WORKING TO MAKE BANKRUPTCY WORK: THE FIRST HUNDRED YEARS OF THE NATIONAL CONFERENCE OF BANKRUPTCY JUDGES PART II

by

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The National Conference of Bankruptcy Judges (NCBJ) turns 100 this year. Part II focuses on the events of the second half of those first 100 years.

The NCBJ's story, as noted in Part I, is in many ways the story of bankruptcy itself, because of the vital role that the NCBJ (first called the National Association of Referees in Bankruptcy) has played in the development of that law and practice. Much of Part I recounted the NCBJ's founding, for the purposes of promoting better acquaintance and cooperation among the bankruptcy judges (then called "referees"), educating its members and others, and generally improving the practice in bankruptcy cases, as well as how the NCBJ from the start was generally successful in reaching these goals.

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Part II begins with the NCBJ's vigorous efforts to attain for its judges the judicial authority, independence, compensation, and working conditions that are commensurate with their role, by seeking Article III status under the bankruptcy reform process in the 1960s and 1970s. It relates to the opposition from Supreme Court Chief Justice Warren Burger, who went from office to office in the Senate Building at night to plead his case against Article III status for bankruptcy judges. Chief Justice Burger, after Congress passed a compromise bill that gave the bankruptcy judges fourteen-year terms, then urged President Carter, by letter sent to Camp David by helicopter, to veto the entire compromise bill. Burger failed, and the compromise bill became the 1978 Bankruptcy Code. Part II then recounts how, six years later, Chief Justice Burger through the Administrative Office of the United States Courts (AOUSC) purported to fire all of the bankruptcy judges because they were not Article III judges. The NCBJ and six bankruptcy judges who brought suit preserved the greater judicial independence that had been obtained by the 14-year terms. It tells of the successful efforts of the NCBJ in the late 1980s to further strengthen the independence of the bankruptcy judiciary by tying bankruptcy judges' salaries to those of the district judges and by obtaining statutory retirement benefits. Part II then turns to more recent and less momentous events, including the NCBJ's role in opposing or supporting more recent bankruptcy legislation. It concludes with some thoughts on the NCBJ today.

Introduction

The National Conference of Bankruptcy Judges (NCBJ) was founded in 1926, as the National Association of Referees in Bankruptcy (NARB), and is now called the NCBJ. Its founders, called bankruptcy "referees," hoped that through NARB and its annual conferences, fellowship, and a better understanding and cooperation among the referees, and improvements in bankruptcy administration, might follow.[1]

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[1] *See Official Proceedings of the First Annual Conference of the National Association of Referees in Bankruptcy held in the Book-Cadillac Hotel, Detroit, Michigan, July 9–10, 1926*, 1 J. NAT'L ASS'N REF. BANKR. 3, 6–7 (1926) [hereinafter *Official Proceedings*]; Paul H. King, *Greetings!*, 1 J. NAT'L ASS'N REF. BANKR. 1, 1 (1926); Robert Jacobvitz, *The NCBJ's Formation*, NAT'L CONF. BANKR. JUDGES (Dec. 15, 2023), https://ncbj.org/the-ncbjs-formation; Reuben G. Hunt, *The National Bankruptcy Conference*, 39 COM. L. J. 576, 576 (1934); Bruce Grohsgal, *Working to Make Bankruptcy Work: The First Hundred Years of the National Conference of Bankruptcy Judges, Part I*, 100 AM. BANKR. L. J. 1, 11 (2026).

In 1926, as now, bankruptcy cases comprised the largest part of the federal judicial docket.[2] The referees, whose tenure and compensation were insecure, knew that they had a deep knowledge of an important and specialized area of the law, though most of the Article III judiciary and the public knew little of what they did. Paul King, NARB's first President, was sure that NARB, if it was formed, would increase public respect for bankruptcy practice.[3] The motion to form a permanent organization unanimously carried.[4]

Bankruptcy Judge Russell L. Hiller would write in 1976, on the 50th Anniversary of the NCBJ (as NARB was later called), that NARB and the referees were ever "mindful of their role as judicial officers and not legislators," and early adopted a policy that the Association "take no part or active interest in initiating or opposing amendments to the Bankruptcy Act." Yet, they soon "adapted that early policy," after being denied at critical junctures their proper judicial status and a seat at the table in the development of the bankruptcy law that they applied.[5]

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[2] In 1926, 46,374 bankruptcy cases were filed in the United States, as compared with only 21,217 private civil cases filed in the district courts. *Caseloads: Bankruptcy Cases, 1899–2017*, https://www.fjc.gov/history/work-courts/caseloads-bankruptcy-cases-1899-2017; [hereinafter *Caseloads: Bankruptcy Cases*]; *Caseloads: Civil Cases, Private, 1873–2017*, FEDERAL JUDICIAL CENTER (FJC), https://www.fjc.gov/history/work-courts/caseloads-civil-cases-private-1873-2017. The bankruptcy courts continue to carry a heavy, and in most years the heaviest docket by comparison to the other federal courts. In 2024, the most recent year for which year-end data is available from the AOUSC, 517,308 bankruptcy cases were filed, as compared with 271,802 civil case filings in the district courts. *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2024*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS: DECEMBER 2024 QUARTERLY BANKRUPTCY FILINGS, https://www.uscourts.gov/sites/default/files/2025-01/bf_f2_1231.2024.pdf; *Federal Judicial Caseload Statistics 2025*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2025.

[3] *Official Proceedings*, *supra* note 1, at 6.

[4] *Id.* at 7.

[5] Russell L. Hiller, *A Conference Anniversary—Fifty Years in Retrospect*, 51 AM. BANKR. L. J. 31, 33 (1977). NARB had renamed itself the "National Conference of Referees in Bankruptcy" (NCRB) in 1965, and the "National Conference of Bankruptcy Judges" (NCBJ) in 1973, "to conform with the change of title effective October 1, 1973 upon the adoption of the new Bankruptcy Rules." *Id.* at 55; 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, 5, n.10 (2007) [hereinafter *Appointed or Anointed: Part One*]. United States Bankruptcy Judge Geraldine Mund (C.D. Cal.), as noted in Part II of this history of the NCBJ, was appointed in 1984 and presently serves on recall. She obtained her M.A. in History from California State University, Northridge, in 2007. Her excellent five-part

Part I of this article considered some of those adaptations. It recounted how NARB, dissatisfied with the pace and substance of bankruptcy reform in the early years of the Great Depression, was instrumental in forming, and its leaders also led the National Bankruptcy Conference (NBC) that drafted and steered into law the 1938 Chandler Act by which corporations and other companies could reorganize and wage earners could confirm repayment plans.[6]

Part I also told how just a few years later, in the mid-1940s, NARB survived threats to its very existence, when bankruptcy filings plummeted and the number of referees was drastically reduced.[7] A resurgent NARB, beginning in the 1950s, would strive tirelessly to elevate the judicial authority and status of the bankruptcy courts and its member referees, by their beginning to wear judicial robes and obtaining proper courtrooms in which to preside, to their being renamed "Judges."[8] In 1965, the referee-members of NARB adopted their association's revised Constitution, which in 1966 changed its name to the "National Conference of Referees in Bankruptcy" (NCRB), "as being more appropriate to its membership and objectives than the former name."[9] The referees, in the 1960s, increasingly dissatisfied with their lowly position in the federal judiciary notwithstanding the growing volume and complexity of their cases, established under their revised Constitution a standing "Committee on Referees' Status." Its purpose was to "study, report and recommend legislation designed to enlarge the jurisdiction and functions of referees, to improve salary and retirement provisions of the law, to effect a change in title more consonant to the judicial functions of the referee, and to further the ultimate establishment of an independent bankruptcy court."[10]

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article on the enactment of the Bankruptcy Code, which began with the first installment cited in this footnote, is "a slightly revised version of the thesis." *Id*. at 1, n.*. Judge Mund's sources included numerous conversations with those involved, the recordings and transcripts of which are located in the National Bankruptcy Archives at Biddle Law Library, Penn Carey Law, University of Pennsylvania.

[6] *See* Grohsgal, *supra* note 1, at 28–35.

[7] *Id.* at 37–49.

[8] *Id.* at 49–65.

[9] *Our New Name and Revised Constitution*, 40 J. NAT'L ASS'N REF. BANKR. 3, 3 (1966) [hereinafter *Our New Name*]; Robert Jacobvitz, *NARB Changes its Name*, NAT'L CONF. BANKR. JUDGES (Dec. 15, 2023), https://ncbj.org/narb-changes-its-name/.

[10] *Recommendations of the Committee on Revision of the Constitution of the Referees' Association*, 39 J. NAT'L ASS'N REF. BANKR. 93, 95 (1965). The Committee on Referees' Status was established pursuant to art. VI, § 3 of the proposed revised Constitution. *Id*. at 95. The Constitution was adopted by a favorable vote of the members present on October 26,

Part I concluded with the NCRB's successful efforts to change from "Referee" to "Judge" the very title of the referees who were its members. The NCBJ reached this goal through its involvement in the framing and adoption of the 1973 Federal Bankruptcy Rules, culminating a 13-year process.[11] The Rules made the referees "United States Bankruptcy Judges," against strong if belated opposition from some members of the Article III judiciary, including its head, Chief Justice of the Supreme Court Warren Burger.[12] The NCRB immediately, in 1973, changed its name for the second time in a decade, to the "National Conference of Bankruptcy Judges" (the NCBJ), which remains its name today.[13]

Part II picks up where Part I left off. It begins with the NCBJ's efforts to improve the bankruptcy reform legislation proposed by the 1970 Bankruptcy Reform Commission that Congress had authorized. The referees were kept off the 1970 Commission that drafted an initial reform bill which the referees viewed as lacking in several regards. The bankruptcy "referees," renamed "judges" in 1973, drafted and in 1975 had introduced in Congress their own "Judges' Bill." Much of the Judges' Bill was enacted by the 1978 Code. But the provisions which would have given the bankruptcy judges Article III status under the U.S. Constitution, including lifetime tenure, were not. Chief Justice Burger, whose dislike for the bankruptcy judges was as deep as it was inexplicable, blocked these Article III provisions for bankruptcy judges, resulting in bankruptcy judges having the 14-terms that they have today.[14]

Part II then continues with the Supreme Court's 1982 holding in *Marathon v. Northern Pipeline* that the bankruptcy judges' jurisdiction was unconstitutional because they had 14-terms instead of lifetime tenure. Congress in 1984 thought it had fixed the bankruptcy courts' jurisdictional

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1965, and became effective on November 25, 1965. *Our New Name*, *supra* note 9, at 3.

[11] An Advisory Committee for the first Federal Rules of Bankruptcy Procedure was established in 1960. The Rules were adopted in 1973. *See* Grohsgal, *supra* note 1, at 61–65.

[12] *Id.* at 65.

[13] *Id*.

[14] Chief Justice Burger's antipathy toward the referees was a puzzle. "He had little experience in the bankruptcy area—either as a lawyer or a judge." One explanation, stated by Circuit Judge Ruggero Aldisert (Third Circuit), a member of the Ad Hoc Committee appointed by Chief Justice Burger to oppose enactment of the Code, was that "he just felt that bankruptcy was a type of practice that no one liked, and it should be hidden in a corner. He just didn't like it." 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, 182 (2008) [hereinafter *Appointed or Anointed: Part Five*] (citing Mund's interview with Aldisert, March 27, 2006).

problem when it passed, and President Reagan signed the Bankruptcy Amendments and Federal Judgeship Act (BAFJA). But *after* that legislative fix, Chief Justice Burger with the Administrative Office of the United States Courts (AOUSC) in tow, summarily (and without any case before the Supreme Court or any other court) terminated the position of "U.S. Bankruptcy Judge," offered the judges the position of "special magistrate" or "consultant," and said the AOUSC would not pay the salary of any "former bankruptcy judge purporting to exercise judicial authority" under BAFJA.[15] The Chief Justice was reported to have vowed to "*teach* those paper-shufflers" and "just take 'em out of existence," saying: "I'm going to merge them with the U.S. magistrates and take them out."[16] The NCBJ, not surprisingly, was united in its opposition. Several bankruptcy judges sued and prevailed.[17] Part II concludes with a review of the NCBJ's activities since.

I. A Palace Revolt—The Judges' Bill and the 1978 Bankruptcy Code

"The only real law of history is the law of unintended consequences," Niall Ferguson has said.[18]

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[15] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333; William E. Foley, Director, Administrative Office of the United States Courts, to "All: Judges, U.S. Courts of Appeals; Judges, U.S. District Courts; *Former* Bankruptcy Judges" (emphasis added) (July 11, 1984) (on file with Nat'l Bankr. Archives, Biddle L. Libr. Univ. of Pennsylvania, Kronish, Lieb, Weiner, and Hellman LLP Bank. Judges Lawsuit files, Box 1, Folder 10) [hereinafter *Kronish Papers*].

[16] *Transcript of Interview of David Kline by Susan Imswiler*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 8 (Oct. 11, 2004) [hereinafter *Kline Transcript*] (emphasis in original), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories; *Transcript of Interview with George Paine by Susan Imswiler*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 7–8 (Oct. 11, 2004), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Paine Transcript*] ("Then the Judicial Conference and the administrative office came up with a scheme to make us consultants, rather than judges. I felt it was another chance to denigrate us.").

[17] *See, e.g.*, Lundin v. Mecham, 980 F. 2d 1450, 1456 (D.C. Cir. 1992) ("[T]he bankruptcy judges' appointments upheld in every case in which a determination was reached on the issue."); *In re* Benny, 44 B.R. 581, 598 (N.D. Cal. 1984) (upholding the bankruptcy courts' jurisdiction on both statutory and constitutional grounds), *aff'd in part, dismissed in part*, 791 F. 2d 712 (9th Cir. 1986).

[18] Ticky Fullerton, *Niall Ferguson: History's lesson is law of unintended consequences*, THE AUSTRALIAN (Nov. 7, 2018), https://www.theaustralian.com.au/business/economics/niall-ferguson-historys-lesson-is-law-of-unintended-consequences/news-story/c3f4d8624b3acd7

A case in point for the historical "law" suggested by the often hyperbolic Ferguson is Chief Justice Earl Warren and Director of AOUSC Warren Olney's asking Bankruptcy Referee Asa Herzog in 1964 to organize educational seminars for recently-appointed referees.[19] The first seminar, held on March 23–27, was held at the Gramercy Inn, Washington, D.C. The session opened with greetings from the Chief Justice, who "then departed for a court session and a meeting . . . of [the Warren Commission,] the Presidential commission investigating the assassination of President Kennedy, . . . which he chaired."[20]

The seminars that Herzog founded are today under the administration of the Federal Judicial Center (FJC) and are encouraged for newly-appointed bankruptcy judges. Bankruptcy judges often affectionately call them "baby judges' school." In the mid-to-late 1960s, the seminars were where the new referees, dubbing themselves the "young turks," expressed to one another their frustrations and aspirations. Having thus become acquainted with one another they began to work together and within NARB (soon to be renamed the NCJB) to accomplish their goals of being renamed "Judges" and being given proper judicial authority under the 1973 Rules and the 1978 Code, commensurate with their roles.[21] The seminars were where a new generation of bankruptcy referees first met and began their concerted push for change, "at government expense" as Judge Joe Lee would later say (chuckling).[22]

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[19] *Transcript of Interview of Asa Herzog by Hon. Randall J. Newsome (Bankr. N.D. Cal.)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 27–28 (Oct. 21, 1993), https://law.upenn.libguides.com /biddle_archives/nba/oralhistories [hereinafter *Herzog Transcript*]; *Warren Olney III*, WIKIPEDIA, https://en.wikipedia.org/wiki/Warren_Olney_III.

[20] Judge Joe Lee, *"How We Got the Bankruptcy Reform Act of 1978"*, *Remarks of the Honorable Joe Lee (Bankr. D. Ky.) at the National Conference of Bankruptcy Judges, San Diego, California October 2004*, *in* THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND, CELEBRATING 25 YEARS, 1979–2004, 26, 26 (Chief Judge James F. Schneider ed., Oct. 2004).

[21] *See* Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 5.

[22] *Transcript of Interview of W. Homer Drake, Jr. by Hon. Judge Paul Bonapfel (Bankr. N.D. Ga.) and Hon. Joyce Bihary (Bankr. N.D. Ga., ret.)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 15 (Jul. 28, 2014), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Drake Transcript*] ("We all went to Washington for what is now called—what do you call it, Baby Judge's school? We didn't call it that then. At the Grammercy Inn in Washington DC. It was conducted by… Asa Herzog from New York City, the Southern District of New York, who was a very outstanding, knowledgeable Bankruptcy Judge, Referee, and some of his friends."); *Transcript of Interview of Joe Lee*, PENN CAREY LAW BIDDLE LAW LIBRARY:

Bankruptcy case filings continued to rise through the 1950s and 1960s. By the mid-1960s, when Herzog's seminars kicked off, the number of new case filings had increased nearly every year for two decades, from the 1946 low of 10,196 to a record number of 171,719 in 1964.[23] And the ratio of full-time to part-time referees flipped. By 1966, there were 165 full-time referees, up nearly four-fold from 1946, and 46 part-time referees.[24]

The referees' seminars that began in 1964 were instrumental in energizing the new referees and reenergizing NARB. Bankruptcy Judge Homer Drake, who was 32 years old when he was appointed in 1964, would observe that "a lot of other young judges were appointed throughout the country," and they all went to Herzog's seminars.[25] Both Herzog and many of these new referees who attended the initial seminars would become Presidents of the NCBJ, or NCRB, which the NCBJ was called from 1965 to 1973.[26]

Herzog had been less than encouraged by the first NARB Annual Conference that he attended, in Boston in 1959. Years later, Herzog's wife, Ruth, would tell Judge Randall Newsome, who was taking Herzog's oral history, that Herzog was "very disgusted" by the Annual Conference. Herzog echoed that "there was no educational program," it "was just a general meeting for fun and games." He confirmed that people "were running around,

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ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 49 (Oct. 19–20, 2005), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Lee Transcript* (2005)] ("And then they had regional seminars. I would say that's when we started to get together, at government expense (chuckles) and visit and talk to each other three or four days, depending on the length of the seminar, and from various parts of the country . . . . So we went to—they call it baby judges' school now—but he was there. They had five of these things in Washington before the Federal Judicial Center took them over, and we had lots of regional seminars. I would say that's where we really got to know each other.").

[23] *Caseloads: Bankruptcy Cases*, *supra* note 2.

[24] Royal E. Jackson, *Trends and Developments in Bankruptcy Administration: Remarks of Royal E. Jackson, Chief, Bankruptcy Division, Administrative Office of the United States Courts, at the Annual Meeting of the National Association of Referees in Bankruptcy at Detroit, Michigan, October 25, 1965*, 40 J. NAT'L CONF. REF. BANKR. 10, 10 (1966).

[25] *Drake Transcript*, *supra* note 22, at 15.

[26] Herzog was President from 1966–1967, just before Senator Quentin Burdick convened the bankruptcy reform hearings, that would lead to enactment of the Bankruptcy Code. *NCBJ Past Presidents*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/about/ncbj-past-presidents. Herzog was the first witness at those hearings. *A Bill to Create a Commission to Study the Bankruptcy Laws of the United States: Hearings on S.J. Res. 100 Before the Subcomm. on Bankr. of the Comm. on the Judiciary,* 90th Cong., 4 (1968) (statement of Asa Herzog, July 16, 1968) [hereinafter *July 16–17, 1968 Burdick Senate Hearings*]. The "young turks" who would become Presidents of the NCRB included W. Homer Drake (1972–1973), Joe Lee (1973–1974), Robert Morton (1974–1975), and Conrad K. Cyr (1976–1977). NCBJ, *NCBJ Past Presidents*, *supra*.

basically drinking and playing with buzzers and so forth like at an Elks Convention."[27] This was notwithstanding that twenty-three pieces of bankruptcy legislation were pending in Congress, and that a "ferment" of pressure for change in the bankruptcy law had begun.[28] Herzog was going to resign from NARB, but his wife Ruth told him: "Don't resign. Change it."[29]

Asa would heed Ruth. In the years that followed, he would serve on NARB committees, including the key "Committee on Referees' Status," would write regularly for JNARB (including a recurring column, called "Bankruptcy Law—Modern Trends"), and would be elected NARB President for 1966–1967.[30] In 1981, the association, by then the NCBJ, designated Herzog "Mr. Bankruptcy," and in 1993 it gave him a Lifetime Award for Excellence in Education.[31]

Herzog may have been too serious a person to enjoy a good party. Or perhaps the 1959 Annual Conference was just too good a party. Regardless, NARB appears in 1959 not to have entirely lost its way. Nor was it flagging in its efforts to increase the status and judicial role of the referees and to obtain a seat for the referees at the table set by the federal judiciary so that the referees might be heard on issues affecting the bankruptcy cases over which they presided and were most knowledgeable. The year after Herzog's disappointing

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[27] *Herzog Transcript*, *supra* note 19, at 29. Judge Joe Lee, asked if Herzog's was "an accurate description," would say: "I suppose, yes." With "the buzzers, gags, and so forth"? "Yea." *Transcript of Interview of Joe Lee by Hon. Randall J. Newsome (Bankr. N.D. Cal)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 33 (Dec. 30, 1993) at 33, https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Lee Transcript (1993)*].

[28] Hiller, *supra* note 5, at 31, 49.

[29] *Herzog Transcript*, *supra* note 19, at 29.

[30] *See, e.g.*, Asa S. Herzog, *Failure to Satisfactorily Explain Loss of Assets or Deficiency of Assets to Meet Liabilities (Bankruptcy Act, Sec 14c(7))*, 34 J. NAT'L ASS'N REF. BANKR. 100 (1960); Asa S. Herzog, *Verification of Pleadings*, 35 J. NAT'L ASS'N REF. BANKR. 68 (1961); *News and Editorial Comment, In Appreciation of Referee Asa S. Herzog*, 36 J. NAT'L ASS'N REF. BANKR. 1, 1 (1962) (thanking Herzog for undertaking the task of preparing a 1950–1961 Index for JNARB, and noting that he also had "agreed at the solicitation of the Editor, to contribute a regular feature to the JOURNAL to be published under the title, BANKRUPTCY LAW—MODERN TRENDS," and concluding with: "The JOURNAL and its readers are much indebted to Referee Herzog."); *News and Editorial Comment, Annual Conference at San Diego a Big Success,* 39 J. NAT'L ASS'N REF. BANKR. 2, 3 (1965) [hereinafter *Annual Conference at San Diego a Big Success*] (noting appointment of Herzog to Committee on Referees' Status). The full name of the Committee was "Committee on Referees' Status (Including tenure, improvement in retirement plan and title)."

[31] Glenn Collins, *Asa Herzog, 92, Chief Judge In Bankruptcy Court, Is Dead*, NY TIMES (Jan. 25, 1996), https://www.nytimes.com/1996/01/25/business/asa-herzog-92-chief-judge-in-bankruptcy-court-is-dead.html.

experience, NARB at its 1960 Annual Conference, held in Pittsburgh, adopted two resolutions. The first noted that: the cost of living had risen considerably since 1949; the referees' last salary increase put the maximum salary at $17,500, but their salaries were $15,000; the referees were "generally recognized as judicial officers who deal with questions of considerable complexity and economic consequences; and a comparison of salaries of referees, with judges in many jurisdictions of comparable judicial responsibility indicated that referees received smaller salaries." NARB resolved, because of these factors, that the maximum yearly salary should be $20,000 for full-time referees and $10,000 for part-time referees. The second resolution stated that bankruptcy referees were recognized as judicial officers in bankruptcy matters, and because JCUS was involved in the administration of bankruptcy cases. NARB "respectfully suggested" that it might be advisable for the JCUS "to have a referee in attendance" at its conferences "to answer any questions."[32]

The seminars for newly appointed referees that the AOUSC in 1964 asked Herzog to establish were a long-time ambition of Edwin L. Covey, Chief, Bankruptcy Division, AOUSC, according to Royal E. Jackson, his successor. Covey was himself a past President of NARB before taking the job at the AOUSC.[33] Herzog concurred that the AOUSC had "been trying to get a seminar" program for bankruptcy referees "off the ground for years." AOUSC Director Warren Olney, Jackson's boss, had recommended Herzog to Chief Justice Warren, after hearing Herzog give a report on Chapter XIII to the NBC.[34] To get Herzog started, the AOUSC gave him "the names of so-called good referees in the country." Herzog "called them and told each one" that he was "helping the Chief Justice, and of course they were impressed and each one agreed to serve." That way, Herzog would say, he "got a staff of about

[32] *News and Editorial Comment*, 34 J. NAT'L ASS'N REF. BANKR. 97, 97 (1960).

[33] Asa S. Herzog, *Bankruptcy Law—Modern Trends*, 38 J. NAT'L ASS'N REF. BANKR. 85, 85 (1964); Jackson, *supra* note 24, at []. Edwin L. Covey was the President of NARB from 1941–1942. *NCBJ Past Presidents*, *supra* note 26. Immediately thereafter, Covey became Chief, Bankruptcy Division, AOUSC, from which position he retired in 1962. *Edwin Covey, Bankruptcy Unit's Chief*, WASH. POST (Dec. 4, 1978), https://www.washingtonpost.com/archive/local/1978/12/05/edwin-covey-bankruptcy-units-chief/4686b060-c374-450b-8675-56907e6a27f5/. Covey's Assistant Chief, Royal E. Jackson, was Acting Chief until 1964, when he became Chief. Jackson, on his ascension to Chief, was "hailed by the Referees in Bankruptcy among whom" he was "widely known and who had endorsed him to succeed Mr. Covey by a resolution of the Referees' Association." *News and Editorial Comment, Royal E. Jackson Appointed Chief of the Administrative Office Bankruptcy Division*, 38 J. NAT'L ASS'N REF. BANKR. 98, 98 (1964).

