AMERICAN
BANKRUPTCY
INSTITUTE

2019 Midwest Regional Bankruptcy Seminar

Life Under the Act

Hon. Beth A. Buchanan, Moderator
U.S. Bankruptcy Court (S.D. Ohio); Cincinnati

Robert A. Goering
Goering & Goering, LLC; Cincinnati

Richard B. Levin
Jenner & Block; New York

William B. Logan, Jr.
Luper Neidenthal & Logan; Columbus, Ohio

2019

THE GOOD OLD DAYS WERE NOT SO GOOD

The Bankruptcy Act of 1898 vs the Bankruptcy Code of 1978 (effective October 1, 1979).

The Bankruptcy Act was passed by Congress in 1898 and amended extensively by the Chandler Act of 1938 following the Great Depression (Introduced by Rep. Walter Chandler, (D-Tenn.))

Some of the major changes are outlined below:

	ACT PROVISIONS	**CODE PROVISIONS**
1.	Bankruptcy judges appointed by the district courts and served for 6-year terms. [Bankruptcy Act § 34a]	Bankruptcy judges appointed by the courts of appeals and serve for 14-year terms. 28 U.S.C. § 152(a)(1)]
2.	Bankruptcy judges' jurisdiction was limited, based on actual or constructive possession of property (summary/plenary jurisdiction) [Bankruptcy Act §§ 23,60b, 67e]	Broad jurisdictional grant, later held unconstitutional [*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 US 50 (1982)], statutorily limited to "core proceedings" (1984 amendments), further limited by *Stern v. Marshall*, 564 US 462(2011). 28 U.S.C. §§ 1334, 157]
3.	Bankruptcy judges ruled on controversies and administered cases. [Bankruptcy Act § 39a]	Bankruptcy judges' role was made primarily judicial.
4.	Bankruptcy judges were the administrative supervisors. [Bankruptcy Act § 39a]	U.S. Trustee program created as non-judicial watchdog for bankruptcy cases. [28 U.S.C. §§ 581 et seq.]
5.	Informal conferences in chambers used frequently to resolve matters.	More formal court procedures for resolving controversies.
6.	Filing fees were low (Chapter XIII filing fee was $15).	High filing fees. [28 U.S.C. § 1930]
7.	No provision for joint petitions; separate petitions required for spouses. [Bankruptcy Act §4]	Joint petitions for spouses authorized. [Bankruptcy Code § 302]
8.	Trustee appointed by bankruptcy judge if creditors did not elect a trustee [Bankruptcy Act § 44a]	Trustee appointed by U.S. Trustee in every chapter 7 (unless elected), 12, or 13 case. [Bankruptcy Code §§ 701, 1202, 1302; 28 U.S.C. § 586(b)]

9.	"First meeting of creditors" conducted by bankruptcy referee (later, bankruptcy judge) [Bankruptcy Act §§ 38(7), 55b]	341 meeting of creditors conducted by trustee; bankruptcy judge may not attend. [Bankruptcy Code § 341(c)]
10.	Chapter XIII available only for "wage earners," without limit on amount of debt. [Bankruptcy Act §§ 606(8), 623]	Chapter 13 expanded to all individuals with regular income, but with limitation on amount of debt. [Bankruptcy Code § 109(e)]
11.	No special relief for small farmers.	Chapter 12 provides special composition procedure for small farmers (1986 act).
12.	No federal exemptions. [Bankruptcy Act § 70a]	Federal exemptions provision with States' right to opt out. [Bankruptcy Code § 522(b)]
13.	Actions for libel, slander, and personal injury did not become property of the estate. [Bankruptcy Act § 70a(5)]	All legal and equitable interests of the debtor become property of the estate. [Bankruptcy Code § 541(a)(1)]
14.	No special treatment for spousal support (other than nondischargeability) [Bankruptcy Act § 17a(7)]	Spousal and child support have first priority (2005 act) and are nondischargeable. [Bankruptcy Code §§ 507(a)(1), 523(a)(5), (15)]
15.	No automatic stay	Bankruptcy filing (order for relief) acts as an injunction against suits and all collection actions. [Bankruptcy Code § 362(a)]
16.	Bifurcation of secured debt recognized by not required.	Over- and under-secured debt treated differently on bifurcated secured claims. [Bankruptcy Code § 506(a)]
17.	Discharge granted without further hearing. [Bankruptcy Act § 14b(2)]	Original 1978 Code required Bankruptcy Judge to hold a separate discharge hearing to advise Debtors of the effect of discharge (later, the discharge hearing was made optional) [Bankruptcy Code § 524(d)]
18.	Discharge was an affirmative defense to be pleaded in civil cases.	Discharge acts as an injunction to suits and all collections activities on discharged debt. [Bankruptcy Code § 524(a)]

19. Reaffirmation could be in writing or be implied by post-petition actions.	Reaffirmation only by a written document approved by the Court or certified by counsel as not imposing an undue burden on the debtor, filed with the Court before discharge. [Bankruptcy Code §§ 524(c)(2), (k)]
20. No requirement for statement of intent on secured debt.	Statement of Intent required to be filed and then fulfilled by debtor within 45 days. [Bankruptcy Code § 521(a)(2)(A)]
21. No provision for special treatment of educational loans.	Student loans nondischargeaable until five years after first payment becomes due (later amended to bar discharge absent undue hardship). [Bankruptcy Code § 523(a)(8)]
22. Corporations could receive a discharge in straight liquidation bankruptcy (Chapter VII) [Bankruptcy Act § 14a]	No discharge for non-individuals in chapter 7 (passed to prevent trafficking in corporation shells for the tax net operating losses). [Bankruptcy Code § 727(a)(1)]
23. Chapter XI designed for reorganization of unsecured debt only. Chapter X with Trustee appointed by District Judge designed to reorganize both secured and unsecured debt.	Chapter X eliminated. Chapter 11 plan may affect all debt and equity. Debtor stays in possession unless removed for cause. [Bankruptcy Code §§ 1101(1), 1104, 1107, 1123, 1141]
24. Securities and Exchange Commission had right to appeal, and the majority of reported cases involved the SEC as appellant. [*See generally General Stores Corp. v. Shlensky*, 350 U.S. 462 (1956)]	SEC may be heard on all matters but may not appeal. [Bankruptcy Code § 1109(a)]
25. No statutory penalties for dismissal of unsuccessful involuntary petition.	Statutory penalties against unsuccessful involuntary petitioners. [Bankruptcy Code § 303(i)]
26. Executory contracts and unexpired leases were unprotected. [*See* Bankruptcy Act § 70b]	*Ipso facto* provisions in executory contracts and unexpired leases are unenforceable. [Bankruptcy Code § 365(e)]

27. Four-month reach back for recovery of preferences. [Bankruptcy Act § 60a(1)]	Ninety-day preference period. [Bankruptcy Code § 547(b)]

LEGISLATIVE HISTORY OF THE NEW BANKRUPTCY LAW

*Kenneth N. Klee**

In 1978, a new federal bankruptcy law was enacted. Problems of statutory interpretation will undoubtedly arise with respect to this law. In an attempt to assist the legal community in solving such problems, the author has presented the legislative history of Public Law No. 95-598 and provided a step-by-step format to be used in researching this legislative history.

On November 6, 1978, the fifth[1] bankruptcy law of the United States, promulgated under Congress' power to enact uniform laws on the subject of bankruptcies,[2] was signed by the President.[3] Although the law is properly[4] cited as Public Law No. 95-598 and does not have an official short title,[5] it is not uncommon to find the law referred to as the "Edwards Act"[6]

---

* The author practices insolvency law in Los Angeles, California, with Shutan & Trost Professional Corporation. The author gratefully acknowledges the assistance of Richard Levin, Esq., and Sally S. Neely, Esq., in editing this article.

