

April 1980

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M. Caldwell Butler, *A Congressman's Reflections on the Drafting of the Bankruptcy Code of 1978*, 21 Wm. & Mary L. Rev. 557 (1980), <https://scholarship.law.wm.edu/wmlr/vol21/iss3/2>

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William and Mary Law Review

VOLUME 21

SPRING & SUMMER 1980

NUMBERS 3 & 4

A CONGRESSMAN'S REFLECTIONS ON THE DRAFTING OF THE BANKRUPTCY CODE OF 1978

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Comprehensive revision of a substantial body of law inevitably produces certain ambiguities, if not outright conflicts, in the finished product. Under such circumstances, the underlying history of the legislation assumes considerable importance, aiding the courts and counsel in attempting to divine the occasionally inartful expressions of intent on the part of the legislature. The legislative history of any law consists of the hearing record, committee reports, and statements during consideration on the floor of each house of Congress. The following discussion should be viewed not as a comprehensive analysis of the legislative history of the Bankruptcy Code, but rather as a description of our national legislative process.

Readers must bear in mind that legislators, like the moving hand, having written, move on. Although I was deeply involved in the bankruptcy legislation for four years of my life, this field no longer is my principal endeavor and I had some difficulty pulling all the pieces together at this late date. Nevertheless, this particular history must be understood from the point of view of the then-ranking Minority Member of the Subcommittee of the House Judiciary Committee charged with the responsibility of drafting the comprehensive revision of the bankruptcy laws. I have no idea of what occurred on the parallel track in the United States Senate. I do know, however, that the entire effort in our subcommittee was nonpartisan, and I have no indication that the approach was any

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different in the Senate. I was not conscious of any particular intrigue or, indeed, excessive involvement on the part of special interest groups.

I would like to make two preliminary observations about the process by which legislation is enacted in the Congress. Although public expressions generally emanate from the members of the legislative body, in the House of Representatives at least, we are very much dependent on our staff for the legislative product. There is a heavy responsibility on these individuals who must, in theory at least, involve themselves without overreaching. The House member also must recognize that his knowledge need be supplemented by a qualified staff; in the absence of a well-qualified staff, a real possibility exists that legislation will fall short of its objective.

I mention these things because we were particularly fortunate in the House Judiciary Subcommittee in recruiting a staff for this purpose. I am told that my predecessor as ranking Minority Member, Charles Wiggins of California, specifically requested the Harvard Law School to recommend a talented and interested student whose background would enable him or her to be particularly helpful in the comprehensive revision of this area of law; the Majority member proceeded in much the same way, turning, however, to the Yale Law School. Mr. Kenneth Klee¹ and Mr. Richard Levin were chosen for our staff and were deeply involved in this legislation for over four years. We depended upon them heavily, and are indebted for their continuing efforts.

Because of my limited experience in bankruptcy, my practice was to insist as often as possible on staff memoranda directed to particular policy decisions that had to be made in the revision of this area of the law. These memoranda are not universally available but, for the serious student, they can certainly be found in a number of places. I will be pleased to share mine with those who might be interested. A well-qualified staff composed of Mr. Robert Fielder and Mr. Harry Dixon directed the efforts on the Senate side.

1. Mr. Klee has written a legislative history of the new Bankruptcy Code which amplifies some of the points discussed herein. See Klee, *Legislative History of the New Bankruptcy Law*, in COLLIER ON BANKRUPTCY app. 2, at v (15th ed. 1979).

BRIEF SUMMARY OF THE LEGISLATIVE HISTORY

I view the manner in which the Congress proceeded to revise the bankruptcy laws as a textbook example of how to effect a comprehensive code revision. The congressional action began with the creation of the Commission on the Bankruptcy Laws of the United States. The history of this particular Commission reveals a real concern for the state of bankruptcy laws in the United States. Although the Commission was established in July, 1970, it did not become operational until June, 1971, and its report was not filed until July, 1973. The report consisted of three parts, including not only extensive findings and recommendations, but also proposed legislation incorporating the recommended reforms and revisions of the existing law.² In preparing this report, the Commission also had the benefit of extensive testimony and a comprehensive report of the Brookings Institution, published in September, 1971, dwelling primarily on the need for bankruptcy reform.³

The National Conference of Bankruptcy Judges, dissatisfied with some of the revisions proposed in the Bankruptcy Commission's report, employed its own counsel and drafted its own suggested legislation. Both bills were introduced in the Ninety-third Congress in the House, but only the Commission's bill was introduced in the Senate; no action was taken, however, in that Congress.

