEWS 1960, 1961; Kennedy, *Bankruptcy Legislation of 1962*, 4 B.C. INDUS. & COM. L. REV. 241, 242 (1963); McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. CHI. L. REV. 369, 375-79 (1937). Professor Richard I. Aaron has recently suggested that the National Bankruptcy Conference is the source of the major ideas in the new Act. See Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill*, 1979 UTAH L. REV. 1, 21-22, 26-28.

19. The Conference's resolutions in respect to the bankruptcy court are set forth in *National Bankruptcy Conference, Summary of Proceedings of 1968 Annual Meeting*, Res. Nos. 24-29, at 12-13; *National Bankruptcy Conference, Summary of Proceedings of 1970 Annual Meeting*, Res. Nos. 2-8 at 5-7; *National Bankruptcy Conference, Summary of Proceedings of 1971 Annual Meeting*, Res. No. 6, at 7; *National Bankruptcy Conference, Summary of Proceedings of 1972 Annual Meeting*, Res. Nos. 4 & 7, at 6. Resolutions respecting other matters considered by the Conference appear in the summaries of proceedings of its annual meetings. The summaries are prepared by William C. Knox, Jr., Esq., of the New York City bar, who is the Secretary of the Conference.

The National Bankruptcy Conference proposed a series of amendments of H.R. 31, the Commission's bill, which are reprinted under the title "Bankruptcy Act of 1975" in the appendix to the published congressional hearings on the bill. *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 30 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. 333-91 app. (1975-1976) [hereinafter cited as *House Hearings*].

court.<sup>20</sup>

(3) A task force of the Brookings Institution was studying the operation of the system of bankruptcy administration with particular reference to its effectiveness in handling the major part of its workload—consumer bankruptcy.<sup>21</sup>

#### A. *The Proposals of the Commission and the Bankruptcy Judges*

It is not surprising that the most controversial feature of the Bankruptcy Reform Act involved the institutional structure of the bankruptcy system. When any student not involved as a functionary within the system has examined bankruptcy administration as it has evolved in this country, the resulting report has frequently recommended a diminution of the judicial character of bankruptcy and reduced involvement of judicial personnel in the process.<sup>22</sup> Any attempted imple-

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20. The concern of the referees in bankruptcy for the enhancement of the fresh start in bankruptcy can be seen in the hearings on proposals to amend the discharge provision of the Bankruptcy Act. See, e.g., *Bankruptcy: Hearings on S.J. Res. 88 and H.R. 6665 and H.R. 12250 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 32-57 (1969).

The second "whereas" clause in the resolution creating the Commission on Bankruptcy Laws, see note 26 *infra*, recited that more than one-fourth of the referees in bankruptcy had problems arising out of the administration of the existing Bankruptcy Act. Seven of the twelve witnesses appearing at the first hearing held on the bill proposing creation of the Commission were referees in bankruptcy. See *Commission to Study Bankruptcy Laws, 1968: Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 4-42, 44-53, 91-95 (1968).

21. The Brookings Institution established a task force to study the operation of the bankruptcy laws in this country in 1965. See Stanley, *The Brookings Institution Study of Problems of Bankruptcy*, 40 REF. J. 4 (1966). The project was initiated after a preliminary study had been made by Professor Victor J. Rosenblum of Northwestern University, who interviewed judges, lawyers, academicians and others with relevant experience and knowledge about bankruptcy. He came to the conclusion that the subject of bankruptcy administration was needful of an empirical study. David Stanley of the Brookings Institution staff was appointed as the director of the study, and he was assisted in carrying out the investigations of the task force by Professor Majorie Girth, now of the State University of New York in Buffalo, Professor Vern Countryman of Harvard Law School, Dr. Gerald R. Jantscher of the Brookings Economics Studies staff, Professor Warren Law of Harvard's Business School, and Professor Melvin G. Shimm of the Duke University Law School. The task force undertook intensive studies of the operations of the bankruptcy courts in Cleveland, Birmingham, Chicago, Los Angeles, and certain other locations. The report, not published until December of 1971, concluded that the existing system was a failure. D. STANLEY, M. GIRTH, V. COUNTRYMAN, G. JANTSCHER, W. LAW, & M. SHIMM, *BANKRUPTCY: PROBLEM, PROCESS, REFORM 197-98* (1971) [hereinafter cited as *BROOKINGS REPORT*].

