

Y 4
.J 89/1
9/1/7

1022
KANSAS STATE UNIVERSITY LIBRARIES

9/1/7
J 89/1
4/1/6

BANKRUPTCY

GOVERNMENT
Storage

HEARINGS BEFORE SUBCOMMITTEE NO. 4 OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS

FIRST SESSION

ON

S.J. Res. 88

TO CREATE A COMMISSION TO STUDY THE BANKRUPTCY
LAWS OF THE UNITED STATES

H.R. 6665 and H.R. 12250

TO AMEND THE BANKRUPTCY ACT WITH RESPECT TO THE
DISCHARGEABILITY OF DEBTS AND FOR OTHER PURPOSES

OCTOBER 1, 1969

Serial No. 7



Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1969

37-207

11600 662807

COMMITTEE ON THE JUDICIARY

EMANUEL CELLER, New York, *Chairman*

MICHAEL A. FEIGHAN, Ohio
PETER W. RODINO, Jr., New Jersey
BYRON G. ROGERS, Colorado
HAROLD D. DONOHUE, Massachusetts
JACK B. BROOKS, Texas
JOHN DOWDY, Texas
ROBERT W. KASTENMEIER, Wisconsin
WILLIAM L. ST. ONGE, Connecticut
DON EDWARDS, California
WILLIAM L. HUNGATE, Missouri
JOHN CONYERS, Jr., Michigan
ANDREW JACOBS, Jr., Indiana
JOSHUA EILBERG, Pennsylvania
WILLIAM F. RYAN, New York
JEROME R. WALDIE, California
EDWIN W. EDWARDS, Louisiana
WALTER FLOWERS, Alabama
JAMES R. MANN, South Carolina
ABNER J. MIKVA, Illinois

WILLIAM M. MCCULLOCH, Ohio
RICHARD H. POFF, Virginia
WILLIAM T. CAHILL, New Jersey
CLARK MACGREGOR, Minnesota
EDWARD HUTCHINSON, Michigan
ROBERT MCCLORY, Illinois
HENRY P. SMITH III, New York
THOMAS J. MESKILL, Connecticut
CHARLES W. SANDMAN, Jr., New Jersey
TOM RAILSBACK, Illinois
EDWARD G. BIESTER, Jr., Pennsylvania
CHARLES E. WIGGINS, California
DAVID W. DENNIS, Indiana
HAMILTON FISH, Jr., New York
R. LAWRENCE COUGHLIN, Pennsylvania

BESS E. DICK, *Staff Director*

BENJAMIN L. ZELENKO, *General Counsel*

KENNETH R. HARKINS, *Chief Counsel, Antitrust Subcommittee*

GARNER J. CLINE, *Counsel*

HERBERT FUCHS, *Counsel*

WILLIAM P. SHATTUCK, *Counsel*

JEROME M. ZEIFMAN, *Counsel*

CHARLES J. ZINN, *Law Revision Counsel*

DONALD G. BENN, *Associate Counsel*

FRANKLIN G. POLK, *Associate Counsel*

SUBCOMMITTEE No. 4

BYRON G. ROGERS, Colorado, *Chairman*

ANDREW JACOBS, Jr., Indiana
JEROME R. WALDIE, California
EDWIN W. EDWARDS, Louisiana

CHARLES E. WIGGINS, California
HAMILTON FISH, Jr., New York
R. LAWRENCE COUGHLIN, Pennsylvania

JEROME M. ZEIFMAN, *Counsel*

THOMAS E. MOONEY, *Associate Counsel*

CONTENTS

Text of bills-----	Page 1
Testimony of-----	
Bare, Clive W., referee in bankruptcy, Knoxville, Tenn-----	32
Brooks, Gene E., referee in bankruptcy, Evansville, Ind-----	32
Burdick, Hon. Quentin N., U.S. Senator from N. Dak-----	5
Countryman, Vern, vice chairman of the National Bankruptcy Conference, Harvard Law School-----	57
Cowans, Daniel R., president, the National Conference of Referees in Bankruptcy, San Jose, Calif-----	32
Foley, William, deputy director, Administrative Office of the U.S. Courts-----	10
Jackson, Royal, chief, Bankruptcy Division, Administrative Office of the U. S. Courts-----	10
Seligson, Charles, chairman of the National Bankruptcy Conference, New York-----	57
Statements of-----	
American Bankers Association-----	85
Barry, Richard H., Fargo, N. Dak-----	7
Denney, Max A., executive vice president of the American Industrial Bankers Association-----	84
Friesen, Hon. Ernest C., Jr., director of the Administrative Office of the U.S. Courts-----	10
Quittner, Francis F., Esq., Los Angeles, Calif-----	80
Weinfeld, Hon. Edward, judge, U.S. District Court for the Southern District of New York-----	20
Willy, Roy E., Sioux Falls, S. Dak-----	81
Letters-----	
Bare, Clive W., president, National Conference of Referees in Bankruptcy, letter to Hon. Byron G. Rogers, November 5, 1969-----	101
Garrity, Paul G., professor, Boston College Law School, letter to Hon. Byron G. Rogers, with enclosures October 14, 1969-----	86
King, Lawrence P., chairman, Committee on Legislation, National Bankruptcy Conference, letter with enclosures to Hon. Byron G. Rogers, October 23, 1969-----	92

BANKRUPTCY

WEDNESDAY, OCTOBER 1, 1969

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE NO. 4 OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to call, in room 2237, Rayburn House Office Building, Hon. Byron G. Rogers, presiding.
Present: Representatives Rogers, Wiggins, Fish, Coughlin, and Jacobs.

Staff members present: Jerome M. Zeifman, counsel; and Thomas E. Mooney, associate counsel.

Mr. ROGERS. The meeting will come to order.

This morning we shall consider three proposals in the bankruptcy area, Senate Joint Resolution 88, H.R. 6665, and H.R. 12250.

The text of these proposals will be included in the record at this point.

(The bills follow:)

[S.J. Res. 88, 91st Cong., first sess.]

JOINT RESOLUTION To create a commission to study the bankruptcy laws of the United States

Whereas the number of bankruptcies in the United States has increased more than 1,000 per centum annually in the last twenty years; and

Whereas more than one-fourth of the referees in bankruptcy have problems arising in their administration of the existing Bankruptcy Act and have made suggestions for substantial improvement in that Act; and

Whereas the technical aspects of the Bankruptcy Act are interwoven with the rapid expansion of credit which has reached proportions far beyond anything previously experienced by the citizens of the United States; and

Whereas there appears to be little experience or understanding by the Federal Government and the commercial community of the Nation in evaluating the need to update the technical aspects of the Bankruptcy Act and the financial policies pursued by the Federal Government and the commercial community: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) there is hereby established a commission to be known as the Commission on the Bankruptcy Laws of the United States (hereinafter referred to as the "Commission").

(b) The Commission shall study, analyze, evaluate, and recommend changes to the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States", approved July 1, 1898 (30 Stat. 544), as amended (title 11, United States Code), in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities. The Commission's study, analysis, and evaluation shall include a consideration of the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, and all other matters which the Commission shall deem relevant.

(1)

(c) The Commission shall submit a comprehensive report of its activities, including its recommendations, to the President and the Congress within two years after the date of enactment of the joint resolution. Upon the filing of such report, the Commission shall cease to exist.

SEC. 2. (a) The Commission shall be composed of the following members appointed as follows:

(1) three members appointed by the President of the United States, one of whom shall be designed as Chairman by the President and two of whom shall be active practitioners in the field of bankruptcy law;

(2) two appointed by the President of the Senate;

(3) two appointed by the Speaker of the House of Representatives; and

(4) two active full-time referees in bankruptcy appointed by the Chief Justice of the United States.

(b) Five members of the Commission shall constitute a quorum.

(c) A vacancy in the Commission shall not affect its powers. Any vacancy shall be filled in the manner in which the original appointment was made.

