

# THE COMMISSION: ITS HISTORY AND PROCESS

## I. Creation, Membership and Staff

### A. Creation

On October 22, 1994, the President signed the Bankruptcy Reform Act of 1994,<sup>1</sup> which established the National Bankruptcy Review Commission.<sup>2</sup> The Commission was created as an independent commission to investigate and study issues relating to the Bankruptcy Code, to solicit divergent views on the operation of the bankruptcy system, to evaluate the advisability of proposals, and to prepare a report to be submitted to the President, Congress and the Chief Justice not later than two years after the date of its first meeting, which took place on October 20, 1995.<sup>3</sup>

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<sup>1</sup> Pub. L. No. 103-394, 108 Stat. 4107 (1994).

<sup>2</sup> All of the Commission's records are on file and publicly available with the holdings of the National Archives, Record Group 220, Records of Temporary Commissions. Unless otherwise noted, all of the Commission documents referred to in this report are available at this facility.

<sup>3</sup> The 1994 Bankruptcy Reform Act specified the duties of the Commission:

(1) to investigate and study issues and problems relating to title 11, United States Code (commonly known as the "Bankruptcy Code");

(2) to evaluate the advisability of proposals and current arrangements

The Commission's enabling statute mandated that the report contain a detailed statement of its findings and conclusions together with the Commission's Recommendations for legislative or administrative action.<sup>4</sup>

The legislation creating the Commission reflected a bipartisan consensus developed over several years. On November 19, 1991, following a series of hearings earlier that year, Senator Howell Heflin (D.-Ala.), joined by Senator Charles E. Grassley (R.-Iowa), introduced S. 1985, a comprehensive package of bankruptcy reform proposals that included the creation of a bankruptcy review commission.<sup>5</sup> This bill was not enacted,<sup>6</sup> but it was followed by other legislation that also called for the creation of a bankruptcy review commission. In the Senate, S. 540, substantially similar to S. 1985, was offered by Senators Heflin and Grassley on March 10, 1993.<sup>7</sup> Like its predecessor, S. 540 provided for the establishment of a bankruptcy review commission.<sup>8</sup> Although S. 540, as amended, was unanimously passed by the Senate

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with respect to such issues and problems;

(3) to prepare and submit to the Congress, the Chief Justice, and the President a report in accordance with section 608; and

(4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system.

Pub. L. No. 103-394, § 603, 108 Stat. 4107, 4147 (1994) [hereinafter National Bankruptcy Review Commission Act].

<sup>4</sup> *Id.* § 608.

<sup>5</sup> S. 1985, 102d Cong. §§ 101-110 (1991).

<sup>6</sup> While S. 1985 was passed by the Senate on two separate occasions, the "final version of S. 1985 was not considered by the House of Representatives before adjourning sine die." S. REP. NO. 103-168, at 38 (1993).

<sup>7</sup> *Id.* at 38-39; S. 540, 103d Cong. §§ 401-10 (1993).

<sup>8</sup> S. 540, 103d Cong. §§ 401-410 (1993). In his floor statement, Senator Grassley explained the role that he envisioned for a bankruptcy review commission:

This Commission, to be composed of bankruptcy experts, will review the operation of the code, and it will report to Congress ways to make our Nation's bankruptcy laws and our code more effective. I want to stress that this Commission is designed to review the code, and we are not setting it up to overhaul it. The term "fine-tuning" might better fit the purpose we see behind the Commission's establishment, because we on the Judiciary Committee are generally satisfied with the code, and we are not interested in the proposals that start from scratch.

on April 21, 1994,<sup>9</sup> there had been less than unanimous support in the bankruptcy community for its provisions establishing a bankruptcy review commission.<sup>10</sup>

As the Senate considered S. 540, the House of Representatives too was studying bankruptcy reform legislation, some of which also called for the establishment of a bankruptcy review commission. On August 17, 1994, for example, the House Judiciary Subcommittee on Economic and Commercial Law held a hearing on at least ten bankruptcy-related bills<sup>11</sup> that included a debate on the need for a bankruptcy review commission.<sup>12</sup> The following month, Chairman Jack Brooks (D.-Tex.) introduced H.R. 5116, which was later revised to incorporate parts of S. 540 and other legislation. On October 5, 1994, the House passed H.R. 5116.<sup>13</sup> The Senate passed this legislation as well on October 6, 1994.<sup>14</sup> Upon its passage, Senator

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What we are interested in is a careful examination of the code and suggestions for how Congress can best exercise its constitutional powers under article I, section 8, which gives Congress the power to establish uniform laws on the subject of bankruptcy throughout the several States.

140 CONG. REC. S4508 (daily ed. Apr. 20, 1994) (statement of Sen. Grassley) [hereinafter Grassley Statement].

<sup>9</sup> 140 CONG. REC. S4666 (daily ed. Apr. 21, 1994).

<sup>10</sup> Organizations that opposed the establishment of a bankruptcy review commission included the National Association of Consumer Bankruptcy Attorneys, *The Bankruptcy Amendments Act of 1993: Hearings on S. 540 Before the Subcomm. on Courts and Admin. Prac. of the Senate Comm. on the Judiciary*, 103d Cong. 327 (1993) (statement of James “Ike” Shulman); and the National Bankruptcy Conference, *id.* at 148 (statement of Steven H. Case). Supporters included the American Bankers Association, *id.* at 259; American Bankruptcy Institute, *id.* at 163 (statement of William J. Perlstein); MasterCard International Incorporated and VISA U.S.A. Inc., *id.* at 375; and ITT, *id.* at 206, 216 (testimony and statement of Robert F. Mitsch).

<sup>11</sup> *Hearing on Bankruptcy Reform Legislation Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong. (1994).

<sup>12</sup> Opposition to the creation of a bankruptcy review commission was again voiced by the National Association of Consumer Bankruptcy Attorneys, *id.* at 554, and the National Bankruptcy Conference, *id.* at 43, 242 (testimony and statement of Kenneth N. Klee). Supporters included the American Bankers Association, *id.* at 197, 222, 242-43 (statement of Philip S. Corwin); the American Bankruptcy Institute, *id.* at 158, 177, 225, 241-2 (testimony and statement of Robin E. Phelan); the Association of Insolvency Accountants, *id.* at 367 (statement of Grant W. Newton); the Commercial Law League of America, *id.* at 131, 155, 226, 242 (testimony and statement of Philip J. Hendel); and the National Association of Federal Credit Unions, *id.* at 578 (statement of Kenneth L. Robinson).

<sup>13</sup> 140 CONG. REC. H10917 (daily ed. Oct. 5, 1994).

<sup>14</sup> 140 CONG. REC. S14461 (daily ed. Oct. 6, 1994).

Grassley observed that “while H.R. 5116 will improve the bankruptcy system, its greatest contribution will come from the commission it creates.”<sup>15</sup> Enacted on October 22, 1994, the Bankruptcy Reform Act of 1994 created the National Bankruptcy Review Commission.<sup>16</sup>

This was not the first bankruptcy commission. In 1970, Congress established a bankruptcy review commission,<sup>17</sup> charged with recommending a comprehensive overhaul of the bankruptcy laws then in existence under the former Bankruptcy Act of 1898.<sup>18</sup> As the 1970 Commission explained in its report, issued in 1973, “The Commission was charged with considering the basic philosophy of bankruptcy, its causes, possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to administration of the Act, and such other matters as the Commission should deem relevant to its assigned mission.”<sup>19</sup>

Unlike its predecessor’s mandate, the assignment given the National Bankruptcy Review Commission was narrower.<sup>20</sup> The House Report accompanying the legislation for the 1994 Commission explained:

Although no exclusive list is set forth, the Commission should be aware that Congress is *generally satisfied* with the basic framework established in the current Bankruptcy Code. Therefore, the work of the Commission should be based upon *reviewing, improving, and*

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<sup>15</sup> *Id.*

<sup>16</sup> National Bankruptcy Review Commission Act, *supra* note 3.

<sup>17</sup> Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

<sup>18</sup> Bankruptcy Act of 1898, 30 Stat. 544 (1898) (repealed 1979).

<sup>19</sup> REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 93-137, at 1 (1973) [hereinafter 1973 COMMISSION REPORT].

<sup>20</sup> Commenting on the bankruptcy review commission provisions contained in S. 1985, a predecessor to the Bankruptcy Reform Act of 1994, Senator Grassley noted:

I want to stress that the bill, in creating a National Bankruptcy Review Commission, is not designed, Mr. President, to produce major overhaul of the Bankruptcy Code. That was done just 13 years ago. The current Bankruptcy Code functions largely well today. The primary goal of the Commission is to find ways of fine-tuning the operations of the Code by addressing those problems that have arisen since 1978.