22. See, e.g., SERON, *JUDICIAL REORGANIZATION: THE POLITICS OF REFORM IN THE FEDERAL BANKRUPTCY COURT* 125-32 (1978); *BROOKINGS REPORT*, *supra* note 21, at 196-218; *COUNSEL TO THE PETITIONERS IN THE MATTER OF INQUIRY INTO THE ADMINISTRATION OF BANKRUPT ESTATES*, 71st Cong., 3d Sess., *ADMINISTRATION OF BANKRUPT ESTATES* 22-23 (Comm. Print 1931) [hereinafter cited as *DONOVAN REPORT*]; *STRENGTHENING OF PROCEDURE IN THE JUDICIAL SYSTEM*, S. DOC. NO. 65, 72d Cong., 1st Sess. 93-96, 104-111 (1932) [hereinafter cited as *THACHER-GARRISON REPORT*]; Billig, *Extra-Judicial Administration of Insolvent Estates: A Study of Recent Cases*, 78 U. PA. L. REV. 293, 317-20 (1930); Billig, *What Price Bankruptcy: A Plea for "Friendly Adjustment"*, 14 CORNELL L.Q. 413 (1929).

mentation of the various recommendations following from these studies, however, understandably has generated vigorous opposition by those who view the recommendations as a repudiation of experience and a threat to the survival of a system to which they have made irrevocable commitments.<sup>23</sup>

Nevertheless, in response to the calls for reform, Congress began hearings in 1968 to ascertain whether there was a need for a study of the bankruptcy laws,<sup>24</sup> and in 1970 created a Commission on Bankruptcy Laws to "study, analyze, evaluate, and recommend changes" in the bankruptcy laws in the light of "technical, financial, and commercial" developments of the last twenty years and more.<sup>25</sup> The congressional resolution creating the Commission recognized the considerations that referees in bankruptcy had brought to the attention of Senator Burdick as Chairman of the Subcommittee on Improvements of Judicial Machinery of the Senate Judiciary Committee.<sup>26</sup> Al-

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23. The BROOKINGS REPORT was a publication by the Brookings Institution of the report of a task force that had conducted empirical studies of bankruptcy administration in the last half of the 1960s. See note 21 *supra*. The report's recommendation that bankruptcy cases be relegated to an administrative agency was strongly criticized by bankruptcy judges and practitioners. See, e.g., Cyr, *The Abandonment of Judicial Administration of Insolvency Proceedings: A Commitment to Consumer Disservice*, 78 COM. L.J. 37 (1973); Levit, *Bankruptcy Administration and the Brookings Report—A Critical Analysis*, 77 COM. L.J. 179, 181-84 (1972); Kruger, *Book Review*, 73 COLUM. L. REV. 381, 386-88 (1973).

The proposals for reform stimulated by the DONOVAN and THACHER-GARRISON REPORTS, *supra* note 22, stirred a group of bankruptcy buffs in Boston to prepare counter proposals. The ultimate result of their activities was the organization of the National Bankruptcy Conference. See McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 CHI. L. REV. 369, 376-78 (1937). The name of the author of this article, who was one of the founding fathers of the National Bankruptcy Conference, "was changed by decree of court, Jan. 21, 1948, correcting an error made in Scotland about 1835." See MacLachlan, *Preference Redefined*, 63 HARV. L. REV. 1390 n.2 (1950).

24. See *Bankruptcy: Hearings on S.J. Res. 88 and H.R. 6665 and H.R. 12250 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Commission to Study Bankruptcy Laws, 1968: Hearings on S.J. Res. 100 before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

25. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

26. The enacting resolution contained the following recitals in the "whereas" clause:

Whereas the number of bankruptcies in the United States has increased more than 1,000 per centum annually in the last twenty years; and

Whereas more than one-fourth of the referees in bankruptcy have problems arising in their administration of the existing Bankruptcy Act and have made suggestions for substantial improvement in that Act; and

Whereas the technical aspects of the Bankruptcy Act are interwoven with the rapid expansion of credit which has reached proportions far beyond anything previously experienced by the citizens of the United States; and

Whereas there appears to be little experience or understanding by the Federal Government and the commercial community of the Nation in evaluating the need to update the technical aspects of the Bankruptcy Act and the financial policies pursued by the Federal Government and the commercial community . . .

though early versions of the resolution required representation by referees and others on the Commission,<sup>27</sup> the Judicial Conference of the United States was successful in resisting the inclusion of any restrictions on the choice of Commission members.<sup>28</sup> The hearings on the proposed resolution to create a Commission drew only witnesses who favored a study with a view to recommending comprehensive reform of the Bankruptcy Act.<sup>29</sup> It would have been surprising, of course, for any witness to take a position that no improvement was necessary or appropriate, but, as the Commission on Bankruptcy Laws soon discovered and the House and Senate Judiciary Committees learned in subsequent hearings, practically every improvement favored by a particular group was strongly opposed by others.