Although these bills were introduced in the Ninety-third Congress, it may have been fortuitous for bankruptcy laws that the impeachment deliberations diverted the House Judiciary Committee from bankruptcy legislation. This enabled the newly-employed staff to begin a more careful analysis of the proposed legislation. The opportunity given them for a detailed study was quite important and provided us with the background we needed as we proceeded in the Ninety-fourth Congress.

The proposals of the Commission and the Bankruptcy Judges were introduced in the House and Senate in early 1975. Formal

2. COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, REPORT, H.R. Doc. No. 137, 93d Cong., 1st Sess. pt. 1 (1973), *reprinted in* COLLIER ON BANKRUPTCY app. 2, pt. 1 (15th ed. 1979).

3. The Brookings Institution report has been published as D. STANLEY & M. GIRTH, *BANKRUPTCY: PROBLEM, PROCESS, REFORM* (1971).

hearings on the legislation began in May of 1975, and continued for almost a year, with over thirty-five days of hearings in the House subcommittee and twenty-four in the Senate. Those hearings are printed⁴ and will shed light on the detailed nature of the process. The purpose of the hearings was to allow all persons involved and interested in the area to express their views; this input, of course, was quite helpful to us. The next step was to review the testimony, with its conflicts and agreements, and to find workable solutions to the questions raised.

The formal record preserves little of the negotiations that took place during the period between the conclusion of our formal hearings and preparation of the final draft. Several preliminary drafts and redrafts, however, were prepared during this period, an exercise that continued through the summer of 1976. These drafts were reviewed by members of the subcommittee with the staff and many of the questions raised were resolved tentatively and informally. Throughout this period, our staff members communicated continuously with the National Conference of Bankruptcy Judges and the National Bankruptcy Conference; the latter organization is composed of those federal judges, lawyers, and professors considered most knowledgeable in the field of bankruptcy. Preliminary drafts also were exchanged periodically with other interested persons.

A subcommittee print dated November 18, 1976, then provided the basis for a series of staff discussions with representatives of both the Bankruptcy Judges and the National Bankruptcy Conference. Minutes of these meetings have been preserved, along with the suggestions generated. Most of the suggestions were incorporated in H.R. 6,⁵ which was introduced and widely distributed in January, 1977 on the first day of the New Congress. This distribution generated further discussion and refinement, leading to a subsequent subcommittee print that was not reintroduced as a bill, but intended as the vehicle for the impending markup or amendment of the bill by the subcommittee.

In March, 1977 the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary met for its

4. *Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess., ser. 27 (1975-76).

5. H.R. 6, 95th Cong., 1st Sess. (1977).

markup of the bankruptcy proposal. The first motion at the amendment session on March 21 was offered by Congressman Robert Drinan of Massachusetts to substitute the new subcommittee print for H.R. 6. Once accepted, the Drinan substitute became the vehicle to which all amendments thereafter were addressed. At the conclusion of our markup session some two months later, the Drinan substitute, as amended, was adopted in lieu of H.R. 6 and received the unanimous blessing of the subcommittee.

The subcommittee markup process was more careful than most. The subcommittee met on twenty-two separate occasions, consumed over forty-two hours in debate and discussion, and concluded its deliberation on May 16, 1977. My office maintained an unofficial transcript of the markup sessions⁶ and formal minutes were preserved by the subcommittee staff.⁷ This amendment process involved a reading of the legislation, section by section, from beginning to end. Over 120 amendments were considered and over 100 adopted, but many more tentatively were discussed. As questions developed, the staff was instructed to prepare memoranda on the points raised. These memoranda generally are preserved and should be helpful to the most serious students.