137 CONG. REC. S17056 (daily ed. Nov. 19, 1991); *see* Grassley Statement, *supra* note 8.

*updating the Code in ways which do not disturb the fundamental tenets of current law.*<sup>21</sup>

The Senate Report, containing similar language, advised the Commission to “pay close attention to many of the key issues which are being debated today in the bankruptcy community.”<sup>22</sup> These issues included, according to the Senate Report, “the constitutionality of the bankruptcy court structure, and how legislation enacted since the dissolution of the Burdick Commission<sup>23</sup> (e.g.: many environmental statutes, ERISA law, and the Tax Code of 1986) interact with the Bankruptcy Code.”<sup>24</sup> In addition, the Senate Report cited the “relationship of local governments to the Bankruptcy laws” as an issue that the Commission should address.<sup>25</sup> Accordingly, this Commission Report addresses each of these issues.<sup>26</sup>

Although authorized \$1.5 million by Congress,<sup>27</sup> the Commission did not receive its initial funding for nearly a year.<sup>28</sup> Then, through the efforts of a diverse

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<sup>21</sup> H.R. REP. NO. 103-835, at 59 (1994) (emphasis supplied).

<sup>22</sup> S. REP. NO. 103-168, at 54 (1993).

<sup>23</sup> U.S. Senator Quentin N. Burdick (D.-N.D.) introduced legislation that led to the establishment of the 1970 Commission. He was also a member of that Commission.

<sup>24</sup> S. REP. NO. 103-168, at 54 (1993).

<sup>25</sup> *Id.* With regard to this issue, the Report explained:

Specifically, given the increases in bankruptcy filings, local governments are increasingly drawn into the bankruptcy process. Since 74 percent of local tax revenues are derived from property taxes, how these taxes are treated under the priority provisions of the Bankruptcy Code deserves special attention. Further, the evolving status of tax liens and other property liens in bankruptcy versus nonbankruptcy settings is in need of review. Such policy considerations merit the careful study of the Commission.

*Id.*

<sup>26</sup> *See, e.g., infra* Chapter 2 (treatment of mass future claims in Bankruptcy); Chapter 3 (jurisdiction); Chapter 4 (taxation and the Bankruptcy Code).

<sup>27</sup> National Bankruptcy Review Commission Act, § 610, *supra* note 3.

<sup>28</sup> This delay in the Commission’s funding effectively tolled the statutory 210-day period by which the Commission was to have held its first meeting under Section 604(e) of its enabling legislation and, in turn, the two-year due date for its report mandated by Section 608. National Bankruptcy Review Commission Act, §§ 604(e), 608, *supra* note 3. As Senator Heflin explained:

group of individuals and organizations,<sup>29</sup> the Commission received an initial \$1 million appropriation from the Congress on July 27, 1995.<sup>30</sup> Thereafter, the Commission's second and final appropriation of \$494,000 became available on September 30, 1996,<sup>31</sup> bringing the Commission's total appropriation to \$1,494,000.<sup>32</sup>

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The Senator [Grassley] is correct. Although the language in the act envisions that the first meeting of the Commission would take place within 210 days of enactment of the act. [sic] It is clear that first meeting as well as the actual 2-year duration of the Commission should be based on the date on which the first formal meeting, is held. This is the practical effect of the budgeting process, to which the Commission is bound.

141 CONG. REC. S10467-8 (daily ed. July 21, 1995).

<sup>29</sup> For example, Senators Grassley and Heflin, in January 1995, wrote the Senate leadership to request that the "Senate act expeditiously" to appropriate the Commission's funds so that it could "undertake its vital work." *See, e.g.*, Letter from Senators Howell Heflin and Charles E. Grassley to Senator Ernest F. Hollings (D.-S.C.), Ranking Member, Senate Subcommittee on Commerce, State, Justice, and the Judiciary (Jan. 26, 1995); Letter from Senators Howell Heflin and Charles E. Grassley to Senator Tom Daschle (D.-S.D.), Senate Democratic Leader (Jan. 26, 1995). Other Members of Congress expressed interest as well. *See, e.g.*, Letter from Representative Jim Bunning (R.-Ky.) to Representative Harold Rogers (R.-Ky.) (Mar. 27, 1995). Groups and organizations also asked Congress to appropriate funds for the Commission. *See, e.g.*, Letter from Paul Mignini, President, & David Young, Chairman - Government Affairs Committee, National Association of Credit Management, to Senator Phil Gramm (R.-Tex.) (Mar. 17, 1995); Letter from the National Consumer Bankruptcy Coalition Executive Committee (including the American Bankers Association, America's Community Bankers, American Financial Services Association, Consumer Bankers Association, Credit Union National Association and National Retail Federation) to Representative Bob Livingston (R.-La.) (Mar. 17, 1995); Letter from James "Ike" Shulman, President, National Association of Consumer Bankruptcy Attorneys, to Senator Mark O. Hatfield (R.-Ore.), Chairman, Senate Committee on Appropriations (Mar. 21, 1995); Letter from David P. Goch, Commercial Law League of America, to Representative Henry Hyde (R.-Ill.) (Mar. 22, 1995).

<sup>30</sup> Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, Pub. L. No. 104-19, tit. I, ch. II, 109 Stat. 194 (1995). The funding was transferred from unobligated balances in the Department of Justice's General Administration Working Capital Fund. *Id.*

<sup>31</sup> Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, tit. V, 110 Stat. 3009 (1996).

<sup>32</sup> This amount, from one commentator's perspective, was "paltry." *Viewpoint: What We Can Learn from the 1973 Commission on Bankruptcy*, 26 BANKR. CT. DEC., Mar. 28, 1995, A3. By comparison, the 1970 Commission was appropriated \$826,000. 1973 COMMISSION REPORT, *supra* note 19, at xviii. Accounting for inflation, the funds appropriated to the 1970 Commission in "1994 dollars" would have approximated \$2.7 million, almost twice the amount appropriated for the 1994 Commission.

Over the Commission’s life, appropriated funds were expended for salaries, meeting and travel expenses,<sup>33</sup> consulting fees, equipment, supplies, as well as communication and printing costs.<sup>34</sup> No expenditures were made for the Commission’s office space and facilities, which were contributed by the Administrative Office of the United States Courts.<sup>35</sup> In addition, the Commission received donated property and services, as authorized by its enabling legislation.<sup>36</sup>

## B. Commission Leadership, Membership and Staffing

### Commission Leadership

The Commission’s enabling legislation provided for a nine-member commission.<sup>37</sup> Both the Senate and House Reports specified that the members of the Commission should be “knowledgeable in bankruptcy law, with diversity of background and opinion considered in their selection.”<sup>38</sup>

On December 23, 1994, President William J. Clinton announced that former Congressman Michael Lynn Synar (D.-Okla.) would serve as Chairman of the

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<sup>33</sup> The Commission received approximately \$7,500 as reimbursement for expenses from various groups.

<sup>34</sup> This is a summary of the approximate amounts expended by the Commission:

Salaries:	\$700,000
Meetings\Travel:	410,000
Support Services:	150,000
GSA Service Agreement\Miscellaneous:	100,000
Communications\Printing:	80,000
Supplies\Equipment:	50,000

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TOTAL \$1,490,000

<sup>35</sup> The Commission’s office was located at the Administrative Office’s facility in the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

<sup>36</sup> Pursuant to its enabling legislation, the Commission was specifically permitted to accept donations of services and property. National Bankruptcy Review Commission Act, § 607(f), *supra* note 3. The names of these donors are acknowledged in the Appendix.

<sup>37</sup> *Id.* § 604(a).

<sup>38</sup> S. REP. NO. 103-168, at 54 (1993); H.R. REP. NO. 103-835, at 59 (1994).

Commission. He was formally appointed on August 17, 1995. Mr. Synar was a member of the House of Representatives for 16 years. During his tenure in Congress, he served on the House Government Operations, Energy and Commerce, and Judiciary Committees. From 1983 to 1995, he chaired the House Subcommittee on Environment, Energy and Natural Resources. He also played an active role in drafting the 1986 amendments to the Bankruptcy Code, which led to the nationwide expansion of the United States Trustee Program and the enactment of the family farmer bankruptcy relief alternative in Chapter 12 of the Bankruptcy Code.<sup>39</sup> In addition, Mr. Synar, as a senior member of the House Judiciary Committee, also played an active role in the passage of the Bankruptcy Reform Act of 1994.