(d) Referees in bankruptcy and any other employees of the Federal Government who are members of the Commission shall serve without additional compensation. Each member from private life shall receive \$100 per diem for each day (including traveltime) during which he is engaged in the actual performance of his duties as a member of the Commission. All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

SEC. 3. The Commission shall have the power to appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of this joint resolution. Such appointments shall be without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and such compensation shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

SEC. 4. To carry out the purposes of this joint resolution, the Commission shall have the authority, within the limits of available appropriations—

(1) to obtain any research or other assistance it deems necessary;

(2) to prescribe such rules and regulations as it deems necessary governing the manner of its operations and its organization and personnel;

(3) to enter into contracts or other arrangements, or modifications thereof, and such contracts or other arrangements or modifications thereof may be entered into without legal consideration, without performance or other bonds, and with without regard to section 3709 of the Revised Statutes, as amended (41 U.S.C. 5);

(4) to make advance, progress, and other payments which it deems necessary without regard to the provisions of section 3648 of the Revised Statutes, as amended (31 U.S.C. 529);

(5) to accept and utilize the services of voluntary and uncompensated personnel and reimburse them for travel expenses, including per diem, as authorized by section 5703 of title 5, United States Code; and

(6) to acquire by lease, loan, gift, bequest, or devise, and to hold and dispose of by sale, lease, or loan, real or personal property of all kinds necessary for or resulting from the exercise of authority under this joint resolution.

SEC. 5. Any office, department, agency, or instrumentality of the executive or judicial branches of the United States Government shall furnish to the Commission, upon a reimbursable basis, such advice, information, and records as the Commission may require for the performance of its duties.

SEC. 6. There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this joint resolution.

Passed the Senate June 20, 1969.

Attest: FRANCIS R. VALEO, *Secretary*.

[H.R. 6665, 91st Cong., first sess.]

A BILL To amend the Bankruptcy Act, sections 2, 15, 17, and 38, to permit the discharge of debts in a subsequent proceeding after denial of discharge for specified reasons in an earlier proceeding, to authorize courts of bankruptcy to determine the dischargeability or nondischargeability of provable debts, and to provide additional grounds for the revocation of discharges

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause (12) of subdivision a, section 2, of the Bankruptcy Act (11 U.S.C. 11(a) (12)) is amended to read as follows:

"(12 Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;"

SEC. 2. Section 15 of the Bankruptcy Act (11 U.S.C. 33) is amended to read as follows:

"SEC. 15. DISCHARGES, WHEN REVOKED.—The court may revoke a discharge upon the application of a creditor, the trustee, the United States attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer."

SEC. 3. Clause (2) of subdivision a. of section 17 of the Bankruptcy Act (11 U.S.C. 35(a) (2)) is amended to read as follows:

"(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; * * * (5) are for wages and commissions to the extent they are entitled to priority under subdivision a. of section 64 of this Act; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; or (7) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation."

SEC. 4. Section 17 of the Bankruptcy Act (11 U.S.C. 35) is amended by adding at the end thereof the following new subdivisions:

"b. The failure of a bankrupt or debtor to obtain a discharge in a prior proceeding under this Act for any of the following reasons shall not bar the release by discharge in a subsequent proceeding under the Act of debts that were dischargeable under subdivision a of this section in the prior proceeding: (1) discharge was denied in the prior proceeding solely under clause (5) or clause (8) of subdivision c of section 14 of this Act; (2) the prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs; (3) the debtor filed a written waiver of discharge to which he was entitled under section 660 of the Act, or the court failed to order such a discharge under that section. If a bankrupt or debtor fails to obtain a discharge in a proceeding under this Act by reason of a waiver filed pursuant to section 14a of this Act or by reason of a denial on any ground under section 14c of this Act other than clause (5) or clause (8) thereof, the debts provable in such proceeding shall not be released by a discharge granted in any subsequent proceeding under this Act. A debt not released by a discharge in a proceeding under this Act by reason of clause (3) of subdivision a of this section 17 may nevertheless be dischargeable in a subsequent bankruptcy proceeding."

"c. (1) After a discharge has been granted, the bankrupt or any other party in interest may obtain a determination by the court of bankruptcy of the dischargeability of a particular debt, whether or not an action on the debt is then pending in another court. The court of bankruptcy may enjoin any action on a debt during the pendency of a proceeding to determine its dischargeability under this subdivision c. If the bankruptcy court determines the debt to be dischargeable, it may make such orders as are necessary to protect or effectuate the determination. If such court determines the debt to be nondischargeable, it may determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof; but upon a timely objection by a party to a proceeding brought in the court of bankruptcy as provided by paragraph (2) of this sub-

division c, or by a party who did not invoke the jurisdiction of the court under this paragraph (1), or upon the court's own initiative, the court shall proceed no further after determining the debt to be nondischargeable, and an action to determine the remaining issues may be commenced or continued in any other court where the action might have been brought if no petition had been filed under this Act. Nothing herein shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists.

"(2) A proceeding to determine whether a debt has been excepted from discharge under clause (2) of subdivision a of this section must be commenced within ninety days after the order granting the bankrupt's discharge has become final and, unless the court of bankruptcy otherwise orders, must be commenced and maintained in that court. A debt shall not be excepted from the bankrupt's discharge by clause (2) of subdivision a unless the court so holds in a proceeding brought under this paragraph. A creditor who brings a proceeding under this paragraph does not thereby submit to the jurisdiction of the court of bankruptcy for any other purpose and may object to the court's jurisdiction to proceed further under this subdivision c after it has held his debt not to be discharged.

"(3) If a bankruptcy case is reopened for the purpose of commencing therein a proceeding to determine dischargeability of a debt, no additional filing fee shall be required."

SEC. 5. Clause (4) of section 38 of the Bankruptcy Act (11 U.S.C. 66) is amended by adding at the end thereof the following: "determine the dischargeability of debts, and render judgments thereon".

SEC. 6. The provisions of this amendatory Act shall take effect on and after sixty days from the date of its approval and shall govern proceedings in all cases pending on such effective date in which an order of discharge has not been entered.

[H.R. 12250, 91st Cong., first sess.]

A BILL To amend sections 2, 17, and 38 of the Bankruptcy Act with respect to the discharge of debts

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (12) of section 2(a) of the Bankruptcy Act (11 U.S.C. 11) is amended to read as follows:

"(12) Discharge or refuse to discharge bankrupts, set aside discharges and reinstate the cases, and determine the dischargeability of particular debts and render judgment thereon;"

SEC. 2. Section 17 of the Bankruptcy Act (11 U.S.C. 35) is amended by adding at the end thereof the following new subsections:

"(b) (1) The court of bankruptcy shall have exclusive jurisdiction to determine the dischargeability of any particular debts of the bankrupt as of the date of the filing of the petition initiating proceedings under this Act except obligations for taxes. The bankrupt or any creditor scheduled by the bankrupt may make application for such determination within one year of the date of filing. The application of a creditor asserting non-dischargeability under subsection (a)

(3) may be made within two years of filing. A closed case may be reopened for this purpose without an additional filing fee.

"(2) If no application to determine dischargeability of debts to spouses or children for maintenance or support be filed within the time limit so set forth, such debts shall not be discharged. All other provable debts concerning which no application is filed within such time are discharged. The court may make such protective orders as are necessary to effectuate its determination. The court in its discretion may conduct the trial of the dischargeability of a particular debt hereunder prior to the final ruling on discharge under section 14. A creditor who brings a proceeding to determine dischargeability does not thereby submit to the jurisdiction of the court of bankruptcy for any other purpose.

"(c) (1) If the court determines any debt to be nondischargeable, it may proceed to determine the obligation of the bankrupt thereon and give necessary judgments and orders for enforcement except that it shall make no such determination over the objection of the party not invoking the jurisdiction of the court under subsection (b). The court may decline to determine the remaining issues.

"(2) Nothing contained herein shall be deemed to deny to any party his right to a jury trial, where that right otherwise exists."

SEC. 3. Clause (4) of section 38 of the Bankruptcy Act (11 U.S.C. 66) is amended to read as follows: "(4) grant, deny, or revoke discharges and determine the dischargeability of particular debts of the bankrupt;"

SEC. 4. The provisions of this amendatory Act shall take effect on and after sixty days from the date of its approval and shall govern proceedings in all cases pending on such effective date in which an order of discharge has not been entered.

Mr. ROGERS. Some of the witnesses will no doubt address themselves to all three proposals, while others may choose to confine their statement to a single bill.

One of the proposals, Senate Joint Resolution 88, provides for the establishment of a commission to study our bankruptcy laws. This measure is sponsored by Senator Quentin N. Burdick of North Dakota, who is Chairman of the Subcommittee on Bankruptcy of the Senate Committee on the Judiciary.

Recognizing that it has now been more than 30 years since the last major revision of the bankruptcy systems, as well as the fact that installment credit has increased from 4 billion to 80 billion over the same period, Senator Burdick proposes that a commission examine the entire bankruptcy system and eventually make recommendations for whatever extensive revisions are necessary.

Senator Burdick's proposal was the subject of hearings before the Senate Judiciary Committee in the 90th Congress. An earlier bill, Senate Joint Resolution 100, passed the Senate toward the end of the 90th Congress too late for consideration by us. The present bill, Senate Joint Resolution 88, passed the Senate in this Congress on June 30, 1969.