Significantly, I think, on May 23, 1977 the subcommittee voted *unanimously* to report the bill to the full committee. The amended version of the legislation, which careful readers will recall was at least the fifth revision, was reintroduced as H.R. 7330⁸ and forwarded to the full committee for consideration. This bill was circulated to those who had expressed a continuing interest in our work, including bankruptcy judges, members of the Bar, and a number of law professors. Some technical suggestions were made and incorporated in the bill and it was introduced again on July 11, 1977 for consideration by the full committee as H.R. 8200.⁹ No major changes were made in the substantive or procedural aspects of H.R. 8200 before it finally was passed by the House of Representatives in February, 1978, but the road to that point was a rocky one as will be explained.

6. See 123 CONG. REC. H11,701 (daily ed. Sept. 27, 1977).

7. *Minutes of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

8. H.R. 7330, 95th Cong., 1st Sess. (1977).

9. H.R. 8200, 95th Cong., 1st Sess. (1977).

A 700-page briefing book, containing much of the work of the subcommittee, was circulated to all members of the Full Judiciary Committee in preparation for full committee consideration of the bill. The full committee met for three days to consider amendments to H.R. 8200, but no substantial amendments were adopted. Minutes of the full committee proceedings,¹⁰ as well as a formal transcript of those proceedings, were preserved and printed.¹¹

The Rules of the House of Representatives are such that the jurisdictional turf of all committees is protected with a good deal more effort and tenacity than one would expect an elderly father to exert to preserve the virtue of his only daughter. The most jealous father of all is the Committee on Ways and Means of the House of Representatives, our tax writing committee. The provisions of the bankruptcy bill dealing with priority of federal taxes, preferences, and a number of other matters, quite naturally, are within the jurisdiction of the Committee on Ways and Means as well as the Judiciary Committee. The House Rules provide that, when jurisdiction of more than one committee is involved, the legislation, after clearing one committee, must be referred to the other. Those of us who had worked so hard on the bankruptcy legislation were fearful that the referral to the very busy Ways and Means Committee would mean the end of the line for this very important legislation. Therefore, we entered into informal negotiations with the staff and influential members of the appropriate subcommittee of Ways and Means. As a result of these negotiations, an agreement was reached that H.R. 8200 would be rewritten once more to extract those portions that trespassed on the jurisdiction of the Ways and Means Committee. Accordingly, on September 8, 1977 H.R. 8200, which had previously been reported out of the Judiciary Committee, was recommitted to the full committee for amendments deleting the tax provisions. A new bill in the nature of a substitute for H.R. 8200 was thereafter reported to the full house. Interestingly the vote in the Judiciary Committee on the initial reporting was twenty-three to six, while the second vote was twenty-three to eight.

10. *Minutes of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

11. *Transcript of Meetings of the House Comm. on the Judiciary*, July 14, 15, & 19, 95th Cong., 1st Sess. (1979).

A bill designed to conform the Internal Revenue Code to the changes brought about by H.R. 8200 was introduced by Chairman Edwards and our entire subcommittee, and referred to the Committee on Ways and Means. This spinoff legislation, as predicted, was not acted on in the Ninety-fifth Congress and consideration has not been completed as we go to press.

Although the Senate Judiciary Subcommittee formally had not undertaken its markup process while the House subcommittee was deliberating, it had not been idle. Counsel for the Senate subcommittee attended most of the House subcommittee meetings, listened to our deliberations with care, took meticulous notes, and, of course, reported them to Senator Dennis DeConcini of Arizona, who was Chairman of the Senate Judiciary Subcommittee on Improvements in Judiciary Machinery. Thus, the Senate was well advised not only as to what the House had done, but also as to the reasons that prompted our actions. When the Senators on the subcommittee introduced their version of the bankruptcy bill, we knew that those areas in which there was disagreement with the House were not undertaken lightly. Three days of hearings were held in the Senate, but no further action was taken in 1977.