1. Each of the four earlier bankruptcy laws of the United States has been referred to as a "Bankruptcy Act." The Bankruptcy Act of 1800, 2 Stat. 19, provided for involuntary bankruptcy proceedings against merchants and was repealed in 1803. The Bankruptcy Act of 1841, 5 Stat. 440, provided for voluntary or involuntary bankruptcy proceedings against individuals, whether or not they were merchants, and permitted a discharge of an individual's debts if the requisite percentage of his creditors consented. That law was repealed in 1843. The Bankruptcy Act of 1867, 14 Stat. 517, extended bankruptcy relief to corporations for the first time. It was repealed in 1878. The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, has remained in effect longer than the other three bankruptcy acts combined. It was amended several times on a piecemeal basis and revised substantially by the Chandler Act in 1938, 52 Stat. 840. The Bankruptcy Act of 1898 was repealed effective October 1, 1979, though it remains in effect with respect to cases pending on September 30, 1979. *See* note 8 *infra*.

2. U.S. CONST. art. I, § 8, cl. 4 states: "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . . ."

3. Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter cited as Pub. L. No. 95-598].

4. For the complete citation *see* note 3 *supra*.

5. A short title is frequently given in the first section of a law and becomes the official name by which the law may be referenced.

6. Congressman Don Edwards was the floor manager of the bankruptcy legislation in the House of Representatives. He devoted more than eight years of his life to the new law, far more time than any other legislator. Senator Quentin Burdick and Congressman M. Caldwell Butler also devoted many years to the development of the new law. Senators Dennis DeConcini and Malcolm Wallop also contributed to the bankruptcy law revision. *See* H.R. 16643, 93d Cong., 2d Sess., A Bill to establish a uniform Law on the subject of Bankruptcies (1974); H.R. 10792, 93d Cong., 1st Sess., A Bill to establish a uniform Law on the subject of Bankruptcies (1973); and notes 21, 22, and 23 *infra*.

or the "Bankruptcy Reform Act of 1978."[7] Pub. L. No. 95-598 became effective, for the most part,[8] on October 1, 1979, the date on which the former Bankruptcy Act[9] was officially repealed.[10]

Whenever a new statute becomes effective, problems arise concerning interpretation of statutory provisions. Courts and legal scholars often look to the legislative history of the statute in order to determine the precise meaning of certain words or provisions. Consistent with such a process of interpretation, this Article will examine the legislative procedures followed in enacting Pub. L. No. 95-598. It will also propose a helpful method of using the law's legislative history to interpret the statutory provisions.

Making the New Law

Like each of the previous bankruptcy laws of the United States,[11] the legislative history of Pub. L. No. 95-598 is surrounded by controversy and intrigue.[12] The new law is unique, however, in that it is the only bankruptcy law of the United States adopted absent the impetus of a severe economic depression or panic.[13] Pub. L. No. 95-598 is the culmination of ten years of effort involving hundreds of participants.

The legislative history of Pub. L. No. 95-598 began in 1968 when Senator Quentin Burdick chaired hearings conducted by a subcommittee of the Senate Judiciary Committee to determine whether a commission to review the bankruptcy laws of the United States should be formed.[14] Those hearings prompted congressional action, and two years later the Commission on the

---

7. Since every other bankruptcy law of the United States has been a "Bankruptcy Act," it is not surprising that Pub. L. No. 95-598, *supra* note 3, would be referred to as a Bankruptcy Act in a colloquial sense.

8. Section 402(a) of Pub. L. No. 95-598, *supra* note 3, establishes an effective date of October 1, 1979, for the new law. Exceptions are prescribed in § 402(b)-(e) of Pub. L. No. 95-598, *supra* note 3, which provides for certain provisions of the new law to take effect on other dates. Provisions that will become effective on April 1, 1984, include most of the amendments to title II of the Act and the amendments to other acts made by sections 335(a) and 336(a) of this Act.

9. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898).

10. Pub. L. No. 95-598, *supra* note 3, at § 401(a).

11. *See* note 1 *supra*.

12. For a description of the legislative history surrounding other bankruptcy laws of the United States, *see generally* C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935) [hereinafter cited as WARREN]. An excellent synopsis prepared by Professor Vern Countryman is contained in his testimony before a Subcommittee of the House Judiciary Committee. *Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 333-38 (1975). *See also* Bacon & Billinger, *Analyzing the Operation and Tax Effects of the New Bankruptcy Act*, 50 J. TAX. 76 (1979).

13. *See* Louisville Joint Land Bank v. Radford, 295 U.S. 555, 581 n.11 (1953). *See generally* WARREN, *supra* note 12.

14. *Hearings on S.J. Res. 100 Before the Subcomm. on Bankruptcy of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968).

Bankruptcy Laws of the United States was formed[15] to study, analyze, evaluate, and recommend changes in the substance and administration of the bankruptcy laws of the United States.[16] The Commission, initiating operations in June, 1971, conducted four public hearings and deliberated a total of forty-four days. Finally, a two-part report was filed with Congress on July 30, 1973.[17] The first part[18] of the report contained the recommendations and findings of the Commission, while the second part[19] embodied a proposed statute complete with explanatory notes.[20]

After submission of the Commission's report, it became Congress' responsibility to continue the process of formulating a new bankruptcy law. The Commission's statutory proposal was introduced as a bill in the House of Representatives by Congressmen Don Edwards and Charles Wiggins in 1973.[21] A comparable bill was also introduced in the Senate by Senator Quentin Burdick, supported by Senator Marlow Cook.[22] In 1974, Congressmen Edwards and Wiggins introduced in the House a competing bill[23] proposed by the National Conference of Bankruptcy Judges.[24] The only

---

15. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468. The Commission on the Bankruptcy Laws of the United States [hereinafter cited as Commission] consisted of nine members. Section 2(a) of Public Law No. 91-354 states:

> the Commission shall be composed of the following members appointed as follows:
> 1) three members appointed by the President of the United States, one of whom shall be designated as Chairman by the President;
> 2) two Members of the Senate, one from each of the two major political parties, appointed by the President of the Senate;
> 3) two Members of the House of Representatives, one from each of the two major political parties, appointed by the Speaker of the House of Representatives; and
> 4) two appointed by the Chief Justice of the United States.

16. *Id.*

17. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, 93d Cong., 1st Sess. (1973) (this report contains two separately paginated parts).

18. *Id.* pt. 1, at 1-301. The Commission made major recommendations with respect to: 1) administrative structure; 2) consumer proceedings; 3) business bankruptcies; and 4) rehabilitation of businesses.

19. *Id.* pt. 2, at 1-300. The statute defines terms as they are used throughout the Bankruptcy Act of 1973.

20. Although the Commission's explanatory notes are not authoritative legislative history, they are useful in understanding portions of Pub. L. No. 95-598, *supra* note 3, which are derived from the Commission's draft statute. Part III of the Commission's report, containing several studies prepared by the Commission's staff, was never published as an official document.

21. H.R. 10792, 93d Cong., 1st Sess. (1973). Congressmen Edwards and Wiggins were both members of the Commission.

22. S. 4026, 93d Cong., 1st Sess. (1973) was the counterpart of H.R. 10792, *see* note 21 *supra*. Senators Burdick and Cook were also members of the Commission.

23. H.R. 16643, 93d Cong., 2d Sess. (1974). No counterpart of H.R. 16643 was introduced in the Senate during the 93d Congress. H.R. 16643 amplifies the plans for debtors with regular incomes, including provisions relating to the claims of creditors, discharge of the debtor, and status of the property of the estate. *Id.* at ch. 6. This bill also added a section regarding the administration of the case. *Id.* at ch. 8.