The two other bills before us today are House Resolution 6665 and House Resolution 12250, both of which relate to the dischargeability of debts.

H.R. 6665 was introduced by me at the request of the National Bankruptcy Conference, while H.R. 12250 was introduced by me at the request of the National Conference of Referees in Bankruptcy.

Proponents of both these measures agree that even if a commission is established to make an overall revision of the bankruptcy law, problems relating to the nondischargeability of debts in the field of consumer bankruptcies are so pressing as to require Congress to act now.

The major objective of these two bills is identical, although the bills differ with respect to the number of details. It is my hope that out of the hearings which we are holding today the difference between the two bills may be reconciled.

Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman.

I am delighted that you saw fit to call hearings on these important matters and I am going to reserve my comments until the witnesses testify and hopefully ask them some pointed and intelligent questions.

Mr. ROGERS. Our first witness today will be Senator Quentin N. Burdick, of North Dakota.

STATEMENT OF HON. QUENTIN N. BURDICK, A U.S. SENATOR IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. Chairman, members, at the outset I wish to commend the Subcommittee and its distinguished Chairman for calling this hearing to consider S. J. Res. 88, to create a commission to study the bankruptcy laws of the United States. It is a pleasure for me to appear to lend my

voice in support of the Resolution. I know your time is very limited this morning, so I shall be brief.

S. J. Res. 88, like its predecessor, S. J. Res. 100 in the 90th Congress, would create a commission to study and recommend changes in our bankruptcy law to the end of having the Act "reflect and adequately meet the demands of present technical, financial, and commercial activities." The scope of the Commission's work would be very wide, to include "the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, and all other matters which the Commission shall deem relevant."

Is such a study needed?

The most recent major revision of our 71-year-old bankruptcy law occurred 31 years ago, in 1938. In that time, the role of "credit" in our society has completely changed. No one, I think, could say with any assurance that our present bankruptcy administration is equal to its appointed task, treating a breakdown of our credit system, of either individual or epidemic proportions.

The changes since 1938 are truly incredible. To illustrate just two facets of this, I would like to refer to a table prepared for me by the Legislative Reference Service of the Library of Congress. I ask that the table be printed following my remarks.

From 1939 to 1969, our population grew from about 130.5 million to 202.3 million; on an index of 100, this is an increase to 155.

However, our population "explosion" dwindles to insignificance when compared with the expansion of consumer credit during the same period. In 1939, there was \$6.4 billion in consumer credit; the figure was \$112.9 billion for 1969. On our index, this is an increase to 1,772 for consumer credit compared with an increase to 155 in our population.

The period since 1939 has, generally, been prosperous. Yet, we see that the rate of growth in bankruptcy filings has far outstripped our rate of population growth, on the order of 363 to 155.

In considering the adequacy of our present bankruptcy laws one is forced to speculate on what would occur if financial conditions caused bankruptcy filings to approach the magnitude of today's consumer credit outstanding.

In Senate hearings last July 16 and 17 on S. J. Res. 100, witnesses discussed a number of weaknesses in our present bankruptcy administration. With something on the order of a fivefold increase in the number of bankruptcy filings, inadequate provisions of our bankruptcy law would prevent an orderly resolution of the financial crisis.

Mr. Chairman, I strongly urge it is time both to examine whether or not our present act is fulfilling its original purpose, as well as to test the assumptions, in light of changed economic, financial and social conditions, on which the present law is premised. I believe the Commission envisioned in S. J. Res. 88 could give us these answers. Thank you.

In addition, Mr. Chairman, I would like to submit for the record the statement of Mr. Richard Barry of Fargo, N. Dak., who could not appear today.

(The material follows:)

THE LIBRARY OF CONGRESS—LEGISLATIVE REFERENCE SERVICE

BANKRUPTCY CASE FILINGS, CONSUMER CREDIT OUTSTANDING, AND POPULATION OF THE UNITED STATES, FISCAL YEARS 1939-69

[Data are expressed in annual totals and as an index with 1939 basis equals 100]

Fiscal year	Total bankruptcy case filings		Total consumer credit outstanding ¹		Population ²	
	Number	Index	Amount (millions)	Index	Number (thousands)	Index
1939	50,997	100	\$6,370	100	130,498	100
1940	52,577	103	7,222	113	131,575	101
1941	56,335	110	8,338	131	132,762	102
1942	52,109	102	9,172	144	134,131	103
1943	34,711	68	5,983	94	135,799	104
1944	19,533	38	4,901	77	137,568	105
1945	12,862	25	5,111	80	139,162	107
1946	10,196	20	5,665	89	140,658	108
1947	13,170	26	8,384	132	142,758	109
1948	18,510	36	11,598	182	145,378	111
1949	26,021	51	14,447	227	147,910	113
1950	33,392	65	17,364	273	151,135	116
1951	35,193	69	21,471	337	153,622	118
1952	34,873	68	22,712	356	156,309	120
1953	40,087	79	27,520	432	158,973	122
1954	53,136	104	31,393	493	161,690	124
1955	59,404	116	32,464	510	164,588	126
1956	62,086	122	38,830	610	167,513	128
1957	73,761	145	42,334	665	170,571	131
1958	91,668	180	44,971	706	173,533	133
1959	100,672	197	45,129	708	176,447	135
1960	110,034	216	51,544	809	179,386	137
1961	146,643	288	56,141	881	182,326	140
1962	147,780	289	57,982	910	185,333	142
1963	155,493	305	63,821	1002	188,160	144
1964	171,719	337	71,739	1126	190,871	146
1965	180,323	354	80,268	1261	193,483	148
1966	192,354	377	90,314	1418	195,856	150
1967	208,329	408	97,543	1531	198,112	152
1968	197,811	388	102,132	1603	200,241	153
1969	184,930	363	112,850	1772	202,253	155

¹ Consumer credit is the amount outstanding at the end of the prior calendar year which is the midpoint in the fiscal year and thus approximates an average for the fiscal year.

² The population data for the years 1950 to 1969 are Bureau of the Census estimates for Jan. 1 annually—the midpoint of the fiscal year. The population data for the years 1939 to 1949 are the averages of the July 1 annual estimates for the beginning and end of the specific fiscal years, thus approximating an average for the fiscal year.

Sources: Bankruptcy case filings: Office of the Attorney General. Consumer credit outstanding: Board of Governors of the Federal Reserve System. Population: U.S. Bureau of the Census. George K. Brite, economist in Industrial Organization and Corporation Finance, Economics Division.

STATEMENT OF RICHARD H. BARRY, PRESIDENT, BARRY AND CO., FARGO, N. DAK.

For the record, my name is Richard H. Barry, a resident of Fargo, North Dakota; I am President of Barry and Company of Fargo, a financial consulting company, plus three additional corporations engaged in other business activities of a diversified nature.

My statement will be brief, but hopefully it will help bring into focus the substance of a broad economic, social and legal problem which has been bred and nourished by an over-extension of low quality credit in this country. This extension of credit has given rise to a present day private and public debt of approximately two trillion dollars. One obvious consequence of an over-extension of credit is the financial distress that is encountered by numerous individuals and businesses who eventually end up in the Bankruptcy Court. It is very important that we recognize that this problem exists. It is even more important that we determine how to solve the problem. I believe that Senate Joint Resolution '88 correctly describes the problem, when it states that there appears to be little knowledge or understanding by the Federal Government and the commercial community as a whole in evaluating the need to update the Federal Bankruptcy Act.

In making my statement today I am taking into consideration the many qualified representatives of the legal profession who have presented their tech-

nical views and related observations before the subcommittee on Bankruptcy in the United States Senate and who are scheduled to appear before your Subcommittee on this Resolution.

In essence, part of my work is in the nature of a financial doctor which continually confronts me with the credit sickness which exists in our nation today. In our complex society with our many new and growing credit problems, one can not expect a financial doctor to operate successfully with inadequate tools. Unfortunately those of us, including the Referees and the legal profession, that must use the Federal Bankruptcy Act as a tool to deal with the illness of both debtors and creditors are struggling with legal machinery that has become cumbersome and inefficient. To state it more strongly, the Bankruptcy Act in its present form has become a relic of another age and does not, in the best interests of our nation, meet the complex problems of today's society.

