AN ORAL HISTORY: REFLECTIONS ON MY 35 YEARS IN BANKRUPTCY POLICY

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TABLE OF CONTENTS

I did not take a bankruptcy course in law school.[1] Professor Sam Donnelly was a renowned teacher at Syracuse who taught the course, but I was more focused on administrative law as an elective in the third year, as I was planning to practice in D.C. after graduation.

It was as an intern in the New York State Attorney General's office while in law school, where I had my first exposure to bankruptcy law and policy. I worked in consumer protection. The office had the statutory authority to bring actions seeking injunctive relief against business practices that defrauded consumers. I investigated a home improvement repair contractor who had clearly defrauded several vulnerable homeowners. The office brought an action in state court and prevailed, securing not only injunctive relief but also an order of restitution for the benefit of the victims. After making a few payments, the defendant stopped and instead filed a Chapter 7 bankruptcy. We sought to bring an adversary action in bankruptcy court to deny the discharge of our debt.

But this was in the early 1980s, and the new Bankruptcy Code enacted in 1978 had only a few specific and limited objections to the discharge of debts. These didn't specifically include restitution. Thus, our debt was discharged. While the court's finding was legally sound, the law, in my opinion, had re-victimized those who had been defrauded. Little did I know it then, but I would have the chance to help change this law less than five years later as a Congressional staffer in Washington.

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† J.D. Syracuse University College of Law, 1983. I am so grateful to the many scholars, practitioners and Senator Chuck Grassley for their contributions to this issue on my behalf. Special thanks to the College of Law for the honor of a dedicated issue and to Nikkia Knudsen for her assistance throughout.

1. The following information is a reflection of the author's professional career and experience in bankruptcy law. Information concerning details and specific experiences reflect the author's own knowledge.

Debts in the nature of restitution owed to a governmental unit are now non-dischargeable in bankruptcy.

After graduation and the D.C. bar exam, I worked as an attorney in the Office of Advocacy of the U.S. Small Business Administration in Washington. There I worked on administrative law matters under the Administrative Procedure Act, as I had hoped. One legislative matter I worked on was the reauthorization of the Equal Access to Justice Act (EAJA). The law allows small businesses to recover attorney's fees in litigation with the federal government in certain cases, where the government's legal actions are not substantially justified. The Senate sponsor of EAJA was Sen. Charles E. Grassley (R-IA).

Through my work on the bill, I became known to the Senator and his staff. One of the staff attorneys on the Senator's Judiciary Committee staff left in 1985 to join the Reagan Administration. Senator Grassley's chief counsel recommended me for the replacement, and I interviewed with the Senator in his office in the Hart Senate Office Building. Just two years removed from Syracuse University College of Law, I was offered a position on the Senator's Judiciary Committee staff. The committee's jurisdiction was administrative law and oversight of agency actions. I had never worked on Capitol Hill but knew these positions, especially in the Senate, were very coveted. With some fear of the unknown, I accepted, and the decision would change the arc of my entire life.[2]

I. EARLY YEARS AS COUNSEL TO A U.S. SENATOR

As a counsel to the majority staff, I settled in on an array of policy issues beyond EAJA. Cost-benefit analysis of agency action was an area of growing reform in an effort to reign in the excesses of the administrative state, which President Reagan (now in his second term) had vowed to cut back. But a more immediate issue became prominent in our office, especially for a Senator in his first term from a farm state.

In response to rising commodity prices and expanding export opportunities in the early 1970s, America's farmers were encouraged to plant "fencerow to fencerow." But as crop prices turned down, agriculture found itself in great crisis. Farm land values had fallen dramatically along with crop and commodity prices. Trade policies including the Carter Administration grain embargo cut off access to markets important to U.S. farmers who had been responsible for feeding the world. Severe weather and natural disasters further challenged the weakened farm sector.

2. A not incidental concern was the fact that I, then a very liberal Democrat, would be working for a very conservative Republican. But soon I began to find my political views in more alignment with my boss.

By the early 1980s, a third of operating farms were in severe financial distress. Farms that had been in families for generations were going into foreclosure. Options such as bankruptcy were of little help, because the major secured lenders had no incentive to work out alternative payments through a restructuring of the debt. While bankruptcy can help fix a company's balance sheet, it cannot produce revenue and farms were in a cash crunch.

The economic toll on the agriculture community was widespread and the personal toll was apparent as well, as small towns suffered the loss of businesses and jobs. Families were distressed too, as we would hear in daily calls and letters to the office in Washington. I responded to many of those communications on behalf of Senator Grassley.

The State's only bankruptcy judge in the Northern District of Iowa suffered a heart attack and died on the job, after working around the clock for months trying to assist family farmers in their emergency hearings to stave off foreclosure. This tragedy brought more immediacy to the need for Congress to assist.

Our Judiciary Committee subcommittee also had jurisdiction over the bankruptcy laws and Senator Grassley, as chairman, would have the ability to shape new legislation to try to address this problem. He tasked me to get to work on possible solutions, and quickly.