The House bill came to the floor of the House of Representatives on October 12, 1977. Few floor amendments to the legislation were made. Members of the subcommittee, of course, accept this as an acknowledgement of their superior work product, but a more accurate representation might be that, with the exception of a few members of the Judiciary Committee, comprehensive bankruptcy revisions were viewed by the membership with massive indifference. There was, however, one exception: the jurisdiction and status of the bankruptcy courts.

The entire subcommittee strongly opposed an amendment offered on the floor with reference to the status of the bankruptcy courts, a subject into which I will probe, in some detail, in a moment. Unfortunately, the floor amendment was successful. Accordingly, on October 13, 1977 we chose to suspend further floor action until we could assess the damage done to the bill by the floor amendment.

A word about how the House can have two votes on one amendment might be helpful at this point. When the House of Representatives is considering a bill, its Rules generally require that it

resolve itself into a Committee of the Whole House. Under the procedures in the Committee of the Whole House, one hundred members constitute a quorum and the business of considering and amending a bill can proceed more expeditiously than in the full House, where a majority is necessary for a quorum. When the Committee of the Whole House completes its action and disposes of all amendments to the bill, it reports back to the full House on its actions. At that time, a member can ask for another vote on any amendment that has been approved in the Committee of the Whole House. As the proponents of the bill, we knew this procedure could be invoked to give us the option of an additional vote on the floor amendment if we felt that it was sufficiently damaging.

Our view, after additional hearings in December of 1977, and informal consideration, was that the damage done by the floor amendment was substantial and that an effort should be made to reverse this result. Accordingly, during the Christmas recess, much of the time of the subcommittee and of friends in the bankruptcy community, including the Bankruptcy Conference was spent contacting members of Congress. When the bill was taken up again after the Christmas recess in February, 1978, the result was reversed in the full House of Representatives by an overwhelming vote of 262 to 146. The structure of the bankruptcy court remained substantially the same when this bill passed the House as when it had left the subcommittee and the full committee.

The only other floor amendment of significance dealt with the dischargeability of student loans. The subcommittee found no reason to give separate status under the law to a debt incurred for a student loan, and that to deny discharge for student loans was a form of discrimination of the rankest sort. The view of a majority of the members, however, was that the alarming default rate on student loans required that they not be dischargeable. Accordingly, this was the other major floor amendment.

After reversal of the amendment on the court structure, H.R. 8200 passed the House by a voice vote on February 1, 1978.

Action in the Senate began in earnest following passage of H.R. 8200 by the House of Representatives. An amendment in the nature of a substitute for the Senate bill which had been introduced earlier was introduced on May 17, 1978, reported by the Senate subcommittee, and, on July 14, 1978, by the Full Senate Judiciary

Committee. The Senate began floor consideration on September 7, 1978, and finally passed the bill on September 22, 1978. On September 26, the Senate requested a conference with the House to resolve the difference in the two bills.

Readers of this history should be aware that we were approaching the end of the congressional year and the Ninety-fifth Congress, which meant that all bills not passed would have to be reintroduced and processed anew when Congress reconvened in January, 1979. Moreover, the Ninety-fifth Congress, facing election on November 4, was anxious to go home.

The traditional method used to resolve House and Senate differences is a meeting in conference. A resolution of the differences is reported back by the conferees to the two Houses for final approval. It is a long and tedious process, but a very good one, that has the ultimate result of translating the intention of the bodies into legislation. Our view, however, was that the traditional conference process never would have been completed in time to enact the legislation in 1978. Many of us believed that the hazards of going down the same road in the next Congress were substantial and growing. The truth of the matter is that the time to take a tart is when the tarts are passing!