24. The National Conference of Bankruptcy Judges is a voluntary nonprofit organization of Bankruptcy Judges, known as "referees" before 1973. *See* Bankruptcy Rule 901(7).

formal legislative action taken during the 93rd Congress was one day of hearings, held on December 10, 1973, conducted by Congressmen Edwards' Subcommittee on Civil and Constitutional Rights.[25] This relative inactivity was due to the Judiciary Committee's preoccupation with the possible impeachment proceedings of Richard M. Nixon.[26]

In contrast, intensive study of the bankruptcy legislation in both the House and Senate occurred during the 94th Congress. Congressmen Edwards and Wiggins reintroduced both the statutory proposal of the Commission in the House of Representatives as H.R. 31[27] and the competing proposal of the bankruptcy judges in the Senate as H.R. 32.[28] Senator Burdick reintroduced in the Senate the Commission's proposal as S. 236[29] and the alternative drafted by the National Conference of Bankruptcy Judges as S.235.[30] Between May of 1975 and May of 1976, Congressman Edwards presided over thirty-five days of hearings on H.R. 31 and H.R. 32 as Chairman of the Subcommittee on Civil and Constitutional Rights.[31] By his side in this bipartisan process was Congressman M. Caldwell Butler, the new ranking minority member of the subcommittee. The extensive House hearings produced over 2,700 pages of testimony from more than 100 witnesses.[32] Senator Burdick pursued an ambitious schedule, presiding over the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary during twenty-one days of hearings on S. 235 and S. 236[33] between February and November of 1975.

At the House and Senate hearings during the 94th Congress, several groups testified regarding the commission's bill and the judges' bill, offering new ideas.[34] Congressman Edwards encouraged groups with divergent views, such as the National Bankruptcy Conference[35] and the National Con-

25. *Hearings on H.R. 10792 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *House Hearings 10792*].

26. *See generally* H.R. REP. NO. 93-1305, 93d Cong., 2d Sess. (1974).

27. H.R. 31, 94th Cong., 1st Sess. (1975) [hereinafter cited as the commission's bill].

28. H.R. 32, 94th Cong., 1st Sess. (1975) [hereinafter cited as the judges' bill].

29. S. 236, 94th Cong., 1st Sess. (1975).

30. S. 235, 94th Cong., 1st Sess. (1975).

31. *Hearings on H.R. 31 & H.R. 32 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st & 2d Sess. (1975-1976) [hereinafter cited as *House Hearings 31 & 32*].

32. *Id.* An extensive committee print comparing H.R. 31 and H.R. 32 with present law is reproduced in the appendix to the *House Hearings 31 & 32, supra* note 31.

33. *Hearings on S. 235 & 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as Senate Hearings].

34. The only group that refused to contribute, orally or in writing, during the hearing process of the 94th Congress was the Judicial Conference of the United States, which did not take action until two months after the introduction of H.R. 6 in January of 1977. *See* H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 19 (1977) [hereinafter cited as the House Report].

35. The National Bankruptcy Conference is a nonprofit organization comprised of law professors, attorneys, and judges interested in bankruptcy law. The conference has assisted Con-

ference of Bankruptcy Judges,[36] to resolve their differences.[37] Although these groups did resolve major differences,[38] they did not present a uniform statutory proposal to Congress.

As the House hearings drew to a close, one witness questioned the constitutionality of the commission's bill and the judges' bill insofar as they both provided for bankruptcy judges who would not have the "life tenure" guarantee of serving during good behavior under article III of the constitution.[39] This testimony prompted Congressman Rodino, Chairman of the House Judiciary Committee, to consult several constitutional experts concerning the constitutionality of these two bills.[40] Nine distinguished experts responded to Chairman Rodino's written request with several different conclusions.[41]

Congressman Edwards then requested the staff of the Subcommittee on Civil and Constitutional Rights to research and report on the issue of constitutionality. In addition, he instructed the staff, in consultation with various bankruptcy experts, to formulate a proposal resolving the hundreds of differences between the commission's bill and judges' bill. The staff then prepared a subcommittee print dated November 10, 1976, which served as a discussion draft for meetings with bankruptcy experts which took place from November 6, 1976, through February 25, 1977. Before the conclusion of these meetings, the discussion draft was further refined and formulated into a bill which was then offered to the subcommittee for introduction in the 95th Congress.

---

gress since 1934 in formulating bankruptcy legislation. *See House Hearings 31 & 32, supra* note 31, at 1410 & 1835.

36. *See* note 23 *supra*.

37. *House Hearings 31 & 32, supra* note 31, at 2681. The two groups proposed that a court be established for bankruptcy proceedings. The Commission on the Bankruptcy Laws of the United States proposed that judges be appointed by the President for fifteen-year terms. The National Conference of Bankruptcy Judges proposed that the judges be appointed by the circuit council which governs the district in which the judge would preside. *Id.*

38. *See* letter from John Copenhaver and Charles A. Horsky to Hon. Don Edwards, June 12, 1976, reproduced in *House Hearings 31 & 32, supra* note 31, at 1938.

39. Testimony of William T. Plumb, Jr., Esq., *House Hearings 31 & 32, supra* note 31, at 2035, 2081-84, & 2090-92. Article III of the constitution states in part: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1, cl. 2.

40. *See House Hearings 31 & 32, supra* note 31, at 2682-84.

41. *Id.* at 2682-2706. The nine experts of the Robert Morris Associates' Task Force on Proposed Changes to the Bankruptcy Act include: Bruce M. Clagett, Esq., of Jones, Day, Reavis & Pogue; Erwin N. Groswold of Georgetown University Law Center; Professor Thomas K. Krattenmaker of University of Chicago Law School; Professor Jo Desha Lucas of University of California—Berkeley; Professor Paul J. Mishkin of University of California—Berkeley; Professor Terrance Sandalow of University of Michigan Law School; Professor David L. Shapiro of Harvard University Law School; Herbert Wechsler, Columbia University; and Professor Charles Alan Wright of University of Texas at Austin.

On January 4, 1977, Congressmen Don Edwards and M. Caldwell Butler introduced this bill as H.R. 6 in the House of Representatives.[42] This bill was a *congressional* product representing a conglomeration of ideas proposed in the commission's bill, the judges' bill, House hearings, and various meetings. Among the provisions included in the legislation was one which required the establishment of an independent tenured bankruptcy court.[43] H.R. 6 was then circulated to the bench, the bar, and academicians who forwarded numerous comments to the subcommittee.[44] From these and other sources, the staff of the Subcommittee on Civil and Constitutional Rights assembled extensive briefing materials in preparation for "markup," the legislative procedure during which a subcommittee holds business meetings to consider legislation and offer amendments.

On March 21, 1977, the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary commenced marking up H.R. 6.[45] As a result of several briefing sessions in which the comments of the bench, the bar, and academicians were evaluated, an amendment in the nature of a substitute to H.R. 6 was formulated. The amendment was offered by Congressman Robert F. Drinan, a member of the subcommittee, on March 21, 1977, and became the legislative template for the balance of the markup sessions. By the time markup was concluded on May 16, 1977, the subcommittee had convened in twenty-two separate meetings and heard forty-two hours of debate examining the Drinan substitute line by line.[46] Over 120 amendments were considered and more than 100 were adopted.[47] Before markup concluded, the staff had prepared over thirty memoranda including a draft report entitled *Constitutional Bankruptcy Courts* dated May 16, 1977. On that day, the subcommittee also voted 7-0 to report out a clean bill incorporating the Drinan substitute into H.R. 6, as amended.[48] One week later, on May 23, 1977, the clean bill was introduced as H.R. 7330,[49] sponsored by all seven members of the Subcommittee on Civil and Constitutional Rights.[50] Thereafter, H.R. 7330 was further

---

42. H.R. 6, 95th Cong., 1st Sess. (1977) [hereinafter cited as H.R. 6]. No companion bill was introduced in the Senate.

43. *Id.* at § 201 (proposing 28 U.S.C. §§ 151-60 (1977)).

44. *See* House Report, *supra* note 34, at 3.