Where to begin in the midst of a national crisis? I lacked a background in agricultural economics and my bankruptcy understanding was primitive. Time was of the essence as more horrors of the crisis on the farm made news daily. The issue was also becoming very political; the "blame game" so common in Washington was coloring my first exposure to the pressure to "do something." An election loomed in less than eighteen months. We needed to at least introduce a bill to demonstrate a willingness to respond.

One of the benefits of my position as majority counsel on the Senate Judiciary Committee was the ability to ask almost anyone for help. I found no shortage of willing experts from law, the judiciary, and academia who had helpful ideas on how to think about solutions. These individuals spent countless hours with me by phone and many traveled to Washington at their own expense to meet with me and other staff. We were able to organize several Senate hearings in 1985 on the scope of the problem, and the shortcomings of Chapter 11 in dealing with agricultural debt. There were constitutional issues to consider, beyond mere policy concerns; a Depression Era special law aimed at resolving farm debts had been declared unconstitutional by the Supreme Court. We established an extensive record on these and other issues, justifying a strong legislative response.

The House of Representatives, controlled by Democrats, was on track to pass farm bankruptcy legislation that was very debtor-oriented, and likely to attract opposition from both the secured lender community (now also in financial distress) and the Reagan Administration, via the Farmers Home Loan Administration. The House majority was all too happy to blame their political opponents in the coming mid-term elections for failure to act. Popular culture, from the music industry[3] to Hollywood[4], stepped up the pressure on Washington to act. If we were going to achieve our goal of relief for farm families, we would have to thread the policy needle.

Senator Grassley's nature and reputation, then and now, is to seek bipartisan support. He was able to persuade our ranking Democrat member, Senator Howell Heflin from Alabama and our House counterpart sponsor, Representative Mike Synar from Oklahoma, of the need for compromise. It helped that each was from a farm state or district, allowing them to see beyond a partisan advantage, as the crisis amplified.

Marathon legislative drafting sessions were held, with all the staff principals in the room. Joining us were bankruptcy judges from North Carolina and Tennessee, who provided extraordinary technical assistance and wise counsel. My small conference room in our Senate office was often the venue for these meetings. One of the judges, a true man of eastern North Carolina, chain-smoked unfiltered Camel cigarettes throughout, which was permitted in offices back in 1985. When we opened the door at the end of the day, we evidenced the apocryphal Washington smoke filled room.

After weeks of drafting, editing, and meetings with leadership, we had an agreement that could satisfy both the House and Senate sponsors. What we came up with was essentially a hybrid of Chapters 11 and 13 but limited to small family operators engaged in farming or fishing. Chapter 12's unique and extraordinary relief arose from two provisions in particular. First, family farmer debtors could write down, or "strip," debt secured by a principal residence. This option was not available to debtors in either Chapter 11 or 13. Second, farm debtors could retain the farm even if they were unable to pay creditors in full. As in Chapter 13, creditors were not entitled to a vote on the debtor's plan of reorganization, insulating farmers from Chapter 11's absolute priority rule. Rather, unsecured creditors would receive all of the debtor's disposable income

3. Willie Nelson came to visit our office while planning the "Farm Aid" concert.

4. Jessica Lange earned an Academy Award nomination for her starring role in the 1985 movie "Country", which portrayed an Iowa family farm devastated by natural disasters and a ruthless Farmers Home Administration Agent.

over the life of the plan and must receive at least what they would get in a Chapter 7 liquidation.

As challenging as it was to reach consensus, we now had an even larger problem in mid-1986. It was getting late in the legislative year, and we needed to find time on the Senate calendar or locate another vehicle to offer our version of the Family Farmer Bankruptcy Act as an amendment. As Republicans controlled the Senate calendar, it was up to Senator Grassley to advocate for his bill. Word was out about our plans and election year politics emerged as a particular hurdle. The only way forward was to seek unanimous consent on the Senate floor, a challenge in that any one of ninety-nine other Senators could withhold consent and prevent the unanimous consent from proceeding.

Ultimately, we secured a "grand bargain"—an agreement to attach the Chapter 12 measure to other bankruptcy legislation then currently in committee: a bill to expand the United States Trustee Program (USTP) from a pilot to nationwide application, and to authorize the creation of more than fifty new bankruptcy judgeships. The USTP expansion was also controversial, as Senators from North Carolina and Alabama strongly objected to changes to the existing bankruptcy administrator rule. We needed support from these farm state members. Inasmuch as any single Senator could block our plan under Senate rules, the Chapter 12 bill sponsors agreed to exempt these states from USTP coverage and encouraged the Department of Justice to stand down as well. Combined with the new judgeships from coast to coast, this bill also had political appeal.

The package was ultimately adopted in the Senate and passed the House as well. But farm lenders played their final card in the form of pressuring the Reagan Administration to veto the package, because of Chapter 12's asserted adverse impact on agricultural lending. The Office of Management and Budget (OMB) issued a veto recommendation—normally a death knell for any legislation.