Anticipating the many problems and disagreements that could arise between the House and Senate, our staff was instructed early on that as soon as passage by the Senate subcommittee was completed, they were to ascertain the areas of disagreement and suggest possible compromise. Because we believed that the Senate would pass a bill quite similar to that which had passed its subcommittee, the House and Senate subcommittee bills were laid side by side and printed for member and staff analysis. Our own staff proceeded to review the differences and report to the members of the House. Informally, the members of our subcommittee gave instructions to the staff as to issues we felt were important. The staff was granted the broadest latitude in resolving the areas of disagreement. Similar authority seems to have been granted on the Senate side. Accordingly, not long after passage of the Senate bill staff members of the two committees were able to get together. Staff deliberations continued for almost two weeks, and substantially all of the issues were resolved. Most of the differences were of style more than substance, except for the areas previously men-

tioned plus the areas of exemptions, reaffirmations and Chapter XI reorganizations.

During the course of these negotiations, we realized that some policy problems would require resolution by the members of Congress. An informal luncheon was arranged between Congressman Edwards, the chairman of our subcommittee, Senator DeConcini, the chairman of the Senate subcommittee and the manager of the Senate bill, Senator Malcolm Wallop, the ranking Republican on the subcommittee, and myself, the ranking Republican member of the House subcommittee. This discussion revealed very few areas of real disagreement, the principal one being that of the structure of the court. During this meeting we hammered out the ultimate resolution of this problem and several others, as will be discussed. The participants then related to their staffs what we were able to resolve and the staffs quickly translated this into legislative language.

One minor impediment to final enactment was removed quickly. The Senate Rules require that a Senate bill be referred to the Senate Finance Committee after the Senate Judiciary Committee has acted. In our case, the Senate Finance Committee had added an amendment that reduced revenues, and this language was retained when the bill was passed by the Senate on September 7, 1978. The House Parliamentarian, however, ruled that the Speaker could not accept the Senate version of the bill for further House consideration because the Senate lacked constitutional authority to originate bills dealing with the generation of revenues. Thus, the Senate withdrew its version on September 22, 1978 and again passed the bill, this time deleting the language dealing with revenues.

The House and Senate principals met shortly thereafter in an attempt to identify and resolve the remaining differences; the solutions to some of the differences were such that they probably could not be resolved through the conference procedure. Conferences are limited in their scope to areas of disagreement in the language of each bill, which is to say that either body must agree to the other's language. The Rules do not allow a House-Senate conference to create new proposals not found in either bill. In the opinion of the members of both bodies, this probable procedural impasse, coupled with the looming adjournment, mandated the procedure employed. You will recall that the Senate passed their bill, then substituted it

for the House bill, H.R. 8200, which had been passed by the House on February 1, 1978. H.R. 8200 thus returned to the House, but as amended by the Senate. As a result of our consultations with the Senators, we then proposed in the House of Representatives an amended version of H.R. 8200, called an amendment in the nature of a substitute to the Senate version. This version passed the House by unanimous consent on September 28, 1978 and was returned to the Senate.

At this point, the media reported that the Chief Justice of the United States Supreme Court had had a telephone conversation with Senator DeConcini, expressing his opposition to the provisions relating to the status of the new bankruptcy judges. The Chief Justice, who heads the Judicial Conference of the United States, was, in the opinion of more than one member of Congress, attempting to wield influence beyond that conferred upon him by the Constituion. We had requested testimony from the Judicial Conference during our lengthy hearing process. Not until after our hearings and the introduction of H.R. 6 on January 4, 1977, however, did the Judicial Conference adopt a resolution disapproving of H.R. 6. The road might have been smoother if we could have had the benefit of testimony on the nature and future of the bankruptcy court from the organization representing the interests of the federal courts of this nation; but such testimony was not forthcoming.

In any event, after more meetings, the Senate further amended our product and passed it on October 5, 1978. This bill was not exactly what we in the House had envisioned as the final product. Our realistic choice, however, was to accept the bill or start over with the new Congress. We believed that the improvements were substantial enough to override our pride of authorship, and, on October 6, 1978 the House concurred with the Senate and the bill emerged from the legislative cauldron.