45. *See* 123 CONG. REC. H11,701 (daily ed. Oct. 27, 1977) (remarks of Rep. Butler). *See also* Minutes of the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977). Unpublished transcripts of each markup session were generated from tapes of the meetings.

46. *Id.*

47. *Id.*

48. *Id.*

49. H.R. 7330, 95th Cong., 1st Sess. (1977) [hereinafter cited as H.R. 7330].

50. During the 95th Congress, the seven members of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary were Representatives Don Edwards, M. Caldwell Butler, John Seiberling, Robert F. Drinan, Harold L. Volkmer, Anthony C. Beilenson, and Robert McClory.

improved as a result of technical comments received from the bench, the bar, and academicians. The result was that a new clean bill, H.R. 8200, superseded H.R. 7330 and was introduced by the members of the subcommittee [51] on July 11, 1977, for consideration by the full House Judiciary Committee. [52]

Meanwhile, in the latter part of May, 1977, Congressmen Edwards and Butler directed their subcommittee staff to prepare briefing materials for the full committee. A 700-page briefing notebook was circulated to all members of the House Judiciary Committee in preparation for full committee markup.[53] In addition, an unofficial table was prepared comparing H.R. 8200 with the commission's bill and the Bankruptcy Act. [54] On June 13, 1977, the staff of the Subcommittee on Civil and Constitutional Rights also completed its report entitled *Constitutional Bankruptcy Courts*. [55] This report concluded that because the bankruptcy court contemplated by the subcommittee's bill would be exercising the judicial power of the United States, the constitution required that the bankruptcy judges serve during good behavior. [56] The conclusion reached in this report was at odds with a paper published by a special committee on H.R. 6 of the Judicial Conference of the United States, [57] a resolution of the judicial conference opposing H.R. 6, and the concepts of tenured bankruptcy judges and a separate bankruptcy court. [58] Two issues, the independence of bankruptcy courts and the status of bankruptcy judges, dominated the debate concerning the bankruptcy legislation for the balance of the 95th Congress.

The House Judiciary Committee commenced markup of H.R. 8200 on July 14, 1977. [59] The comittee met on three different days and adopted six amendments to H.R. 8200. [60] Detailed minutes of the meetings were kept and a transcript was prepared. [61] On July 19, 1977, H.R. 8200, as

51. *See* note 50 *supra*.

52. H.R. 8200, 95th Cong., 1st Sess. (1977) [hereinafter cited as H.R. 8200].

53. 123 CONG. REC. H11,701 (daily ed. Oct. 27, 1977).

54. STAFF OF THE SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., TABLE OF DERIVATION OF H.R. 8200 (Comm. Print No. 6, 1977).

55. STAFF OF THE SUBCOMM. ON CIVIL & CONSTITUTIONAL RIGHTS OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., CONSTITUTIONAL BANKRUPTCY COURTS (Comm. Print No. 3, 1977) [hereinafter cited as Staff Report].

56. *Id.* at 38.

57. The Judicial Conference of the United States is comprised of twenty-five federal judges designated by 28 U.S.C. § 331 (1976). The Special Committee on H.R. 6 of the Judicial Conference was organized in March 1977, and filed its preliminary report on April 28, 1977. *See* House Report, *supra* note 34, at 19 n.112.

58. Resolution of Judicial Conference March 10, 1977. *See* House Report, *supra* note 34, at 18 n.111.

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

60. *Id. See* House Report, *supra* note 34, at 1-2. These amendments involve various technical, drafting, and style changes.

61. Transcript of Meetings of the House Comm. on the Judiciary July 14, 15 & 19, 1977, 95th Cong., 1st Sess. (1977).

amended, was ordered reported by a roll call vote of 26-3, with one member voting present.[62]

On the same day, Congressman Al Ullman, Chairman of the powerful House Ways and Means Committee, wrote a letter to Chairman Peter W. Rodino, Jr., of the House Judiciary Committee informing him of a potential jurisdictional conflict with Ullman's committee relating to certain tax provisions in the bankruptcy legislation.[63] The two committee chairmen met and reached an agreement obviating the need for a sequential referral[64] of H.R. 8200 to the House Ways and Means Committee.[65] Under the agreement, the House Judiciary Committee was to reconsider the bill in order to limit the scope of four special tax provisions[66] to cover only state and local taxes.[67] Therefore, on September 8, 1977, the House Judiciary Committee voted to reconsider its vote of July 19, 1977, ordering H.R. 8200 reported, and adopted an amendment in the nature of a substitute to the bill which contained limited special tax provisions.[68] H.R. 8200, as amended, was then ordered reported by a roll call vote of 23-8,[69] and Congressman Don Edwards immediately filed his 535-page committee report to accompany the bill.[70]

Once the jurisdictional problem with the Ways and Means Committee was resolved and H.R. 8200 was reported out by the House Judiciary Committee, the bankruptcy legislation was ripe for floor action in the House of Representatives. Like most legislation, however, H.R. 8200 was sent to the House Rules Committee as a prerequisite to floor consideration.[71] A rule regulating the procedure under which H.R. 8200 would be considered was granted by the House Rules Committee on October 12, 1977.[72]

62. Minutes of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977). *See* House Report, *supra* note 34, at 3.

63. Letter from Chairman Al Ullman to Chairman Peter W. Rodino, Jr., July 19, 1977. *See* House Report, *supra* note 34, at 3 n.9.

64. A sequential referral is a procedure by which one committee obtains jurisdiction over a bill reported out by another committee. Unless the referral is limited, the committee to which the bill is sequentially referred may adopt a committee amendment to any part of the bill. *See* notes 99-101 *infra* where the Senate Finance Committee even amended parts of S. 2266 over which it did not have jurisdiction.

65. House Report, *supra* note 34, at 3.

66. H.R. 8200, *supra* note 52, § 101 (proposed 11 U.S.C. app. §§ 346, 728, 1146, 1331 (Supp. II 1978).

67. House Report, *supra* note 34, at 3.

68. *Id.* at 1-3.

69. *Id.* at 3. The increased opposition to H.R. 8200, as compared with the vote of July 19, 1977, was due to opposition to article III bankruptcy judges and the United States Trustee System. *See* House Report, *supra* note 34, at 539-42 (separate views).

70. 123 CONG. REC. H9,057 (1977).

71. Other means of access to the floor of the House, such as unanimous consent, placing the bill on the consent calendar or suspension calendar, or waiting for "calendar Wednesday," are rarely used for major legislation. The least onerous of these alternative procedures, suspension of the rules, requires a two-thirds vote on final passage instead of the ordinary majority vote.

72. H. Res. 826, 95th Cong., 1st Sess., 123 CONG. REC. D1,475 (1977). The rule provided for two hours of debate. There were no unusual restrictions on the amendments that could be

Congressmen Edwards and Butler were hopeful that floor consideration of H.R. 8200 would be conducted in the middle of the week; the greatest number of congressmen usually are present and voting at that time. They knew that several floor amendments would be offered, including an amendment sponsored by Congressmen Danielson and Railsback to alter the court and administrative systems. Congressman Edwards approached the Speaker of the House[73] concerning floor time and was verbally assured by the Speaker that efforts would be made to arrange a mid-week consideration. H.R. 8200 was called up for debate, however, late the afternoon of Thursday, October 27, 1977,[74] with the crucial amendments not to be decided until Friday, October 28, 1977.[75]

The House debate revealed no surprises and the stage for the amendment process was set. After a noncontroversial amendment was adopted,[76] Congressman Danielson offered an amendment commonly known as the "Danielson-Railsback Amendment."[77] The amendment was designed to eliminate the article III status of bankruptcy courts and to reinstitute their original position as adjuncts to the United States District Courts. The amendment also proposed to restrict the jurisdiction of bankruptcy courts and to place the United States trustee system under the aegis of the judiciary rather than the Department of Justice.[78] The Danielson-Railsback Amendment was debated and passed on a roll call vote by a margin of 183-158.[79] Congressman Don Edwards then successfully employed a parliamentary device whereby H.R. 8200 was temporarily withdrawn from further floor consideration.[80]

With proceedings in the House at impasse, the focus shifted to the Senate. During the spring and summer of 1977, no formal action was taken by the Senate. Senator Dennis DeConcini, newly-appointed Chairman of the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, however, instructed his subcommittee staff to prepare an alternative to the House version of the legislation. This Senate version would be considered if and when the House of Representatives passed their bill.