[34] *Herzog Transcript*, *supra* note 19, at 27; *Warren Olney III*, *supra* note 19.

ten."[35] "Forty-nine newly appointed Referees were invited to participate" at the first seminar, in 1964, "and all 49 accepted and attended all sessions." Opening remarks were made by the Chief Justice and AOUSC Director Olney.[36] JNARB published the dates for the second seminar, noting that attendees would include another twenty new referees who were expected to be appointed by then, and "approximately 15 or 20 of the senior Referees" who also would be invited.[37] The Journal of the National Association of Referees in Bankruptcy (JNARB), (now known as the "American Bankruptcy Law Journal" (ABLJ)), published much of the substantive content of the seminars for all members of NARB. It printed, in three successive issues, more than one hundred of the "Questions Presented by Participants at the Second Seminar for Referees and the Answers of the Discussion Leaders."[38] The editors "anticipated that the Referees' Seminars would become a recurring annual event and that in time all of the Referees in the country" would "have an opportunity to participate."[39]

The quality of the seminars also shaped and further professionalized the referees, especially the newly-appointed ones. Homer Drake would call Herzog "a very outstanding, knowledgeable Bankruptcy Judge, Referee," so "these young people like myself learned a lot very quickly."[40] Prominent bankruptcy professors came "to teach the judges—Vern Countryman from Harvard, Frank Kennedy of Michigan, . . . Charles Seligson from NYU," and "later Larry King from NYU."[41]

Herzog "thought very highly" of the younger referees "that were coming in." By comparison, he would call the "old batches" of existing referees "sort of hopeless. Very old timers." (He himself was sixty years old at the time.) He confirmed that the longer-serving referees often gave little

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[35] *Herzog Transcript*, *supra* note 19, at 26.

[36] Herzog, *supra* note 33, at 85.

[37] *News and Editorial Comment, Date for Second Referees' Seminar Fixed*, 38 J. NAT'L ASS'N REF. BANKR. 66, 66 (1964) [hereinafter *Date for Second Referees' Seminar Fixed*]; Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 4–5.

[38] *See, e.g.*, *Questions Presented by Participants at the Second Seminar for Referees and the Answers of the Discussion Leaders*, 40 J. NAT'L CONF. REF. BANKR. 60 (1966); *Questions Presented by Participants at the Second Seminar for Referees and the Answers of the Discussion Leaders*, 40 J. NAT'L CONF. REF. BANKR. 127 (1966); *Questions Presented by Participants at the Second Seminar for Referees and the Answers of the Discussion Leaders*, 41 J. NAT'L CONF. REF. BANKR. 32 (1967).

[39] *Date for Second Referees' Seminar Fixed*, *supra* note 37, at 66.

[40] *Drake Transcript*, *supra* note 22, at 15.

[41] *Id.* at 20.

attention to the law and did whatever was customary to do in their particular district.[42]

Many of the newer referees were motivated by their higher aspirations and deeper disappointments. Herzog thought the change began after "the salary system came in" in 1946 and intensified "when they got their robes" beginning in the 1960s.[43] Manifestly, the "use of the robe spread through" the bankruptcy courts, Drake would recall: "seven, eight of us" who had never before worn a robe. They "adopted it very quickly," and these "were just some of the things, trying to upgrade the court to a more formal atmosphere."[44]

As the majority of referees became full-time, so did "their self-awareness and interest in controlling their situation." Their caseloads and the complexity of their cases continued to increase. They went years without a salary increase. They confronted "irritating limitations" on their jurisdiction. They chafed at their six-year terms and their dependence on their personal relationships with their district judges for reappointment, and the lack of adequate facilities in which to do their jobs.[45] "We still didn't have any quarters of any kind, any offices," Drake would say.[46]

Many of them first met at the seminars, including Homer Drake from Atlanta, Joe Lee from Kentucky, Conrad Cyr from Maine, Dan Cowans from California, Bob Morton from Kansas, and Arthur Moller from Houston.[47] Significantly, "these people were instrumental," later, Drake noted, "in helping to get a new Act enacted in 1978."[48]

The revitalization of NARB which had begun in the late 1940s and 1950s was reflected in its Annual Conferences during the 1960s. The 1964 Annual Conference, in San Diego, was attended by eighty-one referees, "more than half of whom were accompanied by their wives or other members of their families, and more than 125 attorneys, trustees, accountants, credit men, auctioneers and others interested in the improvement of bankruptcy administration, a substantial number of whom were likewise accompanied by their ladies." Panelists included Harold Marsh, who President Nixon would appoint Chair of the 1970 Bankruptcy Reform Commission.[49] JNARB

[42] *Herzog Transcript*, *supra* note 19, at 29.

[43] *Id.* at 29. The referees also changed when "the rules were enacted" in 1973, Herzog added. *Id*.

[44] *Drake Transcript*, *supra* note 22, at 15.

[45] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 4–5.

[46] *Drake Transcript*, *supra* note 22, at 15.

[47] *Id.* at 20.

[48] *Id.*

[49] Lee, *supra* note 20, at 28.

described the Conference as "one of the most successful meetings yet held under the auspices of the Association. Host referees were Hon. Arline Rossi, the only woman referee at the time, and Hon. Louis M. Karp, both of San Diego."[50]

The 1965 Annual Conference was held "in Detroit, Michigan, the city in which the organization was founded in 1926." JNARB reported that the Conference reflected "the strength and vigor of the organization of referees," which would thereafter be known as the "National Conference of Referees in Bankruptcy" (NCRB). "A total of 86 referees in bankruptcy, many of whom were accompanied by their wives or other members of their families, and 141 attorneys and guests were registered." The conferees "heard a discussion" of the scope and purposes of the "Brookings Institution Study of Problems of Bankruptcy," which the JCUS had undertaken, by David Stanley, who was in charge of the Study. Professor Frank Kennedy of the University of Michigan Law School, the Reporter of the JCUS's Advisory Committee on Bankruptcy Rules, which in 1960 had begun the process of writing the first Federal Rules of Bankruptcy Procedure, spoke on "The Grant of Bankruptcy Rule Making Power."[51]

A "record number" of ninety-seven referees attended the 40th Annual Conference in 1966 in New Orleans, the first held after the change in name to NCRB.[52] Also in attendance were 126 lawyers, trustees, and other guests, and "155 wives and family members" who "accompanied the registrants." Among the guests were Royal E. Jackson, the Chief of the Bankruptcy Division of the AOUSC, and, reaching across the northern border, Roger Tassé, the Superintendent of Bankruptcy in Canada.[53] Speakers included Senior United States District Judge Richard M. Duncan, of Missouri, whose announced subject was "How to be Confirmed on Review." Judge Duncan perfunctorily reminded the referees that "the best way to be confirmed on review was to make the correct decision in the first place." Whether by design or on impulse, he then "departed from the announced subject of his address "to give his listeners valuable tips on how to procure the enactment of legislation in which they are interested." The Journal noted that Judge Duncan was "able to

[50] *Annual Conference at San Diego a Big* Success, *supra* note 30, at 2.

[51] *News and Editorial Comment, The 1965 Annual Conference*, 40 J. NAT'L CONF. REF. BANKR. 2, 2 (1966).

[52] Hiller, *supra* note 5, at 50; *News and Editorial Comment, The 1966 Annual Conference*, 41 J. NAT'L CONF. REF. BANKR. 2, 2 (1967) [hereinafter *The 1966 Annual Conference*]; Jacobvitz, *supra* note 9. At the same time, the former NARB, now NCRB, retitled its journal the "Journal of the National Conference of Referees in Bankruptcy."

[53] *The 1966 Annual Conference*, *supra* note 52, at 2.

speak with an unusual degree of authority on this subject because prior to his appointment as a federal judge he was for many years a member of the United States Congress . . . ."[54] In the same year, NCRB formed its "Committee on Referees' Status," a subject that was becoming increasingly important to the referees.[55]

Hiller would write that the 1967 Annual Conference held in Washington, D.C., was "the beginning of the modern era for the Conference," and that NCRB President Herzog "presided over a Conference which would assert itself increasingly more effectively in every sphere bearing upon bankruptcy law and administration."[56] Royal Jackson of the AOUSC would report to the membership that Herzog's "annual national seminar program for referees . . . was 'the most progressive development since the salary system was established'" and that regional seminar programs were "getting under way in many parts of the country."[57] Annual new case filings that year exceeded 200,000 for the first time, *fifteen times* the number of filings twenty years earlier.[58]

JNARB, now called the Journal of the National Conference of Referees in Bankruptcy (JNCRB), reported that the "brilliant finale of the [1967] meeting was the annual banquet," presided over by outgoing President Herzog. The speaker at the closing banquet was Senator Quentin N. Burdick (D–N.D.), who the following year would hold the first congressional hearings that would authorize the creation of a commission to reform bankruptcy law. Those hearings began the legislative process that ten years later led to enactment of the Bankruptcy Code. "A farewell dance brought the evening to a close."[59]

Congress established the FJC in 1967, three years after the seminars began.[60] The FJC would soon fold the seminars into the educational part of its mission, where they would come to be called "baby judges school."[61] Herzog

[54] *Id.*

[55] *Committees of the National Conference*, 41 J. NAT'L CONF. REF. BANKR. 4, 4 (1967).

[56] *Id.*

[57] Hiller, *supra* note 5, at 51.

[58] New case filings were 208,329 in 1967, another record high. In 1947, they were just 13,171. *Caseloads: Bankruptcy Cases, supra* note 2.

[59] *News and Editorial Comment, More About the Annual Meeting of NCRIB*, 42 J. NAT'L CONF. REF. BANKR. 2, 2 (1968) [hereinafter *More About the Annual Meeting of NCRIB*].

[60] *About the FJC*, FEDERAL JUDICIAL CENTER (FJC), https://www.fjc.gov/about. Warren Olney was instrumental in the founding of the FJC and was its first Director. *Federal Judicial Center Celebrates 50 Years: General History*, FEDERAL JUDICIAL CENTER (FJC) https://www.fjc.gov/content/327981/fjc-50th-general-history; *Warren Olney III*, *supra* note 19.

[61] *Drake Transcript*, *supra* note 22, at 15.

thought that the FJC had "horned in" on the seminars that he had established at the AOUSC's request three years previously.[62]

NCRB continued to push for change under Hiller, who succeeded Herzog as President. Committees appointed by Hiller, in addition to the long-standing "Committee on Legislation," included the recently established "Committee on Referee's Status" and the new "Committee to Seek Representation on Judicial Conference of the United States."[63] And the "young turks," many of whom had first met at the seminars, soon took leadership positions at the NCRB, NARB's new name beginning in 1966, from which platform they "expressed their hopes and expectations."[64]

A vast increase in the availability of consumer credit and of bankruptcy filings (especially by consumers), and a reenergized NCRB, soon formed a strong current that carried Congress toward substantial bankruptcy law reform beginning in the mid-1960s. The JCUS in 1965 had retained the Brookings Institution to undertake a study of the bankruptcy system, funded by the Ford Foundation.[65] At about the same time, Senator Quentin Burdick (D–N.D.) appears to have been spurred toward seeking bankruptcy reform, initially after speaking with a friend who was a Chapter X (business reorganization) trustee, who told him about the difficulties in reorganization cases that were caused by the limits on the referees' judicial authority. Senator Burdick had some familiarity with financial distress. During the Great Depression, as a young lawyer in his father's North Dakota law firm, he represented farmers facing foreclosure. He guessed that he had "acquired a social conscience during those bad days, and ever since I've had the desire to work toward bettering the living conditions of the people."[66] Judge Conrad Cyr would later concur that "some bad farm times" had interested Burdick in bankruptcy law.[67]

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[62] *Herzog Transcript*, *supra* note 19, at 28. Alfred P. Murrah was Director of the FJC in 1972. *See* Alfred P. Murrah, Director FJC, Memorandum to All Referees in Bankruptcy, May 16, 1972, enclosing "this collection of seminar papers drawn from presentations made in recent courses for Referees In Bankruptcy," Arthur N. Votolato Papers (n.d.) (on file with Nat'l Bankr. Archives, Biddle L. Libr. Univ. of Pennsylvania Box 2, Folder 8).

[63] *More About the Annual Meeting of NCRIB*, *supra* note 59, at 2.

[64] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 5 (*citing* Joe Lee's conversation with author, San Antonio, Texas, November 3, 2005).

[65] *Id.*

[66] *Quentin Burdick*, WIKIPEDIA https://en.wikipedia.org/wiki/Quentin_Burdick.

[67] *Transcript of Interview of Conrad Cyr by Hon. Randall J. Newsome (Bankr. N.D. Cal.)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 22–23 (Oct. 8, 1994), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Cy Transcript*].

Burdick respected the referees and the increasingly judicial nature of their work. The Senate in 1968 debated a bill, which did not pass, to extend the referees' terms from the six years fixed by the 1946 Referees' Salary Act to twelve years. An opponent of the bill asked Burdick: "The Senator is not trying to say that these referees all have judicial experience, is he? . . . I do not want to get personal and name any of them, but I could name some who have not had much experience." Burdick retorted, simply: "The men are experienced men."[68]

Burdick, at about the same time that he spoke with his Chapter X trustee friend, sent "a letter to every referee in the United States asking them to identify the ways the bankruptcy system would be inadequate if the country should again face a major financial setback, such as a depression."[69] The letter had "an electric effect on the referees," who encouraged Burdick to seek congressional authority for a Commission to examine and propose recommendations for revisions to the bankruptcy law. The referees voted at NCRB's 1967 Annual Conference to support the Commission's formation. The NCRB, in its quixotic quest to find harmony with the Article III judiciary and its agencies, conditioned its backing for the formation of a Commission on the "approval" of the JCUS.[70] Burdick's Senate bankruptcy hearings were held on July 16–17, 1968, and began the systematic rewriting by Congress of U.S. bankruptcy law. Unlike all prior major U.S. bankruptcy enactments, the process was not prompted by a financial panic, recession, or depression.[71]

The nation in the late 1960s was embroiled in a different kind of turmoil, though. The hearings began six months after the Tet Offensive in Vietnam undermined U.S. domestic support for the American War there, three months after the assassination of Martin Luther King, Jr., and six weeks after the assassination of presidential candidate Robert F. Kennedy.[72] Chaos broke

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[68] *News and Editorial Comment*, 42 J. NAT'L CONF. REF. BANKR. 98, 98 (1968) (citing Daily Congressional Record, June 4, 1968, p. S 6800) (Senator Quentin Burdick responding to question of Senator John J. Williams of Delaware).

[69] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 6.

[70] *Id*.

[71] Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 32 (1995).

[72] *July 16–17, 1968 Burdick Senate Hearing*s, *supra* note 26; *To Create a Commission to Study the Bankruptcy Laws of the United States, to Amend the Bankruptcy Act with respect to the Dischargeability of Debts and for Other Purposes: Hearings on* H.R. 6665 and H.R. 12250 *Before H. Subcomm. No. 4 of the Judiciary*, 91st Cong. (1969) [hereinafter *October 1, 1969 Burdick House Hearings*]; *Tet Offensive*, WIKIPEDIA, https://en.wikipedia.org/wiki/Tet_Offensive; *1968 in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/1968_in_the_United_States.

out in late-August, at the Democratic National Convention, when police charged protesters on the streets of Chicago.[73] In the November 1968 election that followed, the last U.S. third party candidate to carry a state—George Wallace—carried five, all in the Deep South, winning forty-six electoral votes.[74] And the only U.S. President to resign from office—Richard Nixon—was elected.[75]

Thirty years before, NCRB (then called NARB) had played an instrumental role in passage of the Great Depression-era 1938 Chandler Act.[76] When the Burdick Hearings began in 1968, the members of NCRB were still called "Referees" and adoption of the 1973 Rules that would rename them "Judges" was five years away.[77] Yet NCRB again played an instrumental role in the legislative process, that this time resulted in passage of the 1978 Bankruptcy Code.

The hearings convened in 1968 by Senator Burdick and the Senate Subcommittee on Bankruptcy which he chaired were aimed at forming a Commission to study and improve the nation's bankruptcy law.[78] Burdick's (and perhaps other members of Congress's) positive view of the referees expertise was reflected in the hearing witness list: seven of the twelve witnesses called by his Senate Subcommittee on July 16–17, 1968, were bankruptcy referees, including NCRB's immediate past President Asa Herzog, current President Russell L. Hiller, and future Presidents Daniel R. Cowans, Clive W. Bare, John T. Copenhaver, and Conrad K. Cyr.[79] Only one of the twelve—U.S. District Judge Edward Weinfeld (S.D.N.Y.)—was an Article III judge.[80]

Burdick introduced his first witness as the "Honorable Asa Herzog," and thanked him for interrupting his vacation.[81] Herzog urged major revisions to the bankruptcy law. The Bankruptcy Act "was written in the horse and

[73] *1968 Democratic National Convention*, WIKIPEDIA, https://en.wikipedia.org/wiki/1968_Democratic_National_Convention.

[74] *1968 United States presidential election*, WIKIPEDIA, https://en.wikipedia.org/wiki/1968_United_States_presidential_election.

[75] *Richard Nixon*, WIKIPEDIA, https://en.wikipedia.org/wiki/Richard_Nixon.

[76] Grohsgal, *supra* note 1, at 34–35.

[77] *Id.* at 49–65.

[78] *Burdick Hearings*, *supra* note 72; Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

[79] *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at iii; *Oct. 1, 1969, Burdick House Hearings*, *supra* note 72, at iii; *NCBJ Past Presidents*, *supra* note 26.

[80] Contents, *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at iii.

[81] Lawrence P. King, *Memorial to Asa P. Herzog*, 70 AM. J. BANKR. L. J. (ix)–(x) (1996); *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at 4–5 (statement of Asa Herzog).

buggy days" he said, and the 1960s were the "jet age." Witnesses who followed Herzog noted the apparent connection between the greater availability of credit, especially for consumers, and the increase in bankruptcy filings.[82] Some were concerned that debtors were being deprived of their fresh starts because state courts had the authority to construe and enforce (or decline to enforce) the bankruptcy courts' discharge orders.[83] Witnesses at the Burdick Hearings also spoke of the need to strengthen and better fund the bankruptcy courts and to relieve the referees of many of their non-judicial administrative burdens.[84]

Establishing a strictly judicial role for the referees and giving them the resources and authority with which to accomplish it, was a major issue. By the 1960s, the judicial function of the bankruptcy courts had materially increased, with no commensurate reduction of the referees' non-judicial administrative workload. Jacob Dim, a Minnesota referee, testified at Burdick's Senate hearings that the bankruptcy court tried "more lawsuits in practically every field of law than any other court in the country." The referees did this work, Dim said, with "neither a bailiff to keep law, order, and decorum, nor a law clerk to aid in research in matters as complex as any tried in the Nation, nor attached court reporters for the reporting and transcription of its proceedings," all of whom were "necessary personnel."[85] The bankruptcy courts, Dim asserted, lacked the "administrative machinery to keep pace with the expanding economy of the future and the periodic recessions which may follow in its wake."[86] Dim was not alone in emphasizing the ever-expanding judicial role of the referees. Roy E. Willy, a Sioux Falls, South Dakota lawyer who had served for many years as a part-time Bankruptcy Referee, submitted

[82] *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at 20 (statement of Clive W. Bare); *id.* at 76 (statement of Leslie Dix); *id.* at 90 (statement of John T. Copenhaver).

[83] *See, e.g.*, *July 16–17, 1968 Senate Burdick Hearings*, *supra* note 26, at 22 (statement of Clive W. Bare).

[84] *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at 30 (statement of Jacob Dim). Referee Joseph Kaiser, Maryland's first full-time referee, who did not testify at the Burdick hearings, would later say that for consumer cases, a "substantial part" of his work (and likely for most of his fellow referees) included examining "consumer bankrupts, reviewing their schedules and carefully taking notes of their testimony, on a daily basis, . . . day after day"—work done today by chapter 7 and standing chapter 13 trustees. Michael J. Schwarz, *From the Perspective of the Early 1960s: An Aging Maryland Bankruptcy Lawyer Reflects on the Beginning of His Bankruptcy Act Practice and on Joseph O. Kaiser*, *in* THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND, CELEBRATING 25 YEARS, 1979–2004, 15, 22 (Chief Judge James F. Schneider ed., 2004).

[85] *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 26, at 30 (statement of Jacob Dim).

[86] *Id.* at 29.

a statement at the request of the Legislative Committee of NCRB which posited that the "'Referee' under our Bankruptcy Act performs the functions of a judge and as such should carry the appropriate title." The title "Referee" was "a complete misnomer, Willy asserted, and should be entirely eliminated." The new bankruptcy judges also should be given "complete jurisdiction," he said, and contempt powers by which to enforce their own orders.[87]

Whether the bankruptcy judiciary should be called "Referees" or "Judges" was becoming a flashpoint to NCRB and its members.[88] Shortly after the October 1, 1969, House hearing which considered whether a Bankruptcy Reform Commission should be appointed, Asa Herzog published in Judicature an article titled *The Referee in Bankruptcy: A Judge in Search of a Name*. The article was republished in the CLL's Commercial Law Journal in 1970, and again later that year in JNCRB.[89]

"The referee is no longer a special master to hear and report," Herzog wrote. "The referee *is* the court."[90] The 1938 Chandler Act, he explained, had made the referee a judicial officer. The referee took the same oath of office as did the other federal judges, the case law upheld the referee's judicial status, and the reference by the district court to the referee of most bankruptcy cases was automatic. The referee tried disputed issues and entered final orders. While the 1938 Chandler Act and the 1946 Referees' Salary Act had increased the judicial work of the referees and had reduced their numbers, those Acts had done little to lessen their preexisting non-judicial administrative burdens. But the "many administrative duties imposed upon him" had become "secondary to his enlarged judicial role."[91]

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[87] *Oct. 1, 1969, Burdick House Hearings*, *supra* note 72, at 82 (statement of Roy E. Willy).

[88] *Our New Name and Revised Constitution*, 40 J. NAT'L REF. BANKR. 3, 3 (1966).

[89] Asa S. Herzog, *The Referee in Bankruptcy: A Judge in Search of a Name*, 75 COM. L. J. 37 (1970); Asa S. Herzog, *The Referee in Bankruptcy: A Judge in Search of a Name*, 44 J. CONF. ASS'N REF. BANKR. 39 (1970); *October 1, 1969, Burdick House Hearings*, *supra* note 72.

[90] Herzog, *supra* note 89, at 40 (emphasis in original). *See* Grohsgal, *supra* note 1, at 55.

[91] Herzog, *supra* note 89, at 40. The referee's administrative tasks under the Bankruptcy Act included, among other things: examining the bankrupt's schedules of property and lists of creditors (and requiring amendments if necessary or preparing the schedules and lists if the bankrupt had failed to do so); giving notices to creditors as provided by the Act; furnishing information to interested parties; transmitting records in contested matters, of evidence and findings to the district judge; declaring dividends (distributions) and preparing dividend sheets for the trustees that showed the dividends declared and to whom they were payable; and keeping and transmitting to the district court clerk, at the conclusion of the case, the docket and other records. Prudence Beatty Abram & Andrew DeNatale, *From Referee in*

The referees' judicial role likely was more pronounced in large cities, but it was expanding even in less urban jurisdictions. Conrad Cyr would recall that when in 1961 he "went in" in Maine as a part-time referee (who became full-time the following year), the "judicial" part of his job was only about 5% of what he was doing. By the late 1970s, said Cyr, it was "well over half," adding that: "You just yearned for something." Cyr also would proudly call the bankruptcy judiciary's roles in the adoption of the Rules and enactment of the Bankruptcy Code in the 1960s and 1970s, against strong opposition from much of the Article III judiciary, a "palace revolt."[92]

Both the AOUSC and NCRB tried to quantify the increasing judicial role and administrative burdens of the referees. A November 1970 questionnaire sent by the AOUSC to about one-third of referees asked them to describe the extent to which their activities were judicial as compared with administrative. "Administrative Activities of the Referee" included: "Review of trustees' periodic reports" and "Reconciliation of trustees' reports with bank statements." The AOUSC's letter made clear, though, that the survey's purpose was to determine how many full-time and part-time referees were needed, rather than to reduce the referees' non-judicial, administrative tasks.[93] Also in 1970, Homer Drake, Chair of NCRB's Committee on Referees' Status, sent a questionnaire to NCRB members, which focused on whether the referees were viewed as and appeared as judges. The survey asked, first: (1) what title was "used by members of the local Bar and Court personnel when addressing the Referee in Bankruptcy?" Referee Arthur Votolato, Rhode Island's sole bankruptcy referee, responded that 75% of the members of the local bar and court personnel already addressed him as "Judge," while just 25% called him "Referee." The second question was whether: (2) the referee wore a robe "to conduct Courtroom proceedings." Votolato said: "No."[94]

The question of who should be on the Bankruptcy Reform Commission which Congress, following the Burdick Hearings, authorized in 1970 was a matter of some debate and ultimately, for the referees, disappointment. Most witnesses at the Burdick Hearings had urged that the referees be included. The only Article III Judge to testify at the Burdick

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Bankruptcy to Bankruptcy Judge: A Century of Change in the Second Circuit, *in* THE DEVELOPMENT OF BANKRUPTCY & REORGANIZATION LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES at 74–75 (Matthew Bender, 1995); Bankruptcy Act of 1898, Pub. L. No. 55-541, § 39, 30 Stat. 544; Grohsgal, *supra* note 1, at 23.

[92] *Cyr Transcript*, *supra* note 67, at 20, 26–28.

[93] The survey was attached as Exhibit A to a November 12, 1970, Letter from Berkeley Wright at the AOUSC to the referees. Arthur N. Votolato Papers, *supra* note 62, at Folder 15.