I can recall one particular speaker phone call Senator Grassley had with the Director of OMB, James Miller. The Senator made the case that farm lenders would be no worse off under Chapter 12 than if farms were allowed to go into liquidation—the land values had already diminished, and the bill simply recognized that economic reality. He further explained that the breathing spell provided by Chapter 12 would also work in tandem with mandatory mediation laws enacted by some of the farm states, that required mediation before lenders could foreclose. Director Miller listened and also appreciated the political calculations, as the package would be helpful to several endangered Republican Senators

facing re-election in a few months. Failure to act would have consequences.

Ultimately, we won consent for the package and secured final passage. The new Chapter 12 law was signed by the President and became effective thirty days later, appropriately enough on Thanksgiving Day, 1986. Senator Grassley presented me with a signing pen used by President Reagan—a memento for nearly two years of effort. Also cherished was a handwritten note from Representative Synar which read: "Many will take credit; few deserve it. Great job on farm bankruptcy." I would work with him again nearly ten years later when Synar served as chair of the National Bankruptcy Review Commission, until his tragic death from a brain tumor.

For its part, Chapter 12 has for more than thirty years successfully rehabilitated thousands of family farms with benefits that extend beyond the bankruptcy process. As intended, it encouraged negotiation of debt problems in a way that recognized economic realities and helped stabilize a sector of the economy roiled by liquation and dislocation. This temporary measure ultimately became a permanent fixture of the Bankruptcy Code and in 2019 was expanded in scope to apply to farm operations with up to ten million in debt (legislation I also had a hand in developing during my final year as American Bankruptcy Institute (ABI) Executive Director).

My experience with Chapter 12 made me the de-facto Senate staff person on bankruptcy in the late 1980s. This was hardly due to any particular understanding on my part. In fact, many of my colleagues on the Judiciary Committee had little to no experience with the Bankruptcy Code and were only too happy to defer. But other bankruptcy legislative achievements followed, including a law to reverse a court decision impacting the treatment of intellectual property contracts in bankruptcy, a bill to protect health care benefits for workers in collective bargaining agreements while in Chapter 11, and the law exempting restitution payments to a state from exception to discharge (my issue faced while a law student intern at Syracuse University College of Law).

I also worked on measures aimed at the bankruptcy system as well: legislation to increase bankruptcy judges' salaries and enhance their retirement system. As with the Chapter 12 experience, bankruptcy legislation at that time was a bipartisan effort, whether the Senate was controlled by Republicans or Democrats. This would change after my time in the Senate; indeed, all of Washington would become paralyzed with partisanship and gridlock on virtually every issue.

Of course, the Judiciary Committee's jurisdiction extends well beyond bankruptcy and these other matters consumed most of my time

on the staff, especially after Senator Grassley named me Chief Counsel and Staff Director to the renamed Subcommittee on Courts in 1987. Of greatest consequence was work on an unprecedented flurry of nominations to the Supreme Court, beginning with the elevation of William Rehnquist to Chief Justice and the nomination of Antonin Scalia to the Court in 1986. The Rehnquist's confirmation hearings brought just a glimpse of the extreme partisan battles to come, before he was approved by a divided Senate.

The following year, after the Senate changed control following the mid-term elections, the President nominated prominent D.C. Circuit Judge Robert H. Bork to fill a vacancy on the Court. What followed would trigger the most seismic fault line during my lifetime in Washington. Volumes have been written on the extraordinary nature of the Bork nomination, and ultimately his rejection by the Senate after an unprecedented campaign to distort Bork's distinguished record as a judge and scholar. For me, I felt like I had a ringside seat to an unprecedented period of history, whose impact still looms large more than thirty years later.[5]

More nominations followed: Anthony Kennedy by Reagan in 1987 and David Souter by President George H.W. Bush in 1990. Then came another landmark nomination: Clarence Thomas, first to the U.S. Court of Appeals for the District of Columbia and a year later to the Supreme Court. Staff work for a member of the Senate Judiciary Committee on these nominations was like participating in the highest stakes litigation, with the added glare of twenty-four-seven media coverage akin to a presidential campaign. I feel very fortunate to have participated in this period of history and am eternally grateful to Senator Grassley for the trust he placed in me.

But by mid-1991, my life at home was changing. My wife Michelle and I had one child, a daughter, and were expecting another before the end of the year. Michelle was taking time off from full time work as a lawyer in Washington to care for our children. Living on one income inside the Beltway was, and is, challenging. It was time for me to leave service on Capitol Hill. I briefly considered life as a lobbyist with a major law firm and a junior position in the Office of the White House Counsel. But another opportunity presented itself.

5. ABI, *An Insider View of the Supreme Court Nomination Process*, YOUTUBE (Jul. 25, 2018), https://www.youtube.com/watch?v=NItFz-BvTes.