Events in the House resulted in a change in this strategy. On October 31, 1977, Senator DeConcini introduced S. 2266,[81] cosponsored by Senator

---

offered, but the amendment in the nature of a substitute to H.R. 8200 passed by the House Judiciary Committee was to be considered as the text of the bill for purposes of amendments.

73. Hon. Thomas P. (Tip) O'Neill, Jr.

74. 123 CONG. REC. H11,696 (daily ed. Oct. 27, 1977).

75. 123 CONG. REC. H11,761-83 (daily ed. Oct. 28, 1977).

76. *Id.* at 11,761. The amendment was proposed by Representative Foley and involved an unrelated technical revision.

77. *Id.* at 11,763.

78. *See id.* at 11,767-68 (remarks of Rep. Danielson).

79. *Id.* at H11,782-83.

80. The technical motion was "that the Committee [of the Whole House on the State of the Union] do now rise." *Id.* at H11,783.

81. S. 2266, 95th Cong., 2d Sess. (1977) [hereinafter cited as S. 2266].

Malcolm Wallop, ranking minority member of the subcommittee. S. 2266 was essentially the analogue of H.R. 8200, although there were substantial differences between the two bills. In late November and early December, 1977, Senator DeConcini presided over three days of hearings on S. 2266 by the Subcommittee on Improvements in Judicial Machinery.[82] The subcommittee heard testimony from at least sixty witnesses, including Attorney General Griffin B. Bell, and received several hundred written statements and comments on the bill.[83] No further Senate action on the bankruptcy legislation was taken during 1977.

Meanwhile in the House, Congressman Don Edwards conducted an investigation of alternative court and administrative systems. He presided over hearings on that aspect of H.R. 8200 held by the Subcommittee on Civil and Constitutional Rights on December 12, 13, and 14, 1977.[84] Twenty-two witnesses testified on this controversial issue, including Attorney General Griffin B. Bell and representatives of the powerful Judicial Conference of the United States.[85] After the hearings concluded, the subcommittee published a report reflecting its unanimous and continued belief that article III bankruptcy courts were constitutionally required.[86]

Buoyed by the tenacity of the Subcommittee on Civil and Constitutional Rights on the issue of article III courts, several groups who had testified in opposition to the Danielson-Railsback Amendment commenced a spontaneous educational effort with various congressmen. As a result, Congressman Edwards decided to employ a parliamentary device that would entitle him to request another vote on the Danielson-Railsback Amendment when H.R. 8200 was again considered by the House.

On Wednesday, February 1, 1978, the House of Representatives resumed consideration of H.R. 8200. As reported by the Committee on the Judiciary, H.R. 8200 contained a controversial provision repealing exceptions to dis-

---

82. *See Hearings on S. 2266 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *Senate Hearings 2266*].

83. *See* S. REP. NO. 95-989, 95th Cong., 2d Sess. 2 (1978) [hereinafter cited as the Senate Report].

84. *Hearings on H.R. 8200 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *House Hearings 8200*].

85. *Id.* Members of the House Judiciary Committee who had supported the Danielson-Railsback Amendment were invited to attend the hearings but declined to do so.

86. SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE FOR BANKRUPTCY CASES (Comm. Print No. 13, 1978). *See also* SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS FOR THE COMMITTEE ON THE JUDICIARY, 95TH CONG., 1ST SESS., A REPORT (Comm. Print No. 3, 1977). This report refers to Palmore v. United States, 411 U.S. 389 (1973), in which the Supreme Court states: "[T]he requirements of Article III, . . . are applicable where laws of national applicability and affairs of national concern are at stake. . . ." *Id.* at 407-08.

charge for certain educational loans.[87] Congressman Allen E. Ertel, a member of the committee whose amendment was defeated at the committee level, offered an amendment to H.R. 8200 to insert an educational loan exception to discharge into the Bankruptcy Code;[88] this time the amendment prevailed on division by a vote of 54-26.[89] Two additional amendments were adopted by voice vote before the recount of the Danielson-Railsback Amendment.[90] Immediately before the vote on final passage of the bill, Congressman Don Edwards asked for a separate vote on the Danielson-Railsback Amendment. In a dramatic reversal of the vote of October 28, 1977, the House defeated the amendment by a record vote of 146 for and 262 against.[91] The House then passed H.R. 8200, as amended, by voice vote,[92] and the bill was engrossed and sent to the Senate on Feburary 8, 1978.[93]

Passage of H.R. 8200 by the House of Representatives spurred action in the Senate. The Subcommittee on Improvements in Judicial Machinery synthesized both the results of the hearings it held on S. 2266 in November and December of 1977[94] and comments made after those hearings into an amendment in the nature of a substitute to S. 2266.[95] On May 17, 1978, the subcommittee reported out the amendment to S. 2266 by a vote of 3-0 with one member not voting.[96] The full Senate Judiciary Committee met and considered S. 2266, as amended, on July 12, 1978. After adopting and incorporating three of its own amendments,[97] the Senate Judiciary Commit-

---

87. H.R. 8200, *supra* note 52, §§ 316 & 326. *See* Pub. L. No. 95-595, §§ 317 & 327, 92 Stat. 2678-79.

88. The exception was to be inserted as 11 U.S.C. app. § 523(a)(8) (Supp. II 1978). *See* 124 CONG. REC. H466 (daily ed. Feb. 1, 1978) (remarks of Rep. Ertel).

89. *Id.* at H472. The amendment failed to synchronize the repeal of exceptions under the present law, *e.g.*, Higher Education Act of 1965, § 439A, 20 U.S.C. § 1087-3 (1976), with the insertion of the exception to discharge in 11 U.S.C. app. § 523(a)(8) (Supp. II 1978). The hiatus was perpetuated by Pub. L. No. 95-598 with the result that the exceptions to discharge under former laws were repealed Nov. 6, 1978, while the exception in title 11 would not become effective until October 1, 1979 (Fiscal 1980). *See* §§ 402(a) & 402(d) of Pub. L. No. 95-598, *supra* note 3, at §§ 402(a) & 402(d). ***But see*** Pub. L. No. 96-56 (Aug. 14, 1979) reinstating app. educational loan exception to discharge and amending 11 U.S.C. app. § 523(a)(8) (Supp. II 1978).

90. *See* 124 CONG. REC. H472-74 (daily ed. Feb. 1, 1978) (remarks of Reps. Panetta and McKinney). The amendments were offered by Congressman Leon Panetta regarding the Perishable Agricultural Commodities Act and by Congressman Stewart B. McKinney regarding the Fair Credit Reporting Act.

91. *Id.* at H477-78.

92. *Id.* at H478.

93. 124 CONG. REC. S1,582 (daily ed. Feb. 8, 1978). The engrossed copy of a bill is a clean copy representing the final action of the first house of Congress to take action on a bill.

94. *See* note 82 *supra*.

95. Senate Report, *supra* note 83, at 4.

96. *Id.*

97. The amendments, *inter alia*, affected reaffirmation of discharged debts under proposed 11 U.S.C. app. § 524(b) (Supp. II 1978). *See* Minutes of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. (1978).

tee voted unanimously in favor of the amendment in the nature of a substitute to S. 2266. Senator DeConcini promptly filed his report to accompany S. 2266 on July 14, 1978.[98]

Supporters of the bankruptcy legislation waited nervously as S. 2266 was sent to the Senate Finance Committee on a thirty-day sequential referral to review certain specified provisions.[99] There was legitimate doubt whether the bill could be passed by the Senate, and resolved in a conference with the House before adjournment of the 95th Congress.[100] If new bankruptcy legislation was not enacted during the 95th Congress, the entire process would have to start afresh in the 96th Congress in 1979.