[94] *Id.*

Hearings, U.S. District Judge Weinfeld, thought otherwise. Burdick asked Weinfeld whether the referees, who were "very close to the nuts and bolts" of bankruptcy proceedings, might be "very helpful to the commission?" Judge Weinfeld responded with a categorical "no." At "no point" did he want to be understood as suggesting that their views should not be solicited, "but putting them on the Commission" was "another thing entirely."[95]

A Joint Resolution was adopted by Congress in 1970 to establish a "Commission on the Bankruptcy Laws of the United States." The primary reasons were: the 1,000% (tenfold) increase in bankruptcy filings since 1950; the rapid expansion of credit; concerns regarding the administration of bankruptcy cases; and that the government and the commercial community had little experience or understanding about what might be needed.[96]

The Joint Resolution authorized a Bankruptcy Reform Commission with nine members. Appointment was by the President (three members, including the Chair), the President of the Senate (two members), the Speaker of the House (two members), and the Chief Justice of the Supreme Court (two members). It provided that "[r]eferees in bankruptcy and any other employees of the Federal Government who are members of the Commission shall serve without additional compensation," contemplating the possible appointment to the Commission of one or more bankruptcy referees.[97]

NCRB strenuously sought representation on the Bankruptcy Reform Commission: first from Chief Justice Burger (who, as always, ignored its requests); and then from the bankruptcy advisory committees of the AOUSC and the JCUS. It was repeatedly rebuffed.[98] Joe Lee would recall that Senator Burdick's proposed Joint Resolution would have *required* the appointment of two referees as Commissioners. Burger, the AOUSC, and Judge Weinfeld nixed it.[99] Homer Drake stated:

> The Senate resolution called for the Chief Justice to give precedence to those that knew something about bankruptcy law, namely

[95] *July 16–17, 1968 Burdick Senate Hearings*, *supra* note 72, at 64 (statement of Edward Weinfeld).

[96] Senate Joint Resolution No. 88, Pub. L. No. 91–354, 84 Stat., preamble (1970) [hereinafter 1970 Joint Resolution].

[97] *Id.* § 2(a), (d).

[98] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 9–11.

[99] *Lee Transcript* (1993), *supra* note 27, at 33; Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 7, 8, n. 22 (citing Congress, Senate, Senator Burdick speaking for Creation of a Commission to Study the Bankruptcy Laws of the United States, S. J. Res. 88, 91st Cong., 2nd Sess., *Congressional Record* 116, pt. 18 (15 July 1970): 24436).

> Referees in Bankruptcy. The House, on the other hand, passed a resolution that did not require the Chief Justice to appoint Referees in Bankruptcy, which he was steadfastly opposed to doing anyway.[100]

Senator Burdick appears to have agreed to the revised text of the Joint Resolution while making "it clear that the Senate expected Chief Justice Burger to appoint 'two active full-time referees in bankruptcy.'" Chief Justice Burger "ignored this directive," appointing instead the referees' nemesis, Judge Weinfeld (S.D.N.Y.), and District Judge Hubert Will (N.D. Ill.) as the judiciary's representatives on the Commission.[101]

Concurrently, NCRB was bifurcating its Journal, which it had published since its 1926 founding. One part, called the "American Bankruptcy Law Journal" (ABLJ), would be a proper law review, containing articles of scholarly and practical interest, book reviews, and case notes. Its pages would no longer include the accounts of the Annual Conferences, reports from committees and officers or of the other business of the Association, or the bankruptcy news of the day. The second part, a conference newsletter that would be circulated to members but not published, would serve these purposes.[102]

The "The Silver Whistle" was the first iteration of the conference newsletter. It was edited by the thirty-three-year-old Alabama-born Referee David Kahn (N.D. Ga.) at the request of the sixty-six-year-old Asa Herzog. The first issue was sent to members in November 1970.[103]

[100] *Drake Transcript*, *supra* note 22, at 21.

[101] Frank R. Kennedy, *The Report of the Bankruptcy Commission*, 49 IND. L.J. 422, 422 n.2 (1974). Bankruptcy Judge Asa Herzog, for whom District Judge Edward Weinfeld had worked as an associate in the same law firm, would say that Weinfeld "didn't have much respect for the referees in the country, I'll tell you that." Asked "why," Herzog said: "I never knew. I never could figure it out. We were such good friends, good friends after I was appointed, visited him, he visited me, never could understand. He must have had a bad experience along the way with some referees, something. He stood in the way of their getting increases in salary and he stood in the way of any improvement in their status." *Herzog Transcript*, *supra* note 19, at 22.

[102] *See* Grohsgal, *supra* note 1, at 63.

[103] Kahn was born in 1936, in Mountain Brook, Alabama. *Transcript of Interview of David Kahn by Hon. Randall J. Newsome (Bankr. N.D. Cal)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 1 (Apr. 13, 1994), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Kahn Transcript*]. Herzog was born in Brooklyn, New York on November 22, l903. *Herzog Transcript*, *supra* note 19, at 1. Kahn, in his oral history, said that Herzog asked

Bankruptcy Referee (and later Bankruptcy Judge) A. David Kahn (N.D. Ga.), Editor of the only three issues of "The Silver Whistle" (left, in 1971), and Bankruptcy Judge Catherine Peek McEwen (M.D. Fla.) (right, in 2015), which image accompanied her articles about "The Silver Whistle" in the NCBJ Conference News beginning in 2015[104]

Kahn chose a light tone for "The Silver Whistle," which might not have been the best choice given Herzog's involvement. "Dear Colleague," he wrote, "DO NOT THROW THIS AWAY, YET, it is not a major medical advertisement from the American Bar Association."[105] Kahn told his colleagues:

> Your Journal will no longer come to you in the familiar form. A fine Law quarterly (American Bankruptcy Law Journal) edited by that scholar from Maine, Conrad K. Cyr, who was educated at the Trade-School in New Haven. (I am

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him "to publish something just to try to get interest up." *Kahn Transcript*, *supra* note 103, at 38. The ABLJ's tribute to Kahn on his passing said that Kahn would be remembered for his wonderful sense of humor, and for "his fierce dedication to the fellowship and camaraderie of the bankruptcy conference." Rebecca E. Bruck, *A Tribute to the Honorable A. David Kahn—December 21, 1936–March 19, 2002*, 19 BANKR. DEV. J. 1, 1 (2002).

[104] NCBJ, THE SILVER WHISTLE, November 1970 (on file with Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 1); Catherine Peek McEwen, *The Silver Whistle, Or, What's Past Is Prologue*, NCBJ CONF. NEWS, Winter 2015, 1, 16 [hereinafter NCBJ CONF. NEWS].

[105] NCBJ, THE SILVER WHISTLE, *supra* note 104.

> confident that he will overcome this handicap.) Additionally, you will also get, gratis, each month, a stimulating, witty, and hopefully informative letter from yours truly.[106]

Kahn asked his colleagues for information of a non-legal nature that they considered newsworthy, "appointments, retirements, bar mitzvahs, etc." He noted that because of what was "laughingly called a budget," space was somewhat limited. A well-known-at-the-time muckraking journalist, Jack Anderson, wrote a widely syndicated column called the Washington Merry-Go-Round.[107] Kahn quipped that Anderson and he would "also try to keep you all informed as to what is happening on the Washington Merry-Go-Round which would be of particular interest to our profession."[108]

Kahn's account of the 1970 Annual Conference, held in Ottawa, Canada, began with: "Ottaway convention was a smashing success." Kahn took the "opportunity to thank our Canadian brothers for their 'Northern hospitality.'"[109] He observed that, though their caseloads were "somewhat less than ours," "propinquity and osmosis" would "surely close this gap."[110] The

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[106] *Id*. Judge Conrad C. Cyr graduated from Yale Law and Kahn from Emory Law. *Conrad K. Cyr*, WIKIPEDIA, https://en.wikipedia.org/wiki/Conrad_K._Cyr; Rebecca E. Bruck, *A Tribute to the Honorable A. David Kahn*, 19 BANKR. DEV. J. 1, 1 (2002).

[107] NCBJ, THE SILVER WHISTLE, *supra* note 104.

[108] *Id.* The reference is to the muckraker Jack Anderson's widely-syndicated column, the "Washington Merry-Go-Round." *Jack Anderson (columnist)*, WIKIPEDIA, https: //en.wikipedia.org/wiki/Jack_Anderson_(columnist). Jack Anderson never wrote a word for Kahn's "The Silver Whistle."

[109] NCBJ, THE SILVER WHISTLE, *supra* note 104. My friend Charles A. Simon in Toronto, of the Ontario bar, kindly inquired of his brother-in-law, Norman Lieff who lives in Ottawa, about this apparently intentional mispronunciation of the capital of Canada, and offered this explanation: "'Outaouais' is a region (like a county) that incorporates the Ottawa/Gatineau area. The pronunciation of 'Outaouais' would be pretty much the same as 'Ottaway' so if you just heard the word and did not speak French then that's how you would spell it." Charles Simon also has the distinction of having worked as a young lawyer at Borden & Elliot with Geoffrey B. Morawetz, an eminent restructuring and insolvency lawyer, and Chief Justice of the Superior Court of Justice in Ontario from July 1, 2019, until his retirement earlier this year. Another explanation for the "Ottaway" reference came from the southerner Kahn himself, who apologized for his "error," while seizing upon the opportunity to quip again: "'Ottaway' is not southern for Ottawa. I hope my proof reading improves . . . (It's up to 80 Proof now.))." Catherine Peek McEwen, *The Silver Whistle: Short, and Short-Lived, The Real Silver Whistle Bit To Entertaining?*, NCBJ CONF.NEWS, Winter 2017, at 24, 25.

[110] The 1970 Ottawa Annual Conference was the first held outside of the United States. The 1969 San Juan, Puerto Rico Annual Conference was the first and only held in a U.S. Territory. *NCBJ Past Presidents*, *supra* note 26.

December 1970 issue of "The Silver Whistle," included news of a seminar in New York City, in which Asa Herzog was reported to have "again held forth in his usual inimitable style upon that important topic, the Dischargeability Bill."[111] "Rumor ha[d] it that Asa ha[d] become so enthusiastic over the Bill that he may even shortly handle a consumer case."[112] Kahn in his oral history later said that Herzog's staff "gave him a silver whistle with his name cut in it," photocopied it, and "sent it all over the country." "A lot of Article III judges saw it and thought it was funny."[113]

Herzog appears not to have been amused by any of it. At a conference in New Orleans in early 1971, Herzog scheduled a 7:00 a.m. board meeting. Kahn showed up at 7:15. Herzog, Kahn wrote, "would not accept my excuse of having overslept (indeed, I was just coming in from a gayla evening and had not slept at all)." And "the late and great Asa Herzog while in a fit of pique" at Kahn's "showing up 15 minutes late for a 7:00 *a.m.* board meeting in New Orleans," fired him.[114] Kahn replied: "Asa, you don't have to fire me, I quit, and I'm going to bed."[115] Kahn would later call it his "last sojourn into politics."[116] This exchange also brought an end to "The Silver Whistle," the third and last issue of which was circulated in January 1971.[117]

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[111] Kahn was undoubtedly referring to the recently enacted Dischargeability Act of 1970. Act of October 19, 1970, Pub. L. No. 91-467, 7, 84 Stat. 992. The purpose of the Dischargeability Act was to address the mischief of creditors suing discharged debtors on prepetition debts. It granted to the bankruptcy referees the jurisdiction and authority to determine issues regarding a debtor's discharge. The referees were given exclusive jurisdiction over several of the exceptions to discharge (which were similar to those set forth today in Bankruptcy Code § 523). Prior to the 1970 Dischargeability Act, discharge determinations were made by state courts *after* the bankruptcy court had entered its discharge order, on the suits of such creditors. Vern C. Countryman, *The New Dischargeability Law*, 45 AM. BANKR. L. J. 1, 25–26 (1971). The state courts "didn't exactly do this very well" and "were hostile towards bankruptcy," *Lee Transcript* (1993), *supra* note 27, at 28. NARB's referees wrote and in 1969 caused to be introduced in Congress their own "Referees' Bill" seeking to remedy the problem, as did the NBC. Countryman, *supra* note 111, at 21. The Referees' Bill turned out to be a practice run for the "Judges' Bill" that the NCBJ and the bankruptcy judges would later draft and cause to be introduced in Congress, when they were dissatisfied with the bill drafted by the 1970 Bankruptcy Commission. *See infra*, Part I.

[112] NCBJ, *The Silver Whistle*, *supra* note 104.

[113] *Kahn Transcript*, *supra* note 103, at 39.

[114] Letter from Bankruptcy Judge David Kahn (N.D. Ga.) to Bankruptcy Judge Mary D. Scott (W.D. Ark.), (Sept. 25, 1996) (on file with NCBJ Publication Records, Biddle L. Libr. Univ. of Pennsylvania, Box 005024, Folder 1).

[115] *Kahn Transcript*, *supra* note 103, at 39.

[116] *Id.*

[117] Bankruptcy Judge David Kahn (N.D. Ga.) to Bankruptcy Judge Mary D. Scott (W.D. Ark.), Sept. 25, 1996, *supra* note 114. Kahn, for all his talk, would five years later play a

Herzog likely had more on his mind than Kahn's humorous if well-intended approach to keeping the membership informed. These were serious times and there was serious work to be done by NCRB. Catherine Peek McEwen would later write that "the core group pushing for improvement to the bankruptcy system and strengthening the court" had gotten together, as Homer Drake would say, to make the bankruptcy court "a real court, separate and apart from the District Court." Most of the referees enjoyed Kahn's Silver Whistle, Drake continued. "But the newsletter didn't meet with universal acceptance in the East. Some of the older members [of the association] thought it should be of a more serious nature; in retrospect, they were right. We didn't want to create any schism in our endeavor to improve the court, so we changed it. We cut it out in the interest of unity and completely changed the format."[118]

In May 1971, NCRB began circulating the Silver Whistle's replacement, "The Conference Newsletter." It was typewritten and edited by Arthur N. Votolato (D. R.I.), who at forty was nearly as young as Kahn, but clearly understood the gravity of the job.[119]

If NCRB and its member-referees were disappointed by their being excluded from the Bankruptcy Reform Commission, they remained undeterred.[120] The Commission's Executive Director, Professor Frank R. Kennedy, solicited the referees' views through questions sent to NCRB President Seidman, and Seidman drafted answers. NCRB had formed a Liaison Committee, which Hiller a few years later would describe as "a new and vitally important special Committee, which was to be known as the 'Study Committee,' then the 'Liaison Committee' and, finally, the 'Legislative Committee.' It included at various times, Clive W. Bare, John T. Copenhaver, Jr., Daniel R. Cowans, Conrad K. Cyr, W. Homer Drake, Jr., Asa S. Herzog, Joe Lee, Arthur L. Moller, and Robert B. Morton." That group, continued Hiller, was "to bear the brunt of the burdens and responsibility for studying, developing, coordinating and implementing Conference policy in such crucial

pivotal role in the final hours before passage of the 1978 Bankruptcy Code, when fellow Atlantans Attorney General Griffin Bell and White House Counsel Robert Lipshutz telephoned him in turn to ask whether President Jimmy Carter should pocket veto or sign the bill. *See infra* notes 210–224 and accompanying text.

118 McEwen, *supra* note 109, at 24.

119 NCBJ, THE CONF. NEWS. (July 1971) (on file with National Bankruptcy Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 4); Grohsgal, *supra* note 1, at 63 (in which I incorrectly stated that Judge Votolato was 35 years old, rather than his true age of 40 at the time).

120 Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 9–11.

areas" as the promulgation of new bankruptcy rules, "correction of the inequities in the salary and tenure of bankruptcy judges, proposals for structural, procedural and substantive reform through the Commission on the Bankruptcy Laws of the United States, the drafting and support of the Judges' bill, and the supervision of Conference liaison with a multitude of professional organizations concerned with bankruptcy legislation."[121]

Robert B. Morton, NCRB Liaison Committee Chairman, wrote to his fellow referees on October 21, 1971, urging them to comment on Seidman's draft:

> The weight that will be given to our suggestions will largely depend on the number who participate in the responses. Do not hesitate to indicate contrary opinions but do comment in some way.
>
> We have long sought a consideration of our views by those who shape bankruptcy legislation. Let us not flub this, our first opportunity to be heard on what promises to be the most comprehensive overhaul of the bankruptcy system since 1898.[122]

The Commission's Chair, Harold Marsh, a Los Angeles business bankruptcy lawyer, and Professor Kennedy, were both invited speakers at the 1971 Annual Conference in Seattle.[123] The November 1971 Conference Newsletter, the successor publication to The Silver Whistle, included a letter from NCRB President Saul Seidman to the membership in which Seidman quoted Professor Kennedy's "invitation to the Conference and its members to present information and views to the Commission to assist" it in carrying out its responsibilities. The members and staff of the Commission, Kennedy continued, were "fully aware that no group of persons in the world" were "so well able to inform the Commission as to the problems that had arisen under the present system of bankruptcy administration and to make recommendations for needed changes."[124] The Commission was dependent upon assistance "from concerned organizations and knowledgeable persons, including particularly your Conference and your members."[125] Seidman added

[121] Hiller, *supra* note 5, at 55.

[122] Arthur N. Votolato Papers, *supra* note 62, at Folder 15 (Morton Letter, Oct. 21, 1971).

[123] NCBJ, THE CONF. NEWS. (May 1971) (on file with Nat'l Bankr. Archives, Biddle L. Libr. Univ. of Pennsylvania, Box 005024, Folder 4).

[124] *Id.*

[125] *Id.*

that, as the members knew, there were "powerful interests" recommending that bankruptcy administration be taken from the courts.[126] Others opposed a "grandfather clause" that would preserve the referees' tenure if a new bankruptcy court was created.[127] "In many respects we are fighting for our professional lives and we must be united in our efforts," Seidman wrote.[128] Obviously, he concluded, the collective voice of 200 NCRB members would "bear more weight than individual opinions, no matter how sophisticated."[129]

At the same time, Bob Morton of Wichita, Kansas, was appointed chair of NCRB's Liaison Committee with the Bankruptcy Commission. Morton urged NCRB's members to submit their ideas promptly for consideration by the Liaison Committee, and stressed that time was "of the essence."[130]

In 1971, the Brookings Institution issued its report (that had been commissioned in 1966), on the problems of bankruptcy.[131] The report emphasized at the outset that: "Although the quarter-century since the end of the Second World War ha[d] been characterized by general prosperity and rising incomes, it ha[d] also been a period in which the number of bankruptcies has increased dramatically—some twentyfold."[132] The authors asked, among other questions, "how the bankruptcy process work[ed]—and how well?" and: "Should the bankruptcy laws and procedures be changed?"[133]

The Brookings report was highly critical of the bankruptcy courts, based on its consideration of the practice, Joe Lee would say, in only "four, five, or six different judicial districts," though it was more likely seven.[134] It posited "growing discontent with the effectiveness of judicial administration" of bankruptcy cases.[135] It asserted that both the business and personal "bankruptcy process" was "characterized by creditor indifference, slowness, and scanty results."[136] It placed much of the blame on the assertedly cozy relationships among the district judges, the referees, and the lawyers and other

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[126] *Id*.
[127] *Id*.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] DAVID T. STANLEY & MARJORIE L. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, AND REFORM (Brookings Institution, 1971).
[132] *Id*. at vii.
[133] *Id*.
[134] *Lee Transcript*, *supra* note 22, at 60; *see* Lee, *supra* note 20, at 27; STANLEY & GIRTH, *supra* note 131, at vii.
[135] STANLEY & GIRTH, *supra* note 131, at vii.
[136] *Id*. at 146.

professionals. The bankruptcy system ran "by means of a series of mutual accommodations, exchanges of favors, and resolutions of pressures." "In short, a philosophy of 'don't rock the boat' or 'let's take care of one another' prevail[ed]." There were "few incentives in the present situation for high standards of performance, and resources for supervision and inspection [were] too scanty to achieve significant change."[137]

In Brookings' view, the bankruptcy system was "in most cases not a genuine judicial enterprise." It was instead "a large-scale example of routine administrative machinery. As such it [was] appallingly archaic and ineffective, and its location in the courts impose[d] special conditions and difficulties."[138] Brookings recommended "a completely new bankruptcy statute," and the establishment of a new, independent agency through which bankruptcy cases would be resolved.[139] The referees would be supplanted by the bankruptcy agency, though some might be employed by that agency as examiners or analysts.[140] And the federal judiciary "would be relieved of the administrative burdens of the bankruptcy system."[141]

Referee Asa Herzog and the referees thought otherwise, with the advantage of having adjudicated and administered bankruptcy cases. Herzog had written in 1969 that the 1938 Chandler Act had made the referee a judicial officer, similar to other federal judges. The case law upheld his judicial status, and the referee's "many administrative duties" had become "secondary to his enlarged judicial role."[142]

Bankruptcy Judge Joe Lee would later say that NCRB and the referees "had little input into the Brookings study," amounting to little more than Lee and Cyr "sipping tea at Brookings with Marjorie Girth, the co-author with David Stanley of the Brookings study." That "was about the extent of it."[143] "But Brookings wanted, much like the commission [report] that followed, to create a government agency to handle bankruptcy, have it handled by an administrative agency within the executive branch of government. I think we now know as a result of the *Northern Pipeline* decision," Lee imparted in

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[137] *Id*. at 164.
[138] *Id*. at 74.
[139] *Id*. at 199, 205.
[140] *Id*. at 216.
[141] *Id*. at 216–217.
[142] Herzog, *supra* note 89, at 40. *See also* Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 3 ("Over time the referees took on more of the decision-making process and a greater number became fulltime employees of the judiciary. In 1938, the Chandler Act expanded the role and status of the referees.").
[143] *Lee Transcript* (2005), *supra* note 22, at 60; Lee, *supra* note 20, at 27.

2005, "that that probably never would have worked, because an agency cannot determine controversies between third parties, which is what we do in bankruptcy."[144] David Kahn thought that Brookings was "going to change bankruptcy . . . change the whole system." Brookings proposed to take it from the judiciary, "or within the judiciary to some social security administration." Cyr, Drake, Lee, and he, in response, "spearheaded a group" "to hire Murray Drabkin, one of the great minds, a great negotiator in this world, a really first rate lawyer" to protect and further the interests of the NCRB and its member-referees.[145]

Even while NCRB was being excluded from membership on the 1970 Bankruptcy Reform Commission and was barely consulted in connection with the 1971 Brookings bankruptcy report that the JCUS had commissioned, it was engaged on a second front with the JCUS related to its members' compensation and benefits. Referee Arthur Votolato, editor of the Conference Newsletter, optimistically reported in the November 1971 issue that "the Judicial Conference ha[d] raised the maximum salary level for full-time Referees in Bankruptcy from $30,000.00 to $32,000.00."[146] In the February 1972 Conference Newsletter, he reported that a subsequent meeting with the AOUSC "was cordial and very productive." But AOUSC and the other judicial agencies, controlled by the Article III judiciary, were slow-walking the process. Final action on the salary increase was delayed by District Judge Weinfeld's request that NCRB's "position paper vis-à-vis the implications of the salary increase be submitted with sufficient copies for each member of his Bankruptcy Committee" at the JCUS (from which the referees were excluded).[147] At NCRB's directors meeting to be held that month, Votolato continued, priorities would be set as to the order of presenting these and other problems, i.e., the referees' "retirement program, libraries, publication of decisions, draperies, etc., etc." Votolato asked for any other ideas as to what should be included, hoping that the "era of 'taxation without representation' may be coming to an end!"[148]

The Bankruptcy Reform Commission commenced its public hearings on bankruptcy reform in March 1972. As early as June, 1972, NCRB

[144] *Lee Transcript* (2005), *supra* note 22, at 60.

[145] *Kahn Transcript* (2005), *supra* note 103, at 34; Bruce G. Carruthers & Terence C. Halliday, *Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act of 1986*, 74 AM. BANKR. L. J. 35, 48 (2000).

[146] NCBJ, THE CONF. NEWS (November 1971), *supra* note 124.

[147] *Id.*

[148] NCBJ, THE CONF. NEWS (February 1972) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 4).

President Saul Seidman had told the AOUSC that NCRB had been asked to prepare its own version of a new bankruptcy act to present to the Commission.[149] The JCUS responded that "the establishment of a liaison group to participate in the legislative process was against JCUS policy unless Congress requested the judiciary to comment on legislative proposals or the JCUS initiated its own suggested bills."[150] Later that year, NCRB made its only presentation to the Bankruptcy Commission from which the referees had been excluded. NCRB's witnesses, Joe Lee, Robert Morton, Conrad Cyr, and Arthur Moller, three of whom would soon become Presidents of the Conference, "discussed everything from court structure to chapter 13 individual debtor reorganization."[151] They suggested that bankruptcy matters were better handled by specialized judges and "would not do well under the control of generalist judges." And they wanted, if a new bankruptcy court was established, "to make sure that the present referees would be individually considered for merit appointment to the new court."[152]

The NCRB's Robert Morton, who had fought for three years as a Marine in the Pacific during World War II, was one of the witnesses.[153] Morton recalled a question posed to one of NCRB's witnesses: "Just what do you do?" "What is it that you do?" To Morton, the question smacked of Chief Justice Warren Burger's disparaging and "often repeated comment" that the bankruptcy referees were "just paper shufflers." Morton went back to his office and "started a movement" with help from David Kline "to put the word out all over the country for judges to give us a report on important cases that they had handled, and they did that, and the result was very impressive. Lots of dollars involved and all that." Morton called it "very rewarding" and added:[154]

> It kind of got the group's attention, and they realized that this kind of money was involved in bankruptcy. We would have a legislative committee, we would meet various places,

[149] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 12.

[150] *Id*.