II. BUILDING THE AMERICAN BANKRUPTCY INSTITUTE AS EXECUTIVE DIRECTOR

The ABI was incorporated as a not-for-profit in 1982. The new Bankruptcy Code became effective in 1979 and ABI's early leaders wanted to create an entity to respond to developments under the new law. The organization would have like-minded members across disciplines of law and finance, who shared an interest in developments in the case law. These leaders hoped the organization would grow into a reliable source for education and research, while serving as a trusted source for policy-makers. ABI held its first event in 1983, a forum on Capitol Hill regarding the jurisdictional crisis arising from the new law's grant of judicial authority to courts not established under Article III of the Constitution.

I became aware of ABI while working as a counsel to the Senate Judiciary Committee. ABI members were among the resources I sought out to develop the farm bankruptcy law. I regularly participated in ABI events in Washington aimed at educating members about developments on Capitol Hill. Over the course of six years on the Hill, I came to know many of the members and leaders of the ABI, along with others in the bankruptcy judiciary.

In May 1991, I agreed to become Executive Director of the ABI. Although the ABI had produced some impressive studies from its volunteers, including a national study of professional fees in Chapter 11, and another cited work on the effect of the 1984 amendments to the Bankruptcy Code, it was still a start-up. ABI had just three full-time staff members, housed in a small townhouse office on Capitol Hill, steps from my former office in the Senate. Membership was about 3,000, though recordkeeping was suspect and financials were unaudited. The annual budget was well under one million.

The most appealing aspect of taking on this venture was the opportunity to "run" a business, in this case a member-based, non-profit professional association organized under Section 501(c)(3) of the tax code. ABI had a lot of "head room" to grow as bankruptcy practice was expanding. ABI's volunteer leadership largely allowed me to use my judgment on how best to do it. I didn't expect or realize it at the time, but I would serve as ABI Executive Director for nearly thirty years.

ABI's home base of Washington, D.C. provided the opportunity to feature a public policy centered view of bankruptcy. This distinguished ABI from other organizations. ABI's annual meeting every spring was held in Washington and prominent members of Congress such as Senator Dennis DeConcini, Senator Orrin Hatch, Senator Patrick Leahy, Senator Dick Durbin, Senator Sheldon Whitehouse, and Representatives

Hamilton Fish and Jerrold Nadler appeared at these meetings and provided members with unique insights. In addition, many members of the Supreme Court, including Chief Justice William Rehnquist, Antonin Scalia, Sandra Day O'Connor, Clarence Thomas, Stephen Breyer and Samuel Alito, spoke to ABI audiences. Attorneys General such as Griffin Bell, Richard Thornburg, and John Ashcroft also keynoted ABI events. My Capitol Hill relationships helped me secure these and other Washington speakers, including Solicitors General Kenneth Starr, Drew Days, and John Roberts, who later became Chief Justice.

ABI regularly testified at Congressional hearings on bankruptcy issues, never as an advocate, but rather as a neutral and reliable information source. This was important, as Washington is filled with every stripe of advocacy group, each arguing for a narrow, parochial, or partisan agenda. The ABI's "institute" model was to establish credibility by more of a "think tank approach," using a base of prominent practitioners, judges and scholars from among our dues-paying members. Even today, there are not many associations in Washington who can manage this important balance.

Educational programs for continuing legal education (CLE) credit were always an essential element of ABI's mission through today. These programs grew from two annually to more than thirty per year over the years, serving every region and practice area, from single-day to multi-day events where attendees were encouraged to bring spouses and families. ABI grew to become one of the largest CLE providers in the entire legal space. In my first year at ABI, we held a "Winter Leadership Conference" at a five-star resort in Arizona, the first opportunity for members to successfully combine networking and social events with education. We continued to innovate in education, utilizing different methods of adult learning and formats such as roundtables, debates, and mock trial or mediation proceedings.

ABI established and grew member committees based on practice area interest, such as business reorganization, asset sales, professional fees, and consumer practice. Member committees provided exponentially more educational content and opportunities to publish and speak at ABI events. The committees also became a fertile ground to find new, young and diverse members who would grow into future ABI leaders.

Providing information to the press and public was an important feature, and we held regular press briefings at the National Press Club, establishing ABI as a trusted and non-biased source for data and information. ABI events were regularly covered by C-SPAN, then a new network eager for content. ABI came to be cited by hundreds and then thousands of news reports on bankruptcy.

ABI's regular newsletter evolved into a four-color monthly magazine called the *ABI Journal*, where members provided much of the content on important trends, practice advice, and case law developments. The award-winning Journal over the years reached 100 pages each month, supported entirely by paid advertising.

Through a partnership with St. John's University School of Law, we created a scholarly *Law Review* and a national bankruptcy moot court competition for law schools. The *ABI Law Review* ultimately grew to over 5,000 subscribers, and the Conrad B. Duberstein Moot Court Competition attracted more than 60 competing schools, making it the largest appellate competition in the nation. What especially distinguished the Duberstein was the quality of the judging, as the top professionals from New York volunteered to judge, along with leading members of the bankruptcy judiciary. The final night awards gala in early March drew upwards of 1,000 professionals, held in iconic venues such as Windows on the World at the World Trade Center in lower Manhattan, just months before 9-11.