The Commission delivered its report to Congress in July of 1973, including a draft of a proposed new Bankruptcy Act.<sup>30</sup> The draft proposed many changes of substantive and procedural law, enlargement of

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27. See *Commission to Study Bankruptcy Laws, 1968: Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 2 (1968). As enacted, the joint resolution authorized three members, including the chairman, to be appointed by the President, and two members each to be appointed by the President of the Senate, the Speaker of the House, and the Chief Justice of the Supreme Court. S.J. Res. 88, Pub. L. No. 91-354, 84 Stat. 468 (1970). The President appointed Harold Marsh, Jr., a member of the Los Angeles bar as Chairman. Chairman Marsh, a member of the National Bankruptcy Conference, had formerly been a member of the law faculty of the University of California at Los Angeles and was a recognized leader of the securities bar. The other Presidential appointees included J. Wilson Newman, Chairman of the Finance Committee of Dun & Bradstreet, Inc., and formerly its chairman, president, and chief executive, and Professor Charles Seligson, the dean of the New York City bankruptcy bar, member of the New York University Law School faculty, and Chairman of the National Bankruptcy Conference. The President of the Senate appointed Senator Quentin Burdick of North Dakota, who had introduced the resolution to create the Commission, and Senator Marlow Cook of Kentucky. The Speaker of the House appointed Congressmen Don Edwards and Charles Wiggins, both of California. Both Senators and Congressmen were members of the Judiciary Committees of their respective houses, which are the committees having cognizance of bankruptcy legislation. The Chief Justice appointed United States District Judge Edward Weinfeld of the Southern District of New York and District Judge Hubert Will of the Northern District of Illinois. Both judges had served on the Committee on Bankruptcy Administration of the Judicial Conference of the United States.

28. See *Commission to Study Bankruptcy Laws, 1968: Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 53, 63-65 (1968) (statement of Edward Weinfeld, U.S. District Judge for the Southern District of New York, speaking as Chairman of the Committee on Bankruptcy Administration of the Judicial Conference of the United States, on behalf of the Conference as well as the Committee). See also JUDICIAL CONFERENCE OF THE UNITED STATES, [1968] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 23-24.

29. See *Bankruptcy: Hearings on S.J. Res. 88 and H.R. 6665 and H.R. 12250 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

30. COMMUNICATION FROM THE EXECUTIVE DIRECTOR, COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES TRANSMITTING A REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, July 1973, H.R. Doc. No. 137, PARTS I, II AND III, 93d Cong., 1st Sess. (1973) [hereinafter cited as COMMISSION REPORT].

the jurisdiction of the bankruptcy court, and, of most noteworthy significance, the creation of a new executive agency, the United States Bankruptcy Administration, to perform most of the nonjudicial functions of the bankruptcy process.<sup>31</sup> The congressional members of the Commission shortly afterward introduced the Commission's proposed Act in the two houses.<sup>32</sup>

Notwithstanding the Commission's extensive consultation with the leaders of the National Conferences of Referees,<sup>33</sup> which became the National Conference of Bankruptcy Judges in 1973,<sup>34</sup> that organization was sufficiently dissatisfied with the product of the Commission that it proposed a competing bill that subsequently was introduced in both houses.<sup>35</sup> The Bankruptcy Judges' bill followed the Commission's bill in most respects but significantly departed from it in rejecting the proposed creation of the United States Bankruptcy Administration and the Commission's projections of the future role of bankruptcy judges, private trustees, private counsel, and the Securities and Exchange Commission.<sup>36</sup> The judges' version proposed a structure and allocation of functions much closer to those of the then existing Bankruptcy Act than did the Commission's bill.