In 1965 I had occasion to discuss with United States Senator Quentin N. Burdick some of the administrative and economic problems that I was encountering while administering the Bankruptcy Estate of a defunct North Dakota business. Among my various problems was an economic one in which the Bankrupt firm owned one out of every eight houses in a community of approximately 5,000 persons. All of the mortgages on these houses were delinquent and vulnerable to foreclosure. Senator Burdick became quite concerned with the problem and on October 14, 1965 he addressed the following inquiry to all of the Referees in Bankruptcy in the United States:

"One of my constituents in North Dakota, Richard H. Barry, who is Trustee of a Bankruptcy Estate with estimated assets of over two and one-half million dollars and liabilities of over four million dollars has suggested that the Bankruptcy Act of 1898 as amended is sorely in need of a comprehensive overhaul by Congress.

"I am addressing an inquiry to each of the Referees in Bankruptcy in the United States asking whether or not they are encountering sections of the Bankruptcy Act which conceivably should be evaluated in the light of changes and developments in the economy of our nation in the last 25 years.

"I will appreciate your comments or any suggestions you may have."

The Referees responded to Senator Burdick's inquiry with a substantial amount of documented suggestions as well as observations on the importance to update the Bankruptcy Act.

I am here today in my own behalf as a businessman, a financial consultant and as a private citizen with considerable experience in the subject matter which is dealt with in Senate Joint Resolution 88. I am fully aware from many years of personal exposure to matters of upgrading legislation that there is many times an instinctive reaction by many agencies of the Federal Government and the leaders in the business and financial community and their respective trade organizations to defer what might be termed hard decisions. I hope, therefore, that the members of your Subcommittee will take into consideration that Senate Joint Resolution 88 is not only a grass roots approach to a complex national problem, but that it is also a practical approach to seek the help of Congress as a preliminary method of dealing with what appears to be an unhealthy and potentially dangerous economic, social and legal problem which is compounded by an outmoded Bankruptcy Act.

My business experience goes back approximately 40 years beginning with the stock market crash in 1929 at which time I was employed in the credit department of a bank in Minneapolis, Minnesota. Since that time I have had a diversified business life in banking and in many types of business, first as an employee; subsequently as an officer, a director, a shareholder; and later as a consultant for many business and financial organizations. In the last 15 years my activities have broadened into becoming a credit doctor, sometimes in the capacity of trustee for the benefit of creditors, in other instances as a state appointed receiver of one or more insolvent businesses, and starting in 1965 as a Federal Court appointed trustee or administrative officer dealing with various chapters of the Bankruptcy Act, and more recently in three related cases in Minnesota as a Federal Court appointed financial consultant. In my work I believe that I have helped hundreds of employees of sick businesses retain their jobs or to make an orderly transition without loss of income to other types of employment.

I believe it would be worthwhile to point out to the members of your Subcommittee that one of my memories of the economic chaos in the United States in the 1930's relates to the millions of persons who found themselves destitute

as a secondary result of the problems of their employers plus a wide variety of other economic, social and legal problems over which they had little or no control. In the last 15 years, in addition to my memories of the 1930's, I have had first hand experience in walking into an insolvent business for the first time and being confronted with the mental paralysis of management in facing up to their responsibilities. In practically all instances the bookkeeping records are not current and there is a delinquency to the Internal Revenue Service. This type of procrastination is common in credit sickness and is made up in part of fear, sleepless nights, general frustration, pride, in some cases the resortment to drugs and liquor, in some cases the frustration has resulted in the violation of certain criminal laws, and in various forms of human tragedies affecting other than the debtor. In making these observations I am not overlooking the responsibility of the debtor buying beyond his financial ability to pay.

In reflecting upon the problems I have encountered involving credit sickness, I believe I should also emphasize that many individuals and managers of businesses have become insolvent in part because of the credit laxity and the selling techniques of their creditors. I hesitate to make a final evaluation on the subject of credit cards. In one situation within the last year involving two related businesses that were insolvent the number of credit cards outstanding was estimated at 500. I would like to suggest the possibility that in our fast changing and highly competitive economy the issuance of credit cards seems to be changing in many instances from a matter of prudence to a situation of meeting competition no matter how shortsighted and unsound such competitive pressure may add to the economic problems resulting from abuse by compulsive buyers of merchandise for credit freely available to them. I am equally hesitant to make a final evaluation on the broad use of lease and rental contracts for many individual consumers which is a form of 100% financing to substitute for a reasonable downpayment accompanied by a conditional sales contract or a note and mortgage.

Definite figures on what is happening in the credit card business and in the lease rental business are not readily available. Fortunately, however, figures are more readily available on another aspect of credit sickness which appeared in the Congressional Record on April 18, 1969 in the form of a report by Senator Williams of Delaware on the startling increase of delinquencies of employers to the Internal Revenue Service. These are funds which the employers were holding in a fiduciary capacity and represented withholding taxes from their employees. In the calendar year 1968 there was a nation wide increase in such delinquencies amounting to 32%. Based upon my experience, such a situation is additional evidence of deterioration in alarming proportions in the financial condition of large numbers of businesses in our nation. I have yet to see our leading economists take note of such deterioration and I have reason to wonder if any of them have ever taken the trouble to study problems of this nature or to actually visit and to become familiar with the picture which is daily unfolding in the Bankruptcy Courts across our nation. In conclusion, the wording of Senate Joint Resolution 88 speaks clearly about a problem and certain suggested solutions to the problem. To the best of my knowledge there is little, if any, opposition to the substance of this Joint Resolution. It is becoming more and more obvious to those who study this subject matter that there is an urgent need in our dynamic economy to take the Bankruptcy Court out of the atmosphere of a legal basement only visited by creditors and debtors, about 200 Referees, a small percentage of our legal profession and a few financial consultants.

Prompt and favorable action by your Subcommittee on Senate Joint Resolution 88 can well be another step in bringing early and coordinated leadership on a high level to a head on the part of many of the administrative agencies of our Federal Government and the business community as a whole to deal with the economic side effects and problems of a nation which, to put it mildly, has been on a continuous credit spree of both good and low quality since the end of World War II.

Mr. ROGERS. Thank you, Senator Burdick, we appreciate having the benefit of your views. Our next witnesses are Mr. William Foley, Deputy Director of the Administrative Office of the U.S. Courts and Mr. Royal Jackson, Chief of the Bankruptcy Division.

Gentlemen, we are pleased to have the benefit of your knowledge and experience.

Please proceed in your own manner.

**STATEMENTS OF WILLIAM FOLEY, DEPUTY DIRECTOR, AND
ROYAL JACKSON, CHIEF, BANKRUPTCY DIVISION, ADMINISTRATIVE
OFFICE, U.S. COURTS**

Mr. FOLEY. Thank you, Mr. Chairman.

I am appearing here today on behalf of the Director, Mr. Friesen, who is out of the city. Mr. Friesen has a prepared statement which I would like to submit for the record. Unless you wish me to, I shall submit it and not read it at this time.

Mr. ROGERS. We would be glad to receive it for the record.

(The statement follows:)

**STATEMENT OF HON. ERNEST C. FRIESEN, JR., DIRECTOR OF THE ADMINISTRATIVE
OFFICE OF THE UNITED STATES COURTS**

Mr. Chairman, I am Ernest C. Friesen, Jr., Director of the Administrative Office of the United States Courts. Prior to my appointment as Director of the Administrative Office, I served in the Department of Justice as Assistant Attorney General for Administration from April 5, 1965, to January 15, 1968. From February 1, 1961 to April 7, 1965, I was the Executive for the Section on Judicial Administration of the American Bar Association.

I appear to state the position of the Judicial Conference of the United States and the Administrative Office of the United States Courts with reference to Senate Joint Resolution 88, H.R. 6665 and H.R. 12250.

STATEMENT LIMITATIONS

I would like to say at this point that nothing contained in my statement should be considered as an effort to interfere with matters involving Congressional policy or as an expression of policy contrary to that established by the Judicial Conference of the United States.

SENATE JOINT RESOLUTION 88

As Judge Edward Weinfeld has said in his statement, the Judicial Conference of the United States considered the predecessor resolution, Senate Joint Resolution 100, which is similar to Senate Joint Resolution 88, at the February 1968 session.¹ The Judicial Conference approved in principle the creation of the Commission but took the view that the Commission's functions should be broadened to include study of the basic philosophy of bankruptcy and possible alternatives to the present system of bankruptcy administration. The Conference also recommended that the composition of the Commission be patterned after the Commission on Executive, Legislative and Judicial Salaries established by Public Law 90-206, which provided for a nine-member Commission: three members appointed by the President of the United States, two each by the President of the Senate and the Speaker of the House of Representatives, and two by the Chief Justice of the United States.