ABI created and staffed other professional associations, such as the American Bankruptcy Board of Certification and the honorary American College of Bankruptcy, an invitation only group of the most prominent bankruptcy professionals. More than 1,000 professionals have earned the certification, and the College now has more than 900 distinguished members. As insolvency law was becoming of growing importance in the world economy, ABI was invited to become the first U.S. member association of INSOL International, a global insolvency umbrella organization. ABI is still the largest U.S. member association in INSOL, some thirty-five years later.

ABI's direct international offerings included an annual European Symposium, held in capitals such as London, Paris, Rome, Madrid, Berlin, and Dublin, as well as a popular program on offshore insolvency held in the Cayman Islands. We also established an Endowment Fund of nearly $10 million to financially support empirical and other scholarly research. ABI created an annual corporate restructuring competition, where teams of students from top MBA programs competed for prizes funded by the endowment. The endowment also supported a Resident Scholar, on leave from full-time teaching. Several prominent academics, such as Professor David Skeel, Professor Ted Janger, Professor Margaret Howard, and Professor David Epstein, gave immediate credibility to the scholar program.

All of these efforts were supported by technology, as a method to deliver fresh and insightful content to our members every day. ABI was among the earliest adopters with an online presence on what was then

charmingly called the World Wide Web. ABI's website today (abi.org) is still a leader in using technology to serve members, with streaming, on-demand CLE, daily news headlines, weekly and monthly webcasts on new developments, and a comprehensive search engine of the world's largest database of bankruptcy content, among other features.

Leading all these efforts was a changing, diverse leadership group from ABI's volunteer membership, which grew to some 13,000 paying members from the modest early days. Included were more than 300 of the nation's bankruptcy judges and 100 professors of bankruptcy law. International members came from more than thirty nations.

ABI governance included an executive committee of seventeen and a sixty-member board of directors. They came from all regions of the country and all practice areas. Among the early Presidents was Ed Creel of Dallas, Robert Zinman of New York, Robert Fishman of Chicago, Ford Elsaesser of Idaho, and Andrew Caine from Los Angeles.[6] ABI was a leader in encouraging leadership by women and minorities, with female Presidents such as Bettina Whyte from New York, Deborah Williamson from San Antonio, Melissa Kibler from Chicago and Patricia Redmond from Miami. African Americans also served as ABI President by the year 2000, including Richardo Kilpatrick of Detroit and Reginald Jackson of Columbus.

As ABI's membership peaked, its annual budget reached ten million dollars. I hired all the staff, numbering a full-time staff of thirty professionals skilled in the matters of membership service, publishing, non-profit finance, information technology, and event management. In late 2015, Bill Rochelle joined the staff as Editor at Large. Formerly a columnist for Bloomberg News, Bill was renowned as an insightful writer with an authoritative take on legal developments affecting bankruptcy practice. Prior to his second career in journalism, he practiced bankruptcy law for thirty-five years, including seventeen years as a partner in the New York office of Fulbright & Jaworski LLP. I hired Bill to do what he does best: analyze, write, and speak about important bankruptcy developments affecting the practice and the courts.

ABI benefitted from a staff loyal to our mission: nearly half served more than ten years; a half dozen served about twenty years. In 1996, ABI's offices relocated to a new complex on the Potomac River waterfront in Alexandria, Virginia. While we were not far by miles from our Capitol Hill roots, ABI had indeed come a long way.

6. These leaders gave me unfailing and critical support for which I am eternally grateful.

III. ABI'S INFLUENTIAL ROLE IN BANKRUPTCY POLICY

Article I, Section 8 of the Constitution provides that Congress shall have power to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ."[7] The Bankruptcy Act of 1898 established the first comprehensive bankruptcy system in the United States.[8] The Chandler Act of 1938 provided a major reform, following the Great Depression.[9] The modern Bankruptcy Code was adopted by Congress in 1978. In enacting this new law, Congress relied in part on the work of a blue ribbon commission appointed to study bankruptcy. That commission began its work in 1970 and issued a final report with recommendations in 1973.[10]

In the twenty years since the commission's report, there was nothing less than a revolution in the way U.S. businesses financed their growth and households borrowed and used credit to finance a period of unprecedented prosperity. Bankruptcy filings were rising throughout the 1980s and early 1990s, even during periods of economic growth. While some expressed concern about a "rising tide of consumer bankruptcies," there existed at least an emerging consensus that it was appropriate to explore another careful study of the law. In 1994, ABI was the first organization to urge Congress to create another commission. My former boss, Senator Grassley, co-sponsored the legislation and hearings were held on the concept.

When Congress in fact established the National Bankruptcy Review Commission (NBRC) that year, it was created as an independent commission to investigate and study issues relating to bankruptcy, to solicit divergent views on the operation of the system, and to prepare a report no later than two years after its first meeting in October 1995. In the legislative history, Senator Grassley stated that the Judiciary Committee was "generally satisfied with the basic framework" of the law and counseled the Commission to "not disturb the fundamental tenants . . . of current law."[11]

The NBRC consisted of nine members, named by the President, the Chief Justice, and the leadership from the Senate and House, balanced between the majority and minority parties. Members included a former

7. U.S. CONST. art I, § 8, cl. 4.

8. *The Evolution of U.S. Bankruptcy Law: A Time Line*, FED. JUD. CTR. (Sep. 25, 2019), https://www.fjc.gov/content/323917/evolution-us-bankruptcy-law-time-line.