Following their initial introduction in 1973, these bills were the focus of hearings conducted during the course of the next three years by subcommittees of both the Senate and House Committees on the

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31. The Commission's recommendations were summarized in *id.* Part I, ch. 1. Its proposals were embodied in a draft of statutory language set out in *id.* Part II (accompanied by explanatory notes).

32. H.R. 10792, 93d Cong., 1st Sess. (1973); S. 2565, 93d Cong., 1st Sess. (1973). The Commission's bills also were introduced in the 94th Congress. H.R. 31, 94th Cong., 1st Sess. (1974); S. 236, 94th Cong., 1st Sess. (1974).

33. A committee of the National Conference of Bankruptcy Judges, chaired by Referee Robert Norton of the District of Kansas, supplied the Commission with prodigious reports on matters of concern to the referees. Referees Clive Bare, John Copehaver, Daniel R. Cowans, Conrad Cyr, Homer Drake, Joe Lee, and Arthur Moller made outstanding contributions to these reports.

34. Referees of courts of bankruptcy, as well as district judges when acting in lieu of referees, were denominated "bankruptcy judges" by the Rules of Bankruptcy Procedure. FED. BANKR. R. 901(7). The Rules became effective on October 1, 1973. Bankruptcy Rules and Official Bankruptcy Forms, 411 U.S. 989, 991 (1972). The name of the National Conference of Referees in Bankruptcy became the National Conference of Bankruptcy Judges at about the same time.

35. H.R. 16643, 93d Cong., 2d Sess. (1973); S. 4060, 93d Cong., 2d Sess. (1973). The Bankruptcy Judges' bills also were introduced during the 94th Congress. H.R. 32, 94th Cong., 1st Sess. (1974); S. 235, 94th Cong., 1st Sess. (1974).

36. Administrative functions under the Bankruptcy Judges' bill were to be performed primarily by a newly established Branch of Bankruptcy Administration in the Administrative Office of the United States Courts and by the clerks and other personnel of the bankruptcy court. H.R. 16643, 93d Cong., 2d Sess. (1973), proposed Title I § 2-106(a), Title II, §§ 206, 207; see Lee, *A Critical Comparison of the Commission's Bill and the Judges' Bill for the Amendment of the Bankruptcy Act*, 49 AM. BANKR. L.J. 1, 11-13 (1975).



Judiciary.<sup>37</sup> During that period the Committees were considerably distracted by the consideration of the possible impeachment of the President and the succession to the Presidency.<sup>38</sup> Nevertheless, these hearings generated an extensive record of statements by witnesses. The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee held 35 days of hearings, heard over 100 witnesses, and accumulated a hearing record of over 2700 pages. The Subcommittee on Improvements of Judicial Machinery of the Senate held hearings that extended over 21 days, at which 62 witnesses appeared, and the hearing record ran to 1095 pages. These hearings were well indexed,<sup>39</sup> but they related to the proposals contained in the Commission's and the Bankruptcy Judges' bills. To the considerable extent that the features of these two bills survived in the legislation that was enacted in 1978, however, the record of the hearings on them provides relevant and valuable legislative background. By the same token, the report of the Commission setting forth its recommendations in specific statutory language, together with a section-by-section explanation, constitutes a valuable source of legislative history.<sup>40</sup>

### *B. The Bankruptcy Bills of the 95th Congress*

A new bill, H.R. 6, was introduced in the House in January of 1977, incorporating the results of the deliberations of the members and

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37. HOUSE HEARINGS, *supra* note 19; *The Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

38. In the summer of 1974, shortly after they had joined in introducing the Commission's bill in Congress, Congressmen Don Edwards and Charles Wiggins were seen and heard by a national television audience during the presentation of the views of the members of the House Judiciary Committee at the conclusion of the Committee's inquiry into Watergate. Although their positions were quite divergent on this matter, their views on questions that arose in the course of the Commission's deliberations on bankruptcy reform were generally compatible and characterized by deference and mutual respect. Both Congressmen were conscientious participants in the Commission's monthly sessions and did their homework. Congressman Wiggins remained active on the Subcommittee on Civil and Constitutional Rights during the 94th Congress but was reassigned to another subcommittee in the 95th Congress.