Mr. Synar was diagnosed with cancer in July 1995. While undergoing rigorous treatment, he actively began the Commission's work, securing office space and staffing and preparing a work plan.<sup>40</sup> In October 1995, he named fellow Commissioner United States Bankruptcy Judge Robert E. Ginsberg to serve as the Commission's Vice Chairman. Notwithstanding some initial success with his medical treatment, Mr. Synar's health worsened. Citing his illness, he tendered his resignation to the President on December 19, 1995, effective immediately.<sup>41</sup> Mr. Synar died on January 9, 1996.

With Mr. Synar's resignation, Judge Ginsberg was elected Acting Chairman of the Commission. Judge Ginsberg had been appointed to the Commission by Chief Justice William H. Rehnquist. Prior to his tenure as a bankruptcy judge in the Northern District of Illinois, Judge Ginsberg was a professor at DePaul University College of Law. In addition to co-authoring a treatise on bankruptcy, Judge Ginsberg is a member of the National Bankruptcy Conference, the National Conference of

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<sup>39</sup> Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986).

<sup>40</sup> In October 1995, for example, Mr. Synar issued a statement reflecting his personal perspectives on the goals of the Commission. Mike Synar, *What's Ahead for the National Bankruptcy Review Commission*, 27 BANKR. CT. DEC., Oct. 31, 1995, A3.. He noted:

The challenge for the Commission is to ensure that the final report contains recommendations that will assist in making the bankruptcy process fairer, more efficient and more predictable. To achieve this "simple" goal, the Commission will need to analyze the bankruptcy system in a broad, comprehensive fashion to determine those changes that are most critical and most pressing, with an eye to maintaining a balance between the debtor's need for a fresh start and the obligation to pay debts.

*Id.*

<sup>41</sup> Letter from Alan E. Synar on behalf of Mike Synar to President William J. Clinton (Dec. 19, 1995).



Bankruptcy Judges, and a fellow of the American College of Bankruptcy. Judge Ginsberg served as the Commission's Acting Chairman until Mr. Synar's successor, Brady C. Williamson, was appointed by the President on March 29, 1996.

Mr. Williamson, a partner in the Madison, Wisconsin, law firm of LaFollette & Sinykin, has practiced extensively in commercial, constitutional and bankruptcy law. He also teaches constitutional and bankruptcy law at the University of Wisconsin Law School. Assuming the chairmanship, he said that he hoped the Commission would help "strengthen the bankruptcy code -- to make it more practical, more efficient, more effective -- and to ensure balance and fairness in the often complex legal and economic relationships between lender and borrower."<sup>42</sup> While noting that he did not have an immediate substantive agenda, Mr. Williamson stated that he had a "practical and procedural agenda."<sup>43</sup> He explained:

The Commission's work, with very rare exceptions, should be open. It should be, with no exceptions, inclusive. The Commission, as an entity and Commissioners as individuals, should continue not only to hear every point of view but to solicit points of view not often heard. In that regard, we want to ensure that we are available, accessible, and able to listen as well as to speak to groups and individuals interested in our work.<sup>44</sup>

### **Commission Membership**

In addition to appointing the Chairman, President Clinton named two other members to the Commission. The Chief Justice of the United States, William Rehnquist, also appointed two members. The majority and minority leadership of each house of Congress, pursuant to the enabling legislation, each appointed one member to the Commission.

Named to the Commission by President Clinton, Jay Alix, a Certified Public Accountant, is president of Jay Alix & Associates, a consulting firm specializing in bankruptcy reorganizations, corporate turnarounds, and debt restructurings. He is also the managing principal of Questor Partners Fund LP, an equity fund providing capital for corporate turnarounds. He has served as an operating trustee and examiner in numerous Chapter 11 cases. He also co-authored a handbook on financial accounting

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<sup>42</sup> Statement of Brady C. Williamson to the Commission 2 (Apr. 19, 1996).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

for bankruptcy professionals and is a member of the American Bankruptcy Institute's Board of Directors.

Former Congressman M. Caldwell Butler (R.-Va.), was appointed to the Commission by Robert Michel (R.-Ill.), the Minority Leader of the United States House of Representatives at that time. Representing Virginia's 6th District, Hon. Butler served five terms until his retirement in 1982. During his tenure in Congress, he was a member of the House Judiciary Committee and a principal co-sponsor of the Bankruptcy Reform Act of 1978. As a member of the law firm of Woods, Rodgers & Hazlegrove, PLC at Roanoke, Virginia, Hon. Butler has continued his focus on bankruptcy law and practice.

Babette A. Ceccotti is a partner in the New York City law firm of Cohen, Weiss and Simon, where she specializes in labor law and employee benefits. She was appointed to the Commission by President Clinton. Ms. Ceccotti has represented labor unions and employee benefit plans in numerous bankruptcy cases and has written on labor and bankruptcy issues.

John A. Gose, a senior partner at the Seattle law firm of Preston, Gates & Ellis, was the first member appointed to the Commission. Named by former Speaker of the House Thomas S. Foley (D.-WA), Mr. Gose has practiced extensively in real property and real property insolvency law. He was Chairman of the Real Property Probate & Trust Section of the American Bar Association (1983 to 1984) as well as past President of the American College of Real Estate Lawyers (1988). He is an adviser to the Restatement (Third) of Property - Security (Mortgages) and serves as an adjunct professor of advanced real estate law at Seattle University. He has written and lectured extensively on real property law and related insolvency issues.

Jeffery J. Hartley was named to the Commission by Senator Robert C. Byrd (D.-W.V.), then President *pro tempore* of the Senate, and George J. Mitchell (D.-Me.), the former Majority Leader of the Senate. Before joining the Mobile, Alabama, law firm of Adams and Reese, LLP, Mr. Hartley served for several years as majority counsel to the Senate Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee where he worked on the Bankruptcy Reform Act of 1994. He later was a law clerk to Hon. Margaret A. Mahoney, Chief United States Bankruptcy Judge - S.D. Ala.

Hon. Edith Hollan Jones of the United States Court of Appeals for the Fifth Circuit was appointed to the Commission by Chief Justice Rehnquist. Prior to her appointment to the bench, Judge Jones was with the firm of Andrews & Kurth in Houston where she specialized in commercial and bankruptcy litigation. In addition, Judge Jones was a member of the Judicial Conference's Advisory Committee on Bankruptcy Rules from 1987 to 1992 and served on the American Bar Association's

Business and Banking Law Committee as well as its Subcommittee on Business Bankruptcy.

Named to the Commission by the former Senate Minority Leader Bob Dole (R.-Kan.), James I. Shepard is a bankruptcy/insolvency tax consultant and serves as an adjunct professor of law at the McGeorge School of Law and the San Joaquin College of Law Graduate Tax Program. While in private practice from 1971 to 1986, Mr. Shepard specialized in agriculture and agribusiness, real estate, commercial and bankruptcy law. He has authored a manual for bankruptcy trustees on tax matters as well as articles on bankruptcy and tax issues.

### **Commission Staffing**

Shortly after receiving its initial funding in July 1995, the Commission began its work, hiring an executive director and general counsel, Jarilyn Dupont, who had worked for Congressman Synar.<sup>45</sup> At the height of its operations, the Commission had three senior advisers, a general counsel, three staff attorneys, one volunteer staff attorney, a legislative counsel on detail from the U.S. Department of Justice, and a part-time attorney responsible for the Commission's computerized database. The Commission was, in addition, staffed by two administrative support personnel.<sup>46</sup> A broad cross-section of volunteers also assisted the Commission staff.<sup>47</sup>

At its first organizational meeting on October 20, 1995, the Commission unanimously approved the retention of a Reporter, Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard University, who would serve as a consultant to the Commission.<sup>48</sup> The Reporter was responsible for coordinating the Commission's analysis of issues and organizing the Commission meetings. In addition to drafting proposals and memoranda for the Commissioners, the Reporter oversaw the preparation of the Commission's Report. The Commission was assisted as well by Senior Advisers, Lawrence P. King, Charles Seligson Professor of Law at New York University, and of counsel to Wachtell, Lipton, Rosen & Katz, and Stephen H. Case, a partner at Davis Polk & Wardwell, who, as volunteers, analyzed and guided the review and discussion of issues by the Commissioners.

The Commission's General Counsel, Susan Jensen-Conklin, was primarily responsible for legal/regulatory compliance matters and the supervision of the

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<sup>45</sup> Ms. Dupont resigned as executive director on February 28, 1996.

<sup>46</sup> Biographical sketches of these individuals appear in the Appendix.

<sup>47</sup> A list of these volunteers appears in the Appendix.

<sup>48</sup> Minutes of Oct. 20 & Nov. 1, 1995 Commission Meetings, at 6.