Senate Joint Resolution 88 has been revised to broaden the scope of the Commission's functions and, in that respect, it substantially conforms to the views of the Judicial Conference. The composition of the Commission proposed in Senate Joint Resolution 88 has been changed but, as changed, differs from the composition recommended by the Judicial Conference. Inasmuch as the Judicial Conference will not meet until October 31, 1969, it has had no opportunity to consider the new Joint Resolution.

The Judicial Conference Bankruptcy Committee, of which Judge Weinfeld is the Chairman, has met and formulated recommendations to the Judicial Conference regarding the new Resolution. The Committee recommends that the Judicial Conference approve it in principle but adheres to its previous recommendation that the composition of the Commission conform to the composition of the Salary Commission established pursuant to Public Law 90-206.

¹ Report, Judicial Conference of the United States, February 1968 Session, page 23.

NEED FOR REVIEW OF THE BANKRUPTCY ACT

There can be no question of the need for general revision of the Bankruptcy Act. Our present Act was enacted in 1898. It has had only one major overhaul in seventy-one years and that occurred with the enactment of the Chandler Act of 1938². An important but much less extensive revision was made in 1946 with the passage of the Referees' Salary Act³. This latter Act abolished the old fee system of compensating referees in bankruptcy and placed these officers on a salary basis. The basic structure of substantive law has not been changed except for minor amendments from time to time in over thirty years. In that period of time, there has been a great change in the economy of the country, in social conditions and great growth in business and population. The Bankruptcy Act needs to be given an in-depth study and substantive revisions made to make it more responsive to the needs of our present-day society.

I believe that the establishment of a Commission is necessary if the job is to be accomplished in a satisfactory manner in the shortest possible period of time. The establishment of a Commission such as is proposed in Senate Joint Resolution 88 would be timely. Within the next year or so the Advisory Committee on Bankruptcy Rules of the Judicial Conference will complete the preparation of a complete set of rules of practice and procedure for the conduct of bankruptcy proceedings. These new rules, when they become effective, will supplant every procedural section of the Act, as well as the General Orders in Bankruptcy. There will remain unchanged only the substantive provisions of the Act, and this would be the appropriate time for them to be reviewed and updated.

THE BROOKINGS INSTITUTION STUDY

The Brookings Institution has for several years been engaged in a thorough study of bankruptcy administration. It is understood that their report and recommendations will be released early in the calendar year 1970.

We expect the Brookings Report to contain a number of recommendations for improvement and perhaps recommendations for some constructive changes in certain phases of bankruptcy administration. It seems to us that it would be most advantageous for the proposed Commission to have the benefit of the work of the Rules Committee and the Brookings Report as early as possible after these reports are released.

JUDICIAL CONFERENCE—SUPERVISION OF BANKRUPTCY ADMINISTRATION

The Judicial Conference, through its Bankruptcy Committee, has maintained continuous supervision over bankruptcy administration. My office, through the Bankruptcy Division, has likewise maintained continuous liaison with the bankruptcy courts, particularly with respect to administrative matters.

One of the matters of concern to the Judicial Conference and the Administrative Office is the cost of administering bankruptcy cases—the cost to creditors, because costs of administration are paid out of the assets of bankrupt estates. One of the largest items of cost is compensation paid to attorneys. Attorney fees account for approximately forty percent of total costs of administration. We have made some progress through detailed cost studies prepared in the Administrative Office and distributed each year to all judges and referees in bankruptcy. I believe this matter needs further study as a part of the overall picture. I think that the Commission's study of bankruptcy administration generally would include this phase of bankruptcy administration and that its findings and recommendations would be most helpful.

H.R. 6665 AND H.R. 12250—RELATING TO THE DISCHARGE OF DEBTS

H.R. 6665, a bill sponsored by the National Bankruptcy Conference, was considered by the Bankruptcy Committee at its meeting on July 8, 1969. The Committee has recommended that the Conference approve the bill in principle when it holds its next session on October 31 and November 1, 1969.

H.R. 12250 was introduced shortly before the Bankruptcy Committee met, and it was not possible to analyze it prior to the meeting of the Committee. Conse-

² 52 Stat. 840-940 approved June 22, 1938.

³ 60 Stat. 323-332 approved June 28, 1946.

quently, this bill has not been considered by the Committee or by the Conference, and I am not prepared to take a position with reference to it. I understand, however, that there are only relatively minor differences between the two bills.

The technical aspects of both bills will be fully discussed by witnesses for the National Bankruptcy Conference, and I will speak generally on the long-standing need for legislation of this character.

As the Bankruptcy Act now stands, the court is vested with authority to determine the bankrupt's right to a discharge, but it cannot determine the effect of the discharge except where there are unusual circumstances under the ruling of the United States Supreme Court in *Local Loan Company v. Hunt*.⁴ Under this doctrine, the courts have generally declined to determine the effect of a discharge as to a particular debt either at the instance of the bankrupt or of a creditor except under very unusual circumstances. As the result of this situation, the rehabilitation of the bankrupt which the Bankruptcy Act seeks to accomplish has become largely mythical. The bankrupt may be sued in a State court on a discharged debt at any time after discharge, and unless the discharged bankrupt answers the State court proceeding and pleads his discharge in Federal court as a defense, the creditor will obtain a default judgment.

Many bankrupts do not realize that they must answer the State court proceeding. Those who do have great difficulty obtaining counsel because their resources—such as they had—were exhausted in the bankruptcy proceeding. This has been a source of embarrassment to members of the bankruptcy bar who, having represented the debtor in the bankruptcy proceeding, cannot be expected to continue to represent him in a series of State court proceedings without reasonable compensation. It has also been a source of harrassment to discharged bankrupts.

The referees in bankruptcy and the Administrative Office receive many complaints regarding this situation from lawyers and bankrupts. It is generally conceded that this is the worst defect in the Bankruptcy Act. With the growth of easy credit and the proliferation of credit cards, many of which are mailed out without solicitation, the discharge problem is much greater today than it was thirteen years ago when we first attempted to obtain remedial legislation.

The government has become increasingly concerned in recent years with the plight of our poor people—people who are attempting to raise and educate their families on low incomes. We are also concerned with the problems of the younger generation—the young married people. These are the two classes of our citizens who are usually the victims of the discharge pitfall when they have to seek relief under the Bankruptcy Act as the only way out.

What you will be doing by enacting this bill will be to assure these honest but unfortunate debtors that they can really have a fresh start free of oppressive debt and free of the harrassment of creditors' lawsuits despite the granting of the discharge in the Federal court.

I trust that the Committee will act favorably on Senate Joint Resolution 88 and H.R. 6665.

Mr. FOLEY. Mr. Friesen's statement is in support of Senate Joint Resolution 88, which is before the committee now and also in support of H.R. 6665 which has been endorsed by the Judicial Conference of the United States.

On behalf of Mr. Friesen and myself, I wish only to summarize and to say that, as the committee is aware, the entire economic structure and credit structure of the country has changed so substantially in the past 30 years that we feel a study such as is proposed by Senate Joint Resolution 88 is very much needed and we very much endorse the proposal.

The so-called dischargeability bills which are before your committee are entirely acceptable—either bill, as far as the policy concerned. As to the details, I have the expert with me here, Mr. Jackson, who is the chief of our Bankruptcy Division and I will defer to him any of the details of these bills.

⁴ 292 U.S. 234, 54 Sup. Ct. 695, 78 L. Ed. 1230 (1934).

Mr. ROGERS. First, may I ask you, have you made any estimate as to the approximate cost that will be necessary to carry out the terms and conditions of Senator Burdick's bill?

Mr. FOLEY. Yes, sir; Mr. Jackson has made some study of that and if you wish, he might answer that now.

Mr. JACKSON. Mr. Chairman, we have made a limited study and judging by the budget estimates submitted by the National Commission on Reform of Federal Criminal Laws, which is somewhat in our view comparable to the structure of this commission, we estimate that it would cost in the neighborhood of \$300,000 per year for the operation of the commission for a period of 2 years.

Mr. ROGERS. For a period of 2 years?

Mr. JACKSON. \$300,000 a year, total of \$600,000, as nearly as we can estimate.

Mr. ROGERS. Do you feel that work can be completed and recommendations made by the commission in that period of time?

Mr. JACKSON. Mr. Chairman, I can only point to the work of the Attorney General's Committee on Bankruptcy Administration back in 1939 and 190. That commission did a monumental job in less than 2 years. Their report is a very valuable handbook to which I turn frequently and I see no reason in the world why it could not be accomplished in 2 years or less if it is done the way that job was done.