39. The index to the House and Senate Hearings on H.R. 31 and 32 appears in Part 3 of *House Hearings*, *supra* note 19, at 2716-79. The same subject-matter entries and section references are used for the House and Senate Hearings, so that the page references to each set of hearings appear in parallel columns. Index entries include names of witnesses as well as topic headings, and a separate index leads the reader to discussions in the hearings of sections of H.R. 31 and H.R. 32 and of the Internal Revenue Code. A cross-reference table from H.R. 31 and H.R. 32 to the sections of the new law is needed to facilitate the search for the complete legislative history of the Bankruptcy Reform Act.

40. Parts I and II of the COMMISSION REPORT, *supra* note 30, are reprinted in full in App. 2 COLLIER ON BANKRUPTCY (15th ed. L. King ed. 1979) (Part II contains the Commission's draft of its Bankruptcy Act of 1973).

staff of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee.<sup>41</sup> Although its draftsmanship and organization presented a new appearance,<sup>42</sup> the bill basically adopted the Commission's approach with two important qualifications: (1) H.R. 6 proposed the denomination of the bankruptcy courts as Article III courts, with judges having tenure during good behavior;<sup>43</sup> and (2) H.R. 6 did not adopt the Commission's recommendation for the establishment of the United States Bankruptcy Administration but did propose the establishment of a new office of United States trustee in the executive branch to perform certain administrative functions but with a substantially more limited role than the Commission's proposed United States Bankruptcy Administration.<sup>44</sup>

The proposal of H.R. 6 to create a new Article III court generated strong opposition on the part of the Judicial Conference of the United States, and Congressmen Railsback and Danielson of the House Judiciary Committee succeeded in getting approval of an amendment of the

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41. H.R. 6, 95th Cong., 1st Sess. (1977). The bill was introduced on January 4, 1977, by Congressmen Edwards and Butler. 123 CONG. REC. 125 (1977). The draftsmen of this bill were Richard Levin and Kenneth Klee of the subcommittee's staff.

42. Both the Commission's and the Bankruptcy Judges' bills retained most of the provisions creating the bankruptcy courts and dealing with their jurisdiction, venue, and procedure within Title 11 of the United States Code. See, e.g., H.R. 31, 94th Cong., 1st Sess. § 1 (1977) (Commission Bill) and H.R. 32, 94th Cong., 1st Sess. § 1 (1977) (Judges' Bill), reprinted in *House Hearings, supra* note 19, at app. 26-74. H.R. 6, H.R. 7330, H.R. 8200 and S. 2266, the bills introduced in the 95th Congress, all placed most of these provisions in Title 28 of the Code. See SENATE COMM. ON THE JUDICIARY, COMPARISON OF H.R. 8200 AS REPORTED AND S. 2266, AS INTRODUCED 279-333 (Comm. Print 1977), reprinted in *Bankruptcy Reform Act of 1978: Hearings on S. 2266 and H.R. 8200 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 281-335 (1978). The Commission's bill had 10 chapters, and the Bankruptcy Judges' bill had 11 chapters, all in sequence. See H.R. 31, 94th Cong., 1st Sess. (1975) and H.R. 32, 94th Cong., 1st Sess. (1975), reprinted in *House Hearings, supra* note 19, at app. 2-332.

The 1977 bills divided the sections of the new Title 11 into seven chapters, all having odd numbers. See SENATE COMM. ON THE JUDICIARY, COMPARISON OF H.R. 8200 AS REPORTED AND S. 2266, AS INTRODUCED, *supra*, at 3-366. Both the Commission's and the Bankruptcy Judges' bills provided separate chapters for railroad reorganizations, see H.R. 31, 94th Cong., 1st Sess. (1975) and H.R. 32, 94th Cong., 1st Sess. (1975), but the 1977 bills incorporated railroad reorganizations provisions into the chapter on reorganization. See SENATE COMM. ON THE JUDICIARY, COMPARISON OF H.R. 8200 AS REPORTED AND S. 2266, AS INTRODUCED, *supra*, at 243-63. The 1977 bills included a new subchapter on commodity broker liquidation in the chapter on liquidation. See *id.* at 166-81. See generally H.R. REP. NO. 595, 95th Cong., 1st Sess. 2-3 (1977), reprinted in [1978] U.S. CODE CONG. & AD NEWS 5963, and App. 2 COLLIER ON BANKRUPTCY (15th ed. L. King ed. 1979) (outlining evolution of Bankruptcy Reform Act).