[151] *Id.* at 15. All three were President after the name change to the NCBJ: Joe Lee from 1973–1974; Robert Morton from 1974–1975; and Conrad Cyr from 1976–1977. *NCBJ Past Presidents*, *supra* note 26.

[152] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 15.

[153] Lee, *supra* note 20, at 27.

[154] *Transcript of Interview of Robert Morton by Hon. Randall J. Newsome (Bankr. N.D. Cal.)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 26 (Oct. 24, 1998), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories [hereinafter *Morton Transcript*].

> Kansas City, Colorado, wherever we had the money. We had to advance our own expenses at that time. At one meeting in Kansas City we decided that we were going to have to come up with something definite, whether it would carry through to completion by way of legislation or not, we decided we had to come up with something in black and white.[155]

On July 30, 1973, the Commission transmitted its report to the President, the Chief Justice of the Supreme Court, and Congress. Its draft bill was attached.[156] By Joe Lee's account, the "Commission bought largely into the Brookings solution."[157]

NCRB held its 1973 Annual Conference in Atlanta shortly thereafter. Among the speakers at the 1973 Annual Conference was Representative Don Edwards (D–Cal.), who had introduced the Commission bill (and who, in 1974, would introduce the "Judges' bill" written by the NCRB in the House).[158] The Annual Conference "was an assembly of national leaders who would determine the destiny of the present Bankruptcy Code," including Jimmy Carter, Governor of Georgia, who in 1978, as President of the United States, would sign the Bankruptcy Code into law.

NCRB's reaction to the Commission's bill was far from positive. NCRB's Legislative Committee was "of the unanimous view that many of the Commission's major proposals, particularly the structural and consumer bankruptcy procedural proposals, were unfeasible and improvident and could be improved upon."[159]

In November 1973, Joe Lee wrote Judge Weinfeld asking for a meeting "'to discuss some of the policy matters covered by the new bankruptcy bill optimistically entitled the Bankruptcy Act of 1973.'" Lee in particular "wanted to discuss ways to improve bankruptcy administration within the judicial branch instead of the Commission's proposal of a new administrative agency in the executive branch."[160]

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155 *Morton Transcript*, *supra* note 154, at 26.

156 Report of the Comm'n on the Bankruptcy Laws of the U.S., H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. pt I at Letter of Transmittal (1973) (transmitting the 1973 Bankruptcy Commission Report).

157 Lee, *supra* note 20, at 27.

158 Hiller, *supra* note 5, at 55; Kenneth N. Klee, *Legislative History of the Bankruptcy Reform Act of 1978*, 28 DEPAUL L. REV. 941, 943 (1979).

159 Hiller, *supra* note 5, at 55.

160 Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 13, 13 n.37 (citing Joe Lee

Weinfeld responded that he would be glad to meet with Lee or "'any committee of your group.'" But he questioned "what purpose would be served since the Commission's recommendations were already pending before Congress."[161] Weinfeld added that perhaps the NCRB's views "'would best be submitted to the two committees considering the matter in Congress,'" likely thinking that nothing could come of it and providing another example of Ferguson's historical "law" of unintended consequences.[162]

"The referees jumped at Judge Weinfeld's casual invitation to deal directly with Congress."[163] NCRB "immediately set to work on the drafting of an entirely new bill—the Judges' bill—incorporating in statutory language important provisions more in keeping with the actual needs of the bankruptcy system so familiar to bankruptcy judges." Hiller described it as an "eleventh hour undertaking" of NCRB and its members, and "a monumental task which was to consume more than one year and every ounce of energy of the Legislative Committee membership," consisting of John T. Copenhaver, Jr., Conrad K. Cyr, W. Homer Drake, Jr., Joe Lee, Arthur L. Moller, and Robert B. Morton.[164] Asa Herzog "felt that he couldn't lend his name to that" because he had "a different sort of a boss," District Judge Weinfeld, "to answer to."[165] Conrad Cyr would say that Herzog had "problems back home," explaining that "Weinfeld was the chairman of the Bankruptcy Committee of the Judicial Conference, and there would be no way that there were going to be any status or other improvements" for the referees.[166]

Morton recalled that "George Treister made some contributions, and [Ronald] Trost and [Professor] Frank Kennedy of course of Michigan did a dedicated job, and then from our ranks, the league was pretty much Joe Lee and Cyr and Asa [Herzog] of course although he couldn't let his name be used openly. I hate to leave anybody out . . . ."[167] Hiller wrote that Joe Lee and NCRB Counsel Murray Drabkin "later assumed the primary responsibility for drafting the Judges' bill, with the able assistance of all other Committee colleagues." Lee, when asked if Drabkin served "as an editor," answered: "Yes, he went over my stuff. We would work until two o'clock in the

to Edward Weinfeld, 30 November 1973, letter, Weinfeld Collection).

[161] *Id*. at 13.

[162] *Id*. (citing Weinfeld to Lee, 12 December 1973 letter; *Morton Transcript*, *supra* note 154, at 26).

[163] *Id.* at 13–14.

[164] Hiller, *supra* note 5, at 56.

[165] *Morton Transcript*, *supra* note 154, at 26.

[166] *Cyr Transcript*, *supra* note 67, at 20.

[167] *Morton Transcript*, *supra* note 154, at 27.

morning, just whatever period of time. He had planes to catch and so forth, and sometimes we would work very late and make corrections, which could be corrected. Back then, we didn't have computers."[168]

Once Lee had completed his draft of the bill (in far less time than it had taken Brookings to complete its Study or the Commission to prepare its Report and draft its bill), the Conference, by now called the NCBJ, "mailed drafts to all the members of the conference, and had a meeting at a hotel at the airport in Chicago, to have it out with people who disagreed with it." There were "maybe thirty or forty bankruptcy judges there, . . . for a couple of days." And they "hashed this, and listened to everybody, and there were motions made, and some passed and some didn't," Lee would recall. "Eventually we had a bill which we submitted to Congress."[169] The Judge's bill was formally presented to the NCBJ membership at the 1974 Annual Conference in San Franscisco, at which Joe Lee presided as President, in the hotel in which General Dwight D. "Eisenhower had his headquarters for the Pacific" in World War II.[170]

The final product, a complete text of a new bankruptcy act, was introduced in Congress by Senator Burdick and Representative Edwards in 1975.[171] Hiller wrote that it "not only surprised, it astounded Commission bill proponents." It "eliminated much that was impractical, unnecessary and unworkable in the Commission bill," while also achieving for the bankruptcy judges "what had been unfairly denied them by their exclusion from Commission membership – an equal voice in the deliberative process before the Committees of Congress."[172]

The Commission bill and the Judges' bill framed the debate over what became the 1978 Bankruptcy Code. Between May of 1975 and May of 1976, Representatives Edwards and M. Caldwell Butler presided over 35 days of hearings on the two bills. Senator Burdick was similarly ambitious, holding 21 days of hearing on the Senate versions between February and November 1975. At the House and Senate hearings, several groups, including the NBC, the CLL, and the American Bankers Association, testified regarding the Commission bill and the Judges' bill, "offering new ideas."[173]

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[168] *Lee Transcript* (2005), *supra* note 22, at 79–80.
[169] *Id.* at 82.
[170] *Id.* at 81. Lee stayed in the "Eisenhower Suite. You know, the president always gets a suite." *Id*. at 82.
[171] *Id.*
[172] Hiller, *supra* note 5, at 56.
[173] Klee, *supra* note 158, at 944; H.R. REP. NO. 95–595, at 18 (1977).

At the same time, bankruptcy judges were resigning, for financial reasons, to return to practice, or retiring in such great numbers that the NCBJ's *National Conference Newsletter* in 1976 described it as an "exodus." Included were W. Homer Drake, who only three years before had served as President of the NCBJ. A "number of judges indicated that they would stay on except for financial pressures."[174]

Cyr would later say that the bankruptcy judges had "excellent communication" with Rep. Don Edwards, who shepherded the Commission's and the Judges' bill through Congress.[175] "We knew we were never going to get what we needed for our Court if we didn't put a choice up there for the House Judiciary Committee to consider, and we were by then quite active and we had some leverage in the sense of being able to influence what the structure might be like."[176]

Lee would note that "there was some conflict between the objectives of the bankruptcy judges and the objectives of the National Bankruptcy Conference," notwithstanding that he and several other NCBJ members were also members of the NBC.[177] Cyr said:

> Although there were purists on the NBC who would like to have seen an Article III Court, they didn't want to see it badly enough to jeopardize any of their substantive changes, like XI and that kind of stuff, for which I don't blame them. It was just a reality. That is what they were interested in. We were interested in the Court structure more.[178]

Cyr went on to say: "We stayed largely away from substantive matters, but we did draft a complete bill. Joe Lee was the primary distributor and architect I think you would say, and we had a competing vehicle which is what it amounted to, and basically, it served pretty well. We got an Article III structure before the House Judiciary Committee."[179] Cyr would add that, regarding the proposed new court structure, the NCBJ got more opposition from its own members than from the NBC. The Article III approval process raised concerns "about their own [job] security which is a perfectly reasonable

[174] NCBJ, *NCBJ Past Presidents*, *supra* note 26.
[175] *Cyr Transcript*, *supra* note 67, at 23–25.
[176] *Id.* at 24.
[177] *Lee Transcript* (2005), *supra* note 22, at 79.
[178] *Cyr Transcript*, *supra* note 67, at 24.
[179] *Id.*

thing, and we told them we were going to get a grandfather clause. None of us was out to commit hari-kari . . . ."[180]

Support for the Judges' bill and for Article III status for the bankruptcy judges was strongest in the House. Representative Edwards energetically supported both. Edwards would say that: once he understood the work that the bankruptcy judges did "in the courts, all the hundreds of billions of dollars" that were involved, "and the historical treatment of the bankruptcy judges and referees and the fact that the tenured judges, Article III judges, were a little snotty about and bullying about maintaining their role as bosses of the bankruptcy judges. It kind of rubbed me the wrong way."[181] Asked whether he was responsible "for actually putting in the Article III provisions" into the House bill, he responded simply: "Yes."[182]

Cyr recalled that on the eve of likely passage, he and others involved in the legislation "were in Washington and we had to fish or cut bait."[183]

> What had happened is, the best I can recall, we got an Article III bill through the House. It went over to the Senate. There were something like 7 or 8 days before Congress was going to end its session, and I think it was the end of the Congress too which meant starting from scratch the next year in January, and Don Edwards says "You know," he said "I will do whatever you want. If it means going down the pipe, I will stay with Article III if that is what you want. I owe you that." He didn't really owe us that, but then, that's the kind of guy he is.[184]

The people involved in the legislative process, Cyr continued, had "kept the Article III provision in the Judges' bill quiet." But toward the end of the congressional session, Chief Justice Burger "learned about what was in the bill on the Senate side just before it was too late for him to learn about it," and he

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[180] *Id.*

[181] *Transcript of Interview of Don Edwards by Hon. Randall J. Newsome (Bankr. N.D. Cal)*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 25 (Nov. 19, 1996), https://law.upenn.libguides.com /biddle_archives/nba/oralhistories [hereinafter *Edwards Transcript*].

[182] *Id*. at 25.

[183] *Cyr Transcript*, *supra* note 67, at 25.

[184] *Id.* at 25.

> began to take initiatives to see to it that it didn't come to pass, and that's when we had to face up to the fact that we were going to get this bill with something less than Article III or we were going to have to take our chances of getting nothing, and we ultimately settled for the 14-year term and that kind of thing hoping that we could do better in the future.[185]

David Kline was the NCBJ's President in 1977–1978, as the negotiations over the bankruptcy bills reached their end. An enacted bill was far from a foregone conclusion. The JCUS had formed an ad hoc committee, "headed up by [District] Judge Wesley Brown of Kansas, who had been appointed by the chief justice to see to it that the Bankruptcy Reform Act didn't go anyplace."[186] Notwithstanding that Judge Brown had himself served as a bankruptcy referee for four years before becoming a district judge, he "didn't like bankruptcy referees or judges very well, and as I recall he was not exactly pleased when the title changed and that kind of thing."[187]

Brown urged that the "stature and the jurisdiction of the court could be handled without any kind of sweeping legislation."[188] The NCBJ and its members took the position that, "although there was quite a little involved, we, as bankruptcy judges, only wanted two things."[189]

> We didn't care to argue about just what the act itself should have, that that was a thing that was subject to the input of many, many fine students and professors. We needed expanded jurisdiction, and also had to be in a position to enforce our own orders and be functionally independent from any other court. That was the thrust of it.[190]

"Consequently," Kline said, "we did have a rather direct confrontation in connection with that." Kline explained that he:

> had been working quite a while with Joe Lee out of Kentucky, and Conrad Cyr of Maine, and

[185] *Id.*
[186] *Kline Transcript*, *supra* note 16, at 3.
[187] *Cyr Transcript*, *supra* note 67, at 29; *Wesley E. Brown*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wesley_E._Brown.
[188] *Kline Transcript*, *supra* note 16, at 4.
[189] *Id.*
[190] *Id.*

> Bob Morton out of Kansas. They were remarkable fellows, really students of the law, including bankruptcy law. Without overemphasizing it, we were much better prepared to present the case than the judges on the Chief Justice's ad hoc committee. Chairman Judge Wesley Brown urged that as referees we just worked under delegated authority . . . . Their resistance was you don't *need* to be functionally independent. You're referees. For example, I remember Judge Brown, at one time, when our testimony indicated that we should have support staffs, including law clerks, he said, "That's why we appointed the referees." Oh, it was remarkable![191]

Chief Justice Burger was hell-bent to block the bankruptcy bill and any improvement in the status, authority, and job security of the bankruptcy judges. He harnessed the federal judicial agencies, which he headed, to achieve his goal.[192] The AOUSC was asked in early 1977 to look into whether the NCBJ's counsel, Murray Drabkin, was acting as an unregistered lobbyist.[193] Later in 1977, the AOUSC asked Peter G. McCabe, Chief, Division of Magistrates, to provide a memorandum regarding "the possibility of combining the offices of *referee* in bankruptcy and United States magistrate" (four years *after* the referees had been renamed bankruptcy judges under the 1973 Federal Rules of Bankruptcy Procedure).[194]

[191] *Id.* at 3–4.

[192] The Chief Justice of the United States is the presiding officer of the Judicial Conference of the United States (JCUS). The JCUS's members are the chief judges of the circuit courts of appeals, who are members during their terms as chief judges, and district judge representatives who are elected by majority vote of the circuit and district judges in their circuit. Bankruptcy judges are not members of the JCUS. *About the Judicial Conference of the United States*, UNITED STATES COURTS, https://www.uscourts.gov/administration-policies/governance-judicial-conference/about-judicial-conference-united-states. AOUSC is under the supervision of the JCUS. *Administrative Office of the United States Courts*, WIKIPEDIA, https://en.wikipedia.org/wiki /Administrative_Office_of_the_United_States_ Courts.

[193] Letter from William E. Foley, Director, Administrative Office of the United States, to Hon. Edward Weinfeld (March 15, 1977) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Edward Weinfeld papers, Box 2, Folder 4).

[194] Letter from Peter G. McCabe, Chief, Division of Magistrates, to JCUS Ad Hoc Committee on Bankruptcy Legislation (May 20, 1977) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Edward Weinfeld papers, Box 2, Folder 4) (emphasis

Kline described Chief Justice Burger and the Article III judiciary who opposed the legislation as "absolutely intent, but they really overplayed and overstated it. When it got right down to it, there was little question but what the act *would* pass."[195]

Chief Justice Burger's hostility was so pronounced that it was not enough for him to deny the bankruptcy judges Article III status. He tried to turn the clock back to the pre-1973 Rules referee days. Bankruptcy Judge David Kline, who was the NCBJ's President in 1977–1978, recalled that:

> when this legislation came up, and the chief justice got wind of it, he sent word over to the Federal Judicial Center, to his director and said, "You are *not* to refer to them as judges. You're to reinstate them as referees, and all the things that are submitted there, are to be changed." We had papers submitted as bankruptcy judges, and the next thing we knew, the whole thing was reversed.[196]

Kline heard on good authority that he and the leadership and membership of the NCBJ "had every right to feel threatened." Chief Justice Burger said: "'I'm gonna teach that bunch. I'm gonna merge 'em with the U.S. magistrates, and then just take 'em out of existence;'" and "'I'm going to *teach* those paper-shufflers.'" Kline would later say that he "*knew* what we were facing, and so that really gave us no option."[197]

The only big issue in the Senate, Representative Don Edwards would recall, was lifetime tenure. "My phone rang off the hook with my friends on the Federal Bench in San Jose." "Yeah, they didn't like it at all. Not one liked it. They felt very strongly about it . . . . All of the Article III judges felt that way. The bankruptcy judge didn't have a friend in the Article III judges."[198]

Chief Justice Burger went still further in his efforts. Don Edwards said:

> He was terribly against it. He came rushing over to the Senate, personally, which we resented, and he went from office to office. Yeah, I remember that . . . He walked over. It was untoward. He shouldn't have done it. Judges

added).

[195] *Kline Transcript*, *supra* note 16, at 4.

[196] *Id.* at 6.

[197] *Id.* at 8.

[198] *Edwards Transcript*, *supra* note 181, at 27.

> aren't supposed to do that, Supreme Court judges, but he did. He came over personally. He was seen in the night. He was seen there.[199]

The Commission's bill and the Judges' bill were eventually reconciled, providing for 14-year terms for the bankruptcy judges, with appointment by the President. Nonetheless, on the eve of the vote, Edwards met with Kline, Cyr, and Lee and told them: "'Well, they've beaten us. The chief justice got Strom Thurmond to cut out the retirement provision for bankruptcy judges, so you can't afford to go forward with this.'" Kline recalled responding: "'Well, Congressman, I'm just from Oklahoma, and I'm not really privy to the Washington scene, but it strikes me if they can pass this 193 pages, or whatever it is'" of the bill, then "'somewhere along the line, they'll *have* to give us retirement.'" Kline did not "'want to give them another congressional session to marshal forces, because they mean business on this.'" Then he added that, "'for whatever it's worth, if anything, I'm telling you that as president of the NCBJ we support this Act, without a retirement provision.'" Kline asked Cyr and Lee if they were "'together on that,'" and they "nodded their agreement."[200]

In fact, Kline added, he "retired on civil service, without a retirement provision," and it was not until "some ten years later when the thing was then made right. We had to get out of Dodge right then on that, or the code never would have happened, in my judgment."[201] Robert Morton, Chair of the NCBJ's Liaison Committee that had carried much of the weight for the Conference in its negotiations over the Code, would say that the biggest disappointment of his career was "when they struck down" Article III status for bankruptcy judges.[202]

The bankruptcy bill was passed by the House on February 1 and by the Senate on September 7, 1978.[203] But Chief Justice Burger and his allies among the Article III judiciary were unrelenting, even after congressional passage. The Chief Justice and the Article III judges who opposed the Code and 14-year terms for bankruptcy judges immediately turned their eyes and suasion on the White House, hoping that President Carter would save the day by vetoing the bill.

Chief Justice Burger "made no secret of his intent to seek a presidential veto." He "called Senator DeConcini [D–AZ], yelling that he was

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[199] *Id.* at 33.
[200] *Kline Transcript*, *supra* note 16, at 5.
[201] *Id*.
[202] *Morton Transcript*, *supra* note 154, at 31.
[203] Klee, *supra* note 158, at 950, 953.

irresponsible and telling him that 'I'm going to go to the president and get him to veto this.'"[204] Representative Harold Volkmer (D–MO), a member of the House Subcommittee, wrote Chief Justice Burger chiding him for not respecting the doctrine of separation of powers, saying: "If you wish to participate in the legislative process in this manner, I suggest that you consider resigning from your current post and seek a position in Congress. Your insight and experience would be invaluable to this body, and your last minute actions on pending legislation would be most appropriate."[205]

District Judge Hubert L. Will (N.D. Ill.), one of Chief Justice Burger's appointees to the Commission, sent a mailgram to President Carter on October 12, 1978, "STRONGLY URG[ING] YOU VETO THE BANKRUPTCY BILL."[206] The Article III judges who opposed the bill bemoaned that the Chief Justice had been late to the game. An October 13, 1978, memorandum, apparently from U.S. District Judge James L. Oakes (D. Vt.) to Circuit Judge Irving L. Kaufman, the Second Circuit's representative on the JCUS, stated: "It's too bad that the Chief Justice didn't get around to working on the bankruptcy bill a long time ago," calling it "another bill in a long line of bills . . . denigrat[ing] the authority of the United States District Judges."[207]

Judge Oakes on October 13 wrote to Phillip Spector, White House Associate Assistant, Office of Public Liaison, that the "outrageous bill" that passed the Congress would make bankruptcy judges "the next thing" to Article III judges and "would make them appointable directly by the President rather than accountable to the district courts and would give them contempt

[204] Mund, *Appointed or Anointed: Part Five*, *supra* note 14, at 181 (quoting "Burger Shouted at Him," *Los Angeles Times*, 7 October 1978, part I, p. 10, and "DeConcini Calls Chief Justice 'Very Irate and Rude': Senator Says Burger Tried to Intimidate Him," *The Washington Star*, 6 October 1978, A-7).

[205] Letter from Harold L. Volkmer to Warren E. Burger (5 October 1978) (on file with Klee Collection, box 4, folder 1). This was reported several days later. Nancy L. Ross, *Carter Expected to Sign Revised Bankruptcy Bill*, WASH. POST, 10 October 1978, at sec. D, p. 8.

[206] Mailgram from U.S. District Judge Hubert L. Will to President Jimmy Carter (October 12, 1978) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Edward Weinfeld papers, Box 2, Folder 3).

[207] Letter from J.L.O. (apparently U.S. District Judge James L. Oakes (D. Vt.) to IRK (apparently Circuit Judge Irving R. Kaufman (2d Cir.), Second Circuit's representative to the JCUS in 1978) (Oct. 12, 1978) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Edward Weinfeld papers, Box 2, Folder 3); *Judicial Conference of the United States: Members*, FEDERAL JUDICIAL CENTER (FJC), https://www.fjc.gov/history/administration/judicial-conference-united-states-members.

powers." It was "a terrible bill," Oakes continued, that would cost taxpayers an estimated $143 million in the first year.[208]

For all the AOUSC's concerns about asserted "lobbying" by the NCBJ's counsel Murray Drabkin, Chief Justice Burger had no compunction about writing directly to President Carter to advance his own views. The bankruptcy bill, he claimed in his October 27 letter to the President, stemmed "'from the desire of those officers who were initially appointed to office as bankruptcy referees and who serve as adjunct aides to District Judges to achieve a higher status, with virtually all but the status of 'life tenure' judges—almost like promoting all the Army's Sergeants Major to Captain rank!'"[209] Chief Justice Burger was known to refer to the National Conference of Bankruptcy Judges as "the NCBJ union."[210] David Kahn later related that Burger, who "hated us, despised us," had his "letter to President Carter, a personal letter, had it helicoptered to Camp David on the tenth day, the ninth day, he wrote all kinds of things how it was going to cost millions of dollars to run such a system, nothing wrong with the other system, and generally tearing down what the Congress had passed . . . ."[211]

The NCBJ and the bankruptcy judges were working just as hard, if not harder, to counter the Chief Justice's efforts to obtain the President's veto. The NCBJ's counsel and legislative advisor, Murray Drabkin, spoke with White House counsel Robert Lipshutz "on November 1 and received the disheartening message that the decision on the bill was still up in the air and that Lipshutz could not give assurances that it would be signed." Though there was great support for the bill, Lipshutz said, "whenever you have a 'distinguished American,'" such as Chief Justice Burger, "pointedly resisting, you have some problems."[212] Lipshutz recommended immediate action and the NCBJ took it, "making all the contacts that it could" and "urg[ing] all of the bankruptcy judges and the leadership of the Commercial Law League of America to contact their senators and have them send telegrams or call the White House to express interest in the bill."[213] It also prepared and sent

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[208] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 1(quoting Letter from Judge James L. Oakes (Second Circuit Court of Appeals) to Phillip Spector (White House Associate Assistant, Office of Public Liaison), Oct. 13, 1978).

[209] *Id.* at 2 (quoting Letter from Chief Justice Warren Burger to President Jimmy Carter, Oct. 27, 1978).

[210] *Kline Transcript*, *supra* note 16, at 6.

[211] *Kahn Transcript*, *supra* note 103, at 35.

[212] Mund, *Appointed or Anointed: Part Five*, *supra* note 14, at 189.

[213] *Id.* at 190.

position papers to Stuart Eizenstat, President Carter's Assistant for Domestic Affairs and Policy, in support of the bill.[214]

"By the middle of the afternoon" on November 1, the "NCBJ had ascertained that every staff member in the White House who held a position of responsibility for legislative comment had recommended approval of the bill, indicating that the letter of the chief justice was the only major objection, and not a well-founded one at that." Even with this support, the "critical—and maybe the decisive—voice would be that of Attorney General Griffin Bell, a confidant of President Carter and the negotiator responsible for the final version of the bill."[215]

David Kahn, the bankruptcy judge in Atlanta who seven years earlier had fallen out of Asa Herzog's favor for the jocular tone he took in the first conference newsletter, found himself at a locational fulcrum.[216] Kahn would emphasize that he "really hadn't done anything" on the bankruptcy bill until the House-Senate compromise for 14-year terms that resulted in passage. But he knew Griffin Bell, President Carter's Attorney General, who lived down the street from him in Atlanta. He also knew William B. Spann Jr., President of the ABA, who was his next door neighbor, and had already gotten Bell and Spann "behind this bankruptcy reform business" (including the ABA's earlier support for Article III status for bankruptcy judges).[217] After Chief Justice Burger helicoptered his letter to President Carter urging the President to veto the bill, Bell telephoned Kahn, saying:

> "David, I'm going out on a limb now. Is this a thing that ought to be done?"
> I said, "They studied this ten years, Judge, and we've got to change. We have an Act of l898. We haven't had an Act since l938. It's been forty years. You can imagine what has happened in forty years in the credit business. We've got to change this law. It ain't going to cost them no money."
> He says "You're going to lose your job."
> I said "Well, if that's the way the ball bounces, if it's political, it's political. It ought to be

214 *Id.*
215 *Id.*; *Griffin Bell*, WIKIPEDIA, https://en.wikipedia.org/wiki/Griffin_Bell.
216 *See supra* note 215.
217 *Kahn Transcript*, *supra* note 103, at 34.