One big hurdle remained: the President of the United States had to sign the bill. Although no formal record is available, formally or informally, the Judicial Conference, through its spokesman, the Chief Justice, apparently endeavored to persuade the President not to sign the legislation. At the last moment, however, he did sign the bill and it became Public Law 95-598 on November 6, 1978.

STATUS AND ADMINISTRATION OF BANKRUPTCY COURTS

The major controversy that led to much of the disagreement in the House, and with the Senate and the Judicial Conference, dealt with the status and administration of the bankruptcy court and the tenure of its judges. We had the benefit of a Brookings Institution Study, the Bankruptcy Commission Report, the advice and testimony of the National Conference of Bankruptcy Judges, the National Bankruptcy Conference, and other interested scholars, as well as our own staff involvement. An examination of all of the evidence clearly indicates that a principal reason for the reform was the overlapping of the administrative and judicial functions under the prior bankruptcy law. In the ideal situation, of course, judges adjudicate, but, under the old bankruptcy law they did much more than that. The same bankruptcy judge who presided at the first meeting of creditors and listened to the testimony without restricting it on the basis of relevance or admissibility later authorized litigation and presided over trials arising out of the same set of facts. Under the old law he appointed trustees, participated in decisions, appointed participants that litigated in his court, determined their fees, made business judgments, participated in drafting contracts, and then interpreted and enforced them. The testimony also revealed substantial complaints about the "bankruptcy ring," the intangible and unhealthy understanding between bankruptcy judges, trustees, and attorneys, which resulted in the public's impression of exclusive inside control at the expense of outsiders. Therefore, the major thrust of the reform was to separate the administrative and judicial functions so that the person who presides, the bankruptcy judge, will be free to resolve the disputes in a traditional judicial context.

There were two principal areas of concern, and, of course, differences developed with reference to them. One was the administration of the bankruptcy courts; the other was the question of the status of the judge. The Bankruptcy Commission preferred a separate agency in the executive branch to usurp completely the role of private trustees in administering bankruptcy cases. The Senate, on the other hand, would have established a position in the Administrative Office of the United States Courts to supervise private trustees across the country, and therefore, take the administrative functions away from the court. The House bill took an intermedi-

ate position by establishing a small number of officials under the supervision of the Attorney General, each to be known as a United States Trustee. These officials would operate on a regional basis to supervise the private trustees, and to be responsible for the administration of the bankruptcy cases. When the creditors failed to elect a trustee, the United States Trustee, rather than the court, would have had the responsibility of appointing a trustee. The effect of the House proposal was to remove much of the administrative responsibility imposed on the bankruptcy judge under the existing law, allowing him to devote his time to resolving disputes between parties.

The resolution of this difference was "Solomon-like." The new law creates, for parts of the country, a pilot program employing the United States Trustee system envisioned by the House. The rest of the country will operate under the Senate plan, which is much like the prior system. The pilot program has a "sunset provision," whereby it will end in 1984 unless it proves to be the better alternative, and Congress is willing to extend its operation on a nationwide basis.

The specialized jurisdiction of the bankruptcy courts also received a lot of attention during our deliberations. It was apparent that a *de facto* specialized court system had existed within the district courts for many years. Although some argued that this specialization was contrary to the trend, Congress, on three separate occasions in the past twenty-five years, has set up specialized courts with article III status: the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Courts. The United States Tax Court, created in 1969, is also an independent court, although an article I court. At the heart of the complaint about the bankruptcy court system was the relationship of the bankruptcy courts and the bankruptcy judges to the district courts and their judges. Under the existing law, bankruptcy courts were separate, but not independent; their terms, staffs, libraries, and relationships had made them inferior courts in every sense of the word. Too often, the status of the bankruptcy courts was reflected in the quality of the people attracted to their bench. This major problem was raised in our hearings as well as by the Bankruptcy Commission. In addition, the morale of the people who accepted appointment to the bankruptcy court suffered greatly as a result of

the status it bore to the overall system. The evidence before us indicated the demeaning nature of this relationship.