Commission's administrative operations (budget, personnel, operations, procurement, and production of the Commission's Report) as well as the preparation of the Commission's official meeting minutes. The Senior Staff Attorneys, Elizabeth I. Holland and Melissa B. Jacoby, researched and drafted the Commission's proposals and substantial portions of the Commission's Report. In addition, they participated extensively in the preparation and coordination of the Commission's meetings. The Commission was also assisted by Jennifer C. Frasier and George H. Singer<sup>49</sup> who served in both full-time and volunteer capacities for two of the Commission Working Groups. The Commission's Legislative Counsel, Judith K. Benderson, kept the Commission apprised of legislative developments and coordinated Congressional and media relations.

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<sup>49</sup> Ms. Frasier and Mr. Singer originally joined the Commission as Staff Attorneys before returning to private practice.

## II. Applicability of the Federal Advisory Committee Act, Commission Organization and Deliberative Process

### A. Applicability of the Federal Advisory Committee Act

Shortly after its inception, the Commission determined that it would be subject to the Federal Advisory Committee Act (“FACA”)<sup>50</sup> and memorialized this determination in its charter and bylaws.<sup>51</sup> Pursuant to FACA, every Commission meeting was open to the public,<sup>52</sup> except for sessions concerning personnel matters.<sup>53</sup> Also as required by FACA, all of the Commission meetings were duly noticed in the Federal Register and transcribed.<sup>54</sup> Notice of Commission meetings and agendas was routinely posted on the Commission’s website: <http://www.nbrc.gov>. Detailed official minutes of all of the meetings were prepared and made available to the public. To ensure compliance with FACA, the Commission’s General Counsel was appointed as the Designated Federal Officer.<sup>55</sup>

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<sup>50</sup> 5 U.S.C. app. §10 (1994) [hereinafter FACA].

<sup>51</sup> National Bankruptcy Review Commission Charter (adopted Oct. 5, 1995); National Bankruptcy Review Commission Bylaws, Bylaw II(B) (adopted Feb. 24, 1996).

<sup>52</sup> FACA § 10(a)(1), *supra* note 50.

<sup>53</sup> *Id.* § 10(d). This section incorporates by reference the requirements of the Government in the Sunshine Act (“GISA”), 5 U.S.C. § 552b (1995). GISA is “based on the policy that ‘the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government.’” RICHARD K. BERG & STEPHEN H. KLITZMAN, AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT xiii (Admin. Conference of the U.S. 1978) (quoting Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976)). GISA implements this requirement by mandating that “every portion of every meeting of an agency shall be open to public observation” with only limited exception. 5 U.S.C. § 552b(b) (1995). One recognized exception pertains to internal personnel matters. *Id.* at § 552b(c)(2).

<sup>54</sup> FACA § 10(a)(2), *supra* note 50.

<sup>55</sup> *Id.* § 10(e) and (f); GSA Final Rule on Federal Advisory Committee Management, 41 C.F.R. § 101-6.1019. To fulfill these reporting requirements, the Designated Federal Officer prepared advisory memoranda for the Commission that analyzed the applicable law. *See, e.g.*, Memorandum from Susan Jensen-Conklin to Commission on requirements for telephone conference meetings (July 3, 1997); Memorandum from Susan Jensen-Conklin to Commission analyzing the applicability of FACA and GISA to telephone conference meetings (July 29, 1997); Memorandum from Susan Jensen-Conklin to Commission reviewing facts regarding July 24, 1997 conference call

As required by FACA, all Commission documents were available for public inspection and copying.<sup>56</sup> The Commission's administrative staff processed thousands of requests from the public for copies of Commission documents, including its draft proposals and memoranda, without charge. To facilitate the widest dissemination of these materials, many were posted on the Commission's website as well as on the websites maintained by such organizations as the American Bankruptcy Institute, Commercial Law League of America, and the National Association of Consumer Bankruptcy Attorneys.

## **B. Commission Organization**

The Commission filed its charter on October 5, 1995<sup>57</sup> and formally adopted bylaws on February 24, 1996.<sup>58</sup> Prompted by Commissioner Jay Alix, the Commission at several meetings also considered working drafts of vision and mission statements.<sup>59</sup>

At its first organizational meeting on October 20, 1995, the Commission began to develop a work plan.<sup>60</sup> The Reporter recommended that the Commission view the bankruptcy system from the perspective of different "baskets" of issues, which she described, for example, as consumer bankruptcy, small business, and large

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(Sept. 5, 1997).

<sup>56</sup> FACA § 10(b), *supra* note 50. As noted earlier, *supra* note 2, all of these documents are on file with the National Archives.

<sup>57</sup> National Bankruptcy Review Commission Charter (adopted Oct. 5, 1995).

<sup>58</sup> National Bankruptcy Review Commission Bylaws (adopted Feb. 24, 1996).

<sup>59</sup> *See, e.g.*, Minutes of Feb. 23-24, 1996 Commission Meeting, at 29; Minutes of Apr. 19, 1996 Commission Meeting, at 19; Minutes of May 16-17, 1996 Commission Meeting, at 40. For example, the Commission's working draft of its vision statement dated July 26, 1996 provided:

The National Bankruptcy Review Commission envisions a national bankruptcy system that provides fairness, uniformity, and relative certainty; a system that is accessible, easier to use, cost efficient, and does not result in undue delay; we envision a system that eliminates the major problems and addresses the frustrations in the current system through solutions that use new technology and the current infrastructure when possible; and, we envision a system structured to meet the needs and demands of the next 20 years.

Working Drafts of Commission Vision and Mission Statements (dated July 26, 1996).

<sup>60</sup> Minutes of Oct. 20 & Nov. 1, 1995 Commission Meetings, at 7-12.

Chapter 11 cases.<sup>61</sup> Based in part on this recommendation, the Chairman announced at the Commission's June 1996, meeting the formation of eight working groups, each staffed by three or four Commissioners along with the Reporter or a Senior Adviser and an assigned Staff Attorney. These working groups were: Chapter 11; Consumer Bankruptcy; Government; Jurisdiction and Procedure; Mass Torts and Future Claims; Service to the Estate and Ethics; Small Business, Partnerships and Single Asset Real Estate; and Transnational Insolvency.<sup>62</sup> In addition, some topics, such as executory contracts, were covered addressed primarily in plenary sessions. Although the working groups provided the structure for the Commission's development of its proposals, the entire Commission, and each Commissioner, retained the final authority for addressing and deciding each issue.

The Commission also had the assistance of several task forces. Early in 1997, the Chairman appointed a ten-member tax advisory committee comprised of federal and state government representatives, academics and practitioners. Led by Professor Jack Williams of the Georgia State University College of Law, the Committee reviewed more than 140 issues and prepared a report, which is included in its entirety

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<sup>61</sup> *Id.* at 7-8.

<sup>62</sup> The membership and staffing of these working groups were as follows:

Chapter 11

Commissioners: Alix, Ceccotti, Ginsberg  
Reporter: Warren  
Staff Attorney: Jacoby

Consumer Bankruptcy

Commissioners: Ceccotti, Jones,  
Williamson  
Reporter: Warren  
Staff Attorney: Jacoby

Government

Commissioners: Gose, Shepard, Williamson  
Senior Adviser: Case  
Staff Attorneys: Frasier, Holland, Jacoby, Singer

Jurisdiction and Procedure

Commissioners: Butler, Hartley, Jones  
Senior Adviser: King  
Staff Attorney: Holland

Mass Torts & Future Claims

Commissioners: Ceccotti, Ginsberg, Gose, Jones  
Reporter: Warren  
Staff Attorney: Jacoby

Service to the Estate and Ethics

Commissioners: Alix, Butler, Ginsberg  
Senior Adviser: King  
Staff Attorney: Holland

Small Business, Partnerships and Single Asset Real Estate

Commissioners: Gose, Hartley, Shepard  
Senior Adviser: Case  
Staff Attorneys: Frasier, Holland (partnerships), Singer

Transnational

Commissioners: Alix, Butler, Hartley,  
Shepard  
Senior Advisers: Case, King  
Staff Attorney: Holland

in the Appendix,<sup>63</sup> identifying consensus as well as controversial recommendations. Of these proposals, the Commission formally adopted 37 Recommendations.

In addition, a four-person committee of academics and bankruptcy judges examined the Bankruptcy Code's discharge and dischargeability provisions. The Report presented more than 30 recommendations addressing the overall structure of dischargeability as well as specific areas for change.<sup>64</sup> The Commission adopted, in whole or with modification, some of these proposals.