> Article III, but it's not going to be, that's done."[218]

"Bobbie Lipschutz [Robert Lipshutz, White House counsel], called me that night," Kahn continued.[219] Lipshutz said:

> "David, I'm with the President. The President has called me, and you know he can pocket veto that bill by just not signing it . . . . I've known you for a long time, and I know you've been on the bench for a long time, what do you and Homer [Drake] think about it?" I said "Bob, it's the only game in town. We'll never get it done if we don't do it now . . . . He called the President of the United States and said OK, and that's how it got passed."[220]

Kahn added:

> It's kind of like a football game, you know you get it down to the one yard line but if you can't punch it over and that Bill would not have passed. I am convinced it would not have passed but for the local contacts in Atlanta at that time.[221]

Regardless of whether Kahn was right that all roads went through Atlanta in late 1978, President Carter's advisors and ultimately the President were not impressed by the efforts or arguments made against the Code by the Chief Justice and his allies at the end of a 10-year trip that began with the 1968 Burdick Hearings. Lipshutz would write to Carter on October 31 that:

> Insofar as I can ascertain, the only remaining opposition [to the Bankruptcy Act of 1978] is that of the Judicial Conference, 25 judges

[218] *Id.* at 35. Bell had been a judge on the Fifth Circuit Court of Appeals for fifteen years before his appointment in 1977 as U.S. Attorney General. *Griffin Bell*, WIKIPEDIA, *supra* note 215. Bell, who may have been keeping his own counsel, related to Mund that he had no memory of whether he "fully supported the bill on his own volition, was convinced by others, or was merely angry about the Burger letter, which rejected the compromise that Bell had worked out on his behalf . . . ." He nonetheless was "reasonably certain that he spoke to Carter and urged him to sign the bill." Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 193. Bell added: "But I would not have asked him to veto." *Id*. at 193, note 62.

[219] *Kahn Transcript, supra* note 103, at 35; *Robert Lipshutz*, WIKIPEDIA, https://en.wikipedia.org/wiki/Robert_Lipshutz.

[220] *Kahn Transcript*, *supra* note 103, at 35.

[221] *Id.* at 36.

> headed by the Chief Justice. It is my judgment that the principal reason for this emotional opposition is the desire of this small group, and particularly the district court judges, to retain the right of appointment of bankruptcy judges (referees), which they now have, and to have these judges continue (in the language of the Chief Justice) "to serve as adjunct aides to district judges." Every other group of persons concerned with this important subject matter has concluded that this legislation is extremely necessary because of the importance today of both consumer credit and commercial credit.[222]

And on November 4, Eizenstat and Frank White, Carter's Domestic Policy Staff Associate Director for Justice and Civil Rights, sent a memo to the President stating:

> While they [the Judicial Conference of the United States] argue strenuously that the transformation [of the bankruptcy courts] will be too costly, it seems obvious that the overriding reason for their opposition is the upgrading of the referees to judges, the removal of influence, control and jurisdiction from district judges, and a perceived diminution in the status of the district judges.[223]

Monday, November 6, was the last day on which Carter could sign the bankruptcy bill, H.R. 8200, or could pocket veto it by letting the clock run out. Carter and his family spent the day at Camp David. He sat down to work at 5:00 p.m., making "a quick series of phone calls" including to Griffin Bell and Stuart Eizenstat. He completed his calls and his work by 7:00 p.m., and signed six bills including H.R. 8200, which would become known as the Bankruptcy Code.[224]

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[222] Mund, *Appointed or Anointed: Part Five*, *supra* note 14, at 13–14; Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 2 (quoting Memorandum from Robert Lipshutz, Counsel to the President, to President Carter, Oct. 31, 1978).

[223] Memorandum from Stu Eizenstat, Assistant to the President for Domestic Affairs and Policy, and Frank White, Domestic Policy Staff Associate Director for Justice and Civil Rights, to President Carter (Nov. 4, 1978); *see also* Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 2.

[224] Mund, *Appointed or Anointed: Part Five*, *supra* note 14, at 193.

District Judge Wesley Brown, the former referee, to whom the Chief Justice had assigned the task of killing the Code, was embittered by his failure.[225] Bankruptcy Judge David Kline, who was NCBJ President during the machinations of 1978, would describe Brown as a "very fine person, but he was commissioned by the chief justice to block this legislation because he had been a former referee in bankruptcy. Brown just took that commission seriously, and it was pretty heavy."[226] Brown would later call "the passing of the 1978 Bankruptcy Reform Act . . . the biggest disappointment of my personal and professional life." He held "Kline as accountable as any one person. The time may come to where I can, but I can't go to lunch with that man."[227] Now that "shows the feeling," said Kline, and "it wasn't personal with me, we'd never had a contact in that sense, except legislatively."[228]

Representative Edwards, when asked what he would "have done differently in the substance of the '78 Code" if he had it to do all of over again, replied "only two things" that he could think of. First, he "would not have given the states as much leeway, and I don't think we did in the House bill, in exemptions." Second: "Lifetime tenure for bankruptcy judges, yeah."[229] Years later, Edwards would say that he viewed enactment of the Bankruptcy Code among his three greatest accomplishments in the House, the other two being passage of habeas corpus legislation for poorly represented criminal defendants, and a bill creating a wildlife refuge. He felt "awfully good about slipping the Bankruptcy Bill through." "I mean, I think it was a real accomplishment of [Representative] Wiggins and I and the staff and the people involved, the judges themselves, and the Bankruptcy Bar, Consumer Bar, the guys, the lawyers in San Jose representing the consumer, the little guys. They were very pleased and they have been my friends ever since."[230]

David Kline, the NCBJ's President in 1978 when the Code was enacted, would "challenge anybody in, around it, or near it, to suggest that this would *ever* have happened without the national conference . . . it wouldn't have happened. There isn't a chance on this blessed earth it would have happened without our presence. Moreover, the Congress ended up adopting a

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225 *Wesley E. Brown*, WIKIPEDIA, https://en.wikipedia.org/wiki/Wesley_E._Brown.

226 *Kline Transcript*, *supra* note 16, at 8–9.

227 If Judge Brown held a grudge, he held it for a very long time. He died in 2012 at the age of 104, at which time "he was the oldest person to serve as a federal judge in the history of the United States, actively hearing cases until approximately one month before his death." Wesley E. Brown, WIKIPEDIA, supra note 225.

228 *Kline Transcript*, *supra* note 16, at 9.

229 *Edwards Transcript*, *supra* note 181, at 30.

230 *Id.* at 34.

good part of the so-called judges' bill, as opposed to the commission bill. A good part of it was adopted pretty much as written."[231] The palace revolt had succeeded.[232]

II. Judgeships Lost and Restored – *Northern Pipeline v. Marathon* and Its Fallout

The Bankruptcy Code, signed into law by President Carter in 1978, became effective in 1979. The Code referred to the former referees as "judges" (a title formerly used in such sense only in the 1973 Bankruptcy Rules), lengthened their terms from six to fourteen years, and gave them a strictly judicial function.

Judge Barry Russell (C.D. Cal.), currently the longest-serving U.S. bankruptcy judge, reflected in 2014 that everything changed after passage of the 1978 Code: "it was like going from darkness into light. We now had vast jurisdiction." Under the old Act, "we could not do a whole lot."[233]

> We could now hear the cases from beginning to end. Larger and more complex business cases were filed. The large firms developed bankruptcy practices. We no longer had to appoint the trustees who appeared before us. The circuits became more involved. I was invited to the Ninth Circuit Judicial Conference for the first time in 1978. District judges began to think of bankruptcy judges as judges instead of referees. The change was dramatic.[234]

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[231] *Kline Transcript*, *supra* note 16, at 9–10.

[232] *See Cyr Transcript*, *supra* note 67, at 20, 28.

[233] Robert Jacobvitz, *Barry Russell, Remembrances of a Referee in Bankruptcy: Going from Darkness into Light*, NCBJ CONFERENCE NEWS, at 22, 24 (2014) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005027, Folder 2. *See also Jurisdiction: Bankruptcy,* FEDERAL JUDICIAL CENTER (FJC), https://www.fjc.gov/history work-courts/jurisdiction-bankruptcy ("Under the Bankruptcy Act of 1898, ordinary controversies related to bankrupt estates would be heard primarily in the state courts. Court-appointed trustees were required to file multiple suits in different courts in connection with a single bankruptcy and await their adjudication before being able to finalize the liquidation of an estate or reorganization of a corporation. In addition, the new act created a great deal of confusion as to which actions were to be considered summary proceedings and which were plenary suits, leading to frequent litigation to determine jurisdictional questions.").

[234] *Id.*

A lobbyist for the financial sector famously said it's "halftime," shortly after enactment of the Dodd-Frank Act that regulated the banks in response to the 2008 financial crisis. The second half contest between the banks and those who supported Dodd-Frank would feature the banks trying to convince financial regulators to water down Dodd-Frank's statutory provisions by rule-making while they also lobbied Congress to revisit and repeal parts of the act.[235]

In 1978, for Chief Justice Burger, the federal judicial agencies that he controlled, and his allies in the Article III judiciary, the contest wasn't over yet. It was halftime. And the game over the status of the bankruptcy judiciary would resume just a few years later.

The Supreme Court in 1982 in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co*. held that the jurisdictional regime enacted by the Bankruptcy Code was unconstitutional.[236] The problem was not with the appointment process: the Code initially provided for appointment of the bankruptcy judges by the President on the advice and consent of the Senate, the same procedure as for Article III judges.[237] The problem was that the bankruptcy judges lacked the other attributes of Article III judicial status required by the U.S. Constitution: lifetime tenure and salary protections, which, ironically, the Chief Justice and his allies in the judiciary had demanded be stripped from the bill passed by Congress four years earlier.[238]

Northern Pipeline was a simple case. Two months after Northern Pipeline filed its chapter 11 petition, it brought a contract claim against Marathon Pipe Line seeking damages. Marathon Pipe Line asserted that the Bankruptcy Code's jurisdictional scheme was unconstitutional and moved to dismiss. The Code, it argued, gave bankruptcy judges Article III judicial authority and jurisdiction without their actually being Article III judges, because they did not have lifetime tenure or protection against salary diminution.[239]

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[235] The "halftime" remark is attributed to Scott Talbott, the head of government affairs at the Financial Services Roundtable. Talbott said it was simple: the signing of Dodd-Frank in July 2010 "represented 'halftime' in the debate" over more stringent financial institution regulation, following which opponents would "fight a two-front war that ha[d] them trying to persuade elected officials to rethink decisions while influencing the regulators whose job it [was] to implement Dodd-Frank." Gary Rivlin, *The Billion Dollar Bank Heist,* NEWSWEEK (July 11, 2011), https://www.newsweek.com/billion-dollar-bank-heist-68427.

[236] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[237] *Id.* at 53; *see* FEDERAL JUDICIAL CENTER (FJC), *Bankruptcy Judgeships*, https://www.fjc.gov/history/judges/bankruptcy-judgeships.

[238] *See N. Pipeline Const. Co.*, 458 U.S. at 58–59.

[239] *Id.* at 56–57.

The bankruptcy court denied the motion. On appeal, the district court reversed, holding that the delegation of authority to the bankruptcy judges under the Code "to try cases which are otherwise relegated under the Constitution to Article III judges" was unconstitutional. Both Northern Pipeline and the United States took direct appeals to the Court.[240]

Justice Brennan wrote the Supreme Court's plurality opinion, in which three of his colleagues joined. The Court stated that the congressional choice to vest Article III jurisdiction to the bankruptcy courts, "after giving substantial consideration to the constitutionality of the Act, [was] of course reason to respect the congressional conclusion."[241] Ultimately, though, it was for the Court to decide whether Congress had exceeded its authority.[242]

Justice Brennan held that it had. The Code, he wrote, had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and ha[d] vested those attributes in a non-Art. III adjunct." Such a grant of jurisdiction could not be sustained as an exercise of Congress's power to create adjuncts to Article III courts."[243] Three Justices joined in Brennan's opinion. Justices Rehnquist and O'Connor concurred in the judgment, making six Justices affirming the district court's holding that the Code's jurisdictional regime was unconstitutional.[244]

Chief Justice Burger who, after all, had created the problem by blocking Article III status for the bankruptcy judges, dissented. But he would not have held the bankruptcy court's jurisdiction was constitutional. Rather, Burger suggested that the problem could be "resolved simply by providing that ancillary common-law actions, such as the one involved in these cases, be

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[240] *Id.* at 57.

[241] *Id.* at 61.

[242] *See id.* at 61–62.

[243] *Id.* at 87. The Court recognized, as the appellants argued, that a "public right" might be adjudicated by a legislative, non-Article III court. But a contract claim to augment a debtor's estate was a private, not a public right. *Id.* at 71–72. And the lack of a "limiting principle" for such judicial authority "threaten[ed] to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of 'specialized' legislative courts." *Id.* at 73. Appellants asserted also that the bankruptcy court was a mere "adjunct" to the district court, citing cases in which the Court had approved "the use of administrative agencies and magistrates as adjuncts to Art. III courts." *Id.* at 77. The Court accepted that "some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar." But "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court," which the Code had not done. *Id.* at 81.

[244] *See id.* at 89–91.

routed to the United States district court of which the bankruptcy court is an adjunct."[245]

The Court, recognizing that chaos might result, stayed its judgment until October 4, 1982, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[246] When Congress failed to act, the Court extended the stay to December 24, 1982. Then on Christmas Day, 1982, the day after the extended stay expired, and still with no legislative fix in the offing, the JCUS adopted an emergency interim rule, by which the district courts could refer bankruptcy cases to the bankruptcy courts, but could withdraw the reference of those cases at any time.[247]

The NCBJ and Chief Justice Burger, in a rematch of their 1978 contest over the proper authority and status of the bankruptcy judges, went at it again. Two bills were eventually introduced in the House. The Rodino-Fish bill would have made bankruptcy judges Article III judges, while H.R. 3257 would have vested bankruptcy jurisdiction in each district court and allowed each district court to refer the bankruptcy cases filed in its district to the district's bankruptcy judges. H.R. 3257 also removed the requirement that two bankruptcy judges would serve on the JCUS.[248]

The NCBJ and its 1983–1984 President, Hal J. Bonney, Jr. (E.D. Va), "worked tirelessly and fearlessly to promote passage of the Rodino-Fish bill" and Article III status for the bankruptcy judges.[249] Bonney wrote that the "second class status" that the bankruptcy court had "so long endured" would "continue and grow worse absent" Article III protections.[250] "The *Marathon* case," Bonney continued, "demand[ed] Article III solutions, not we."[251] The bankruptcy judges had "truly been through the mill, not just with all of this inexcusable uncertainty," but for years had "been treated as second or third class citizens, or as [Bankruptcy Judge] George Paine says, 'field hands.'"[252]

[245] *Id.* at 92 (C.J. Burger dissenting).

[246] *Id.* at 88.

[247] WIKIPEDIA, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, https://en.wikipedia.org/wiki/Northern_Pipeline_Construction_Co._v._Marathon_Pipe_Line_Co.

[248] *Bankruptcy Amendments and Federal Judgeship Act of 1984*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/bankruptcy-amendments-and-federal-judgeship-act-of-1984/.

[249] *Id.*; *NCBJ Past Presidents*, *supra* note 26.

[250] NCBJ, THE CONFERENCE NEWSLETTER, at 2 (1984) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 4).

[251] *Id.* at 3.

[252] NCBJ, THE CONFERENCE NEWSLETTER, at 1 (1984) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 4). Bonney titled his

In March, Bonney urged: "Further, it's high time to wrap up the people in your area to contact the members of Congress call some of your friends right now. Believe it! It's your future at stake. Do you want to be a field hand or a full-fledged judge?"[253]

Chief Justice Burger, the JCUS, and the AOUSC fought hard to defeat Rodino-Fish. Chief Justice Burger himself once again lobbied Congress against Article III status for bankruptcy judges, including out of concern that doing so "would dilute the prestige and quality of the Federal judiciary." In a letter to Senate majority leader Howard H. Baker Jr. and other members of Congress, the Chief Justice added that the Rodino-Fish bill would constitute "a gross misallocation of judicial resources and public funds." The AOUSC, in a further effort to subjugate the bankruptcy judges, sought inclusion in H.R. 3257 of provisions by which incumbent bankruptcy judges could be replaced by new appointments, and by which the Article III judiciary and its agencies, rather than Congress, would set bankruptcy judges' pay.[254]

Congress finally passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA). Burger won to the extent that Article III status was again denied for bankruptcy judges.[255] The Circuit Courts of Appeals would appoint the bankruptcy judges, and each district court was authorized (but not required) to refer all bankruptcy cases filed in its district to the bankruptcy court in its district. BAFJA also established the distinction between core proceedings, regarding which the bankruptcy courts could enter final judgments, and non-core proceedings, regarding which final judgments could only be entered by the district courts.[256] The NCBJ won some victories, if not Article III status for its members: bankruptcy judges under BAFJA were entitled to court clerks, law clerks, and administrative assistants, protections against removal, salaries set pursuant to the federal salary act, and improved retirement benefits.[257]

President Reagan, in his July 10, 1984, signing statement, intentionally or inadvertently hinted at things to come, by expressing his reservations regarding the bill's constitutionality. The AOUSC and the U.S. Department of Justice (DOJ), Reagan said, had informed him that the provisions in the bill seeking to continue in office all existing bankruptcy judges were "inconsistent with the appointments clause of the Constitution." Reagan added that he was

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piece: "The President's Report . . . A Tide in the Affairs of Men."

[253] *Id.*

[254] *See Bankruptcy Amendments and Federal Judgeship Act of 1984*, *supra* note 248.

[255] *See id.*

[256] *Summary: H.R.5174—98th Congress (1983–1984)*, CONGRESS.GOV.

[257] *Bankruptcy Amendments and Federal Judgeship Act of 1984*, *supra* note 248.

signing the bill "after having received assurances from the Administrative Office [AOUSC] that bankruptcy cases may be handled in the courts without reliance on those invalid provisions." At the same time, he urged Congress "immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the new bankruptcy system."[258]

Chief Justice Burger and William E. Foley, Director of the AOUSC, which reported to the JCUS over which Burger presided, were lying in wait. And the worst was yet to come, just a day later.

On that extraordinary day, July 11, 1984, Foley summarily fired all of the bankruptcy judges whose appointments Congress had just authorized. Foley informed the bankruptcy judges and the Article III judiciary of his actions in a Memorandum addressed to: "Judges, U.S. Courts of Appeals;" "Judges U.S. District Courts;" and "*Former* Bankruptcy Judges."[259]

Foley leveraged President Reagan's signing statement to fire the bankruptcy judiciary. He claimed that BAFJA, § 121, "while clearly intended by Congress retroactively to 'resurrect' or to 'restore' the grant of judicial authority vested in bankruptcy judges prior to midnight on June 27, may not be constitutionally valid." He fully recognized that "only a duly authorized court" could finally determine the matter. But he "could not ignore the inherent risk of the invalidation of judicial actions taken by bankruptcy judges acting in reliance" on the "presumed validity" of § 121.[260]

Foley, and presumably Burger's reasoning was strained, at best, based on technicalities that could not bear its weight. The 1978 Code had provided for a transition period for incumbent bankruptcy judges, which expired on March 31, 1984, or "whenever his successor takes office," during which the sitting judges would continue to act in bankruptcy matters pending the appointment of new judges. Congress had extended the March 31 date to June 27, 1984. Congress then allowed the June 27 deadline to expire without further extending it, until it did so retroactively in BAFJA.[261] Foley simply

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[258] Ronald Reagan, *Statement on Signing the Bankruptcy Amendments and Federal Judgeship Act of 1984*, UNIV. OF CAL. SANTA BARBARA: THE AM. PRES. PROJECT (July 10, 1984), https://www.presidency.ucsb.edu/documents/statement-signing-the-bankruptcy-amendments-and-federal-judgeship-act-1984.

[259] *See id*.

[260] Letter from William E. Foley to Judges of the U.S. Courts of Appeals, Judges of the U.S. District Courts, and Former Bankruptcy Judges, July 11, 1984, *Kronish Papers*, *supra* note 15.

[261] *See, e.g.*, *In re* Benny, 44 B.R. 581, 584–88 (N.D. Cal. 1984); Vern Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, The Judicial Conference, and the Legislative Process*, 22 HARV. J. ON LEG. 1, 32–33 (1985); BANKRUPTCY

closed his eyes to the term-extending clause "or whenever his successor takes office," while at the same time positing that Congress in BAFJA could not extend the June 27 extension *nunc pro tunc*. So, by Foley's thinking, the bankruptcy judges had ceased to exist on June 27, 1984, and Congress and BAFJA could not revive them.[262]

Foley and Burger doubled down. Chief Justice Burger had long dreamed of turning the bankruptcy judiciary into magistrates. It was a pet project of his. In 1977, when enactment of the Code was slowed by the debate over Article III status, the AOUSC had sought and obtained for the JCUS a memo from the Chief of the Magistrates on how to accomplish it.[263] In 1984, Foley could not "ignore" his "responsibility as 'paymaster' of the Federal judiciary." He had decided therefore, on the advice of his General Counsel, that he would "not approve payment of salary to any former bankruptcy judge purporting to exercise judicial authority" under BAFJA, §121.[264] The "former bankruptcy judges," in Foley's words, if they wanted to get paid, could instead resign their positions and sign up as "consultants" or "special magistrates," and presumably then do the same work they had done as actual bankruptcy judges.[265] Foley also referred to his June 28 memorandum

AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, Pub. L. No. 98–353, 98 Stat. 333, §§ 106(a), 121(c)–(e), 122(c) (1984).

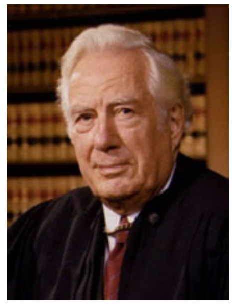
[262] Letter from William E. Foley to Judges of the U.S. Courts of Appeals, Judges of the U.S. District Courts, and Former Bankruptcy Judges, July 11, 1984, *supra* note 15.

[263] Letter from McCabe to JCUS Ad Hoc Committee on Bankruptcy Legislation, May 20, 1977, *supra* note 194. McCabe in his Memorandum ably walked the tightrope strung for him by the Chief Justice and the AOUSC. He persisted in referring to the bankruptcy judges as referees, as Burger did, though the Bankruptcy Rules had renamed them "Judges" four years earlier. He said that "[t]he two offices today [had] little in common as to the specific areas of the law in which they work," while also suggesting that the judicial skills were "identical." *Id*. at 3. McCabe acknowledged that the "present co-equal, but separate systems of referees and magistrates appear to work very well," and "[t]here may be no pressing need to change the organizational structure." Nevertheless, he added, balancing himself on the rope yet again, "this seems to be no reason why consolidation or a system of cross-assignments among magistrates and referees would not succeed. It might, in fact, produce some tangible benefits." *Id*. at 4.

[264] *Id*.

[265] *Id*. Foley had outlined his and Chief Justice Burger's plan to turn the bankruptcy judges into consultants and special magistrates in an earlier, June 28, 1984, "Memorandum to All: Chief Judges, United States Courts of Appeals; Chief Judges, United States District Courts; Circuit Executives; and District Court Executives." Notably, Foley's June 28 Memorandum was not sent to any of the bankruptcy judges or to most of the Circuit or District Court judges. William E. Foley, Director, Administrative Office of the United States, to "Memorandum to All: Chief Judges, United States Courts of Appeals; Chief Judges, United States District Courts; Circuit Executives; and District Court Executives," June 28,

(transmitted to the Chiefs and Executives of the Circuit and District Courts) in which he had authorized the district courts to appoint magistrates to hear bankruptcy matters.[266]



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

July 11, 1984

MEMORANDUM TO ALL: JUDGES, U.S. COURTS OF APPEALS
JUDGES, U.S. DISTRICT COURTS
FORMER BANKRUPTCY JUDGES

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As welcome as this enactment is, I regret that one aspect of it has framed a very serious problem, as noted by the President in his statement on signing the legislation, which is attached for your information. Section 121 of the Act, while clearly intended by Congress retroactively to "resurrect" or to "restore" the grant of judicial authority vested in bankruptcy judges prior to midnight on June 27, may not be constitutionally valid. If the purpose served by the provision is interpreted to be equivalent to a new

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I have therefore decided, upon advice of my General Counsel, and in accordance with my responsibilities under section 604 of title 28 of the United States Code, that I will not approve payment of salary to any former bankruptcy judge purporting to exercise judicial authority under the provisions contained in section 121.

U.S. Supreme Court Chief Justice Warren Burger (top)
and Excerpts from July 11, 1984 Memorandum from William E. Foley, Director, AOUSC,
to the Article III Judiciary and the *Former* Bankruptcy Judges (below)[267]

1984 [hereinafter Foley Memorandum, June 28, 1984], Kronish Papers, *supra* note 15.

[266] *Id*. at 2, referring to Foley Memorandum, June 28, 1984, *supra* note 265.