Mr. ROGERS. What is your thought concerning the possibility of some consumer representation on this commission, since about 90 percent of the bankruptcy cases are consumer oriented?

Mr. JACKSON. Certainly, consumer interest should be represented in some manner. And I have thought that certainly whether a member of the commission who was directly representing the consumer interest or not, that the persons representing those interests would be consulted.

As you say, approximately 92 percent of the cases filed in the courts, bankruptcy cases, are filed by individuals not business cases. So certainly those interests are important and they should be represented.

Mr. ROGERS. What about the wage earner? I assume you can classify him in the same category as the consumer?

Mr. JACKSON. By that I intended to include the wage earner. About 29,000 cases were filed under chapter 13 last year. I suppose that probably that many more cases were eligible for chapter 13, but the persons did not elect to use it.

So in this broad consumer group, of course, we would include the chapter 13.

Mr. ROGERS. As I understand it, under the bill the two members to be appointed by the Chief Justice are required to be referees. Should the Chief Justice be limited to choosing referees or should he also be able to appoint a judge of the circuit or district court?

Mr. JACKSON. Under the terms of the resolution, the Chief Justice, as I understand it, would be limited to appointing referees. In the view of the Judicial Conference, however, the composition of the commission should conform to the composition of the Salary Commission, as Judge Weinfeld has pointed out in his statement which I am going to offer for the record. He has set out the composition of each of these bodies in his statement and I will have to say that the Judicial Conference, which does not meet until October 31, has had no opportunity

to consider this resolution, but it did consider the previous one, Senate Joint Resolution 100.

The Bankruptcy Committee of the Judicial Conference, however, on July 8, considered Senate Joint Resolution 88. They were pleased to note that the scope of the operations of the commission, its frame of reference, was broadened as the conference had recommended. But the committee adhered to its former recommendation that the composition of the commission be it as it was in the Salary Commission, the Presidential Salary Commission.

Mr. ROGERS. Under Senate Joint Resolution 100, which was approved by the Senate last year, there was a method whereby the Speaker of the House of Representatives, and the President of the Senate would appoint Members of Congress to the committee. Under the present bill, the Speaker of the House and President of the Senate are not limited to appointing Members of Congress. Is that correct?

Mr. JACKSON. The Speaker is not limited, Mr. Chairman. I have the provision before me. The Senate joint resolution provides for three members to be appointed by the President of the United States, one of whom shall be designated as chairman, and two of whom shall be active practitioners in the field of bankruptcy law; two appointed by the President of the Senate, with no restrictions; two members appointed by the Speaker of the House of Representatives, and again there are no restrictions, and two active full-time referees in bankruptcy appointed by the Chief Justice of the United States.

Mr. ROGERS. Do you think that the Speaker should be limited to Members of the House or the Senate?

Mr. JACKSON. I can only answer, Mr. Chairman, that the views of the Judicial Conference are that the appointing authority should not be restricted. The language which Judge Weinfeld has placed in his statement is this, and I quote from his statement:

The committee adheres to its view that in the appointment of the members of the commission, the appointing authority should not be limited in the selection of persons to be appointed.

This is the policy statement of the Bankruptcy Committee of the Judicial Conference which I give you.

Mr. ROGERS. You don't make any recommendation, but leave it to the judgment of the Speaker and the Vice President?

Mr. JACKSON. Yes, sir.

Mr. WIGGINS. Except in the case of the referees, then, they would be two full-time referees?

Mr. JACKSON. That is correct.

This is in Senate Joint Resolution 88. The Judicial Conference, however, prefers the other system.

Mr. ROGERS. Are you familiar with the Brookings studies?

Mr. JACKSON. Yes, sir.

Mr. ROGERS. Do you know how soon we may anticipate that?

Mr. JACKSON. I have been in conference with the staff director within the past week and I understand that their report is to be released early in calendar year 1970. They are in final rewrite of the report now.

Mr. ROGERS. Do you feel that this Commission may be duplicating part of their work?

Mr. JACKSON. No, sir. No, I hadn't thought that that would occur

at all. But I think this Commission would benefit greatly by having the benefit of the findings and the recommendations that the Brookings Institution may make. But I don't think there would be duplication.

Mr. ROGERS. Your suggestion is that whatever the Brookings study may come up with, this Commission could make good use of it?

Mr. JACKSON. Yes, sir.

Mr. ROGERS. And that it would not be a duplication.

Now, since, in addition to Senate Joint Resolution 88, we have these other bills, I believe your administrative office recommends H.R. 6665.

Mr. JACKSON. Yes, sir.

Mr. ROGERS. Do you feel that we should await the suggestions of the Commission that may be created under Senate Joint Resolution 88 before we take any action on the other bills?

Mr. JACKSON. Mr. Chairman, my answer to that would have to be no. This is a discharge problem and in my judgment it is the worst defect in the Bankruptcy Act because it affects this broad segment of consumer bankruptcy. It is a matter which my former director, Mr. Chandler, tried to correct starting 13 years ago. I would earnestly recommend that this bill, this House bill 6665, be considered as soon as possible and not left for the Commission to correct.

Mr. ROGERS. Do you have any idea what additional costs there might be in the event that we do adopt H.R. 6665 or similar proposals?

Mr. JACKSON. I can't see that there would be any additional costs at all, Mr. Chairman. We have the machinery for hearing these matters. We have the full-time and part-time referees who are ready and available. It is part of a job that they ought to do.

Mr. ROGERS. The biggest complaint I get from referees is that they are overworked and underpaid. Now, has an analysis been made as to the ability of the full-time and even the part-time referees to handle the extra load these bills might give them?

Mr. JACKSON. I do not regard it as a serious matter at all, Mr. Chairman. And I base this on daily contact with 218 referees around the country. And I am almost every day in contact with some of them. I have talked to them. Right now, because of the declining caseload, would be the best time in the world to have them take on this additional work, such as it is.

And I believe the witnesses who are going to follow me, particularly Hon. Clive Bare, Hon. Daniel Cowans, and Hon. Gene Brooks, who are referees, will say to you that they do not regard the additional work as a serious matter at all. Probably there will be some of these cases, for a matter of a few months until the creditors, those who perpetually harass bankrupts, find out that they can't do that any more, that this a matter that is going to be settled in bankruptcy court. And I think then, and Judge Weinfeld also says so in his statement, that this additional litigation will dwindle away.

We do not regard it at all a serious matter. We do regard it as a function that the Federal court should perform.

Mr. ROGERS. Once the individual has been given a discharge, he should be protected.

Mr. JACKSON. He should be protected because the concept of the Bankruptcy Act is, as you know, that the honest but unfortunate debtor should be given a chance to have a fresh start.

MR. ROGERS. Now, I understand that of the two bills that have been introduced, H.R. 6665 and H.R. 12250, you are in favor of 6665.

MR. JACKSON. Yes, Mr. Chairman. The Bankruptcy Division and the Bankruptcy Committee of the Judicial Conference have considered H.R. 6665 and approve it in principle. The Bankruptcy Committee has recommended that the Judicial Conference approve H.R. 6665 in principle when the Conference meets October 31–November 1, 1969. H.R. 12250 was introduced shortly before the Bankruptcy Committee met on July 8. There was no opportunity for use to analyze this bill and compare it section by section with H.R. 6665. Consequently, we have taken no position with respect to H.R. 12250, and it will not be considered by the Judicial Conference at the October 31 session. The Conference will consider H.R. 6665, and I have every reason to believe the Conference will approve it in principle as the Bankruptcy Committee recommends. So this bill, H.R. 6665, I am authorized to support.

As to the technical details of the two bills, I don't feel that I am competent to discuss them and I would prefer to have these questions addressed to the witnesses who represent the National Bankruptcy Conference.

MR. ROGERS. Do you think that the National Conference of Referees in Bankruptcy and the National Bankruptcy Conference can agree on a bill relating to dischargeability?

MR. JACKSON. Yes, sir; I think so.

MR. ROGERS. Mr. Wiggins?

MR. WIGGINS. Thank you, Mr. Chairman.

I address this question to both witnesses here and either may respond to it.

I, frankly, don't recall the manner in which the Salary Commission was created and the composition of its members. What was the composition of the members of the Salary Commission that you recommended?

MR. FOLEY. Mr. Jackson has that in his statement. He can get it for you in a second.

MR. WIGGINS. I have it before me now.

MR. JACKSON. I have it also. Would you like me to give it to you?

MR. WIGGINS. No, it will not be necessary. I am reading it from the Senate report.

The differences, superficially, are very slight, aren't they?

MR. JACKSON. Yes.