Various individuals, at the Chairman's request, assisted the Commission by reviewing specific issues and preparing reports on those matters. Professor Lynn LoPucki of Cornell Law School prepared an initial report on data collection for the Commission.<sup>65</sup> Commissioner John Gose, Senior Adviser Stephen H. Case and Professor LoPucki then developed the Commission's position on data collection, which appears in Chapter 4. Professor Karen Gross of New York Law School also prepared an analysis on consumer financial education together with an outline for a proposed pilot project.<sup>66</sup> In addition, Professor Jay Westbrook, who was co-head of the United States' delegation to United Nations Commission on International Trade Laws ("UNCITRAL"), assisted the Commission in developing recommendations on transnational insolvency.<sup>67</sup>

### **C. The Deliberative Process**

This Report contains 172 individual and specific recommendations for changes or additions to the current bankruptcy law and rules of procedure. These Recommendations are the result of a multi-stage process. Typically, a proposal began with a concept considered by the appropriate working group. If there was working

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<sup>63</sup> See Final Report of the Tax Advisory Committee to the National Bankruptcy Review Commission (Aug. 1997). This Report, together with a list of the Committee's members, can be found in the Appendix.

<sup>64</sup> See Memorandum from Hon. Samuel Bufford, Bankruptcy Judge, *et al.* to the National Bankruptcy Review Commission regarding discharge and dischargeability (May 30, 1997). This Memorandum, together with a list of the Committee's members, can be found in the Appendix.

<sup>65</sup> See Lynn LoPucki, *Enhancing the Accessibility and Effectiveness of Bankruptcy Information* (1997). This paper can be found in the Appendix.

<sup>66</sup> See Karen Gross, *Introducing a Debtor Education Program into the U.S. Bankruptcy System: A Roadmap for Change* (July 7, 1997). This paper can be found in the Appendix.

<sup>67</sup> See Memorandum dated July 29, 1997 from Jay Lawrence Westbrook to the National Bankruptcy Review Commission regarding UNCITRAL Model Law on Cross-Border Insolvency. This paper can be found in the Appendix.



group consensus for a proposal, the Senior Adviser and Staff Attorney then researched and prepared an analysis and an initial conceptual proposal, which were distributed to the full Commission for its consideration. After a threshold discussion of the proposal by the full Commission and if there was sufficient support, an expanded analysis was prepared by the staff to address any open issues. The last step in this process was the consideration by the full Commission of the draft proposal. If it was supported by a majority of the Commissioners,<sup>68</sup> the proposal was noted as tentatively adopted subject to reconsideration or subsequent amendment.<sup>69</sup>

Nearly every working group meeting and plenary session included roundtable discussions at which academics, practitioners, government representatives and other leaders of their fields participated. Typically representing a broad cross-section of viewpoints on these issues, these participants assisted the Commission in its review of virtually all of the proposals it considered. More than 600 professionals<sup>70</sup> were called upon to explain the substantive law, to discuss the issues presented, and to discuss possible improvements.

An integral part of the Commission's deliberations was the direct involvement of the bankruptcy community and public generally in every phase of this process. First, the public was invited to observe and, often, to participate in nearly every facet of the development of the Commission's proposals, beginning with the working groups' initial consideration. After these proposals were distributed to the full Commission for its consideration, copies were made available to the public and widely disseminated in the bankruptcy community for comment. Many draft proposals were posted on the Commission's website as well as websites maintained by other organizations. Copies were supplied by the Commission without charge to anyone who requested them. In addition, the Commission's staff, from time to time, mailed draft proposals and other materials for comment to literally hundreds of individuals and others on mailing lists maintained by the Commission.<sup>71</sup>

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<sup>68</sup> In most instances, there was a formal vote of the Commissioners. On occasion, however, the lack of objection by any Commissioner was simply noted by the Chairman. Twenty-nine proposals were determined by mail ballot.

<sup>69</sup> A chart tracking the progress of these proposals was prepared by the Commission staff and periodically updated to keep the public apprised of their status.

<sup>70</sup> A statistical breakdown of this number by meeting date can be found in the Appendix.

<sup>71</sup> Over the course of the Commission's life, four main mailing lists were developed. The largest of these was the consumer bankruptcy mailing list, which contained more than 500 names. In addition, the Commission maintained regular contact with the bankruptcy bench and wrote to all of the nation's 315 bankruptcy judges in the summer of 1997 to describe the Commission's work and notify them of the availability of the proposals.

### **III. The Commission's Outreach Efforts**

#### **A. Overview**

To fulfill its statutory mandate, the Commission actively solicited “divergent views of all parties concerned with the operation of the bankruptcy system”<sup>72</sup> in a variety of ways. These included a series of national and regional meetings, where any member of the public could address his or her concerns directly to the Commission, and the development of a national dialogue through the Commission’s website and a broad range of other efforts.

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<sup>72</sup> National Bankruptcy Review Commission Act §603(4), *supra* note 3.

## B. Public Participation at Commission Meetings

Over the its two-year life, the Commission held a total of 21 public meetings<sup>73</sup> and regional hearings,<sup>74</sup> lasting a total of 35 days. Conducted at sites throughout the nation, these meetings and hearings were attended by more than 2,600 members of the public.<sup>75</sup> Notice of every meeting appeared in the Federal Register, and the Commission publicized them through news releases and notices posted on the

<sup>73</sup> The dates and locations for the Commission's public meetings were:

	<u>LOCATION</u>	<u>ATTENDEES</u>	<u>PARTICIPANTS</u>	<u>OPEN FORUM</u>
10/20/95	Washington, DC	25	-	-
11/1/95	New Orleans, LA	40	-	22
2/23-24/96	Washington, DC	60	7	2
4/19/96	Washington, DC	45	14	4
5/16-17/96	San Antonio, TX	75	11	28
6/20-21/96	Washington, DC	100	41	1
7/18-19/96	Washington, DC	125	75	4
9/18-19/96	Santa Fe, NM	125	30	18
10/18-19/96	San Diego, CA	250	45	28
12/17-18/96	Washington, DC	200	45	18
1/22-23/97	Washington, DC	200	67	13
2/20-21/97	Washington, DC	150	48	15
4/17-18/97	Seattle, WA	350	55	32
5/14-16/97	Washington, DC	125	55	8
6/19-20/97	Detroit, MI	125	30	11
8/11-12/97	Washington, DC	200	11	11
TOTAL:		2,195	534	215

<sup>74</sup> The dates and locations for the Commission's regional hearings were:

	<u>LOCATION</u>	<u>ATTENDEES</u>	<u>PARTICIPANTS</u>	<u>OPEN FORUM</u>
12/4/96	Akron, OH	70	-	25
4/1/97	Des Moines, IA	100	13	24
5/9/97	New York, NY	60	23	14
6/6/97	Orange Beach, AL	125	10	9
7/17/97	Chicago, IL	50	22	2
TOTAL:		405	68	74

<sup>75</sup> The 1970 Commission met in executive session 21 times and conducted four public hearings at which a total of 60 witnesses appeared. 1973 COMMISSION REPORT, *supra* note 19, at vi-xi.

Commission's website.<sup>76</sup> Transcripts and official minutes for every meeting were prepared and made available to the public upon request.<sup>77</sup>

In addition to holding ten plenary meetings in Washington, D.C., the Commission met in plenary session in New Orleans, Santa Fe, Seattle, San Antonio, Detroit and San Diego. The Commission also conducted five regional hearings, where two or three Commissioners gathered to hear general and specific presentations. In Akron, Ohio, the regional hearing addressed a variety of matters of interest to Midwest practitioners, including the question of the venue standard for bankruptcy cases. The New York City regional hearing focused primarily on bankruptcy case management and business bankruptcy issues. Consumer and small business bankruptcies, including the work of Bankruptcy Administrators, were among the matters discussed at the Orange Beach, Alabama, regional hearing.

To ensure that these meetings and hearings included diverse and comprehensive input from the bankruptcy community, individuals, organizations and groups representing a broad cross-section of interests were specifically invited to participate.<sup>78</sup> The Commission heard directly from debtors and creditors who described their experiences with the bankruptcy system.<sup>79</sup> In addition, federal, state and local government representatives<sup>80</sup> actively participated in Commission meetings together with Chapter 7, 12 and 13 trustees, bankruptcy practitioners, accountants,

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<sup>76</sup> More than 100 media organizations received notice of Commission meetings.

<sup>77</sup> At least two organizations, the American Bankruptcy Institute <<http://www.abiworld.org>> and the Commercial Law League of America <<http://bankrupt.com/clla/clla.html>>, posted the Commission's official meeting minutes and other material on their websites.

<sup>78</sup> Approximately 600 people made presentations and participated directly in the Commission's deliberations.

<sup>79</sup> See, e.g., Minutes of May 16-17, 1996 Commission Meeting, at 27-28.