[267] *Chief Justice Warren E. Burger, Official Portrait 1986*, WIKIPEDIA, https://en.wikipedia.org/wiki/Warren_E._Burger; Excerpts from Letter from William E. Foley to Judges of the U.S. Courts of Appeals, Judges of the U.S. District Courts, and Former Bankruptcy Judges, July 11, 1984, *supra* note 15. The slanting lines in the upper-right-hand part of the first excerpted paragraph of Foley's Memorandum are from rust on a paper clip.

Burger and Foley, in a dazzling (if specious) display of legal reasoning, had sought to destroy the bankruptcy judgeships that the 1973 Federal Rules of Bankruptcy Procedure (adopted by Burger's own Supreme Court) and the 1978 Code had created, and that Congress in BAFJA had just preserved. They did this notwithstanding that there was no case or controversy before the Supreme Court or before any other federal court regarding the constitutionality of BAFJA, nor had Congress in BAFJA suggested or authorized any intervention by the AOUSC or any other judicial agency.

Bankruptcy Judge Arthur Votolato (Bankr. D. R.I.) recalled others saying at the time that the change in status sought by Foley's letter "was intended to clean out the troublemakers on the bankruptcy—in the system. The ones who had been looking for Article III status." He declined to say whose idea it was but suggested that Chief Justice Burger was behind it. "I guess, at that time, well, when the Article III dispute was at its height, that's when Chief Justice Burger pretty much took a leave of absence from the Supreme Court and went on the stump and toured the country for a year or so, lobbying everybody against Article III for bankruptcy judges."[268]

Also on July 11, Foley sent a letter to Peter W. Rodino, Jr. (D–N.J.), Chairman of the House Judiciary Committee. Rodino thought that he had just fixed the *Northern Pipeline* problem by shepherding H.R. 3257 through to enactment, albeit without Article III status for bankruptcy judges, which he had favored. Foley asserted that nothing was fixed, writing that BAFJA raised "a serious constitutional question" and proposing "emergency remedial legislation to correct the problem."[269] Foley did not attach the AOUSC's proposed legislation, but promised to "officially transmit" it when Congress reconvened on July 23.[270]

On July 12, Rodino, skipping past the messenger Foley, responded directly to Chief Justice Burger, calling Foley's July 11 letter "most disturbing." He described Foley's actions as "[c]ontrary to express sections of the new law." He referred to his previous communications to Burger and the

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[268] *Transcript of Interview with Arthur Votolato by Judge Joan Feeney*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS 1, 37–38 (Aug. 23, 2013), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories. Votolato presumably was referring the Burger's efforts in 1977–1978 to prevent Congress from making the bankruptcy judges Article III judges. Burger's nurtured his animus into the 1980s.

[269] Letter from William E. Foley, Director, Administrative Office of the United States, to Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives, July 11, 1984, Kronish Papers, *supra* note 15, Box 1, Folder 1, at 1.

[270] *Id*. at 2.

JCUS "about the separation of powers problems created by certain, albeit well-meaning, but institutionally inappropriate pronouncements" of the AOUSC.[271] Rodino called the statutory function of the AOUSC "the performance of purely clerical duties," and reminded Burger that "[u]ntil such time as they may be judicially declared invalid, legislative enactments must be followed not only by the citizens of this country, but also its public officials."[272] Rodino closed by asking Burger to assure him, since congressional investigation might follow, that "all documentation concerning the decision leading to the Administrative Office's memoranda be preserved."[273]

The NCBJ, on July 14 in a letter to Foley penned by Joe Lee, NCBJ Secretary, "protest[ed] the decision announced" in Foley's July 11 memorandum not to approve payment of the bankruptcy judges' salaries. "You and your General Counsel," wrote Lee, "appear to be acting on the erroneous assumption that the terms of all sitting bankruptcy judges expired on June 27, 1984." Lee noted that Foley had sent his June 28 memorandum authorizing district judges to appoint magistrates to handle bankruptcy matters *before* Congress and the President had enacted BAJFA. Now that Congress had spoken and the President had signed the bill, Foley's "suggesting continuation of the use of magistrates to handle bankruptcy matters border[ed] on misprison."[274]

Bankruptcy Judge Keith Lundin (M.D. Tenn.) received Foley's July 11, 1984, letter and telephoned Richard Lieb, who had been writing on the jurisdiction of the bankruptcy courts after *Northern Pipeline*. Lundin said to Lieb: "They're saying we're not going to be paid" and "we're unconstitutional. What do we do?" Lieb said: "sue the bastards." Lundin spoke with his friend and fellow Middle District of Tennessee Bankruptcy Judge George Paine, who lit up, in Lundin's words, "like the Christmas tree that he is" and said, "right on, that's just what we do." Lieb had offered to represent the judges pro bono, "unless he could get his fees from the court."[275]

[271] Letter from Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, House of Representatives, to Warren E. Burger, Chief Justice of the United States, July 12, 1984, Kronish Papers, *supra* note 15, Box 1, Folder 1, at 1.

[272] *Id.* at 2.

[273] *Id.* at 3.

[274] Letter from Joe Lee, NCBJ Secretary, to William Foley, Director, Administrative Office of the United States Courts, July 14, 1984, Kronish Papers, *supra* note 15, Box 1, Folder 2.

[275] Interview with David Houston III, Keith M. Lundin, and George C. Paine II by Catherine Peek McEwen, April 19, 2025 (on file with author). Judge McEwen's wonderful interview of Judges Houston, Lundin, and Paine, though unpublished at present, is expected

On July 17, Lieb sent a letter to Foley, stating that his firm, Kronish, Lieb, Shainswit, Weiner & Hellman represented Judge Lundin. Lundin, Lieb wrote, and more than 220 other bankruptcy judges held office by virtue of a statute enacted by Congress and approved by the President of the United States. "We find no authority for the Administrative Office or you as its Director to disregard this law under which bankruptcy judges have been authorized to act."[276] Lieb asked that Foley rescind his July 11 Memorandum by midday July 19, 1984, stressing the impending August 1 payroll date. Absent such rescission by July 19, Lieb promised to "commence appropriate litigation on behalf of our client against you to remedy this situation."[277]

Lundin and Lieb were true to their word. On the morning of Friday, July 20, 1984, Lieb and his partner, Larry Kotler, who Lundin called "one of the smartest lawyers I've ever met in my life," filed suit against AOUSC Director Foley in the District Court for the District of Columbia on behalf of his clients, six bankruptcy judges: Lundin (M.D. Tenn.); Mark B. McFeeley (D.N.M.); William L. Norton (N.D. Ga.); George C. Paine, II (M.D. Tenn.); Hugh Robinson Jr. (N.D. Ga.); and Arthur N. Votolato, Jr. (D.R.I.).[278] The complaint sought, among other things, to compel the AOUSC Director to pay bankruptcy judges and to cease his unlawful efforts to restructure the bankruptcy system by forcing bankruptcy judges to resign and accept positions as special magistrates or consultants.[279]

Paine would later say that Foley "didn't take it seriously."[280]

> Yet [continued Paine] we all came from a culture of if you need something done, and it's not done, you litigate. We were all trial lawyers,

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to be transcribed and located in the National Bankruptcy Archives, Biddle Law Library, University of Pennsylvania, at a later date.

[276] Letter from Richard Lieb, Kronish, Lieb, Shainswit, Weiner & Hellman, to William E. Foley, Director, Administrative Office of the United States Courts, July 17, 1984, at 1; Kronish Papers, *supra* note 15, Box 1, Folder 1.

[277] *Id*. at 2. United States Bankruptcy Judge George C. Paine, one of the plaintiffs in the complaint that was later filed, asserted that Foley (and presumably Burger) "didn't take it [Lundin and Lieb's promise to sue] seriously." Paine added: "[W]e all came from a culture of if you need something done, and it's not done, you litigate. We were all trial lawyers, and they weren't used to dealing with people that did this. So twenty-four hours came and went, and we sued them." *Paine Transcript*, *supra* note 16, at 8.

[278] Houston, Lundin, and Paine Interview by McEwen, *supra* note 275; *see, e.g.*, *Bankruptcy Amendments and Federal Judgeship Act of 1984*, *supra* note 248.

[279] *See BAFJA and the AO Director's Decision Not to Pay Bankruptcy Judges*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/bafja-and-the-ao-directors-decision-not-to-pay-bankruptcy-judges/.

[280] *Paine Transcript*, *supra* note 16, at 8.

> and they weren't used to dealing with people that did this. So twenty-four hours came and went, and we sued them. We ultimately prevailed, but it just dumbfounded the older judges that we would sue. It scared some bankruptcy judges to death, because they thought we were biting the hand that fed us.[281]

Judge Arthur Votolato, one of the six plaintiff-bankruptcy judges comfortable with litigating, was described on his retirement thirty years later as a "humble jurist" who, though "mild-mannered and soft-spoken," had "never been afraid of ruffling feathers."[282] Just four years earlier, he had sued the Government Services Administration (GSA) for the court facilities to which he was legally entitled as a bankruptcy judge.[283] When the GSA complied, and his case was dismissed as moot, Votolato sued to recover the $70 filing fee for the complaint. He reasoned that his suit was a service rendered on behalf of the United States Bankruptcy Court and therefore, under 28 U.S.C. § 1913, no filing fee should have been charged.[284]

Foley, later on the same July 20, 1984, date on which the judges sued him, rescinded his July 11 "no pay" memorandum. He expressed "regret" "that many bankruptcy judges apparently misunderstood his intentions, and therefore misconstrued completely" his July 11 "decision concerning payment of salary."[285] He said that "[v]irtually every bankruptcy judge" had accepted a position as a "consultant" or "special magistrate," as required by his June 28 memorandum if he or she expected to be paid.[286] Nonetheless, Foley reversed himself, saying that he would "authorize payment of salary" to those bankruptcy judges who had continued to act as such, as well those who had

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[281] *Id.*

[282] Joan Feeney, *Humble Jurists Closes Career After 44 Years!*, NCBJ CONFERENCE NEWS, 16, 16, (2013) (on file at Nat'l Bankr. Archives, Univ. of Pennsylvania, Box 005027, Folder 1).

[283] Votolato Papers, *supra* note 62, Folder 3. Judge Votolato, in his complaint filed on July 3, 1980, asserted that "according to GSA standards, plaintiff is entitled to approximately 4950 square feet of space," but "presently has only 2300 square ft.," 800 square feet of which was largely non-contiguous. His present facilities were "clearly inadequate" he averred, with insufficient seating capacity in the courtroom, no library facilities (and books "accumulating in storage"), and "no witness and/or attorney conference room facilities."

[284] *Id.*

[285] Letter from William E. Foley, Director, Administrative Office of the United States, Memorandum to All Judges of the United States, July 20, 1984, Kronish Papers, *supra* note 15,Box 1, Folder 10, at 1.

[286] *Id.* at 2.

accepted positions as consultants or special magistrates, though he would not "presume to contradict" the "managerial decisions" made by different district courts regarding whether to comply with his directive regarding the constitutionality of § 121 of BAFJA.[287]

Hal Bonney, President of the NCBJ, wrote that the Conference had labored faithfully and hard for an Article III court, but got BAFJA instead. Still, with its signing by President Reagan, the bankruptcy judges:

> anticipated that all would settle down . . . . Then, came Mr. Foley's infamous memorandum of July 11 . . . . While the peg may be found to hang any premise on, this was born out of motives which were not entirely pure. That an administrator would state he did not believe an act of Congress constitutional and, consequently, that he would act in that direction is without recallable precedent. Who has ever seen its parallel?[288]

Bonney asserted that it "would only be done where the bankruptcy court was involved" and called it "an unholy act," involving not only salary but abolition of the bankruptcy judges' very office, retirement, and continuity of service. The reason for Foley's reversal, said Bonney, was the "suit brought by six Bankruptcy judges, the outrage of Congress and the loud dissent of the nation's Bankruptcy Judges themselves."[289] The "worst ploy of all," he continued, "was to seek to shove a magistrate system down the bankruptcy system's throat." "Do keep strong," wrote Bonney. "Never sacrifice integrity. Keep active in the cause. And never lose the touch of one to another. Be kind and forgiving. Pray, for through this do we not only share our concern for others, but we have direct contact with Him who will have truth prevail."[290]

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[287] *Id.* at 3.

[288] NCBJ, NCBJ CONFERENCE NEWS, at 1 (Aug. 1984) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005024, Folder 10).

[289] *Id.*

[290] *Id.* at 2. Bonney's invocation was not written idly, for he was devout Methodist. On his retiring from the bench in 1995, he was described as "the gospel in action." He led the Wesleymen's Bible study class on a local radio station, gave "Bible-thumping Sunday school lectures," and "spreads holiday cheer by ringing jingle bells in the hallowed halls" of the bankruptcy court. Mylene Mangalindan, *Profile: Hal J. Bonney Jr., A Benchmark In Bankruptcy, The Federal Judge, A Complex Man Known for His Command of the Courtroom, Straight-Shooting Legal Opinions and Longtime Service in the Community, Is Stepping Down After Nearly 25 Years*, THE VIRGINIAN-PILOT (Jan. 15, 1995), https://scholar.lib.vt.edu/VA-news/VA-Pilot/issues/1995/vp950115/01170444.htm.

The six bankruptcy judges who sued Foley ultimately prevailed, though it took several years and their intervening in several districts. George Paine, one of the plaintiffs, would say: "We were ultimately validated, we won in every court that we litigated in. They were ordered to pay us, and eventually they had to pay our attorneys' fees of several hundred thousand dollars. So we found that very satisfying. We didn't see it as anything other than access to the courts."[291] Lundin would call Dick Lieb, and his colleagues at Kronish Lieb, Larry Kaiser and Adam Walinsky, the "real heroes."[292]

III. Making Things Right: The NCBJ's Obtaining Retirement Benefits and the 92% Salary Rule for Bankruptcy Judges, and Its Efforts to Diversify the Bankruptcy Judiciary and the Leadership of the NCBJ

On the eve of the vote on the 1978 Bankruptcy Code, Representative Don Edwards had met with NCBJ President David Kline, Conrad Cyr, and Joe Lee, and told them: "they've beaten us." As recounted in § II above, Senator Strom Thurmond (R–S.C.), at the behest of Chief Justice Warren Burger, had "cut out the retirement provision for bankruptcy judges" from the bill that would become the 1978 Bankruptcy Code.[293]

Burger, who ascribed selfish motives to the NCBJ, calling it "the NCBJ union," likely thought that depriving the bankruptcy judges of retirement benefits would derail the Code.[294] If so, he was mistaken. As previously noted, NCBJ leadership decided to not jeopardize the enactment of the 1978 Code by holding out for retirement benefits.

Kline was prescient about the bankruptcy judges getting a retirement benefit, though it took another ten years. On August 7, 1987, Senator Howell Heflin (D–AL) introduced S.1630, the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act. The purpose of the bill was to make right what the bankruptcy judges had lost on the eve of passage of the 1978 Bankruptcy Code.[295]

The NCBJ's obtaining fairer and more appropriate treatment for the bankruptcy judiciary was a less daunting task by the late 1980s. Justice William Rehnquist replaced Warren Burger as Chief Justice in 1986.[296]

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[291] *Paine Transcript*, *supra* note 16, at 8.

[292] Houston, Lundin, and Paine Interview by McEwen, *supra* note 275.

[293] *Kline Transcript*, *supra* note 16, at 4–5.

[294] *See id*. at 6.

[295] *S.1630—Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988*, CONGRESS.GOV.

[296] *William Rehnquist*, WIKIPEDIA, https://en.wikipedia.org/wiki/William_Rehnquist.

William E. Anderson (W.D. Va.), who was NCBJ President in 1987–1988, related that: "George Paine got us an appointment with the chief justice [Rehnquist] to talk about bankruptcy and the problems with bankruptcy, what we needed to get worked out—really just to bring him up to date on how things were going . . . . He gave us anything from ten minutes to forty-five minutes of his time once a year." Anderson later asked Rehnquist if he enjoyed tennis, and for several years, they played the game at the Fourth Circuit Judicial Conference held at the Homestead Resort in Hot Springs, Virginia. Anderson would later say: "I can't tell you anything really special that he's done for us, but I can tell you he hasn't done anything *against* us, which is just as good as doing something for us, I think."[297]

Ralph Mecham replaced William E. Foley as Director of the AOUSC in 1985.[298] Anderson attributed "a lot of our improvement in relations" with the JCUS to Mecham. David W. Houston (N.D. Miss.), who became NCBJ President in 1993–1994, would say the NCBJ was "blessed" to have Mecham as the Director of the AOUSC.[299]

The AOUSC nonetheless opposed the proposed retirement benefit "as being too generous," and the NCBJ had to negotiate hard for it.[300] George Paine explained:

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[297] *Transcript of Interview of William Anderson by Bradley B. Williams*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 73 (June 15–16, 2005)(emphasis in original), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories. William E. Anderson was born in the small Virginia city of Danville, which was tobacco country and the home of the Dan River Cotton Mills. *Id.* at 1–2, 21, 71. Both "sides of the road, as far as you could see, every field we had available was plowed and had tobacco in it." *Id.* at 72. His father, a pharmacist, was working at the time for a druggist named "Ebert." Anderson's given middle name was "Elbert," after his mother's brother. But his father "told his boss man" that he "was named Ebert by mistake." His father's employer, the druggist Ebert, owned the local baseball team, the Danville Leafs. Anderson "got free tickets all my childhood, because I was named after him. And actually, on record, I wasn't – and he never knew the difference." *Id.* at 1–2. Anderson's father died shortly after Anderson finished high school, and Anderson got though college working as a laborer, operating a dinky car, in the cotton mill. *Id.* at 21–22.

[298] *Administrative Office of the United States Courts*, WIKIPEDIA, https://en.wikipedia.org/wiki/Administrative_Office_of_the_United_States_Courts.

[299] *See Transcript of Interview of David Houston by Susan Imswiler*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 28 (Oct. 12, 2004), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories.

[300] *Bankruptcy Judge Retirement Benefits Legislation*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/bankruptcy-judge-retirement-benefits-legislation/.

> When we were working in Congress, we actually found the administrative office [AOUSC] worked against us. They didn't want us to have a better retirement than the Article III judges . . . [a]nd so we would negotiate with the members of Congress, and every time we hit a sticking point, we'd say, "Okay, give us Article III lifetime tenure, because that's the only way you can protect us and stop this hemorrhage of judges leaving the bench," because a lot of judges were going into private practice, where they would make four or five times what we were making.[301]

It actually got to the point, Paine recalled, "where it got so good we were afraid they'd say, 'Okay, we'll give you lifetime tenure.'" The bankruptcy judges' contribution to their retirement "kept going down and down and down. And the A.O. didn't like this, because they thought we were getting too good a deal, too sweet a deal."[302]

One reason was that, ironically, Senator Strom Thurmond had become an ally. Thurmond had stripped the bankruptcy judges' retirement provisions out of the 1978 Code at Chief Justice Burger's behest, and "had always been against retirement for *anyone* because he thought you ought to work until you died—as he successfully did—and never, never wanted to give any benefits to government employees." But Thurmond also had a nephew, "who he looked on as a son," who "became a bankruptcy judge, so we had a back channel to Senator Thurmond. We had him giving us advice in the Senate. We found that blood is much thicker than water with Senator Thurmond. He said he could get the contribution down to zero."[303]

The NCBJ had hired former Congressman, Caldwell Butler, to assist with the retirement bill, and Anderson and Butler were "working the halls of Congress" and "trying to get a compromise worked out on the amount of contribution the bankruptcy judges were to pay towards their retirement." The amount "started out at 5% and, of course, we, as bankruptcy judges, thought it was unfair since the district court judges didn't have to make any

[301] *Paine Transcript*, *supra* note 16, at 13–14.
[302] *Id.* at 14.
[303] *Id.* at 14–15.

contributions to their retirement. After some discussion they said that they thought 3% would be a good settlement figure."[304]

Anderson and Caldwell "went out in the hall" to discuss the offer and Anderson asked Caldwell, "what he thought we should do." Caldwell "said something like, 'You don't pay me enough to make that decision. It's your call.'" Anderson suggested that they "go over and check with Heflin," and they spoke with him and Thurmond.[305] "Senator Heflin's staff person seemed to think that 3% was a good settlement and we should take it, but Senator Thurmond thought we could do better. He told us to go back and talk with Kastenmeier at the House side and see if we could work something out a little bit better." Anderson "went back and said we were still holding out for 0%. We didn't think it was fair that the district court judges made no contribution and they were trying to require us to pay 3% and we shouldn't accept 3%."[306]

> There was quite a bit of discussion. It was the end of the year and Congress was anxious to adjourn. They offered 1% and we decided we had better take it. It would be a shame to have to start over in January. They said okay, we will offer you 1% and take away your Rule of 80's and a few other things in the bill. We said okay, if you want to take away, then what we should do is look at the 1% after a period of time and see if it is a substantial contribution to help the government defer the cost of the bill. They agreed to look at it in five years and to see if we should do away with the 1% and we felt good making the deal.[307]

Paine would say that "Bill [Anderson] was heroic in this, because for some reason all of the leadership was out of pocket, and Bill was the one who had to make these decisions." It was "the waning days of whatever session of Congress it was" and the NCBJ had "been negotiating this bill for two years." The AOUSC said the judges' retirement contribution "should be five percent then two and a half percent." The "magistrate judges who were more controlled by the A.O. than we were, saying, 'You've got to take two and a half percent.'" "Bill, on our behalf, was holding out for one percent."[308]

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304 *Anderson Transcript*, *supra* note 297, at 75.
305 *Id*. at 76.
306 *Id*.
307 *Id*.
308 *Paine Transcript*, *supra* note 16, at 15.

Because the magistrates' retirement benefits were part of the same bill, they certainly had cause for concern that the bankruptcy judges were overplaying their hand.[309]

The NCBJ's negotiators "knew Strom Thurmond was going to deliver, but they [the magistrates] didn't know that. But we also didn't want anything to happen to Strom Thurmond, or we'd lose the whole bill."[310]

> So Bill [Anderson] finally cut the deal by himself, without the advice of the rest of us, because we were all missing in action. We would have gone along with him, we would have supported him completely, but he really had a huge decision to make, and he said, "Yeah, we'll cut the deal at one percent."[311]

Thurmond would later say: "Well, I could have gotten it down to zero." But, Paine recalled, "we were literally on the last or next-to-last day of the legislative session."[312] And David Houston concurred that Anderson was "heroic in his ability to get our retirement package put together like he did. He was strong when others were not so resolute." Houston guessed "he would be a great poker player," though he didn't think that Anderson played the card game. "He kept that contribution that we had to make at one percent, and others were falling by the wayside. They would have wilted long before he wilted. But that was a big deal for the Bankruptcy Courts and the bankruptcy judges to get that retirement program through." Houston added: "it's largely because of Bill Anderson's determination that we got it in the form that we got it, with only a one percent contribution. I might have left the bench, had that not happened."[313]

The Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988 was signed by President Reagan and became law on November 15, 1988.[314] It also provided for cost-of-living increases in retirement benefits and survivors' annuities for bankruptcy judges and

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[309] *See generally H.R. 4340—Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988*, CONGRESS.GOV.

[310] *Paine Transcript*, *supra* note 16, at 15.

[311] *Id.*

[312] *Id.*

[313] *Houston Transcript*, *supra* note 299, at 27.

[314] *H.R. 4340—Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988*, *supra* note 309.

magistrates and authorized the recall of retired bankruptcy judges and magistrates into service.[315]

Also in 1988, bankruptcy judges' salaries were fixed at 92% of district judges' salaries.[316] Before the Code, Congress authorized the JCUS to fix the bankruptcy judiciary's salaries, within a range the top of which was lower than the district judges' salaries. Chief Justice Burger, to whom the JCUS reported, availed himself of the opportunity to use this discretion to do considerable mischief in the 1960s–1970s, keeping the bankruptcy judiciary's salaries at the lowest end of the range (thereby aggravating some members of Congress).[317] Things were changing for the better for the bankruptcy judges.

David Houston recalled that the Reagan Administration, through Donald Regan, White House Chief of Staff, at a time when the President was ill, made a recommendation to Congress on judicial salaries. "Magistrate judges and bankruptcy judges were left far behind in those recommendations." Houston didn't think that the Administration "had really looked into the far-reaching impact of what was being done."[318]

George Paine said: "The Administrative Office controlled our salary, and if they were mad at us, they wouldn't give us raises, and we really were treated like field hands—that's a southern expression—by the A.O., because they danced to the tune of the Article III judges, some of whom saw us as their ex brothers-in-law or their ex law partners." Ralph Kelley (NCBJ President, 1985–1986) and Paine (NCBJ President, 1988–1989) and some others were "having a drink with a lawyer with a lobbying firm in Washington, who had been on the Hill as a House staffer, and we were trying to figure out how we could deal with getting our salary locked-in.[319] So the lawyer said, 'Well, that's easy enough. Just put it on an appropriations bill and it'll go through in the dead of night. Everybody's putting ornaments on the Christmas tree right now.'"[320]

> We did some research and we found that the best we ever were, proportionate to the District Court, was something like 92½ percent. I don't know when that was, but we found it, so we then went to a couple of senators who were

[315] *Id.*; *see* 28 U.S.C. § 377. In Paine's words, "we were very effective in Congress." *Paine Transcript*, *supra* note 16, at 20.

[316] 28 U.S.C. § 153(a).

[317] *See* Grohsgal, *supra* note 1, at 56–57.

[318] *Houston Transcript*, *supra* note 299, at 24.

[319] *Paine Transcript*, *supra* note 16, at 21–22; *NCBJ Past Presidents*, *supra* note 26.

[320] *Paine Transcript*, *supra* note 16, at 22.