9. *See id.*

10. *See id.*

11. Symposium, *A Century of Regress or Profess? A Political History of Bankruptcy Legislation in 1989 and 1998*, 15 BANK. DEV. J. 343, 347 (1999).

Congressman (Representative Caldwell Butler), a U.S. Court of Appeals Judge (Honorable Edith Hollan Jones), and a member of the ABI Board of Directors (restructuring titan Jay Alix). Former Representative Mike Synar of Oklahoma was named by President Clinton to serve as chair, and the Commission members selected Elizabeth Warren as its Reporter. She was then a prominent bankruptcy law professor at Harvard Law School and an active ABI member.

ABI was very involved in the NBRC process. The Commission held a public outreach meeting in conjunction with the ABI's annual spring meeting in May 1997. In addition to regular presentations at Commission public hearings, ABI undertook several comprehensive projects and surveys that were resources for the Commission and its staff. These efforts, as part of ABI's Bankruptcy Reform Study Project, included a multi-volume study of various aspects of bankruptcy law,[12] a membership survey on bankruptcy issues, and a survey of attorneys and credit managers on preference actions.

ABI also initiated a consumer bankruptcy forum, bringing together more than fifty experts representing diverse views and resulting in a report with findings and recommendations adopted by the NBRC. ABI further assisted by publishing reports and articles about the Commission and its activities in the *ABI Journal* and *ABI Law Review* and posting NBRC draft proposals for comment on the ABI website.

In October 1997, the NBRC's final report of more than 1,000 pages contained some 170 recommendations for Congress to consider in the areas of personal and business bankruptcy. I enjoyed assisting the Commission throughout the process in support of new chair Brady Williamson, who assumed the role after the tragic death of Representative Synar. In its final report, the Commission stated, "No group was more involved or supportive than the American Bankruptcy Institute, and no individual more encouraging than its executive director, Sam Gerdano."[13]

When the law creating the Commission was under development, there was the hope, if not expectation, that the effort would be balanced, and the resulting recommendations would be embraced by consensus.

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12. ABI's Bankruptcy Reform Study Project produced eight reports between May 1995 and April 1996 on the following topics: (1) Defining Success in Business Bankruptcy; (2) Exclusivity and DIP Management; (3) Should the Automatic Stay be Abolished?; (4) Administrative Oversight in the Bankruptcy System; (5) How Consensual Workouts are Shaped by Business Bankruptcy; (6) Labor Issues in Bankruptcy; (7) Impact of Bankruptcy on Free Market Competition; and (8) Professional Compensation: Does Bankruptcy Cost too Much?.

13. BRADY C. WILLIAMSON ET AL., BANKRUPTCY: THE NEXT TWENTY YEARS: NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, NAT'L BANKR. REV. COMM'N 8 (1997).

After all, that is how bankruptcy legislation used to be developed. But Washington was now feeling the effects of sharp partisan division during the Clinton Administration—a divide that seeped over into bankruptcy policies that had formerly been bipartisan affairs. In the mid-term elections of 1994, an electoral earthquake brought power to Republicans in the House of Representatives for the first time in forty years. The Commission was thus conducting its work under the scrutiny of interests anxious to use the changed political landscape to advance creditor interests, especially in the area of consumer bankruptcy.

Not surprisingly, the Commission's work was viewed by these interests as "pro-debtor" and fault lines among Commission members took firm hold. Indeed, by the time of the final report, a bill was pending in the Republican-led House that would establish a form of "means testing" for consumer eligibility to seek bankruptcy relief. The means testing concept had been rejected by a sharply divided Commission. In 1998, an empirical study funded by ABI's Endowment found flaws in the means testing theory and application. Much of the next seven years in Congress consisted of frequent efforts at bankruptcy reform, but always stymied in the Senate or by Presidential veto.

As Congress continued to consider bankruptcy reform, in 2003 ABI held a symposium in Washington on the twenty-fifth anniversary of the Bankruptcy Code. Prominent practitioners, judges, and scholars participated in the event, held at Georgetown Law Center. In ABI's tradition, all viewpoints and stakeholder interests were represented. The panel format allowed a sharing and even challenging of ideas, under the direction of symposium moderator Professor Arthur Miller.

In 2005, after years of effort, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) and President George W. Bush signed it into law.[14] The law was controversial in shifting away from a perceived debtor orientation, especially in consumer bankruptcy. BAPCPA was largely a Republican initiative, but it had at least some bipartisan support from prominent Senate Democrats such as Senator Joe Biden, whose Delaware constituents included many large banks. His sponsorship put him at odds with Professor Warren. They continued to publicly disagree about bankruptcy for twenty-five years, through even their respective campaigns for President in 2020.