<sup>80</sup> These governmental representatives included the Administrative Office of the United States Courts, Executive Office for United States Trustees, United States Trustees and Assistant United States Trustees, Bankruptcy Administrators, the Congressional Budget Office, Department of Justice, Department of the Treasury, the Department of Housing and Urban Development, Internal Revenue Service, Pension Benefit Guaranty Corporation, Securities and Exchange Commission, state and county treasurers and tax collectors, and state attorneys general.

paralegals, academics, as well as labor union<sup>81</sup> and private industry representatives.<sup>82</sup> Bankruptcy judges attended and participated at Commission meetings and hearings. To permit direct input from the public, nearly every meeting and hearing set aside time, known as “open forum” sessions, where anyone could address his or her concerns to the Commission about any matter pertaining to bankruptcy.<sup>83</sup> As a result, the Commission heard a very broad spectrum of viewpoints.<sup>84</sup>

Specifically with regard to consumer bankruptcy, the Commission repeatedly involved all of those with interests affected by the bankruptcy system. For example, the Commission at its December 17-18, 1996 meeting heard from four panels comprised of 16 witnesses chosen by creditor representatives.<sup>85</sup> The Commission, at its May 14-16, 1997 meeting, heard a four-part panel presentation organized by

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<sup>81</sup> Examples include the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and the United Steelworkers of America.

<sup>82</sup> Banking, credit union and other credit industry representatives, insurance companies, automobile manufacturers and finance companies, and retailers are examples.

<sup>83</sup> A total of 289 open forum speakers addressed the Commission.

<sup>84</sup> A non-exclusive list includes: Ad Hoc Secured Creditor Group, American Arbitration Association, American Bankers Association, American Bankruptcy Board of Certification, American Bankruptcy Institute, American Bar Association, American College of Bankruptcy, American Financial Services Association, American Law Institute, American Tax Reduction Movement, America’s Community Bankers, Apartment Association of Greater Los Angeles, Association of Bankruptcy Professionals, Association of Insolvency Accountants, Automobile Manufacturers’ Association; California Association of Independent Paralegals, Commercial Investment Real Estate Institute, Commercial Law League of America, Community Associations Institute, Consumer Bankers Association, Consumers League of New Jersey, Credit Union National Association, Foundation for Consumer Credit, Gain Credit Group/Giftware Credit Interchange, Government Finance Officers Association, HALT - An Organization of Americans for Legal Reform, Independent Bankers Association of America, International Association of Insolvency Practitioners, International Bar Association - Committee J, International Council of Shopping Centers, International Credit Association, Mortgage Bankers Association of America, National Association of Attorneys General, National Association of Bankruptcy Trustees, National Association of Chapter 12 Trustees, National Association of Chapter 13 Trustees, National Association of Consumer Bankruptcy Attorneys, National Association of County Treasurers and Finance Officers, National Association of Credit Management, National Association of Federal Credit Unions, National Association of State Credit Union Supervisors, National Bankruptcy Conference, National Conference of Bankruptcy Judges, National Consumer Bankruptcy Coalition, National Consumer Law Center, Inc., National Credit Counseling Services, National Federation for Consumer Credit, National Housewares Manufacturers Association, National Multi Housing Council/National Apartment Association, National Realty Committee, National Retail Federation, Northwest Bankruptcy Institute, States’ Association of Bankruptcy Attorneys, Turnaround Management Association, and the Virginia Treasurers Association as well as state and local bar associations.

<sup>85</sup> Minutes of Dec. 17-18, 1996 Commission Meeting, at 2-15.

consumer debtor representatives.<sup>86</sup> To supplement the Commission's outreach efforts, particularly in the area of consumer bankruptcy, there were several informal sessions where consumer creditor and debtor representatives shared their views in an environment designed for an open exchange of ideas and dialogue.<sup>87</sup>

### **C. Submissions by the Public to the Commission**

The goal of the Commission's deliberative process was to involve the entire bankruptcy community, broadly defined, and the public at large. Without question, this goal was achieved. The Commission received more than 2,300 submissions from the public, ranging from succinct comments by electronic mail transmission<sup>88</sup> to extensive law review articles specifically addressed to the Commission.<sup>89</sup> Submissions were received from every state in the nation on virtually every issue considered by the Commission.<sup>90</sup> In sum, written public comment was actively solicited and received throughout the Commission's deliberative process.

Upon receipt, these submissions were photocopied and distributed in periodic mailings to each of the Commissioners, Senior Advisers and Staff Attorneys. Each document was recorded on a master materials list that identified the date of the submission and its writer and briefly summarized its contents. In addition, many of these submissions were entered into a computer database to their permit retrieval by author, author's affiliation, geographic location and judicial circuit, topic, subject matter, or section of the Bankruptcy Code. Utilized as a research resource for the Commission staff, these documents were also available for public inspection and copying upon request.

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<sup>86</sup> Minutes of May 14-16, 1997 Commission Meeting, at 17-25.

<sup>87</sup> Sessions were held, for instance, at Boston (Nov. 23, 1996), Washington, D.C. (Dec. 6, 1996), St. Louis (Feb. 1, 1997), and Dallas (Apr. 5, 1997).

<sup>88</sup> The Commission's website permitted written comments to be sent directly to the Commission's office by electronic transmission. The Commission also maintained a separate electronic mail address for the use of the public.

<sup>89</sup> The forms of these submissions were as varied as their contents. They included letters, memoranda, news articles, law review articles, studies, reports, books, booklets, videos and tape recordings.

<sup>90</sup> The Commission was the object of several letter-writing campaigns. For instance, the Commission received more than 300 letters from residential landlords concerning the applicability of the automatic stay provisions of 11 U.S.C. § 362 to eviction proceedings. Bankruptcy petition preparers sent more than 120 letters addressing the application of 11 U.S.C. § 110 to their profession. Credit unions were actively involved in the process as well with the Commission receiving more than 110 submissions from their representatives, employees and members.

## D. Other Efforts to Involve the Bankruptcy Community

In addition to the activities noted above, the Commission repeatedly involved the bankruptcy community in the deliberative process in other ways. Individual Commissioners as well as Senior Advisers and staff members addressed groups and organizations throughout the country. The Commission's Chairman, for example, himself made more than 50 presentations before various organizations and federal agencies from April 1996 through September 1997.<sup>91</sup>

The Commission and its staff also worked very closely with various organizations and government agencies involved in the bankruptcy community. The American Bankruptcy Institute ("ABI"), for example, played a very active role in the Commission's process.<sup>92</sup> In addition to regular presentations at Commission meetings, ABI undertook several comprehensive projects and surveys that were resources for the Commission and its staff.<sup>93</sup> ABI initiated its own consumer bankruptcy reform forum resulting in the preparation of a report with findings and recommendations adopted by the Commission.<sup>94</sup> ABI further assisted the Commission by publishing reports and articles about the Commission and its activities in its journals<sup>95</sup> and posting the Commission's draft proposals, meeting minutes and other important materials on its website.

Other groups that contributed their valuable time and resources to the Commission were the Commercial Law League of America,<sup>96</sup> the National

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<sup>91</sup> A complete list of these groups and organizations can be found in the Appendix.

<sup>92</sup> The Commission, for example, met in conjunction with the American Bankruptcy Institute at its annual spring meeting on May 15-16, 1997.

<sup>93</sup> These efforts, as part of ABI's Bankruptcy Reform Study Project, included a multi-volume study on various aspects of bankruptcy law with recommendations, a comprehensive membership survey on bankruptcy issues, and a survey of attorneys and credit managers on preference actions.

<sup>94</sup> The American Bankruptcy Institute Consumer Bankruptcy Reform Forum - Summary and Report on Options (undated) can be found in the Appendix.

<sup>95</sup> For example, the Commission prepared progress reports on its activities and draft proposals that were periodically published in the *American Bankruptcy Institute Journal*. See, e.g., *Bankruptcy Review Commission Reports on Consumer Bankruptcy Considerations*, 16 AM. BANKR. INST. J. 1 (May 1997).

<sup>96</sup> The Commercial Law League of America made regular presentations to the Commission. See, e.g., Minutes of Feb. 23-24, 1996 Commission Meeting, at 24-25 (presentation on tax issues

Association of Consumer Bankruptcy Attorneys<sup>97</sup> and the National Conference of Bankruptcy Judges.<sup>98</sup> In addition, the Commission benefitted from surveys and projects prepared by the American College of Bankruptcy,<sup>99</sup> the National Bankruptcy Conference<sup>100</sup> and the National Conference of Bankruptcy Clerks.<sup>101</sup>

The Commission also worked closely with all three branches of the federal government. In the judicial branch, the Commission coordinated its work with the Administrative Office of the United States Courts and its Bankruptcy Judges

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presented in Chapter 7 cases); Minutes of June 20-21, 1996 Commission Meeting, at 6-15 (comments on pending Commission proposals); Minutes of Oct. 18-19, 1996 Commission Meeting, at 47-48 (the need to establish a “good faith” standard for Chapter 11 cases); Minutes of Feb. 20-21, 1997 Commission Meeting, at 10-13 (review of the Commission’s tentative tax proposals); Minutes of May 14-16, 1997 Commission Meeting, at 33-35 (the League’s recommendations for change and single-asset real estate issues). In addition, the League reported on the Commission’s work in its *Commercial Law Bulletin* and posted the Commission’s meeting agendas, memoranda, meeting minutes and proposals on its website.