43. H.R. 6 inserted a new Chapter 6 in Title 28 of the United States Code. H.R. 6, 95th Cong., 1st Sess., § 201 (1977). The rationale for creating the United States Bankruptcy Court as an Article III court is set out in H.R. REP. NO. 595, 95th Cong., 1st Sess. 7-87 (1977).

44. H.R. 6 inserted a new Chapter 39 in Title 28 of the United States Code. H.R. 6, 95th Cong., 1st Sess. 224 (1977).

House bill on October 28, 1977,<sup>45</sup> that would have limited the tenure of bankruptcy judges as well as their jurisdiction of proceedings when no loss of assets or other detriment was threatened.<sup>46</sup> That amendment was overturned on February 1, 1978, however, when the House passed H.R. 8200 by voice vote after restoring the provisions for an Article III bankruptcy court and for tenure during good behavior for the bankruptcy judges.<sup>47</sup>

In the meantime a new Senate bill, S. 2266, prepared by the members and staff of the Subcommittee on Improvements of Judicial Machinery of the Senate Judiciary Committee, had been introduced in October of 1977.<sup>48</sup> That bill originally proposed neither a bankruptcy court nor the office of a United States trustee but was later amended to provide for the creation of an adjunct court whose judges would hold office for a term of twelve years.<sup>49</sup> It passed the Senate on September 7, 1978.<sup>50</sup>

Among the over 300 differences between H.R. 8200, as passed by the House on February 1, 1978, and S. 2266, as passed by the Senate on September 7, 1978, were the diverse treatments accorded the bankruptcy court and the reorganization process involving publicly held companies. Between September 7 and October 6, 1978, Congressmen Edwards and Butler, the managers of the House bill, and Senators DeConcini and Wallop, the managers of the Senate bill, hammered out a resolution of the differences through intensive negotiation and consultation. The conventional procedure of utilizing a conference committee was not followed. During this process Richard Levin and Kenneth Klee, staff members of the House Judiciary Subcommittee on Civil and Constitutional Rights, and Robert Feidler and Harry Dixon,

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45. See 123 CONG. REC. H11,782 (daily ed. Oct. 28, 1977); Wall St. J., Oct. 31, 1977, at 1, col. 3.

46. See 123 CONG. REC. H11,763 (daily ed. Oct. 28, 1977) (remarks of Cong. Danielson). A novel feature of the Railsback-Danielson amendment was one withdrawing jurisdiction from the bankruptcy court under certain circumstances when no loss of assets or adverse impact on the estate would result. See *id.* H11,763-11,782.

47. 124 CONG. REC. H478 (daily ed. Feb. 1, 1978). It was this bill to which Congressman Butler's remarks were addressed. See text accompanying note 15 *supra*.

48. S. 2266, 95th Cong., 2d Sess. (1977). This bill was introduced by Senators DeConcini and Wallop.

49. *Id.* § 201 (proposing a new Chapter 6 of Title 28 of the United States Code).

50. 124 CONG. REC. S14,745 (daily ed. Sept. 7, 1978). The bill actually passed was denominated H.R. 8200, but the substance was that of S. 2266. Because of parliamentary difficulties arising out of the inadvertent inclusion in the Senate-passed bill of tax provisions supposed to be postponed for consideration of the 96th Congress, the Senate approval of September 7th was subsequently vitiated, and a new version was passed by the Senate on September 22, 1978. 124 CONG. REC. S15,878 (daily ed. Sept. 22, 1978).

staff members of the Subcommittee on Improvements of Judicial Machinery of the Senate Judiciary Committee, were heavily involved. At the same time, the legislation underwent a number of important changes that could not be described as reconciliation of the diverse provisions of the bills that passed the House and Senate.<sup>51</sup>

An apparent resolution of differences was reached on September 28, 1978, and the House passed an amended version of H.R. 8200 on that date.<sup>52</sup> This bill contained an anomalous provision that would have made the bankruptcy courts adjuncts of the United States courts of appeals.<sup>53</sup> The Chief Justice was strongly opposed to this provision and to a number of other features of the compromise, and he obtained the support of Senator Thurmond and other members of the Senate for changes that were reflected in the final version of the bills that passed both houses on October 6, 1978.<sup>54</sup>

The results of the reconciliation process are elaborated in two long, nearly identical statements of Congressman Edwards and Senator DeConcini, which are set out in the *Congressional Record* for September 28 and October 6, 1978.<sup>55</sup> As these statements disclose, the Senate's bill largely prevailed with respect to the structure of the court,<sup>56</sup> but the Senate managers deferred to the House with respect to most other matters.