> friendly with us, and we said, "Traditionally, we have always been at 92 percent, but it goes up and down." We were probably at 60 percent of them at that point, or less. Oh, and one wonderful thing had happened. Our clerks were making more than we were, because, they would get the cost of living that a federal employees does, and we weren't.[321]

Houston acknowledged that the NCBJ "had a lot of support from a lot of different people. Director Mecham was supportive. Through his efforts the Judicial Conference passed a resolution to get our pay parity back up to where it was historically, at 92 percent of a District Court Judge's salary." "They passed the resolution," said Houston, "we did the work." Houston went with George Paine, Bill Anderson, and Ralph Kelley, all of whom were NCBJ Presidents in the 1980s, to see Senator Todd Cochran. Cochran, who was on the Senate Appropriations Committee, outlined the strategy for the group, which included going to Senator Fritz Hollings. They enlisted the help of "a great district judge in South Carolina by the name of Solomon Blatt, just a great guy," who "was a very close friend of Senator Hollings." With Senator Hollings and Cochran's help, they "were able to push the 92 percent pay parity through the Congress. So that was a big deal. Now, whether that will ever change or not, I really don't think so."[322]

Anderson, who had so skillfully negotiated for the bankruptcy judges' retirement benefits, was succeeded as NCBJ President in 1988–1989 by George Paine, who with five other bankruptcy judges had successfully sued the AOUSC over its attempt to fire all the judges in 1984. Charles N. Clevert (E.D. Wis.), who had been appointed a bankruptcy judge in 1977 when he was thirty years old, succeeded Paine as the NCBJ's first black President in 1989–

[321] *Id.*
[322] *Houston Transcript*, *supra* note 299, at 25.

1990.[323] In 1996, Clevert was elevated to the district court (E.D. Wis.) by President Clinton.[324]

David Houston, who with Anderson, Paine, and then-NCBJ President Kelley, went to Senator Cochran to successfully push the retirement benefits through Congress in 1988, was elected NCBJ President in 1993–1994.[325] Houston was succeeded by Louise DeCarl Adler (S.D. Cal.), the NCBJ's first woman President, in 1994–1995.[326] Adler would say that she was encouraged in 1983 to apply for her bankruptcy judgeship by District Judge Judy Keep (S.D. Cal.). She decided to apply after a friend said: "Louise, judgeships are not like trolley cars. There's not another one coming by in fifteen minutes. You ought to take it if you're ever interested in doing this."[327] Adler would add that:

> It was just pretty cut-and-dried, because they had also made a decision—talking dog or not—that it was about time to bring some diversity to the bankruptcy bench as well. There was no other woman practicing bankruptcy law in San Diego to the degree that I was. So there was no one else. There were some women coming up the pipeline, but I was kind of ahead of the curve on it.[328]

Adler had been sworn in in March 1984.[329] She was urged to join the NCBJ by Judges Keith Lundin (M.D. Tenn.) and George Paine (also M.D.

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323 *See NCBJ Past Presidents*, *supra* note 26; *50-Year Member: Former Federal District Court Judge Charles Clevert*, JAMS (Jul. 1, 2022), https://www.jamsadr.com/insight/2022/50-year-member-former-federal-district-court-judge-charles-clevert. The NCBJ several years later would establish a minority fellowship program, later named the Blackshear Presidential Fellowship, after Bankruptcy Judge Cornelius Blackshear (S.D.N.Y.). There have been 70 Blackshear Presidential Fellows since, three of whom became bankruptcy judges. *Who is Judge Blackshear and Why Does NCBJ Have a Fellowship Named After Him?*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/wp-content/uploads/2024/07/NCBJ-DD-Article-on-Judge-Blackshear.pdf.

324 *Charles N. Clevert Jr.*, WIKIPEDIA, https://en.wikipedia.org/wiki/Charles_N._Clevert_Jr.

325 *See NCBJ Past Presidents*, *supra* note 26.

326 *Id.*

327 *Transcript of Interview with Louise DeCarl Adler by Bradley B. Williams*, PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 12 (July 20, 2005), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories.

328 *Id.* at 13.

329 *Id.*

Tenn.), a few months after her investiture, when she spoke with them of her isolation upon becoming a judge, at about the same time that they and the rest of the six judges sued the AOUSC over its attempted firing of the entire bankruptcy judiciary.[330]

IV. Congress Turns its Back: BAPCPA and The Great Recession

George Wallace, the former Alabama Governor, while running for president in 1968 frequently said that "there ain't a dime's worth of difference between the two parties."[331] As late as 1982, Les Aspin, the Wisconsin Congressman quipped: "If you give Congress a chance to vote on both sides of an issue, it will always do it."[332] Wallace and Aspin's statements, however cynical or satirical, reflect a reality that prior to the late 1980s success in elections and enacting legislation depended on politicians' finding the middle ground.

The situation in Washington and the nation would change. Georgia Representative Newt Gingrich was the right's most strident strategist for a new order.[333] Gingrich recognized the paradox that voters hated Congress but loved their own congressperson (most often an incumbent Democrat). He admitted that he sought to destroy Congress, by intensifying the public's distrust of it, in order to save it.[334] Gingrich "hit Congress like a human wrecking ball, shattering norms that senior legislators thought were bedrocks to good governance."[335] Compromise fell out of fashion.[336] Gingrich was

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[330] *See id.* at 13–14; *see also Paine Transcript*, *supra* note 16, at 9. Some NCBJ members called Lundin and Paine members of the NCBJ's "southern mafia," a characterization with which Paine disagreed. *See Paine Transcript*, *supra* note 16, at 10.

[331] Robert P. Saldin, *Foreign Affairs and Party Ideology in America: The Case of Democrats and World War II*, 22 J. POLICY HIST. 387, 387 (2010).

[332] MARGARET MINER & HUGH RAWSON (Selected and Annotated), AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS 122 (Penguin Group 1997) (quoting NY TIMES, *Quotation of the Day* (Dec. 9, 1982)), https://www.nytimes.com/1982/12/09 /nyregion/quotation-of-the-day-088316.html.

[333] *See Newt Gingrich*, WIKIPEDIA, https://en.wikipedia.org/wiki/Newt_Gingrich.

[334] THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 33 (Basic Books 2012).

[335] JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH AND THE RISE OF THE NEW REPUBLICAN PARTY 38 (Penguin Press 2020); *see* Bruce Grohsgal, *The Long Strange Trip to A Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy*, 95 AM. BANKR. L.J. 443, 479 (2021).

[336] ZELIZER, *supra* note 335, at 293–94; *see also* Grohsgal, *The Long Strange Trip*, *supra* note 335, at 479.

elected House Minority Whip in 1989.[337] His strategy would work. In 1994, the Republicans regained both houses of Congress for the first time in forty-two years and Gingrich was elected Speaker.[338] He and his Republican colleagues in the House doubled down, challenging President Clinton, a Democrat, and his initiatives at every turn, using the federal budget and debt limits as sword and shield.[339] Two government shutdowns followed.[340]

Consensus could still be achieved on some bankruptcy legislation. Congress passed the Bankruptcy Reform Act of 1994 despite the divide, by a voice vote of both houses.[341] President Clinton in his signing statement lauded the 1994 Act as a bipartisan accomplishment that broke through "years of gridlock."[342] Substantively, the 1994 Act established a procedure for resolving asbestos company bankruptcy cases, which included non-consensual third-party releases, enacting much of the procedure established in *In re Johns-Manville*.[343] Otherwise, it was a modest enactment, that established a small business chapter 11 procedure (that proved generally ineffective and was rarely used), expanded the debt limits for chapter 13 eligibility, and included a grab bag of amendments to various provisions of the Bankruptcy Code.[344]

The 1994 Act also authorized the formation of a National Bankruptcy Review Commission (NBRC or Commission) to consider changes to the law.[345] The NBRC was formed in 1995. The spirit of cooperation that President Clinton had lauded was lost within the Commission itself soon afterward, over the issue of the proper treatment of consumer debtors.[346] The ideological heat generated by the disagreements among the Commissioners, and between some of the Commissioners and the Reporter, was all the more surprising because the Commission's mission was so modest. Congress had

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[337] *Newt Gingrich*, supra note 33.

[338] *See generally* WIKIPEDIA, *1994 United States elections*, https://en.wikipedia.org/wiki/1994_United_States_elections.

[339] MANN & ORNSTEIN, *supra* note 334, at 40.

[340] *See* Grohsgal, *supra* note 335, at 479–486.

[341] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994); *H.R.5116 – Bankruptcy Reform Act of 1994*, CONGRESS.GOV.

[342] William J. Clinton, *Statement on Signing the Bankruptcy Reform Act of 1994*, UNIV. OF CAL. SANTA BARBARA: THE AM. PRES. PROJECT (Oct. 22, 1994), https://www.presidency.ucsb.edu/documents/statement-signing-the-bankruptcy-reform-act-1994.

[343] H.R.5116—Bankruptcy Reform Act of 1994, *supra* note 341; § 111, codified as 11 U.S.C. § 524(g); *see Matter of* Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986).

[344] *See* H.R.5116—Bankruptcy Reform Act of 1994, *supra* note 341.

[345] *Id.* at §§ 601–10.

[346] *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Protection and Consumer Protection Act of 2005*, 79 AM. BANK. L.J. 485, 487–90 (2005).

stated, in creating the NBRC, that "the Commission should be aware that Congress is *generally satisfied* with the basic framework established in the current Bankruptcy Code. Therefore, the work of the Commission should be based upon *reviewing, improving, and updating the Code in ways which do not disturb the fundamental tenets and balance of current law*."[347]

The Commission made available a written summary of its consumer proposals on September 2, 1997.[348] It submitted its 1,300-page report on October 20, 1997.[349] The 1997 Report contained 170 recommendations, thirty-four of which regarded consumer issues. It was accompanied by lengthy and often pointed dissents.[350] Only three of the nine Commissioners did not dissent to one or more of the Commission's recommendations.[351] Four Commissioners opposed most of the majority's consumer bankruptcy recommendations and urged that they did not go far enough to deter citizens' abuse of the bankruptcy process.[352]

The question was stark for two of the dissenting Commissioners: should consumers' eligibility for a fresh start be nearly inviolable, or should

[347] H.R. REP. NO. 103-835, at 59 (1994) (emphasis added).

[348] *Proposals Initially Adopted by the National Bankruptcy Review Commission*, NAT'L BANKR. REV. COMM'N (Sept. 2, 1997), https://govinfo.library.unt.edu/nbrc/archive/proposals9.97.html.

[349] *See The Commission: Its History and Process*, NAT'L BANKR. REV. COMM'N (Oct. 20, 1997), https://govinfo.library.unt.edu/nbrc/reporttitlepg.html.

[350] KEITH M. LUNDIN, LUNDIN ON CHAPTER 13, § 2.2 ¶ 8 (2017); *see also Proposals Initially Adopted by the National Bankruptcy Review Commission*, *supra* note 348, at 1–46 ("Recommendations to Congress").

[351] The NBR Commission Members were Brady C. Williamson, Esq., Wisconsin (Chairman); Hon. Robert E. Ginsberg, U.S. Bankruptcy Judge, Illinois (Vice Chair); Jay Alix, C.P.A., Michigan; M. Caldwell Butler, Esq., former Member of Congress, Virginia; Babette A. Cecotti, Esq., New York; John A. Gose, Esq., Washington; Jeffery J. Hartley, Esq., Alabama; Hon. Edith Hollan Jones, U.S. Circuit Judge, Fifth Circuit, Texas; and James I. Shepard, Esq., California. *The Commission: Its History and* Process, *supra* note 349 ("Commission Members and Staff," https://govinfo.library.unt.edu/nbrc/members.html). At the NBR Commission's organizational meeting on October 25, 1995, it approved the retention of Professor Elizabeth Warren, then at Harvard Law School, as its reporter and consultant. *Id.* at 57. Only Chairman Williamson and Messrs. Alix and Butler did not dissent to any of the recommendations. *See Proposals Initially Adopted by the National Bankruptcy Review Commission*, *supra* note 348, at 1030–1313. Judge Jones and Commissioner Shepard's "additional" dissent to the recommendations regarding consumer issues was seventy-three pages long, with Judge Jones adding another four pages in a separate statement. *Id.* at 1123–1200 ("Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law, Submitted by Honorable Edith H. Jones and Commissioner James L. Shepard" and "Separate Statement of Commission Edith H. Jones").

[352] *See* Jensen, *supra* note 346, at 487–88.

higher income consumers be held responsible for incurring debt and be deprived of a fresh start unless they completed a chapter 13 repayment plan? These dissenters likened bankruptcy relief to the government's social safety net programs, which already were means-tested.[353]

Two different Commissioners described the rift as between those who thought that the consumer bankruptcy system was too permissive, and lacked any measure of personal responsibility, and those who viewed the right to a fresh start as sacrosanct. The truth, they thought, actually fell somewhere in the middle.[354]

But the ideological divide within the NBRC soon found its way to Congress, with moderates and even liberals and progressives advancing the NBRC dissenters' views on the issue of personal responsibility for consumer debtors.[355] The Commission had not favored means testing, and the proposal for it had come from a dissent signed onto by only two Commissioners. But on September 18—one month *before* the issuance of the Commission's full 1997 Report—Representatives McCollum (R–FL) and Boucher (D–VA) introduced legislation in the House designed to establish "means testing" that would force consumer debtors into chapter 13 payment plans.[356] The day after the NBRC issued its Report action was taken in the Senate, with Senators Grassley (R–IA) and Durbin (D–IL) introducing "S. 1301, the Consumer Bankruptcy Reform Act of 1997, which also included a form of means testing."[357]

Over the next seven-and-one-half years, the legislation that would become BAPCPA, wended its way through Congress in various iterations.[358] A bill that passed both the House and Senate in 2000 was pocket-vetoed by President Clinton after then-Professor Elizabeth Warren, the Commission's Reporter, spoke with then-First Lady Hillary Clinton.[359] The bill was

[353] *See id.* at 489–90.

[354] *See* Grohsgal, *The Long Strange Trip*, *supra* note 335, at 476 (citing *Proposals Initially Adopted by the National Bankruptcy Review Commission*, *supra* note 348, at 1119).

[355] *See Proposals Initially Adopted by the National Bankruptcy Review Commission*, *supra* note 348.

[356] *See* Responsible Borrower Protection Bankruptcy Act, H.R. 2500, 105th Cong. (introduced Sept. 18, 1997); *see also* Grohsgal, *The Long Strange Trip*, *supra* note 335, at 474–475; Jensen, *supra* note 346, at 493–494.

[357] *See* Jensen, *supra* note 346, at 494.

[358] *See also* Jensen, *supra* note 346.

[359] *See* Theodoric Meyer, *Inside Biden and Warren's Yearslong Feud*, POLITICO (Mar. 12, 2019), https://www.politico.com/magazine/story/2019/03/12/biden-vs-warren-2020-democratic-primaries-bankruptcy-bill-225728/.

reintroduced in each Congress but became entangled with threats of filibuster and amendments involving controversial issues, such as abortion.[360]

The NCBJ and other bankruptcy groups unflaggingly opposed it.[361] Joining the NCBJ in urging Congress not to pass the consumer bankruptcy legislation that became BAPCPA were the NBC, the American Bankruptcy Institute (ABI), the CLL, the National Association of Chapter 13 Trustees (NACTT), the National Association of Bankruptcy Trustees (NABT), the National Association of Consumer Bankruptcy Attorneys (NACBA), and the American College of Bankruptcy.[362]

But a political era defined by polarization had widened the doorway to greater influence on bankruptcy legislation. Reporters observed that campaign contributions and lobbying muscle came largely from "the politically powerful financial community."[363] BAPCPA's enactment "underscore[d] the new influence business ha[d] in Washington," and was "a huge success for banks, credit-card companies and retailers," who "boast[ed] some of the best-connected lobbyists on Capitol Hill."[364]

George Paine in his 2004 oral history also thought that Congress had materially changed from

> the old days, where the sides would get together, the majority and the minority, and eventually work things out . . . [i]t is so polarized that they just don't even talk to each other. So it's now very unpleasant. Friends of mine who are in Congress, are not having fun

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[360] *See* Jensen, *supra* note 346, at 485.

[361] *See, e.g.*, H.R. REP. NO. 106–123, pt. 1, (1999); Part VIII: Related Reports: 106th Congress at 381–382; Consideration of Conference Report on H.R. 2415, 146 Cong. Rec. S11683 (Daily Ed. Dec. 7, 2000) (includes Section-by-Section Analysis); Part V: Congressional Record: 106th Congress—Document (Remarks of Senator Chris Dodd) at S. 11726; H.R. REP. NO. 108–40, pt. 1, (2003) at 558.

[362] H.R. REP. NO. 108–40, pt. 1, *supra* note 361, at 558.

[363] Eric Schmitt*, Senate Approves a Bill to Toughen Bankruptcy Rules: Higher Bar for Debtors*, NY TIMES (Feb. 3, 2000), https://archive.nytimes.com/www.nytimes.com/library/politics/020300senate-bankrupt.html?Partner=AOL&RefId=FnnnnFnFl3eE; *see also* Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1134 (2004).

[364] *Id.* (quoting first Kathleen Day, *Senate Votes to Toughen Bankruptcy: 36 Democrats Support Measure Backed by Bush*, WASH. POST, Mar. 16, 2001; then Katharine Q. Seelye, *Republicans Agree to New Limits on Consumer Bankruptcy Filings*, N.Y. TIMES, Oct. 8, 1998; then Philip Shenon, *Senate Democrats Stall Bankruptcy Bill*, N.Y. TIMES, Feb. 17, 2001; and then Peter Pae & Stephanie Stoughton, *Personal Bankruptcy Filings Hit Record: Easy Credit Blamed, Congress May Act*, WASH. POST, June 7, 1998).

> like they did before. They don't leave things in the House or the Senate and then go have a drink afterwards. It's a tough place to be. So I don't think anyone has real political power anymore, except groups like the AARP [American Association of Retired People] and the NRA [National Rifle Association]. It's a different world, and hopefully it'll go back to being a more collegial affair.[365]

Louise DeCarl Adler, NCBJ President in 1994–1995, said in her 2005 oral history that "we kind of got beaten down by this new bill," BAPCPA, "this new reform act, if you will, where we were so roundly ignored in our advice. I think what we really need to do is to try and reconnect with Congress, the congressional staffers. But having said that, I'm not sure if we have the current political climate, insofar as contributions and campaign contributions, and the need for that."[366]

Campaign contributions aside, the seven-and-one-half year path to enactment was also a drawn-out morality play, in which the main character was personal irresponsibility. A theme of the Clinton administration and of many Democrats, as they tirelessly tacked to the center on the issue of welfare reform and the social safety net, was personal responsibility.[367] The Bush administration, which followed, was on board from the start, supporting the "overall goal of the bankruptcy reform legislation" and asserting that the "common sense reforms" in the bills would "curb many of the abuses of the current bankruptcy laws."[368]

The Senate passed BAPCPA, S. 256, by a 74 to 25 vote on March 10, 2005.[369] President George W. Bush issued a statement applauding the Senate's "strong bipartisan vote . . . to curb abuses of the bankruptcy system" and urged the House "to act quickly." He added that BAPCPA would give more Americans, "especially lower-income Americans . . . greater access to credit."[370]

365 *Paine Transcript*, *supra* note 16, at 16–17.

366 *Adler Transcript*, *supra* note 327, at 25–26; *NCBJ Past Presidents*, *supra* note 26.

367 *See* Jacoby, *supra* note 363, at 1134, n.244.

368 Jensen, *supra* note 346, at 542–543 (citing Executive Office of the President—Office of Management and Budget, Statement of Administration Policy—H.R. 333—Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 (Feb. 28, 2001), http://www.whitehouse.gov/omb/legislative/sap/107-1/HR333-r.html).

369 *Id.* at 565 (citing 151 Cong. Rec. S2463 (daily ed. Mar. 10, 2005) at S2474).

370 *Id.*; *see* Press Release, George W. Bush, President of the United States, Statement on

The House took up S. 256 on April 14, 2005, pursuant to a rule permitting its consideration without amendments. It passed S. 256 by a vote of 302 (all Republican members plus 73 Democrats) to 126.[371]

President Bush signed BAPCPA into law April 20, 2005.[372] At the signing ceremony, he called legislation "common-sense reforms" that would strengthen the nation's financial system and economy," "ensure that more Americans can get access to affordable credit," and restore "integrity to the bankruptcy process."[373]

BAPCPA was the first major substantive piece of bankruptcy legislation that became law over the opposition of the NCBJ, the NBC, and other professional associations whose members knew something of bankruptcy because they dealt with it every day of their working lives. The NCBJ, the NBC, and other groups had worked closely with Congress to obtain passage of both the Chandler Act in 1938 and the Bankruptcy Code in 1978. BAPCPA, for whatever reason, was different—whether because elected officials and Americans believed the narrative of a middle class and upper-middle class that lacked integrity and personal responsibility, or because a more polarized Congress was less interested in advancing legislation based on informed policy, or because the bill was bought and paid for by car lenders and credit card companies.

Different it was. Joe Lee was the primary drafter of the Judges' Bill that resulted in enactment of the Bankruptcy Code in 1978. He had been on the bench for forty-four years. He would say that he was "crushed" by the 2005 enactment of BAPCPA[374]

The NCBJ, notwithstanding that BAPCPA was enacted over its opposition, fulfilled the educational part of its mission. Beginning immediately, and for the next several years, it held numerous programs and published considerable material educating its member bankruptcy judges, lawyers and other bankruptcy professionals, and citizens about BAPCPA.[375]

Senate Passage of Bankruptcy Reform Legislation (Mar. 10, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050310-15.html.

[371] *See* Jensen, *supra* note 346, at 566 (citing 151 Cong. Rec. H2074-76 (daily ed. Apr. 14, 2005)).

[372] *Id*. (citing Pub. L. No. 109–8, 119 Stat. 23 (2005)).

[373] *See id*.; Press Release, George W. Bush, President of the United States, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html.

[374] *See Lee Transcript* (2005), *supra* note 22, at 122.

[375] *See, e.g.*, NCBJ, NCBJ CONFERENCE NEWS: Spring 2005, at 10; Fall 2005, at 3; Winter 2006, at 10; Summer 2006, at 1, 11; Winter 2007, at 6, 12 (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania).

Meanwhile, the horizon for consumer debtors was becoming more troubled, and the NCBJ saw it coming. In December 2006, Bankruptcy Judge Randall Newsome would say in the NCBJ Conference News:

> It is no exaggeration to state that a perfect financial storm is in the making. It seems fairly clear that the average American consumer is leveraging his house and other assets to spend more, or to pay off other debts, or simply to make ends meet. When all of the houses have been refinanced up to and beyond their fair market value to pay off all the credit cards that have reached their limits, and when all of those cards reach their limits again, the debt bubble will burst. It may not happen next week, or even next year, but basic principles of mathematics dictate that it will happen eventually.
>
> In order for the US economy to weather this coming financial storm, it is essential that we have in place a bankruptcy system that is efficient and ready—so that consumers can reorganize their financial affairs and rehabilitate their balance sheets. One way of increasing the efficiency as well as the predictability of the present system would be to clarify some of the language in BAPCPA.[376]

The storm came just a few months later and the Great Recession brought on by the 2007–2009 financial crisis followed. As housing prices plummeted, millions of American families faced foreclosure on their homes. The Code did not allow them to cram down the debt to the value of the collateral (as is the case for other kinds of secured debt in bankruptcy), or to otherwise restructure their mortgages, even in a chapter 13 case into which BAPCPA forced many of them. Some members of Congress stepped up to address the foreclosure problem once the financial crisis hit, sponsoring legislation in 2007–2009 that would have revised the Bankruptcy Code to permit cramdowns of residential mortgages. Hearings were held in the Senate in December 2007.[377] NCBJ President-elect Thomas B. Bennett (N.D. Ala.)

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[376] NCBJ, NCBJ CONFERENCE NEWS, Winter 2007, at 17 (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005026, Folder 4).

[377] *See The Looming Foreclosure Crisis: How to Help Families Same Their Homes*: *S.*

testified in favor of such relief, even outside of bankruptcy.[378] Judge Jacqueline P. Cox (N.D. Ill.) also testified in support.[379] Judges Bennett and Cox both stated that the bankruptcy courts could handle the volume of mortgage cram-down cases that might need to be adjudicated.[380] The Senate Judiciary Committee held further hearings in mid-July 2009 on amending the Code to permit residential mortgage cramdowns.[381] The legislation went nowhere.

V. Win Some: Subchapter V

The voices of the NCBJ and the bankruptcy judiciary were not heeded in the 2005 passage of BAPCPA or in the failure of Congress to act for Main Street homeowners during the 2007–2009 financial crisis. The situation was somewhat different for small business owners a few years later.

Chapter 11, from its becoming effective in 1979, had been highly effective for the reorganization of larger business enterprises. It was the "gold standard" for preserving and reorganizing a distressed, operating business, to the general benefit of creditors, employees, counterparties, and the larger economy.[382]

But by the 1990s, it had become a poor tool for smaller, often family-owned businesses, including because of the costs of a long stay in bankruptcy. Bankruptcy Judge Thomas Small (E.D.N.C.) wrote in the ABI Law Review in 1993 that chapter 11 was "synonymous with unnecessary delay" that tended "to frustrate creditors, exasperate debtors, and burden an already

Hrg. 110-511 before the Committee on the Judiciary, United States Senate, 110th Cong., 1st Sess. (Dec. 5, 2007), https://www.govinfo.gov/content/pkg/CHRG-110shrg44330/html/CHRG-110shrg44330.htm. Similar bills were introduced in the House. *See, e.g.*, Marjorie B. Maynard, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Mortgage Cramdown in Bankruptcy as a Necessary Incentive to Encourage Mortgage Modification*, 14 N.C. BANKING INST. 275, 277 & n.22, 278 & n.24 (2010).

378 *Id.* at 18.

379 *Id.* at 15–16.