<sup>97</sup> The National Association of Consumer Bankruptcy Attorneys actively participated in the Commission’s deliberative process. The entire Commission met in conjunction with the Association on May 16-17, 1996 at its annual meeting. In addition, the Association made presentations at numerous Commission meetings. *See, e.g.*, Minutes of Apr. 19, 1996 Commission Meeting, at 4-11; Minutes of May 16-17, 1996 Commission Meeting, at 29; Minutes of Sept. 18-19, 1996 Commission Meeting, at 28; Minutes of Feb. 20-21, 1997 Commission Meeting, at 20-23; Minutes of May 14-16, 1997 Commission Meeting, at 24-25. The Association also posted information about the Commission’s work on its website.

<sup>98</sup> The Commission met twice in conjunction with the National Conference of Bankruptcy Judges at its annual meetings (November 1, 1995 and October 18-19, 1996). Commissioners also attended the Conference’s meeting on October 17, 1997. In addition, the Conference and its members made a number of presentations to the Commission. *See, e.g.*, Minutes of June 20-21, 1996 Commission Meeting, at 6-15.

<sup>99</sup> In addition to making presentations to the Commission, the American College of Bankruptcy established a Bankruptcy Review Commission Project that, in turn, conducted a survey of the College’s membership regarding pending Commission proposals and other matters. The College also actively participated in Commission meetings. *See, e.g.*, Minutes of June 20-21, 1996 Commission Meeting, at 6-15.

<sup>100</sup> National Bankruptcy Conference members actively participated in the Commission’s deliberative process. *See, e.g., id.* at 6-15; Minutes of Jan. 22-23, 1997 Commission Meeting, at 21-22. Among the Conference’s most valuable contributions to the Commission was its comprehensive review of the Bankruptcy Code. *See* REFORMING THE BANKRUPTCY CODE: THE NATIONAL BANKRUPTCY CONFERENCE’S CODE REVIEW PROJECT, FINAL REPORT (rev. ed. 1997).

<sup>101</sup> For example, the National Conference of Bankruptcy Clerks, in the spring of 1996, surveyed 31 bankruptcy courts throughout the nation on the administration of bankruptcy cases and prepared a compilation of the survey results for the Commission.



Division,<sup>102</sup> the Judicial Conference's Advisory Committee on Bankruptcy Rules,<sup>103</sup> the Federal Judicial Center,<sup>104</sup> Bankruptcy Judges<sup>105</sup> and their clerks and Bankruptcy Administrators.<sup>106</sup> From the executive branch, the Commission solicited statistical and administrative input from the Executive Office for United States Trustees and its field offices.<sup>107</sup> The Executive Office, under the leadership of its Director, Jerry Patchan,

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<sup>102</sup> As noted earlier, *see supra* text accompanying note 35, the Administrative Office and its Director, Leonidas Ralph Mecham, provided office space, facilities and other assistance to the Commission and its staff. The Bankruptcy Judges Division of the Administrative Office assisted the Commission and its staff on nearly a daily basis by providing statistical data on bankruptcy cases as well as supplying other information. In addition, the Commission and its staff worked with the Administrative Office on substantive matters of concern. For example, Commission representatives, on March 3-4, 1997, participated at the Conference on Future Bankruptcy Data sponsored by the Administrative Office of the United States Courts. The purpose of the Conference was to identify current and future bankruptcy data needs and to develop a report with recommendations. *See* Letter from Leonidas Ralph Mecham, Director, Administrative Office of the United States Courts, to Brady C. Williamson, Commission Chairman, enclosing the Report of the Bankruptcy Statistics Task Force (June 30, 1997). This Report can be found in the Appendix.

<sup>103</sup> Two Commissioners, for example, met with this Committee on September 11, 1997 to discuss the Commission's recommendations on bankruptcy rules and official forms, including the notice provisions.

<sup>104</sup> The Federal Judicial Center, for example, supplied the Commission with a report on the venue of large Chapter 11 debtors. *See* FEDERAL JUDICIAL CENTER REPORT TO THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM: CHAPTER 11 VENUE CHOICE BY LARGE PUBLIC COMPANIES (1997). This Report can be found in the Appendix. In addition, the Center sponsored several workshops for bankruptcy judges at which Commission representatives provided the latest information on the Commission's work. For example, Commissioners and Commission representatives participated in workshops held March 12, 1997 (Memphis), April 14, 1997 (Seattle), July 30, 1997 (Minneapolis) and September 10, 1997 (Washington, D.C.).

<sup>105</sup> Commission representatives periodically briefed the Bankruptcy Judges Advisory Committee at its meetings (May 7, 1996, October 29, 1996 and May 13, 1997). In addition, the Commission Chairman, on July 15, 1997, sent a letter to all of the bankruptcy judges about the Commission's work. Members of the bankruptcy bench submitted more than 200 separate letters, memoranda and other materials to the Commission.

<sup>106</sup> Bankruptcy Administrators participated in Commission meetings and hearings. *See, e.g.,* Minutes of Oct. 18-19, 1996 Commission Meeting, at 4-15.

<sup>107</sup> *See, e.g.,* Statement of Jerry Patchan, Director, Executive Office for United States Trustees (Nov. 1, 1995); Letter from Mr. Patchan to Brady C. Williamson, Commission Chairman, enclosing a list of proposals (Feb. 28, 1997); Letter from Martha L. Davis, General Counsel, Executive Office for United States Trustees, to Staff Attorney Jennifer C. Frasier, providing a cost-benefit analysis of the United States Trustees' implementation of the Small Business Proposal (Apr. 7, 1997); Letter from Mr. Patchan to Mr. Williamson commenting on Service to the Estate and Ethics Working Group Proposal No. 1 - Disinterestedness (May 13, 1997); Letter from Mr. Patchan to Mr. Williamson discussing the concept of auditing consumer bankruptcy cases (June 5, 1997);

was directly involved in virtually every Commission meeting. In addition, the Commission regularly received comments and recommendations from other executive branch agencies such as the Department of Justice and the Internal Revenue Service<sup>108</sup> as well as the Securities and Exchange Commission.<sup>109</sup> The Commission also coordinated its work with various state and local government representatives.<sup>110</sup>

The Commission augmented its outreach efforts through electronic mail communication facilities as well as its own website on the Internet. The address for the Commission's website was "http://www.nbrc.gov," which went "live" in January

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Letter from Ms. Davis to Mr. Williamson conveying the results of a survey of all United States Trustees regarding petition preparers under 11 U.S.C. § 110 (Aug. 12, 1997).

<sup>108</sup> These agencies became involved early in the Commission's process. For example, two Commissioners and one staff member met on February 22, 1996 to discuss tax issues with representatives of these agencies. *See* Memorandum from Commissioner Edith Hollan Jones to Commission and staff regarding Feb. 22, 1996 meeting with Internal Revenue Service (Mar. 7, 1996). In addition to actively participating at Commission meetings, Department of Justice and Internal Revenue Service representatives served on the Commission's Tax Advisory Committee. A list of this Committee's membership appears in the Appendix. These agencies also prepared numerous submissions on various aspects of bankruptcy law. *See, e.g.,* Letter from Francis M. Allegra, Deputy Associate Attorney General, U.S. Department of Justice - Office of the Associate Attorney General, to Brady C. Williamson, Commission Chairman, enclosing the Report of the Department of Justice Bankruptcy Working Group (Sept. 12, 1996); Letter from Joyce E. Bauchner, Assistant Chief Counsel (General Litigation), Department of the Treasury - Internal Revenue Service, to Mr. Williamson enclosing proposals to improve the administration of bankruptcy cases with regard to Internal Revenue Service claims and benefit tax collection (Aug. 28, 1996); Letter from Mr. Allegra to Mr. Williamson regarding the treatment of future claims in bankruptcy (May 12, 1997); Letter from Ms. Bauchner to Staff Attorney Jennifer C. Frasier, describing the Service's procedures for crediting tax overpayments against tax liabilities (Feb. 11, 1997); Letter from Mr. Allegra to Mr. Williamson commenting on various aspects of consumer bankruptcy (June 18, 1997).