MR. WIGGINS. Total number of members is the same, two appointed by the Speaker and by the Vice President, two by the Chief Justice and the balance by the President.

Under the language of the Joint Resolution 88, we have really four appointing authorities: The President, the Vice President, the Chief Justice, and the Speaker.

Do you think it is possible to get the right balance on the committee, give four appointing authorities?

MR. JACKSON. Yes, I think so. I believe that the experience under the Commission on Salaries was reasonably satisfactory. I think that is possible.

MR. WIGGINS. I think you would agree, would you not, sir, that there should be represented on this Commission not only the referees

in day-to-day contact with the problem, but consumer interests, business interests, creditor interests, and the like. Do you agree that they should have that kind of balance on the Commission?

Mr. JACKSON. They should have that kind of balance on the Commission or those groups should be consulted. I am bound, sir, by policy stated by the Judicial Conference in my responses to you, and they have not directed their recommendations so much to balance as they have to freedom of the appointing authorities to choose without restriction.

Mr. WIGGINS. And that is exempt in the case of the referees, which is preserved under the language of the resolution?

Mr. JACKSON. No, sir; the Senate resolution restricts the President to appointing two active practitioners in bankruptcy law. So there are two areas of restriction in the Senate Joint Resolution 88.

Mr. WIGGINS. We have a letter filed with the Senate committee by the Chairman of the Securities and Exchange Commission, Mr. Budge, wherein he recommends that his Commission be specifically represented on this new Commission. Do you want to comment on that?

Mr. JACKSON. I have discussed that with one of the officials of the SEC and, of course, we know that the Securities and Exchange Commission is actively involved in every corporate reorganization case filed under chapter 10 and they are interested in every arrangement proceeding filed under chapter 11.

Here, again, I would say that the Securities and Exchange Commission should be consulted in the process of the work of the Commission, whether they should be represented by membership on the Commission I have to leave to the Congress.

Mr. ROGERS. May I interrupt?

Mr. WIGGINS. Surely.

Mr. ROGERS. Do you feel there is enough bankruptcy under chapter 10 and chapter 11 that the SEC is involved in, that the SEC should become interested in the Commission.

Mr. JACKSON. In the number of cases, there are not many of those cases, but they are important cases. This is where the big money is involved. This is true in corporate reorganization cases particularly where there is public ownership of stock. So while the cases are not numerous they are very important cases and they take much time of the bankruptcy court because it takes a long time to work out an arrangement, it takes a long time to work out a corporate reorganization.

Mr. ROGERS. Do you know of any instance where reorganization may have been approved and so forth and then submitted to the SEC and the SEC wouldn't go along with it?

Mr. JACKSON. In answer to this question I have to say I don't know personally of such a case, but I think the referees who will follow me as witnesses could answer.

Mr. WIGGINS. Are you satisfied that the approach taken here of creating a commission is the best way to get this old Chandler Act looked at and recommendations made for its modernization?

Mr. JACKSON. Yes, Congressman Wiggins. I am satisfied that this is the best way to do it. I say this not as a criticism of Congress, because I recognize that the Congress has to set priorities on legislation and

erect those bills which take precedence over lesser important bills. But the dischargeability defect has been before every Congress since 1956. This is a period of 13 years. So this is a long time in trying to correct this defect by remedial legislation.

The bill to provide a more liberal and more reasonable retirement system for referees and extending the term of office of full-time referees has been pending since 1960, a period of 9 years. There are bills pending to reform the partnership provisions of bankruptcy, a bill pending, an omnibus bill, to streamline and make more efficient chapter 13, wage earner provisions. I think that if all of these matters are taken together as a package the job can be done much more efficiently all at one time by a competent commission than by a piecemeal process which, necessarily, has to be slow.

Mr. WIGGINS. We have some experience in the Congress in dealing with the comprehensive pieces of legislation such as, just by way of an illustration, the problem of patents, copyrights. A long study was undertaken by the Judiciary Committee in that field. We just concluded action on taxation of interstate commerce. I mention that only to suggest an alternative way of reaching a desired result. Does your answer, recommending the commission, consider that there have been other alternative ways of getting the job done?

Mr. JACKSON. Sir, I really don't know of any other alternative way that would get the job done reasonably soon and do it all at one time. I had not thought that there was an alternative way.

There could, perhaps, be a Congressional commission, but I have personally had no experience with a Congressional Commission. I was a member of the staff of the Department of Justice at the time the Attorney General's Committee on Bankruptcy Administration was doing its work. I joined the staff of the Administrative Office of the U.S. courts when it was organized in the spring of 1940, so I have been close to that monumental piece of work. They did a great job and they did this in less than 2 years. That report gave rise to the creation of the bankruptcy division and established the salary system for referees and got bankruptcy administration away from the evils of the old fee system.

Mr. WIGGINS. I raised these questions in anticipation of comments made on the floor. I would anticipate a question being asked: "What is wrong with the Judiciary Committee? How come you can't do this? You are created for the purpose of legislation in this field." And it might be pointed out that the Judiciary Committee conducted a 4 or 5 year study, our counsel here was involved in the area of interstate taxation of interstate commerce. It might be pointed out that we are more apt to get a legislative result if the legislators themselves are kind of involved in the study rather than having strangers do it. It might be pointed out by some members on the floor that whatever the commission does will have to be redone by the committee and will duplicate efforts. We will have to hold hearings, obviously, on the results of the massive study which might conceivably be as long and as complicated as the study itself.

In raising these questions I am not necessarily embracing them. I am just considering what might be asked on the floor.

If you have any comments that would help us, I would like to hear them.

Mr. JACKSON. Well, I am sorry that I have to say, sir, that I have had no experience directly with a Congressional Commission. I recognize that the job could be done that way, if it is the judgment of the Congress that that is the way it ought to be done.

My only firsthand experience has been with the Attorney General's Committee which was constituted much as this commission is supposed to be and as I said, of course, that I regard that as a monumental job and I am still amazed at how they did it in so short a period of time. The limitation here is 2 years. I believe the job can be done in 2 years if the right people do it.

Mr. WIGGINS. Mr. Foley?

Mr. FOLEY. It occurs to me that the problem here is such a tremendously broad one. It is very much akin to the problem the Congress faced when it created the revision of the criminal law which is now operating. It will require a tremendous amount of staff work. And I think that a commission especially created for this purpose might be a more efficient way of getting the job done within a reasonable length of time.

Mr. WIGGINS. Your comments in the record will be valuable, later on, and I appreciate your observations.

I have questions concerning dischargeability, but I am going to reserve them for the other witnesses.

Mr. ROGERS. You feel that the expertise that may arise from the commission would be of somewhat better assistance to the House Judiciary Committee in answering these problems; is that a fair estimation?

Mr. FOLEY. I think that the expertise that is developed will be of tremendous assistance to the Judiciary Committee when it receives the results of the commission's work, because the staff work that goes behind it—and it will be incorporated in the record—will be of tremendous help I would expect.

Mr. ROGERS. Mr. Jacobs?

Mr. JACOBS. I have no questions.

Mr. ROGERS. Mr. Coughlin?

Mr. COUGHLIN. I have no questions.

Mr. ROGERS. Thank you, gentlemen.

Counsel, do you have a question?

Mr. ZEIFMAN. Mr. Jackson, are you expressing the views of the Judicial Conference?

Mr. JACKSON. In my responses, I hope so; I intended to, sir.

Mr. ZEIFMAN. Are there any differences between the positions taken by the Judicial Conference and the position taken by the Administrative Office of the U.S. Courts?

Mr. JACKSON. With respect to what, sir?

Mr. ZEIFMAN. With respect to the structure of the commission?

Mr. FOLEY. Well, the Administrative Office normally is bound to carry out the policy directives of the Judicial Conference. And Mr. Jackson's statement and Mr. Friesen's statement, which I have submitted, do carry that out.

From simply a personal standpoint, Mr. Friesen and I both feel that, however the commission is structured, referees should be represented. And insofar as that may differ from the Conference position, that is solely a personal standpoint.

Mr. ZEIFMAN. Is it the position of the Conference, for example, that the 3 members appointed by the President should not be limited to practitioners?

Mr. JACKSON. That is correct. The Judicial Conference does not feel that the appointing authority in any instance should be limited in the selection of the members of the commission.

Mr. ROGERS. I understand you have a statement from Judge Weinfeld.

Mr. JACKSON. Yes, Mr. Chairman, Judge Weinfeld asked me to express his regret that he could not be here in person. He is in the trial of a case which he felt he should not leave. He has given to me, and I have given to the reporter, his statement; and I have also given to the reporter the text of my own statement for the record.