380 *Id.* at 22.

381 *The Worsening Foreclosure Crisis: Is It Time To Reconsider Bankruptcy Reform?: S. Hrg. 111–328 before the Committee on the Judiciary, United States Senate*, 111th Cong., 1st Sess. (July 23, 2009), https://www.govinfo.gov/content/pkg/CHRG-111shrg55519/html/CHRG-111shrg55519.htm.

382 *See* Michelle M. Harner & Robert Hockenbury, *Reflections on Business Bankruptcy Reform*, 71 SYRACUSE. L. REV. 501, 501 (2021).

overburdened bankruptcy system." Small acknowledged that, while complex chapter 11 cases took time, "less complicated reorganizations should not."[383]

Judge Small then laid out how his district, since 1987, had been "experimenting with ways to accelerate the confirmation of small business chapter 11 cases." The process was implemented by local rules, known in the district as "[c]hapter 11(a)," which provided for: (1) the prompt filing of the debtor's plan; (2) conditional approval of the disclosure statement (which Small thought had minimal value in a small business case, as opposed to a mega case); and (3) combined hearings on the disclosure statement and plan confirmation.[384]

Small found authority in Bankruptcy Rule 1001. That Rule requires the court "to construe the Rules 'to secure the just, speedy, and inexpensive determination of every case and proceeding.'" Small's reasoning was strikingly similar to Valentine Nesbit's when he created, from § 74 under the Act, the wage-earner's plan proceeding that would become Chapter XIII under the Chandler Act and chapter 13 under the Code.[385]

For the small business cases in Small's district, the proof was in the pudding. Most Rule 11(a) plans were confirmed expeditiously and with fewer disputes. Debtors' counsel, sole practitioners, and creditors and their counsel all appeared to favor the proceeding. Several other districts adopted similar procedures.[386]

Judge Small in his 1993 paper recommended to Congress his procedure for a small business case, coupled with additional amendments. These included: eliminating the requirement for appointment of an unsecured creditors' committee; appointment of a supervisory trustee; requiring the payment of all disposable income to creditors under the plan; and eliminating plan voting, while preserving parties' rights to object.[387]

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383 A. Thomas Small, *Small Business Bankruptcy Cases*, 1 AM. BANKR. L. INST. 305, 305 (1993). Much of the material in these several paragraphs regarding Judge Small's 1993 paper on his small business chapter 11 proceeding is based on the written materials prepared by the author for an *ABLJ* Roundtable titled "Looking Back to Look Ahead" and held by Zoom on January, 29, 2026. The Roundtable was moderated by Judge Judith Fitzgerald (ret.). The other participants in the Roundtable were Professors David A. Skeel, Stephen Lubben, and the author. *See* A. Thomas Small, *Suggestions for the National Bankruptcy Review Commission: Small Business Reorganization Chapter*, 4 AM. BANKR. INST. L. REV. 487, 550 (1996).

384 Small, *supra* note 383, at 307.

385 *Id*. at 313; *see* Grohsgal, *supra* note 1, at 32–33.

386 *See* Small, *supra* note 383, at 315.

387 *See id*. at 319–32.

Congress did not quickly act on most of Small's recommendations. The Bankruptcy Reform Act of 1994 did speed up plan approval in a small business proceeding somewhat, and it permitted the court to consider why an unsecured creditors' committee should *not* be appointed in a small business case.[388] But these provisions proved inadequate.

Since 1994, Congress has not authorized a commission to consider changes in chapter 11 bankruptcy law, despite the fact that neither the U.S. economy nor U.S. bankruptcy law has worked perfectly during that time. The financial crisis that began in 2007 sent the United States. into a two-year long recession, the longest since the Great Depression of the 1930s. It caused the residential foreclosure crisis that was a cruel part of it, which the Code could do little to alleviate.[389] The COVID pandemic resulted in a sharp, though shorter-lived recession in 2020.[390] No commission was authorized in the wake of either. And the question has been asked often over that time whether chapter 11, long the "gold standard" of business reorganization laws, is still up to the task of resolving business failures ranging from the largest business enterprises to the smallest, often family-owned businesses.[391]

The American Bankruptcy Institute (ABI) in 2011 stepped into this congressional void as best it could. Founded in 1982, the ABI is today the largest association of bankruptcy professionals in the United States, with about 10,000 members.[392] In 2011, it organized a twenty-three-member

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[388] Bankruptcy Reform Act of 1994, *supra* note 341, § 217.

[389] *Dates of U.S. Recessions as Inferred by GDP-based Recession Indicator*, FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/JHDUSRGDPBR; WIKIPEDIA, List of Recessions in the United States, https://en.wikipedia.org/wiki/List_of_recessions_in_the_United_States. Unemployment during the Great Recession, which the downturn brought on by the financial crisis is often called, reached 10% and GDP decline was -5.1% from peak to trough.

[390] *Dates of U.S. Recessions*, *supra* note 389; WIKIPEDIA, *List of Recessions in the United States*, *supra* note 389. Unemployment during the COVID pandemic reached 10.7% and GDP decline was -19.2% from peak to trough. *Id.*

[391] Harner & Hockenbury, *supra* note 403, at 501. For large, financial institution reorganizations, *see, e.g.*, THOMAS H. JACKSON, *BUILDING ON BANKRUPTCY: A REVISED CHAPTER 14 PROPOSAL FOR THE RECAPITALIZATION, REORGANIZATION, OR LIQUIDATION OF LARGE FINANCIAL INSTITUTIONS* (Thomas H. Jackson et al., Hoover Inst. Press 2015); KENNETH E. SCOTT & JOHN B. TAYLOR, BANKRUPTCY NOT BAILOUT: A SPECIAL CHAPTER 14, 27–28 (Kenneth E. Scott & John B. Taylor, Hoover Inst. Press 2012), https://www.hoover.org/sites/default/files/research/docs/makingfailurefeasible-ch2.pdf (reference to Chapter 2 written by Thomas H. Jackson viewable at). For small, often family-owned businesses, *see, e.g.*, A. Thomas Small, *If You Fix It, They Will Come—A New Playing Field for Small Business Bankruptcies*, 79 AM. BANKR. L.J. 981 (2005).

[392] *About,* ABI, https://www.abi.org/about-us.

Commission, co-chaired by Robert Keach and Albert Togut, and with Professor (now Bankruptcy Judge) Michelle M. Harner as its Reporter, "to study and address how financial markets, products and participants have evolved and, in some respects, outgrown the current chapter 11 framework, enacted in 1978."[393]

The ABI Commission held its first organizational meeting in December 2011, and issued its report in December 2014.[394] Harner would write with her co-author:

> The high profile and public nature of the ABI Commission's study garnered considerable attention during the three-year study period. The discourse and debate intensified, however, with the release and roll-out of the ABI Report in December 2014. The ABI Report was the subject of many panel discussions at professional conferences, and it spurred various kinds of responses from professional organizations both domestically and internationally.[395]

The Report made recommendations on a number of important chapter 11 issues, ranging from first day relief to post-bankruptcy financing, the treatment of executory contracts, and the safe harbors for the derivatives, repo financing, and other financial contracts that had played a large role in causing the financial crisis.[396] The ABI Commission's study fostered considerable discourse and debate during its three-year study period, which intensified with the release and roll-out of its Report in December 2014.[397] The Report surely will continue to provide guidance to the courts on difficult questions of law.[398] But few of the Commission's recommendations have been enacted.

A material exception is the Small Business Reorganization Act of 2019 (SBRA). The ABI Commission Report recognized the importance of small and middle-market enterprises to the U.S. economy and, as had Judge

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[393] Harner & Hockenbury, *supra* note 382, at 505; Donald S. Bernstein, *ABI Commission to Study the Reform of Chapter 11 Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE, https://corpgov.law.harvard.edu/2015/01/04/abi-commission-to-study-the-reform-of-chapter-11-report/.

[394] Harner & Hockenbury, *supra* note 382, at 503.

[395] *Id*. at 505.

[396] *Id*. at 505, 515–17.

[397] *See id*. at 505.

[398] *See generally id*. at 508–11.

Small and other judges and commentators, the obstacles to preserving and reorganizing those businesses.[399] The Report recommended special Bankruptcy Code provisions for "small or medium-sized enterprises" (SMEs).[400] Those provisions included many of Judge Small's 1993 recommendations.[401]

The ABI took the laboring oar in obtaining passage of SBRA in 2019. The strategy included seeking simultaneous passage of the Honoring Veterans in Extreme Need (HAVEN) Act (exempting certain veterans disability benefits from the calculation of monthly income for chapter 7 means test eligibility), and the Family Farmer Relief Act of 2019 (increasing the debt ceiling for chapter 12 family farmer eligibility).[402]

ABI Commission Co-Chair Robert Keach testified on the Report's SME recommendations on two separate occasions (March 2018 and June 2019). "Keach's testimony and the Commission's work on SME bankruptcies apparently resonated with Congress."[403]

Professor Harner would note: "Rarely is a piece of legislation the result of one group's efforts, and SBRA is no exception." Several organizations made meaningful contributions to the legislation and its enactment.[404] The NCBJ's Small testified (though on behalf of the NBC), and the NCBJ submitted a letter in support of both SBRA and the HAVEN Act.[405] The three bills passed on the same day, August 13, 2019.[406]

VI. The NCBJ Today

The NCBJ was formed as the National Association of Referees in Bankruptcy (NARB) in 1926, a mostly prosperous period that would soon

[399] *See* AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11 276–78 (2014), https://commission.abi.org/final-report (the Commission in its Report posited that such companies, with 50 to 5,000 employees, accounted for more employment than those with over 5,000, and accounted for about 40% percent of the U.S. GDP).

[400] *See id.* at 279.

[401] *See id.* at 291–302.

[402] WIKIPEDIA, *List of acts of the 116th United States Congress*, https://en.wikipedia.org/wiki/List_of_acts_of_the_116th_United_States_Congress.

[403] Harner & Hockenbury, *supra* note 382, at 512.

[404] *See id*.

[405] *Oversight of Bankruptcy Law and Legislative Proposals: Hearings Before the Subcomm. On Antitrust, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 116th Cong. (2019); *id.* at 116–133 (J. Small in support of SBRA); *id.* at 44–45 (NCBJ materials in support of SBRA); *id.* at 185 (NCBJ in support of HAVEN Act).

[406] *Id*.

turn into tougher times. The referees who founded their association had little status or security in either tenure or compensation.[407] Yet NARB immediately allied itself with other commercial and legal associations to make bankruptcy law better.[408] It mostly succeeded, especially in the legislative response to the Great Depression and increasing and then protecting the bankruptcy judges' judicial authority and independence in the 1970s and 1980s (including by suit brought against the AOUSC in 1984 by six of its members, two of whom would become NCBJ Presidents).

The NCBJ has been less successful in working with Congress to obtain passage of positive bankruptcy law since. It was unable to steer Congress away from passing BAPCPA in 2005, though most of its members thought the statute poorly conceived and written.[409] And the NCBJ did not succeed (though some of its members testified before Congress) in pushing Congress toward authorizing home mortgage modifications that likely would have kept many families in their homes and might even have shortened the financial crisis.[410]

One nagging question that emerges is why the NCBJ was so successful in Congress (and in 1984 in the courts) during its first 60 years as compared with the last 40 years? Did the NCBJ became complacent once its members became judges with more reasonable tenure and compensation protection? Did it lose its legislative touch in an increasingly polarized Washington, D.C.?

The answer likely lies more in the NCBJ's and its members being ever "mindful of their role as judicial officers and not legislators," as Russell Hiller wrote fifty years ago on the NCBJ's 50th Anniversary.[411] The NCBJ does not perceive its role to include telling Congress whether bankruptcy law should be more punitive or forgiving of debtors or who should be the substantive law's winners and losers, unless it has received a real invitation from Congress to do so. In the Great Depression of the 1930s, Walter Chandler and others in Congress appear to have welcomed the input of the NBC, in which NARB was heavily involved, in connection with drafting and enacting the 1938 Chandler Act.[412] In the 1970s, Senator Quentin Burdick and Representative Don Edwards and others in Congress sought the bankruptcy judges' views on what became the Bankruptcy Code. Burdick and Edwards would introduce the

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[407] *See* Grohsgal, *supra* note 1, at 2.
[408] *See id*. at 3.
[409] *See infra* Section IV.
[410] *Id.*
[411] Hiller, *supra* note 5, at 33.
[412] Grohsgal, *supra* note 1, at 34–35.

"Judges' Bill" that the NCBJ had drafted after the JCUS (through Chief Justice Warren's protégé, District Judge Weinfeld) had snubbed it.[413]

Congress was less open to considering the NCBJ's opinion on BAPCPA in 2005 and regarding residential mortgage cramdowns in 2007–2009. For BAPCPA, strong bipartisan support developed early on for "personal responsibility" by consumers in their financial affairs and car lenders and credit card companies lined up behind the bill, making passage highly likely if not nearly inevitable, notwithstanding the opposition of the NCBJ, the NBC, and other insolvency and consumer law associations.[414] The residential mortgage cramdown legislation similarly gained little momentum during the 2007–2009 financial crisis likely because Congress, the Obama Administration, and the bank regulators, rightly or wrongly, were more worried about widespread financial failures on Wall Street than they were about foreclosures on Main Street.[415]

A comparison between the NCBJ's greater involvement in the adoption of the 1973 Bankruptcy Rules and the 1978 enactment of the Code, and its lesser role in the enactment of the 1938 Chandler Act and the 2019 SBRA, also is a case in point for the NCBJ's members' being ever "mindful of their role as judicial officers and not legislators." The NCBJ fought at the front, with considerable success in the 1970s and 1980s, for the significant if imperfect judicial authority and independence that the bankruptcy judiciary needed to do its job and that the Rules and the Code now provide.[416] By comparison, the NBC (albeit it with NARB's substantial involvement) led the charge for the 1938 Chandler Act, and the ABI led it for the 2019 SBRA. Both bills primarily involved changes to substantive law, and to a much lesser extent implicated the bankruptcy judges' authority and independence.[417] These other associations took the lead, and there was no reason (nor it might be argued was it appropriate) for the NCBJ to do.

In addition, proposed bankruptcy legislation from time to time divides the NCBJ. In such situations most NCBJ members would consider the NCBJ ill-advised to weigh in on one side. One such change was the proposal in the late 1920s and 1930s to pay salaries rather than commissions to referees, which was favored by some but far from all referees. The change was enacted nonetheless in 1946, without NARB's taking a strong position, when

[413] Mund, *Appointed or Anointed: Part One*, *supra* note 5, at 13–14 (citing Dec. 12, 1973, Letter from District Judge Weinfeld to Joe Lee).

[414] *See supra* Section IV.

[415] *Id.*

[416] *See supra* Sections I, II.

[417] *See* Grohsgal, *supra* note 1, at 34–35; *see supra* Section V.

compensation under the commission system became paltry and referees resigned and went back to practicing law full-time to support their families.[418] A more recent example is venue reform, by which debtor's and/or creditors' venue choices would be restricted. It is not surprising that the NCBJ has been divided on this issue, in part between judges in jurisdictions in which more chapter 11 cases are filed and those in which fewer chapter 11 cases are filed. The NCBJ Committee formed to consider the issue "recognize[d] that compelling arguments exist[ed] on both sides of the debate" on venue reform and took "no position on the merits of either side," leaving "that decision to the individual reader, with hopes that the reader's views have been informed."[419]

All of that said, the NCBJ and its Legislation Committee have continued to cultivate and maintain close relationships with Congress and to encourage its members to personally do so. "As experience has borne out over the years, a warm hand off is better than a cold call almost every time."[420] Judge Judith K. Fitzgerald (W.D. Pa.) said in a 2001 interview, when she was NCBJ President-elect and means-testing legislation was pending in Congress, that the NCBJ's members "stand ready to assist with providing whatever expertise the conference committee or some legislative group would need, certainly that will continue . . . the judges all stand ready to provide whatever help Congress would ask of us."[421] And, she said in her oral history, "there are always battles on the horizon of one sort or another."[422]

The NCBJ, of course, has purposes in addition to protecting the judicial authority and independence of bankruptcy judges and being available to inform and advise Congress on these and other bankruptcy matters. From the start it been a forum for collegiality among its members, and a clearinghouse for ideas.

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418 *Id.* at 42.

419 Terrence L. Michael et al., *NCBJ Special Committee on Venue: Report on Proposal for Revision of the Venue Statute in Commercial Bankruptcy Cases*, 93 AM. BANKR. L.J. 741, 814 (2019).

420 *See, e.g.*, NCBJ CONFERENCE NEWS, at 21 (Fall 2022) (on file with Nat'l Bankr. Archives, Biddle L. Libr., Univ. of Pennsylvania, Box 005028, Folder 6).

421 Sam Gerdano, *Interview with New NCBJ President Judith K. Fitzgerald*, AM. BANKR. INST. J., Oct. 2001.

422 *Transcript of Interview of Judith Fitzgerald by Susan Imswiler,* PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 5 (Oct. 12, 2004), https://law.upenn.libguides.com/biddle_archives/nba/oralhistories.

In 1926, as now, the Conference has sought to promote acquaintance and cooperation among its members.[423] In the early years, those attending the Annual Conference were mostly referees and invited speakers and representatives of other groups. Even more recently, as Judge Thomas Small would observe, the Annual Conference "used to have more judges than lawyers. Now it's *many* more lawyers than judges attend."[424] The lawyers "come for networking; *all* the top bankruptcy professionals are here. Lawyers, even if they never go to the educational programs—but I think most of them do, they're very well attended—have an opportunity to see their counterparts" and other bankruptcy professionals "from all over the United States."[425] Judge George Paine observed that the Annual Conference evolved "where the lawyers network with each other, and we're kind of irrelevant to this meeting now, which is terrific. They get together, we get together, and yet there is a lot of interaction between the two. And it's what makes it fun. The bankruptcy bar, like the bankruptcy judges, is a relatively small group. They have a national practice. They could have a case in Wichita today and Nashville tomorrow. So we see the same suspects, and that creates a collegiate feeling between the judges and the bar."[426] Paine suggested that "the only reason" the NCBJ "exist[s] is to provide camaraderie and collegiality within the bankruptcy bench."[427] Judge Louise DeCarl Adler would recall that she "*hated* the isolation" when she first became a judge. When she told Paine and Lundin how unhappy she was, they said: "Well, you have to get involved in the NCBJ."[428] Robert D. Martin, NCBJ President in 1995–1996, would say that the NCBJ was "the best club *I* ever was invited to join . . [i]t's strange: a lot of people think of it as being sort of a depressing area or something, but in fact there's a closeness, there's a camaraderie, and I think for the most part that's been visible through the organization and through the meetings, and it's always been a pleasure to be a part of it."[429]

[423] *The Association's Constitution*, Art. I, § 1, 4 J. NAT'L ASS'N REF. BANKR. 31, 31–32 (1929–1930).

[424] *Transcript of Interview of A. Thomas Small by Patrick Carlton,* PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 14 (Oct. 13, 2004) (emphasis in original), https://law.upenn.libguides.com/biddle_archives/nba/oral histories.

[425] *Id.* at 5.

[426] *Paine Transcript*, *supra* note 16, at 18.

[427] *Id.* at 10.

[428] *Adler Transcript*, *supra* note 327, at 13–14 (emphasis in original).

[429] *Transcript of Interview of Robert D. Martin by Patrick Carlton,* PENN CAREY LAW BIDDLE LAW LIBRARY: ARCHIVES AND SPECIAL COLLECTIONS: NBA ORAL HISTORY COLLECTIONS, 1, 24 (Oct. 10, 2004) (emphasis in original), https://law.upenn.libguides.com/biddle_archives/nba/oral histories.

The NCBJ also embraced from the start its mission to improve bankruptcy administration by educating its members and others, both within and outside of the bankruptcy practice. Paul King, the first President of NARB (n/k/a the NCBJ), at the first Annual Conference, expressed his hope that the experiences of referees in different parts of the country "could be broadcast, so to speak, to all others." The association could be "a clearing house for their ideas and a forum for discussion among them" and could "help to increase a greater public respect for the bankruptcy practice."[430] Thomas Small would say, more than seventy-five years later, that the Annual Conference "*has* become, the premier educational bankruptcy event in the country," and the judges "wanted to keep it that way, and make it better."[431] NCBJ also continues to work closely with other professional associations, including the ABA and the CLL with which it has worked for 100 years, as well as the ABI, to provide educational programs that cover "a wide range of perspectives across the bankruptcy field."[432] Throughout the year, NCBJ webinars, podcasts, video interviews, and other educational programs abound.[433]

The NCBJ is unique in another way. Though its members handle more than half the federal judicial docket, it is a small association, consisting entirely of a few hundred current and retired bankruptcy judges. The ABI and the Turnaround Management Association (TMA), by comparison, boast about 10,000 members each.[434] The opportunity to raise revenues required for operations is obviously much greater for these larger, non-judicial associations than for the NCBJ.

Most of the NCBJ's income in recent decades has come from the registration fees for the Annual Conference. This can pose financial difficulties when, for example, the 2020 San Diego Annual Conference was cancelled because of the COVID-19 pandemic.[435] And finances have long been a focus of the NCBJ. Judge Judith Fitzgerald once said: "My dedication to the NCBJ has always been to keep the organization solvent (something that, when I first became Treasurer, was not a given) and to provide the best educational opportunities money can buy while at the same time

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430 *Official Proceedings*, 1 J. NAT'L ASS'N REF. BANKR., *supra* note 1, at 6.

431 *Small Transcript*, *supra* note 424, at 4 (emphasis in original).

432 *Education*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/education/.

433 *See id.*

434 ABI, *About, supra* note 392. *About TMA*, TURN MGMT. ASS'N, https: //www.turnaround.org/about-tma/.

435 *NCBJ Past Presidents*, *supra* note 26.

understanding that bankruptcy, in many ways, is a joint venture among all the stakeholders."[436]

The market for legal conferences has changed in recent years, implicating both the NCBJ's educational programming and its revenues. More lawyers and other professionals prefer to attend conferences remotely, especially since the pandemic. Others favor shorter, "skinny" conferences. Some of the large, business bankruptcy firms are less willing to pay the cost of their people's attending. And other associations compete, including the ABI and the TMA, in convening large bankruptcy conferences that offer both rigorous educational programs and the opportunity for bankruptcy judges and bankruptcy professionals to network.

The NCBJ to its credit has formed a Futures Subcommittee of the 100th Anniversary Committee to consider the path forward. The NCBJ for its first 100 years has responded nimbly and decisively to changes both large and small. At the start of its second century, it is laying the groundwork to do so again.

Conclusion

The NCBJ has a unique place among organizations of judges, as noted at the Conclusion of Part I of this article. Bankruptcy judges need to know a specialized area of the law, with which few people outside the practice are familiar. Yet bankruptcy is an essential aspect of capitalism, and bankruptcy cases have long comprised the largest part of the federal judicial docket.[437] Bankruptcy law and practice have radically evolved since 1926. As a result of the changes wrought by the 1978 Bankruptcy Code, especially those regarding business reorganizations, the bankruptcy courts have become, as one bankruptcy judge has said, "*the* commercial courts of the United States," writing "more law dealing with business than any other court."[438]

And for vast numbers of citizens, wrote Judge Alfred P. Murrah (10th Cir.) in 1961, "the only courts they will ever know, and the only kind of

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[436] Jeffrey A. Deller, *From Adair to Fitzgerald, The Western District of Pennsylvania's Legacy Within the NCBJ*, NAT'L CONF. BANKR. JUDGES, https://ncbj.org/from-adair-to-fitzgerald/. Judge Deller's judgeship in Pittsburgh (W.D. Pa.) is the seat formerly held by Referee Watson B. Adair, the second President of the NCBJ (f/k/a NARB). Deller is a former Editor-in-Chief of the *American Bankruptcy Law Journal*. His fine article tells the story of the Bankruptcy Court for the Eastern District of Pennsylvania and the involved of its judges in the NCBJ and the NBC over the last 100 years.

[437] *See supra* note 2.

[438] *Houston Transcript*, *supra* note 299, at 26.

justice they will ever have, will be at the even hand" of the bankruptcy judge. Addressing the bankruptcy referees who would become today's bankruptcy judges, he continued: "The quality of justice you dispense symbolizes the federal courts of this land. Indeed, you speak for the federal system of which you are an integral and important part."[439]

This Part II began with the bankruptcy judges' efforts to obtain the judicial authority and independence that was commensurate with their role. When Hiller wrote his history of the NCBJ on its 50th "Golden Anniversary," hard legislative negotiations were underway over the final form of the Bankruptcy Code that would soon be enacted. The NCBJ and the bankruptcy judges who comprised its members, ever "mindful of their role as judicial officers and not legislators," were intensively involved in those negotiations.[440] They sought the Article III protections of lifetime tenure without salary reduction that are at the core of an independent federal judiciary. The NCBJ lost this battle for Article III status at beginning of its second fifty years. But it won too, in 1978 and the years that followed, by obtaining and then preserving for bankruptcy judges more expansive judicial authority (and relief from the non-judicial administrative duties that had been much of the referees' work), and greater judicial independence with fourteen-year terms, salaries tied to those paid to the district judges, and adequate retirement benefits.

All the while, the NCBJ has also done the other tasks that it first set out to do. It has ably provided a forum for collegiality among its members, has worked closely with and stood ready to assist the Congress that writes the laws that its members apply, and has been a center for education and a clearinghouse for ideas.

The NCBJ for its first 100 years has served the nation and its members well. May it long continue.

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[439] Alfred P. Murrah, *The Referee in Bankruptcy*, 35 J. NAT'L ASS'N REF. BANKR. 97, 98 (1961).

[440] Hiller, *supra* note 5, at 33. Hiller called the 50th the "Golden Anniversary." *Id.* at 59.