Congressman Don Edwards recognized that if the Senate did act on the bankruptcy legislation in August or September of 1978, there would be very little time to resolve the differences between the two houses of Congress. Accordingly, as soon as S. 2266 passed the Senate Judiciary Committee, he instructed his subcommittee staff to prepare a memorandum comparing H.R. 8200 as passed by the House, and S. 2266 as reported by the Senate Judiciary Committee. On August 1, 1978, members of the House Subcommittee on Civil and Constitutional Rights received a memorandum outlining fifty-two potential issues which might surface at a conference between the two houses and an additional memorandum anticipating amendments to S. 2266 that might be adopted by the Senate Finance Committee. On August 2, 1978, members of the House subcommittee were briefed by its staff on those issues together with numerous ancillary points.

Meanwhile, the Senate Finance Committee collaborated with the staff of the Joint Committee on Taxation and with representatives of the Internal Revenue Service, and the Departments of Treasury and Justice. The full Senate Finance Committee considered S. 2266 on August 8, 1978, and adopted several committee amendments to S. 2266. The Senate Finance Committee then reported S. 2266 as amended, and Senator Russel B. Long, Chairman of the Finance Committee, filed his committee's report on August 10, 1978.[101]

The Senate proceeded to consider S. 2266 on September 7, 1978. An amendment offered by Senator Dewey Bartlett permitting reaffirmation of discharged debts was passed on a roll call vote of 51 to 20, and three other less controversial amendments were agreed to by voice vote.[102] Then, according to normal Senate procedure, the Senate tabled S. 2266, took up

---

98. Senate Report, *supra* note 83.

99. Only sections 346, 507, 509, 523, 728, 1146, and 1331 of proposed title 11 were sequentially referred to the Senate Finance Committee.

100. Conference on a major piece of legislation can often take months, *e.g.*, as with the energy legislation in the 95th Congress.

101. S. REP. No. 95-1106, 95th Cong., 2d Sess. (1978) [hereinafter cited as Senate Report 95-1106].

102. 124 CONG. REC. S17,422-43 (daily ed. Sept. 7, 1978) (remarks of Sen. Bartlett). The noncontroversial amendments included, *inter alia*, various amendments to the Commodity Broker Liquidation provisions in subchapter IV of chapter 7 of title 11.

H.R. 8200, struck out all of the text appearing after the enacting clause, and instead inserted the text of S. 2266, as amended. H.R. 8200, as revised by the Senate amendment in the nature of a substitute, was then passed by voice vote.[103] The Senate immediately insisted on its amendment and requested a conference with the House, but no Senate conferees were appointed.[104]

The Senate amendment in the nature of a substitute to H.R. 8200 differed substantially from the House version. The principal difference involved the court and administrative systems. Under the House bill, independent article III bankruptcy courts were established, while supervision of the administration of cases was entrusted to United States trustees monitored by the Department of Justice. Under the Senate amendment to H.R. 8200, bankruptcy courts would remain adjuncts to the United States District Courts eliminating United States trustees. There were significant differences in the substantive law as well, including issues such as exemptions, reaffirmation, and the treatment of public companies in reorganization cases.

For the moment, all of these differences were dwarfed by a seemingly insignificant amendment to the Internal Revenue Code which was originally adopted by the Senate Finance Committee and passed by the Senate.[105] The House parliamentarian advised members of the House Judiciary Committee that there was a problem. This amendment originated in the Senate and reduced revenues, and, since the bankruptcy bill was not a revenue-raising bill, the amendment violated the constitution.[106] Therefore, the engrossed copy of the Senate amendment would not be accepted by the Speaker of the House. Accordingly, arrangements were made to vitiate the passage of H.R. 8200 as amended by the Senate and to delete the controversial tax amendment. On September 22, 1978, passage of H.R. 8200 was vitiated by unanimous consent of the Senate,[107] and, after an appropriate amendment in the nature of a substitute was adopted, the bill was passed again by unanimous consent.[108]

On September 26, 1978, the Senate insisted on its version of H.R. 8200, requested a conference with the House, and appointed conferees.[109] On that same day, Congressmen Edwards, Butler, Drinan, Volkmer, and

---

103. *Id.* at S14,745.

104. *Id.*

105. Section 318(a) of the amendment in the nature of a substitute to H.R. 8200 passed by the Senate on September 7, 1978, would have amended section 47 of the Internal Revenue Code with respect to certain transfers to Conrail.

106. U.S. CONST. art. 1, § 7, cl. 1 provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives. . . ." Bills reducing revenue may be within the purview of this provision.

107. 124 CONG. REC. S15,878 (daily ed. Sept. 22, 1978) (remarks of Sen. Robert Byrd).

108. *Id.*

109. 124 CONG. REC. S16,210 (daily ed. Sept. 22, 1978) (remarks of Sens. Robert Byrd and Clark). Senators James Eastland, Chairman of the Senate Judiciary Committee, DeConcini, Joseph Biden, Strom Thurmond, and Wallop were named as conferees. *Id.* The appointment of conferees by the Senate was a precondition to sending the papers back to the House for action.

McClory met with Senators DeConcini and Wallop at a public meeting to discuss the procedure for resolving the differences between the House and Senate versions of H.R. 8200.[110] It was readily apparent that a House-Senate conference would not be fruitful because the crucial compromises to be reached would not be within the scope of the differences between the House and Senate versions of the bill.[111] Accordingly, the managers of the legislation in the House and Senate agreed to resolve the differences between the two versions of the bill without a formal conference.[112] This agreement was offered by Congressman Don Edwards in the House of Representatives on September 28, 1978, in the form of a House amendment to the final adopted Senate amendment in the nature of a substitute to H.R. 8200.[113] An amended version of H.R. 8200 was then passed by unanimous consent,[114] even though an initial unanimous consent request was unsuccessful.[115] Immediately thereafter, the new House amendment was engrossed and sent to the Senate, where it would have been considered and probably passed on the evening of September 28, 1978.

At that point, however, the Chief Justice of the United States[116] personally intervened in an attempt to thwart passage of the bankruptcy legislation.[117] As a compromise between the House bill and the Senate amendment, the new House amendment provided for non-tenured bankruptcy judges to serve on independent bankruptcy courts as adjuncts to the United States Courts of Appeals, with a pilot program of United States trustees in eighteen judicial districts.[118] The Chief Justice objected to the proposed elevation in status of bankruptcy judges. He first voiced his objection to Senator DeConcini during a telephone conversation.[119] The Chief Justice then telephoned Senators Wallop and Thurmond, at which time Senator Thurmond immediately placed a "hold" on the legislation, effectively preventing its consideration by the Senate.[120]

---

110. *See* 124 CONG. REC. H11,089 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

111. Clause 3 of Rule XXVIII of the Rules of the House of Representatives, 95th Cong., 1st Sess. (1977), makes a conference report subject to a point of order if it contains matters not within the scope of the differences. W. BROWN, CONSTITUTION JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 416, 93d Cong., 2d Sess. 616-17 (1975).

112. 124 CONG. REC. H11,089 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

113. *Id.* at H11,047.

114. *Id.* at H11,117.

115. *Id.* at H11,037. Congressman Henry Hyde reserved the right to object and suggested that the unanimous consent be deferred. After the request was withdrawn, Congressmen Don Edwards, Butler, and McClory then met with Congressman Hyde. When Congressman Edwards made another unanimous consent request later the same day, Congressman Hyde did not object.