<sup>109</sup> Securities and Exchange Commission representatives made several presentations to the Commission at its meetings. *see, e.g.,* Minutes of Apr. 19, 1996 Commission Meeting, at 28-29; Minutes of Sept. 18-19, 1996 Commission Meeting, at 9-17; Minutes of Oct. 18-19, 1996 Commission Meeting, at 36-42. In addition, agency representatives submitted written recommendations and observations. *See, e.g.,* Letter from Judith R. Starr, Assistant Chief Litigation Counsel, Securities and Exchange Commission, to Brady C. Williamson, Commission Chair, providing background materials regarding prebankruptcy waivers (July 7, 1997); Statement of Issues Identified by the Director of Enforcement and the Office of General Counsel of the Securities and Exchange Commission for Consideration by the Bankruptcy Review Commission (submitted Feb. 1996). The Statement of Issues submitted by the Securities and Exchange can be found in the Appendix.

<sup>110</sup> The Commission, for example, met in conjunction with the States' Association of Bankruptcy Attorneys on September 17-18, 1996 in Santa Fe, New Mexico where state and local government representatives addressed the Commission. In addition, two of the ten members of the Commission's Tax Advisory Committee were state government representatives.

1997. Besides providing basic background information on the Commission, the site listed upcoming meeting dates and agendas. Through the use of hyperlinks, the Commission's website permitted immediate access to home pages for websites maintained by others.<sup>111</sup> Individuals accessing the Commission's website had the option of communicating directly with the Commission through an electronic mail transmission facility.<sup>112</sup> Over the life of the website,<sup>113</sup> the total number of web pages accessed exceeded 29,000.<sup>114</sup>

The Commission reached out to the bankruptcy community and the general public in other ways. Bankruptcy was often "front-page news" in part because of the Commission's work.<sup>115</sup> To keep the news media apprised of that work, the staff provided background explanations and updates. Commissioners were available to be interviewed by the media.<sup>116</sup> News releases announcing meetings and providing relevant details were issued to a distribution list with more than 100 media

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<sup>111</sup> These included the Administrative Office of the United States Courts, the American Bankruptcy Institute, Commercial Law League of America, and the Executive Office for United States Trustees.

<sup>112</sup> It is estimated that the Commission's "contact page" was accessed approximately 800 times and that more than 200 communications to the Commission were transmitted in this way.

<sup>113</sup> Pursuant to the sunset provisions of the Commission's enabling statute, National Bankruptcy Review Act, § 609, *supra* note 3, all Commission operations must terminate on November 19, 1997.

<sup>114</sup> The Commission's website "home page" was accessed approximately 9,000 times.

<sup>115</sup> See, e.g., Fred R. Bleakley, *Personal Bankruptcy Filings Are Soaring*, WALL ST. J., May 8, 1996, at A2; Fred R. Bleakley, *Debate Mounts Over Rising Bankruptcies - Study Disputes Whether Debt Loads Play Lead Role*, WALL ST. J., May 23, 1996, at A2; Sandra Ward, *Bailing Out: Bankruptcy, Once a Disgrace, Has Become as American as the Fourth*, BARRON'S, June 17, 1996, at 17; Saul Hansell, *Personal Bankruptcies Surging as Economy Hums*, N. Y. TIMES, Aug. 25, 1996, at 1; John M. Berry, *Banks Tightening Consumer Credit - Fed Finds Losses Higher, Bankruptcies Up*, WASH. POST, Aug. 27, 1996, at D1; Toddi Gunter, *Commentary - Personal Bankruptcy: How To Slow the Stampede*, BUS. WK., Sept. 9, 1996, at 46; Albert B. Crenshaw, *Hill Panel Seeks Answers To the Bankruptcy Boom*, WASH. POST, Dec. 8, 1996, at H1; Diana Bork Culp, *Why Personal Bankruptcies Are Surging*, WALL ST. J., Jan 29, 1997, at A11; Ann Davis, *Too Much Bustle in Bankruptcy Court?*, WALL ST. J., Feb. 5, 1997, at B1; John Rothschild, *A Case for Debtors' Prison*, FORTUNE MAG., Mar. 3, 1997, at 207; Daniel McGinn, *Deadbeat Nation - Why Are So Many People in Bankruptcy Court?*, NEWSWEEK, Apr. 14, 1997, at 50; Christine Dugas, *Cover Story: Bankruptcy Stigma Lessens*, USA TODAY, June 10, 1997, at 1A.

<sup>116</sup> In addition to keeping the media apprised of the Commission's work on nearly a daily basis, the Commissioners and the staff participated in more than 80 interviews with the Chairman giving approximately 50 interviews.

organizations. The staff, in addition, prepared progress reports, summaries of draft proposals and other materials that were made available to the public.<sup>117</sup>

Congress was kept apprised of the Commission's work through a variety of channels. The Commission Chairman, for instance, testified at several Congressional hearings.<sup>118</sup> Beginning in July, 1996, regular quarterly reports providing a detailed narrative of the Commission's activities were sent to the subcommittees of the House and Senate having jurisdiction over bankruptcy matters. Copies of tentatively adopted recommendations and explanatory memoranda were provided as well. In addition, Commissioners and staff met regularly with Members of Congress and their staff to discuss the Commission's proposals and to provide assistance. Commission staff also attended Congressional hearings on matters pertaining to bankruptcy and prepared summaries disseminated to the Commissioners.<sup>119</sup> The Commission received and responded to more than 30 Congressional letters, many of which included correspondence from constituents seeking information on bankruptcy matters.

## **IV. The Next Process**

Upon the submission of this Report on October 20, 1997, the Commission's work ends. As mandated by its enabling statute, the Commission will "cease to exist" 30 days following that date.<sup>120</sup>

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<sup>117</sup> The last version of the Commission's progress report appears in the Appendix.

<sup>118</sup> On September 12, 1996, Brady Williamson appeared before the House Committee on Banking and Financial Services regarding the interplay of bankruptcy and consumer credit. *Consumer Debt: Hearing Before the House of Representatives Comm. on Banking and Financial Services*, 104th Cong. (1996). He later testified, together with Senior Adviser Stephen H. Case, on bankruptcy developments and the Commission's work before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee on April 16, 1997.

<sup>119</sup> See, e.g., Memorandum from Susan Jensen-Conklin to Commission regarding April 24, 1996 hearing on the need for additional bankruptcy judgeships and the United States Trustee Program before the Senate Subcommittee on Administrative Oversight and the Courts (Apr. 26, 1996); Memorandum from Susan Jensen-Conklin regarding July 24, 1996 oversight hearing on the United States Trustee Program before the House Subcommittee on Commercial and Administrative Law (July 24, 1996); Memorandum from Susan Jensen-Conklin regarding April 30, 1997 hearing before the House Subcommittee on Commercial and Administrative Law on H.R. 764, the "Bankruptcy Amendments of 1997," and H.R. 120, the "Bankruptcy Law Technical Corrections Act of 1997" (Apr. 30, 1997).

<sup>120</sup> National Bankruptcy Review Commission Act § 609, *supra* note 3.

Although this Report signals the end of the Commission's process, it also signals the beginning of another process. Following the submission of this Report, Congress will review and analyze the more than 170 Recommendations it contains. While some of these Recommendations have already been either the subject of proposed legislation or otherwise prompted legislative activity,<sup>121</sup> this process, like that of the 1970 Commission, will take several years before changes are made in the law. This process, as did the Commission's, should continue to stimulate a nationwide dialogue on the bankruptcy system and the issues it presents.

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<sup>121</sup> See, e.g., Religious Liberty and Charitable Donation Protection Act of 1997, S.1244 (1997) (would establish special protections for tithing); The Responsible Borrower Protection Bankruptcy Act of 1997, H.R. 2500 (1997) (would establish a form of means testing for consumer bankruptcy debtors and create a commission to review exemptions); Investment in Education Act of 1997, S. 1149 (1997) (would amend 11 U.S.C. § 362 to provide further protection to certain tax liens; approved by the Senate Judiciary Committee on Oct. 9, 1997); Chemical Weapons Convention Implementation Act of 1997, S. 610, § 603 (1997) (would create additional exceptions to the automatic stay for governmental units); Family Farmer Protection Act of 1997, S.1024 (would make Chapter 12 permanent; approved by the Senate Judiciary Committee on Oct. 9, 1997); The Bankruptcy Amendments of 1997, H.R. 764 (1997) (would *inter alia* clarify treatment of single asset real estate cases); Bankruptcy Law Technical Corrections Act of 1997, H.R. 120 (1997) (same).