We thus were confronted with a specialized and inferior court system, that was separate but not independent, exercising jurisdiction over assets that in 1978 exceeded many billions of dollars. The responsibilities of this system were every bit as great as those of the federal district courts, and it now was about to be granted expanded jurisdiction. We felt strongly that a bankruptcy court should not rely on possession of property or the consent of some party to exercise its jurisdiction. Therefore, pervasive jurisdiction was deemed essential to our reform. The new law grants to the bankruptcy courts exclusive jurisdiction over all proceedings arising in or relating to bankruptcy cases.

We trust that forum shopping and jurisdictional litigation, which clearly are inefficient and unfair impediments to speedy resolution of problems, largely have been eliminated by our efforts. The only powers not held by the new court will be that of punishing contempt by imprisonment and enjoining other courts. We felt this limitation was necessary because the new bankruptcy court remains essentially an adjunct to the district courts.

The House of Representatives believed that a bankruptcy court separate and independent from the district court was essential. The Bankruptcy Commission had proposed such a separation; the National Bankruptcy Conference had testified in support of it; the Commercial Law League of America and the American Banking Association also had urged the adoption of an independent court system. Finally, the American Bar Association in its 1976 meeting, and the Association of the Bar of the City of New York also had called for the creation of an independent bankruptcy court. The testimony in opposition to the independent court came almost exclusively from the judiciary and the Judicial Conference. The general feeling of our subcommittee and those who testified concerning the problems that had come before the bankruptcy courts was that the issues arising under the system's expanded jurisdiction would be every bit as significant in terms of dollars, of litigation involved, of lives, property, and jobs, as the questions that ordinarily come before a district court. Therefore, the status of the new bankruptcy court should be equal to that of the district courts.

Thus far, we had reached no areas of real disagreement among

our witnesses or among the subcommittee members. We needed an independent court system, and this was the proposal initially made by the Bankruptcy Commission. The problem was that an independent court with the pervasive jurisdiction contemplated required adequate constitutional powers to do the job. Chairman Rodino, at the urging of Congressman Edwards and his staff, wrote to a number of scholars to get their views on this subject. I am relieved to state that I was not consulted as to the scholars to whom the letter was to be sent; but I am indeed embarrassed that not a single law professor or teacher of constitutional law at any of the distinguished law schools in the State of Virginia was consulted on this issue.

The results were not unanimous. There was general agreement that conferral of article III status would eliminate any questions as to the jurisdiction and authority of the new court. The Department of Justice concurred that such an approach would not be constitutionally suspect. Another suggestion stated that Congress' constitutional power to establish uniform laws on the subject of bankruptcy gives the legislature wide latitude to fashion a court structure with ample jurisdictional powers to meet its needs. The consensus was that such congressional power would insulate adequately the orders of the proposed court from any attack on jurisdictional grounds.

Nevertheless, the question of whether we could have an independent judge without life tenure was lurking throughout the deliberations in our markup sessions. We had drafted H.R. 6 with this independence in mind. As we neared completion of our markup, many of us on the subcommittee doubted the necessity of this independence. I preferred a system of independent article I courts patterned after the Tax Court or something of a similar nature. On May 23, 1977 our staff submitted a memorandum to us, which was rewritten and published on July 23, 1977. Relying on the staff memorandum and my own limited research, I concluded that we could not have an independent court exercising the powers we envisioned in which the judges did not have life tenure.¹²

12. The impediment to not having life-tenured (Article III) judges was the possibility that the desired grant of jurisdiction to the Bankruptcy Court might be flawed, and ultimately subject to constitutional attack.

This determination provided the basis for the argument on the House floor supporting the amendment offered by Congressman Danielson mentioned earlier. Efforts were made on the floor of the House of Representatives to strike the portions of the Committee bill expanding the jurisdiction of the bankruptcy courts. As I have discussed above, these attempts ultimately were rejected by the House. Nevertheless, the Senate version preserved the ancient adjunct system and, in the view of the House, took away the necessary independence of the court, one of the major reasons for the new bill.