116. Hon. Warren E. Burger.

117. *See, e.g.*, Los Angeles Daily Journal, Oct. 4, 1978, at 1, col. 7.

118. *See* §§ 201 & 224 of H.R. 8200 as passed by the House of Representatives, September 28, 1978. 124 CONG. REC. H11,107 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

119. *See, e.g.*, Los Angeles Times, Oct. 7, 1978, § 1, at 10.

120. *See* 124 CONG. REC. S17,434 (daily ed. Oct. 6, 1978) (remarks of Sen. Thurmond). Senator Thurmond's "hold" on the House amendment to the Senate amendment in the nature

The next week witnessed intense confrontations at several levels. The most important of which was a meeting of the Attorney General[121] with the House and Senate managers of the bankruptcy legislation, called in order to forge a compromise. Efforts by the Chief Justice to meet with congressional principals were rebuffed. With varying success, special interest groups lobbied senators to place additional "holds" on the legislation unless Senator DeConcini would accept their amendments.[122] Prospects for final passage diminished as negotiations continued. As soon as one problem was solved, a different special interest group would make additional demands. With every passing day adjournment of the 95th Congress, set for October 14, 1978, drew closer.

Thus, it was no small matter that on October 5, 1978, Senator DeConcini arranged a time agreement with Senator Thurmond which facilitated consideration of the bankruptcy legislation.[123] The Senate Majority Leader[124] asked the Chair to lay before the Senate the House of Representatives' amendment to H.R. 8200.[125] Shortly thereafter, Senator DeConcini moved to concur in the House amendment with a series of unprinted Senate amendments offered en bloc.[126] The motion was agreed to by voice vote, and the Senate amendment was returned to the House.[127]

On the morning of Friday, October 6, 1978, Congressman Don Edwards had to make an immediate decision regarding the bankruptcy legislation. Senator DeConcini had telephoned to say that the Senate would not act on the legislation again during the 95th Congress and that the bill was in a "take it or leave it" posture. Congressman Edwards urged acceptance of certain controversial provisions included by the Senate "because of the lateness of the session and our concern with insuring passage of this much-needed legislation."[128]

Passage of H.R. 8200 by the House, however, was far from insured. Because of the lateness of the session, Congressman Edwards could not obtain a rule from the House Rules Committee to gain access to the House floor for consideration of H.R. 8200. Since the bill did not go through the procedure

---

of a substitute to H.R. 8200 did not present a technical parliamentary obstacle to consideration of the bill. Rather, Senator DeConcini refused to process the legislation as a matter of senatorial courtesy. In rare circumstances the Senate leadership may call up legislation notwithstanding a "hold" although there is always a risk that the Senator placing the "hold" will then filibuster the legislation.

121. Hon. Griffin B. Bell.

122. Lobbyists from the commodities industry and the railroads were very successful while the efforts of the Securities Exchange Commission staff and the consumer finance industry were less fruitful.

123. 124 CONG. REC. S17,403 (daily ed. Oct. 6, 1978) (remarks of Sen. Robert C. Byrd).

124. Sen. Robert C. Byrd.

125. 124 CONG. REC. S17,403-04 (daily ed. Oct. 6, 1978) (remarks of Sen. Robert C. Byrd).

126. *Id.* at S17,404-05.

127. *Id.* at S17,434. The Senate amendment amended the House amendment to the previous Senate amendment, which had been in the nature of a substitute to H.R. 8200.

128. *Id.* at H11,866 (remarks of Rep. Don Edwards).

of a conference, consideration was not privileged under the rules of the House and an alternative approach was needed.[129] Therefore, on the afternoon of October 6, 1978, Congressman Edwards asked the House of Representatives to unanimously consent to take H.R. 8200, as amended, from the desk, and to unanimously concur in the latest Senate amendment.[130] Congressman John Ashbrook objected and the request was denied.[131]

Unanimous consent is seldom obtained during the final days of a session when the power of dissenting congressmen becomes enormous. Congressman Edwards and others talked with Congressman Ashbrook during the afternoon of October 6, 1978, and before Congressman Edwards left the Capitol to fly to California he was confident an agreement had been reached. Late on the afternoon of October 6, 1978, Congressman Herbert E. Harris II renewed the request for unanimous consent to concur in the Senate amendment.[132] Congressman Robert Bauman, the Republican "official objector," stated that he had no objection, and the motion to concur in the latest Senate amendment carried without objection.[133]

Normally when a bill passes both houses of Congress, enrollment[134] is swift and transmission to the White House for presidential action is rapid. Nothing was normal, however, in the history of H.R. 8200. Days passed as the House enrolling clerk complained of the crush of processing final legislation and delay in receiving enrolled bills from the Government Printing Office. Whatever the reason for or source of the delay, the enrolled bill was not transmitted to the White House until October 25, 1978.[135]

Once the enrolled copy of H.R. 8200 arrived at the White House, it was officially circulated through the Executive Branch. It was rumored that although most recommendations were positive, the Securities and Exchange Commission and the Chief Justice[136] urged the President to veto the bill.[137] Disregarding speculation about who advised the President or when

129. *See* note 71 *supra*.

130. 124 CONG. REC. H11,850 (daily ed. Oct. 6, 1978) (remarks of Rep. Don Edwards).

131. *Id.*

132. *Id.* at H11,864.

133. *Id.* at H11,866.

134. Enrollment of a bill involves passage by both houses of Congress, signatures by the proper officers of each house, approval by the president and filing by the secretary of state. *See* BLACK'S LAW DICTIONARY 624 (4th ed. 1968). Before a bill may be transmitted from Congress to the President, the enrolling clerk must "enroll" the bill.

135. 124 CONG. REC. H13,700 (daily ed. Nov. 15, 1978).

136. *See* note 116 *supra*. Evidently the Chief Justice communicated the veto message as Chairman of the Judicial Conference of the United States. On October 17, 1978, the conference, in closed session reportedly voted unanimously to urge the President to veto the bill. *See* Aldisert, *The Judicial Conference and the New Bankruptcy Act*, 65 A.B.A.J. 229 (February 1979). Title 28 U.S.C. § 331 (1976) authorizes the Chief Justice to transmit to Congress recommendations of the conference for legislation; however, there is no express authorization for the conference to transmit recommendations for legislation to the President.

137. A grossly inflated cost estimate of the bill totalling more than half a billion dollars over the first ten years was prepared by the Administrative Office of the United States Courts and

a final decision was made, it is public record that the President signed H.R. 8200 into law at Camp David, Maryland, late on the night of November 6, 1978, the last day on which the bill could have been signed into law.[138] Thus, the legislative history of the fifth bankruptcy law of the United States[139] was concluded successfully.

Using Legislative History to Interpret the Law

Recounting the legislative history of the new bankruptcy law[140] is of practical importance to practicing lawyers as well as to legal scholars. To some extent,[141] the legislative history is useful in interpreting the statute whether the purpose is to gain academic insight or to advocate a legal proposition. Unfortunately, proper evaluation of the legislative history of a statute is often confusing even when Congress follows simple legislative procedures. As the history of Pub. L. No. 95-598 indicates, the new bankruptcy law[142] was not enacted by a simple legislative procedure.

Suppose that a particular section of Title 11 of the United States Code[143] must be analyzed and researched. The best method of using the legislative history to aid in interpretation is to begin with the most recent statement of authority and delve backward through the legislative process. Thus the following authorities should be consulted in this order:

1. floor statement of Congressman Don Edwards, October 6, 1978,[144] on final passage of H.R. 8200;
2. floor statement of Senator DeConcini, October 5, 1978,[145] on passage of the final Senate amendment in the nature of a substitute to H.R. 8200;
3. floor statement of Congressman Don Edwards, September 28, 1978,[146] on passage of the House amendment to the Senate amendment in the nature of a substitute to H.R. 8200;

---

submitted to the Office of Management and Budget. *Id.* The Congressional Budget Office submitted a cost estimate that was much more reserved and realistic, projecting an average cost less than $20 million per year.