Immediately after BAPCPA's passage, ABI held dozens of informational seminars around the country to advise the insolvency community of the major changes that were about to be implemented.

14. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

These educational programs continued through 2008. During this period, ABI continued to appear at Congressional hearings on issues such as labor law issues in bankruptcy and the emerging issue of home mortgage foreclosure. ABI also testified in support of increased judicial salaries.

In November 2009, ABI conducted a special symposium in Washington titled: Chapter 11 at the Crossroads, Does Reorganization Need Reform? The two-day event at Georgetown University Law Center featured scholarly papers and comment by many of the architects of the 1978 Code. The proceedings were published in the *ABI Law Review*.

IV. ABI COMMISSIONS DEMONSTRATE THOUGHT LEADERSHIP

The success of the 2009 symposium provoked an emerging consensus that the now 35-year-old U.S. Bankruptcy Code needed modernization. Significantly, Chapter 11 sits at the intersection of numerous forces affecting workers: deregulation, trade policy, globalization, and the decline of the manufacturing sector. The Code was designed to balance the rights of debtors and creditors and consider the public interest while rehabilitating businesses to benefit all stakeholders.

A growing number of critics said the Code was out of balance, in part because of changed economic conditions and piecemeal amendments that unfairly favored certain creditors over the corporate debtor. New types of lenders and tranches of debt, together with a robust claims trading market, had grown dramatically. These debt and capital structures were more complex, with multiple levels of secured debt, and inter-creditor agreements never even imagined in 1978. The new breed of lending had some good, but unintended, consequences for Chapter 11. Multinational companies were less dependent on hard assets and more on financial contracts, high-yield debt, and intellectual property. There was a growing perception that "maximizing value" for certain secured creditors was more important than fixing businesses to preserve jobs and the tax base in communities.

These factors led ABI to announce the creation of a new Commission to Study the Reform of Chapter 11 in 2011. The ambitious multi-year project would aim to assemble the top thinkers on commercial bankruptcy, from all perspectives and without preconceived notions about what the end product would look like. The information and data-gathering process would be comprehensive and transparent and invite hundreds of experienced professionals to participate. Elsewhere in this issue, Michelle Harner (now a bankruptcy judge) beautifully describes the process and work product contained in the 400-page final report and recommendations, issued unanimously in December 2014.

In designing the Commission, I was especially mindful of the contentious NBRC experience, and in working with ABI's volunteer leadership to build the Commission[15], emphasized three critical elements to better ensure the final product would be well received: (1) the members of the Commission had to be the clear leaders of the practice and fairly represent all viewpoints, (2) it would be essential for these giants of the field to "check their clients' interests" at the door, and keep their internal discussions in confidence, with a goal to achieve consensus on every issue, and (3) the final report would have to be a master work on bankruptcy law and policy.[16]

The Commission members selected by ABI leadership were of unquestioned stature. They included the chief House and Senate architects of the 1978 Code, the leading Chapter 11 lawyer of our time, the judge who presided over some of the largest and most complex cases in history, the former Chief Restructuring Officer of the U.S. Treasury during the 2008 financial crisis, the legislative chair of the National Bankruptcy Conference, the president of INSOL International, the president of the American College of Bankruptcy, the past president of the Turnaround Management Association, and five past presidents of ABI.[17] Every individual identified by Commission Co-chairs Bob Keach and Al Togut accepted the invitation and challenge of service.

Most remarkably, this august group was open to differing ideas and, despite strong personal views, the acceptance of consensus as the goal. The group understood that final recommendations coming with "one voice" from diverse perspectives would carry more weight with our four discrete "audiences": policy makers, judges, scholars, and the public. This meant that some highly controversial issues, such as venue reform,

15. Then ABI President Geoff Berman of Los Angeles announced the Commission in 2011 and authorized ABI's endowment to fund the effort the next year.

16. HON. WILLIAM BROWN ET AL., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY: 2017–2019 FINAL REPORT & RECOMMENDATIONS, AM. BANKR. INST. (2019) [hereinafter ABI REPORT]. ABI would follow a similar model with a commission on consumer bankruptcy. The commission's charge was to recommend improvements to the consumer bankruptcy system that could be implemented within its existing structure. These changes might include amendments to the Bankruptcy Code, changes to the Federal Rules of Bankruptcy Procedure, administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement. The 255-page Final Report was issued during my last year as ABI Executive Director.