The bill that was finally passed by Congress, however, was still unsatisfactory to the Chief Justice,<sup>57</sup> the Securities and Exchange Commission, the consumer credit industry, and various other organizations and interest groups. The President reportedly was importuned by rep-

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51. *E.g.*, 11 U.S.C.A. § 1111(b) (West 1979) and other provisions added to overrule what was regarded as the *Pine Gate* doctrine that evolved under Chapter XII of the Bankruptcy Act. *See In re Pine Gate Assoc., Ltd.*, 10 C.B.C. 581 (N.D. Ga. 1976); [1977-78 Transfer Binder] BANKR. L. REP. (CCH) ¶ 66,325. These changes were discussed in 124 CONG. REC. H11,103-H11,104 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *id.* S17,419-S17,422 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).

52. 124 CONG. REC. H11,117 (daily ed. Sept. 28, 1978).

53. *See* 1 COLLIER ON BANKRUPTCY ¶ 1.03[5], at 1-52 (15th ed. L. King ed. 1979).

54. *See* 124 CONG. REC. S17,401 (daily ed. Oct. 6, 1978).

55. 124 CONG. REC. H11,089-H11,117 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *id.* S17,403-S17,434 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 5787, 6436-573, and also *reprinted in* App. 3 COLLIER ON BANKRUPTCY §§ IX, X (15th ed. L. King ed. 1979).

56. 124 CONG. REC. H11,047, H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); *id.* S17,404 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini). The differences between the House and Senate respecting the United States trustee were resolved by a compromise that established the office as a pilot project in 18 districts for the interim transitional period that ends on April 1, 1984. *Id.*

57. N.Y. Times, Dec. 1, 1978, at A-26, cols. 1-2. *See also* Clarkson, *More About the Bankruptcy Act of 1978*, 65 A.B.A.J. 736 (1979).

representatives of these groups to veto the legislation on the ground that the measure was inflationary,<sup>58</sup> but he nevertheless signed the bill at Camp David late on November 6, 1978.<sup>59</sup>

For the student of legislative history House Report 95-595, which accompanied H.R. 8200, is more useful than Senate Report 95-989, which accompanied S. 2266, not only because the House Report is more complete<sup>60</sup> but also because the final version of the legislation enacted by Congress was much closer to the House bill than the Senate bill.<sup>61</sup> The draftsmanship of the final product is to be attributed primarily to House staffmembers, Richard Levin and Kenneth Klee. The draftsmanship is itself remarkable. The style is stilted and a far cry from plain English.<sup>62</sup> The provisions dealing with executory contracts and standards for confirmation of reorganization plans are, for example, nearly impenetrable. Part of the difficulty in reading the statutory language is attributable to a style that deliberately avoids use of personal pronouns and the relative pronoun "who" and places great reliance on the use of "such." As a result the statute rarely recognizes gender. It is nevertheless necessary to acknowledge that the draftsmanship represents a remarkable achievement in accuracy and specificity in dealing with many complex matters. Particularly in its late stages, the work of reconciliation that took place in the last three weeks of Sep-

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58. See Klee, *Legislative History of the New Bankruptcy Law*, in App. 2 COLLIER ON BANKRUPTCY § V (15th ed. L. King ed. 1979).

59. Since both houses of Congress had adjourned *sine die* on October 15, 1978, the bill would have suffered a pocket veto had the President not signed it on November 6, 1978.

60. The House Report contains 549 pages, and the Senate Report contains 177 pages. The Senate Report duplicates much of the House Report where it contains commentary on provisions that are identical in H.R. 8200 and S. 2266. Unfortunately, neither report contains a table of contents or an index. H.R. REP. NO. 595, 95th Cong., 2d Sess. (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963 and App. 2 COLLIER ON BANKRUPTCY (15th ed. L. King ed. 1979); S. REP. NO. 989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787 and App. 3 COLLIER ON BANKRUPTCY (15th ed. L. King ed. 1979).