138. Under U.S. CONST. art. I, § 7, cl. 2, if Congress had adjourned *sine die* so that a bill cannot be returned, then the President must sign a bill into law within ten days (excluding Sundays) after it is received by him. If no action is taken by the President under those circumstances, the bill is pocket vetoed.

139. Pub. L. No. 95-598, *supra* note 3.

140. *Id.*

141. The extent to which legislative history should be consulted is unclear. There are canons of statutory construction that the legislative history is never consulted when the statute is clear and unambiguous. On the other hand, some cases hold that it is always appropriate to consult legislative history to interpret a statute however clear the words of the statute may appear. Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976).

142. Pub. L. No. 95-598, *supra* note 3.

143. Title I of Pub. L. No. 95-598, *supra* note 3, codifies and enacts title 11 of the United States Code—Bankruptcy, 92 Stat. 2549, [hereinafter cited as the Code].

144. 124 CONG. REC. H11,866 (daily ed. Oct. 6, 1978) (remarks of Rep. Don Edwards).

145. 124 CONG. REC. S17,404-33 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

146. 124 CONG. REC. H11,047-115 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).

4. floor statement of Senator DeConcini, September 7, 1978,[147] on initial passage of the Senate amendment in the nature of a substitute to H.R. 8200;
5. Senate Report of the Finance Committee[148] to accompany S. 2266 filed by Senator Long on August 10, 1978;
6. Senate Report of the Judiciary Committee[149] to accompany S. 2266 filed by Senator DeConcini on July 14, 1978;
7. floor statement of Congressman Don Edwards, February 1, 1978,[150] on passage of H.R. 8200, as amended;
8. floor statement of Congressman Don Edwards, October 27, 1977,[151] on consideration of H.R. 8200;
9. House Report of the Judiciary Committee[152] to accompany H.R. 8200 as reported filed by Congressman Don Edwards, September 8, 1977.

If further research is necessary, other sources may be consulted, such as hearings[153] or transcripts of markup sessions.[154] In any event, it is important to remember that only the statements listed in items one and two above refer to the new bankruptcy law[155] as enacted. Every other source, items three through nine, interprets an earlier version of the final legislative product. Accordingly, each source must be correlated with the appropriate piece of legislation. For example, the Senate report[156] must be read with the amendment in the nature of a substitute to S. 2266 as reported by the Senate Judiciary Committee on July 14, 1978, instead of with S. 2266 as introduced[157] on October 31, 1977.

Consider, for example, the question of whether a person is considered an affiliate of a debtor if that person has all of his or her property operated by the debtor under a lease. To answer this question, the definition of "affiliate" is examined in the code.[158] The definition covers a person who has all of his or her property operated under an operating agreement with the debtor,[159] but the term "lease" is not used. To determine if the omission of the word "lease" was intentional, the procedure outlined above should be implemented.

---

147. 124 CONG. REC. S14,718-45 (daily ed. Sept. 7, 1978) (remarks of Sen. DeConcini).
148. Senate Report 95-1106, *supra* note 101.
149. Senate Report, *supra* note 83.
150. 124 CONG. REC. H473 (daily ed. Feb. 1, 1978) (remarks of Rep. Don Edwards).
151. 123 CONG. REC. H11,698-99 & H11,703-04 (daily ed. Oct. 27, 1977) (remarks of Rep. Don Edwards).
152. House Report, *supra* note 34.
153. *House Hearings 10792, supra* note 25; *House Hearings 31 & 32, supra* note 31; *House Hearings 8200, supra* note 84; Senate Hearings, *supra* note 33; *Senate Hearings 2266, supra* note 82.
154. *See* notes 45 & 61 *supra*.
155. Pub. L. No. 95-598, *supra* note 3.
156. Senate Report, *supra* note 83.
157. S. 2266, *supra* note 81.
158. 11 U.S.C. app. § 101(2) (Supp. II 1978).
159. *Id.* at § 101(2)(c).

Under step one, reference is made to Congressman Edwards' final floor statement,[160] but no mention of the definition of "affiliate" is made. Under step two, reference is made to Senator DeConcini's final floor statement[161] and an explanation can be found that the deletion of "lease" was intentional.[162] It is comforting to note that if the third step is pursued, the statement of Congressman Don Edwards explaining the House amendment,[163] yields the same result.[164] It must be noted, however, that reference to the House Report[165] in step nine would provide contrary legislative history;[166] the definition of "affiliate" in H.R. 8200 as reported by the House Committee on the Judiciary included property operated under a lease.[167] Thus, when step one or two of the legislative history contains an explanation, it is a mistake to rely unquestioningly on legislative history from step eight or nine because the language of the statute may have been amended. Stated in a different way, the more recent legislative history is usually more accurate than the older history in describing the code.

Often there will be no legislative history derived from step one, two, or three. Then it is necessary to dig deeper. There may be a question on whether costs *and* an attorney's fee may be awarded against petitioning creditors and in favor of the debtor on the dismissal of an involuntary petition. The code permits the court to award "costs; a reasonable attorney's fee; or any damages. . . ."[168] Examining the Rules of Construction reveals that the word "or" is not exclusive.[169] In order to find out what "not exclusive" means, the nine-step procedure is employed. The first five steps produce no enlightenment; it is not until the Senate Report[170] is examined in step six that the answer is found: "if a party 'may do (a) or (b),' then the party may do either or both."[171] Examination of step nine, the House report,[172] supports the conclusion that the court may award costs, an attorney's fee, or both costs and an attorney's fee.[173]

Sometimes the legislative history found in one step will expressly incorporate the legislative history from another step. In that event, the legislative history from intervening steps should be ignored in preference to the history that is specifically incorporated by reference. For example, an individual

---

160. 124 CONG. REC. H11,866 (daily ed. Oct. 6, 1978) (remarks of Rep. Don Edwards).
161. *Id.* at 517, 404-33 (remarks of Sen. DeConcini).
162. *Id.* at S17,406.
163. *Id.* at H11,047-115 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards).
164. *Id.* at H11,090.
165. House Report, *supra* note 34.
166. *Id.* at 308.
167. H.R. 8200, 95th Cong., 1st Sess. (proposing 11 U.S.C. app. § 101(2) (Supp. II 1978).
168. 11 U.S.C. app. § 303(i)(1)(B) (Supp. II 1978).
169. 11 U.S.C. app. § 102(5) (Supp. II 1978).
170. Senate Report, *supra* note 83.
171. *Id.* at 28.
172. House Report, *supra* note 34.
173. *Id.* at 315.

debtor in a liquidation case may desire to redeem an automobile worth $2,000 from a $1,200 lien under 11 U.S.C. § 722. The issue arises whether the entire lien may be redeemed or only that portion that is technically exemptible. The answer under the code is unclear.[174] Using the nine-step procedure, one finds that step one produces no results but step two reveals that "[s]ection 722 of the House amendment adopts the position taken in H.R. 8200 as passed by the House and rejects the alternative contained in section 722 of the Senate amendment."[175] Therefore, inquiry is focused on the House report[176] in step nine which reveals that the car may be redeemed from the entire lien.[177] The fact that the crucial language in the House report is omitted in the more recent Senate report[178] is of no concern; once step two directs the search to step nine, step six is ignored.

The foregoing method should assist legal scholars, advocates, and judges in accurately evaluating "congressional intent" in relation to Pub. L. No. 95-598. While the method may seem cumbersome or opaque the first few times it is used, eventually it will become as routine as "shepardizing" cases.

---

174. 11 U.S.C. app. § 722 (Supp. II 1978).

175. 124 CONG. REC. S17,414 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

176. House Report, *supra* note 34.

177. *Id.* at 381.

178. Senate Report, *supra* note 83, at 95.