A compromise was reached by creating a court adjunct to the district court, but with much greater powers than the present system. This action necessarily involved a great deal of discussion of the appeals process. The original House bill provided for an appeal directly to the court of appeals, taking the bankruptcy court out from under the district court and placing it on the same level. Of the principal negotiating Senators on the subcommittee, one was from Arizona and another from Wyoming, states in which a party might have to travel hundreds of miles to reach the circuit court of appeals. This fact constituted their main objection to this particular aspect of the proposal. In order to resolve this dilemma, we created an appellate process whereby an appeal can be taken to one of three bodies: to the district court in the district in which the bankruptcy court is located; to a three-judge panel of bankruptcy judges, appointed at the discretion of the circuit council to hear such appeals; or to the appropriate circuit court if the parties so agree. This appellate process is novel but it solved some practical problems. With proper oversight, Congress can make adjustments in this structure when necessary.

Our efforts in the long process of drafting a new bankruptcy law were disrupted by the financial embarrassment of the City of New York in the fall of 1975 and the spring of 1976. During our deliberations, a cursory examination of Chapter IX, which dealt with municipal reorganization, revealed enough inherent problems to justify an interruption of our timetable to update this aspect of the law. Accordingly, in the spring of 1976, we pulled out for separate consideration Chapter IX of the old bankruptcy act, and enacted

substantial changes affecting municipal reorganization.¹³ When our comprehensive revision of the new Bankruptcy Code was completed, we incorporated these changes without significant modification.

I think a legitimate criticism of this particular portion of our revision is that we were conscious only of the New York situation in drafting this legislation, although we endeavored not to be. Municipal reorganizations of that size, of course, never had occurred before; the major use of such legislation had been in modest circumstances of sanitation districts and very small municipal corporations. I still believe, however, it will prove workable.

The bankruptcy law became effective on October 1, 1979, but some loose ends still needed to be resolved. As I mentioned, the treatment of federal taxes under the new Code was left to the Committee on Ways and Means, which, as of this writing, is attempting to draft new provisions. Although I no longer am a member of the subcommittee of the House Committee on the Judiciary, I have tried, in conjunction with Congressman Edwards, to encourage the Ways and Means Committee to include bankruptcy policy considerations in their work.

This same interest spurred Congressman Edwards and myself to advise the committees concerned with the Chrysler Corporation difficulties not to ignore the business reorganization provisions of the new Code. Perhaps we have undue pride in our work, but we both believe this recently-enacted Code could play some role in protecting creditors, employees, and the general public if the situation at Chrysler continues to deteriorate.

CONCLUSION

The hasty resolution of House and Senate differences as Congress was about to adjourn, coupled with the length of the new Code, necessitated certain technical changes. These changes in-

13. The revision of Chapter IX deals generally with improvements in the administration of municipal readjustments of debts. In addition, two powers are granted to the Bankruptcy Court which it had possessed in former Chapters X and XI business reorganizations. These powers were: (1) the power to permit the petitioner (municipality) to reject executory contracts, and (2) the power to authorize the petitioner to issue certificates of indebtedness, with such priority and security as the court deems equitable.

clude correction of certain printing errors and mistakes not detected earlier. Our subcommittee has begun the markup process of a bill effecting the changes, and the Senate already has passed its version. I anticipate that, as experience under the new Code grows, Congress from time to time will be called upon to adjust and clarify the law as it faces the realities of dealing with actual cases.

I emphasize again that this has been a very subjective story of a comprehensive Code revision with many facets. I have limited my discussion to a few major problem areas, but they are illustrative of the general legislative process. I leave to the scholars who are wiser and more patient than I the microscopic examination of the subtleties of the many changes we have made in the law; but, to the extent that my files can generate memoranda, transcripts, or recollections to help resolve the problems that will arise under the Bankruptcy Code of 1978 in the years to come, I will be pleased to be of assistance.

The participation in the comprehensive revision of any substantial body of statutory law is an experience that every lawyer would find interesting, rewarding, and very meaningful; I am grateful for the opportunity given to me, but once in a lifetime is enough.