61. H.R. 8200, however, contemplated an Article III court as well as a United States trustee stationed throughout the country, whereas Pub. L. No. 95-598 as enacted created an adjunct bankruptcy court that was closer to that envisaged by S. 2266. See 124 CONG. REC. 514, 745 (daily ed. Sept. 7, 1978). Moreover, the United States trustee survived only as a pilot project in 18 districts. An unfortunate result is that in nonpilot districts there is a lacuna in the new law in that bankruptcy judges are supposed to be relieved of responsibility for administrative aspects of bankruptcy administration but there is no office of the United States trustee or other functionary to assume this responsibility.

62. See R. HENSON, SECURED TRANSACTIONS 20 (2d ed. 1979 Supp.):

Those who found troublesome problems in the language of the Bankruptcy Act of 1898 are not likely to find the Bankruptcy Act of 1978 to be without blemish in its drafting . . . . It is . . . occasionally challenging to figure out what the new Act is supposed to mean. . . . Through all of the difficulties at least one thing appears to be certain: the drafting is such that lawyers will be making a living from the ambiguities for a long time to come.

tember and the first week of October 1978 was done under tremendous pressures, and the accomplishment of the House and Senate managers in bringing the legislation to a successful culmination by October 6th is nothing short of miraculous.<sup>63</sup>

### III. AN APPRAISAL

Patricia Wald, then Assistant Attorney General for Legislative Affairs and since elevated to the United States Court of Appeals for the District of Columbia Circuit, observed shortly after the passage of the Bankruptcy Reform Act that the changes effected by the "controversial and comprehensive reform of federal bankruptcy law . . . were understood and discussed by only a small fraction of the legislators who passed the final bill in the feverish pace of the last days of the session."<sup>64</sup> That H.R. 8200 did negotiate the hazardous channel between Scylla and Charybdis is cogent evidence of the confidence and respect both houses had in and for the work product of the managers of the bill and their staffs. In particular, the Bankruptcy Reform Act of 1978 is a tribute to Congressmen Edwards and Butler and Senator DeConcini, who devoted enormous time, energy and care to the project of shepherding the legislation to the White House. The legislation contains many imperfections and is in some respects disappointing to everyone who contributed to the effort that resulted in final enactment. The delays and difficulties that have been encountered in the process of preparing technical amendments,<sup>65</sup> however, reflects the enormity of the problem of developing the kind of accord that is indispensable on the part of many interested groups and persons before legislation of such complexity and magnitude can clear all the hurdles.

The transitional period provided for in Title IV of the Act<sup>66</sup> ensures that Congress will be taking another look at this comprehensive

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63. The Byzantine parliamentary maneuvers necessary to steer the legislation through to successful passage are described in considerable detail in Klee, *Legislative History of the New Bankruptcy Law*, App. 2 COLLIER ON BANKRUPTCY v-xxix (15th ed. L. King ed. 1979).

64. Wald, *Justice in the Ninety-fifth Congress: An Overview*, 64 A.B.A.J. 1854, 1855 (1978).

65. S. 658, which was introduced by Senator DeConcini in the 96th Congress, 1st Session, on March 14, 1979, was finally passed after numerous amendments on September 7, 1979. The declared purpose of this bill was "[t]o correct technical errors, clarify and make minor substantive changes to Public Law 95-598." S. 658, 96th Cong., 1st Sess. (1979). H.R. 5447 was introduced by Congressman Edwards, with Congressman Hyde, on September 27, 1979, for the purpose of correcting technical errors in and clarifying certain provisions of Public Law 95-598, but on October 22, 1979, Congressman Edwards introduced an amendment in the nature of a substitute to S. 658. This bill has since been amended in a number of particulars, and neither H.R. 5447 nor the substitute for S. 658 was acted on before the House recessed on January 3, 1980.

66. Pub. L. No. 95-598, §§ 402(b) & (e), 404, 405, 406, 407, 408, & 409, 92 Stat. 2682 (1978).

legislation some time before 1984, and it is to be hoped that the five-year experiment with the United States trustee will have demonstrated its advantages and potentialities.<sup>67</sup> Incident to the consideration of the future of the United States trustee system, Congress may also be persuaded to consider and adopt other improvements suggested by the intervening experience under the new dispensation. Even without these improvements, however, the Bankruptcy Reform Act must be considered a remarkable achievement and a significant and laudable reform.

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67. Senator Wallop's prediction in 124 CONG. REC. S17,405 (daily ed. Oct. 6, 1978), however, is to the contrary: "This pilot project will sunset on March 31, 1984. I do not expect it to be renewed or expanded at that time."