17. Members of the Commission were D.J. (Jan) Baker, Donald S. Bernstein, William A. Brandt, Jack Butler, Babette Ceccotti, Hon. Arthur Gonzales, Steven Hedberg, Robert J. Keach, Prof. Ken Klee, Richard Levin, Harvey Miller, James Millstein, Harold Novikoff, James Seery, Sheila Smith, James H.M. Sprayregen, Albert Togut, Clifford J. White, Bettina M. Whyte, and Deborah D. Williamson.

were not likely candidates for a consensus recommendation, though the Commission gave the issue a comprehensive look.[18]

As for the final report being a work that would serve as a lasting piece of scholarship, there was no one more important than Michelle Harner. Then a professor at the University of Maryland's Francis King Carey School of Law, Michelle had a year earlier been invited by me to serve as ABI's Resident Scholar. She had to decline because of additional duties at her law school, but I also knew of the coming Commission project which would better showcase her many skills. When she became available and accepted the invitation to serve as official reporter, I could not have been more thrilled. Her comprehensive understanding of the theory, history, and practice of Chapter 11, combined with uncommon sense of how best to work collaboratively, made her the only choice for official reporter. The final report was indeed well-received, cited by several courts, including the U.S. Supreme Court.

The report contained more than 100 discrete recommendations for reform, rather than a rewrite of the Code, to allow Congress to consider each proposal on its own merit. ABI identified the section on Small and Medium Enterprises (SME) as a priority area. After all, American's thirty million small businesses are often described as the backbone of the U.S. economy. Yet our study found that the bankruptcy laws were failing these companies on a regular basis, making it more difficult for them to survive and prosper in their respective communities. We thought that every member of Congress should have an interest in making Chapter 11 work for SMEs, especially if the proposals did not require any added resources from the Federal Treasury.

The recommendations on how to reform the law's treatment of distressed small business began to attract some attention from Congress in 2015. At the time, the U.S. economy was relatively healthy and growing, so it was initially challenging to persuade policy-makers that bankruptcy policy should be a priority. ABI's message was that it might be too late if Congress waited for an economic downturn to devise a fix; that the time for reform was better done in relatively calm economic seas, rather than the panic such as that followed by the 2008 financial crisis. Little did I know then that advice would prove prophetic.

The 2016 election brought a new President (one familiar with the bankruptcy process), a new Congress, and a Senate Judiciary Committee now chaired by my former boss, Senator Chuck Grassley. We began to

18. The Commission held a field hearing exclusively on Chapter 11 venue. The hearing was held in Texas, a hotbed for the view that cases should be filed in close proximity to the business operations of the company, rather than New York or Delaware.

plan a hearing on the small business proposals. In March of 2018, the Senate subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts held a hearing, where ABI (through Commission Co-chair Bob Keach) and other witnesses urged a change in the rules along the lines suggested by the ABI Commission and the National Bankruptcy Conference. The hearing was a breakthrough in that several Democrat members of the committee participated. It was encouraging that there was bipartisan openness to consider reform.

We continued to work with Congressional staff and in 2019, a bipartisan bill, titled the Small Business Reorganization Act (SBRA) was introduced in the U.S. House of Representatives.[19] ABI Commission Co-chair Bob Keach again testified, this time before the House Subcommittee on Antitrust, Commercial and Administrative Law. The legislative hearing in June was followed by the full Judiciary Committee's approval the following month. The House passed the bill by a voice vote on July 23 under a procedure known as suspension of the rules.

In parallel action, the Senate took up the House passed bill on August 1, minutes before the August recess, and approved it by a voice vote.[20] H.R. 3311 was presented to the President on August 13 and signed into law on August 23, 2019 as Public Law 116-54.[21] A new subchapter V of Chapter 11 for small business was now the law, to take effect in February 2020.

The timing of the new law was serendipitous, as an estimated forty percent of all small businesses (and many large ones) were in danger of permanent closure in the wake of the COVID-19 pandemic. We had streamlined the road to reorganization for main street businesses, and not a minute too soon.

As to the SBRA impact, it was estimated that about 40 percent of Chapter 11 business debtors that had filed after October 1, 2007 would qualify for SBRA treatment and that about twenty-five percent of

19. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019) (codified as amended at 11 U.S.C. § 11) (H.R. 3311 was introduced by Reps. Ben Cline (R-Va) and subcommittee chairman David Cicilline (D-RI), full committee ranking member Doug Collins (R-Ga) and Steve Cohen (D-Tenn) as original co-sponsors).

20. The bill was passed as part of a package of bills that included one to raise the debt limit in Chapter 12 to ten million dollars, and another bill to exclude certain disability and death-related benefits payable to veterans and their survivors from the Code's definition of "current monthly income". ABI supported these measures as well. It was important to keep the three measures linked as they collectively made for an attractive package, benefitting disabled veterans, family farmers, and main street businesses.

21. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019).

individuals who had filed for Chapter 11 would also qualify. These percentages would increase sharply after Congress increased the SBRA debt limit to $7.5 million for purposes of subchapter V, with the Coronavirus Aid, Relief and Economic Security Act enacted effective March 27, 2020.[22] This most impactful bankruptcy legislation of the last forty years would not only benefit the owners of these businesses but employees, suppliers, customers, and others who rely on that business. These going concerns would also be able to continue to pay taxes and serve as positive community members.

And it was, for me personally, a fitting cap to my nearly thirty-five years of engagement with bankruptcy law and policy. I retired as ABI Executive Director effective at year end of 2019, grateful to have served the bankruptcy system in several capacities during a most consequential time.

22. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).