Mr. ROGERS. We will then receive the Judge's statement and your statement and place them in the record at this point.

(The statements follow:)

STATEMENT OF HON. EDWARD WEINFELD, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Mr. Chairman, I am Edward Weinfeld, Judge of the United States District Court for the Southern District of New York. I have been a judge of my court since 1950, and I have been a member of the Committee on Bankruptcy Administration of the Judicial Conference of the United States since 1956. I was appointed Chairman of the Committee on November 22, 1967.

My appearance here is in response to a request by your Honorable Committee for the views of the Bankruptcy Committee of the Judicial Conference of the United States on Senate Joint Resolution 88, H.R. 6665 and H.R. 12250. We are pleased to comply.

THE BANKRUPTCY COMMITTEE

The Bankruptcy Committee of the Judicial Conference of the United States is composed of two circuit and five district judges as follows: Chief Judge Bailey Aldrich of the Court of Appeals for the First Circuit; Senior Judge Phillip Forman of the Court of Appeals for the Third Circuit; Chief Judge George B. Harris of the Northern District of California; District Judge Wesley E. Brown of the District of Kansas; District Judge Hubert L. Will of the Northern District of Illinois; District Judge William K. Thomas of the Northern District of Ohio, and I am the Chairman.

The Committee meets twice a year prior to the meetings of the Judicial Conference of the United States for the purpose of reviewing the administration of bankruptcy proceedings in the court. The Bankruptcy Committee examines such proceedings and makes recommendations to the Judicial Conference concerning the administration of the Bankruptcy Act for consideration and appropriate action.

For the most part, these recommendations are based upon material presented by the Director of the Administrative Office of the United States Courts. Where appropriate, the Bankruptcy Committee acts only after consultation with the district judges and the Judicial Councils of the circuits concerned. The Committee actions relate generally to the following matters:

1. The authorization of new referee positions and changes in character or salaries of existing referee positions. (Recommendations of districts and circuits involved are sought prior to Committee action in this respect.)

2. The territories, headquarters and places of holding court of the referees.

3. The budget estimates for the bankruptcy courts.

4. The status of the Special Fund in the Treasury out of which all salaries and expenses are paid. This Fund is maintained by filing fees, including \$37 of the \$50 filing fee in each straight bankruptcy, Chapter XI and XII case, and \$30 in each Chapter XIII case. Other payments to the Fund include a percentage charge on debts paid or extended in Chapter XI cases; on payments by or for the debtor in Chapter XIII cases, and on net realization in straight bankruptcy cases. These percentage charges, fixed by the Judicial Conference under Section 40 of the Bankruptcy Act, range from one percent in Chapters XI and XIII

cases to two and one-half percent in straight bankruptcy cases. To these sums are added miscellaneous other payments made by parties to bankruptcy proceedings.

5. Proposed legislation to amend the Bankruptcy Act. The Committee's actions upon proposed legislation are premised upon requests from appropriate legislative committees or in rare instances when its attention is called to a measure which does not involve legislative policy and which may adversely affect bankruptcy administration. Its recommendations in such regard are reported to the Judicial Conference and are subject to Judicial Conference review and determination.

6. The volume and character of the bankruptcy cases filed in the bankruptcy courts and the status of the referees' dockets.

7. The Seminar program for the referees.

8. Costs of administration in bankruptcy cases and methods of achieving economy in administration.

9. The facilities of the bankruptcy courts, staffs, libraries, quarters and similar arrangements.

STATEMENTS LIMITATIONS

At the outset, I desire to make it clear that nothing contained in my statement is to be considered either as an effort to interfere with matters involving Congressional policy, or as an expression of policy contrary to that established by the Judicial Conference of the United States.

BANKRUPTCY COMMITTEE AND JUDICIAL CONFERENCE ACTION IN REFERENCE TO SENATE JOINT RESOLUTIONS 100 AND 88

SENATE JOINT RESOLUTION 100

Senate Joint Resolution 100 was first brought to the attention of the Bankruptcy Committee by the Director of the Administration Office on February 20, 1968, when the Committee was requested to express its views to the Judicial Conference of the United States. The Committee, after full consideration of the various provisions of the Resolution, recommended that the Judicial Conference approve the Resolution in principle but felt that the scope of the Commission which the Resolution proposes to create should be broadened. In addition to a study of the technical problems of the administration of the Bankruptcy Act, the Committee felt that the frame of reference should include the basic philosophy of the Act, the causes of bankruptcy, and possible alternatives to the present system of bankruptcy administration, particularly in reference to the large volume of so-called consumer bankruptcies presently filed in the courts.

The Committee also considered the composition of the Commission, and it was the judgment of its members that the Commission should be patterned after the Commission on Executive, Legislative and Judicial Salaries established by Public Law 90-206, December 16, 1967.

As you are aware, the Senate Joint Resolution 100, in Section 2(a), called for the creation of a Commission to be appointed by the President, composed of

- (1) two Members of the Senate, one from each of the two major political parties;
- (2) two Members of the House of Representatives, one from each of the major political parties;
- (3) three Referees in Bankruptcy; and
- (4) three businessmen knowledgeable in the field of bankruptcy.

The Resolution also provided that the President should appoint a Chairman of the Commission.

The Commission created by Public Law 90-206 is as follows:

- (1) three members appointed by the President of the United States, one of whom shall be designated as Chairman by the President;
- (2) two appointed by the President of the Senate;
- (3) two appointed by the Speaker of the House of Representatives; and
- (4) two appointed by the Chief Justice of the United States.

The Bankruptcy Committee of the Judicial Conference assumes, of course, that any Commission—however constituted—in discharging its responsibility, would seek the views and expertise of referees in bankruptcy, who are daily concerned with administration of the Bankruptcy Act, and of the leading businessmen of the country, as well as leading members of the bankruptcy bar, bar associations, trade associations, credit associations, and the like. But it saw no substantial reason why the legislation creating the Commission should man-

date its membership and felt that the type of member to be appointed should be left to the judgment of the appointing authority.

In approving the recommendation of the Bankruptcy Committee, the Judicial Conference of the United States in its report¹ stated:

"The Conference considered Senate Joint Resolution 100, 90th Congress, introduced by Senator Burdick, which would establish a commission to be known as the Commission on Bankruptcy Laws of the United States, to study, analyze, evaluate and recommend changes to the Bankruptcy Act; to reflect and more adequately to meet the demands of present technical, financial and commercial activities. The Conference approved, in principle, the creation of this Commission but took the view that the scope of the Commission's functions should be broadened to include study of the basic philosophy and causes of bankruptcy and possible alternatives to the present system of bankruptcy administration. The Conference also recommended that the composition of the Commission should be patterned after the Commission on Executive, Legislative and Judicial Salaries established by Public Law 90-206 which provides for a nine-member Commission, three appointed by the President of the United States and two each by the President of the Senate and Speaker of the House and by the Chief Justice of the United States."

SENATE JOINT RESOLUTION 88

Senate Joint Resolution 88, which is similar to Senate Joint Resolution 100, was introduced in the Senate on April 3, 1969, and passed by the Senate on June 20, 1969. This Resolution was considered by the Bankruptcy Committee of the Judicial Conference at its meeting on July 8, 1969. It will not be considered by the Judicial Conference of the United States until that body meets on October 31 and November 1, 1969.

The Bankruptcy Committee is pleased to note that the scope of the study to be conducted by the proposed Commission has been broadened in Senate Joint Resolution 88 as recommended by the Judicial Conference. The composition of the Commission has been changed to provide for:

- (1) three Members appointed by the President, one of whom shall be designated Chairman, and two of whom shall be active practitioners in the field of bankruptcy law;
- (2) two Members appointed by the President of the Senate;
- (3) two Members appointed by the Speaker of the House of Representatives; and
- (4) two active full-time Referees in Bankruptcy appointed by the Chief Justice of the United States.

At its meeting on July 8, 1969, the Bankruptcy Committee carefully considered the composition of the Commission as provided in Senate Joint Resolution 88, noting that it differs from the composition contained in Senate Joint Resolution 100. The Committee, however, has recommended to the Judicial Conference of the United States that it approve Senate Joint Resolution 88 except as to the composition of the Commission and that the Conference reaffirm its previous recommendation with respect to the Commission membership. The Committee adheres to its view that in the appointment of the Members of the Commission, the appointing authority should not be limited in the selection of persons to be appointed.

HISTORICAL REFERENCE

Turning now to the need for overhaul of the Bankruptcy Act, the present Act was passed in 1898. The first major revision of the Act occurred forty years later when the Chandler Act² was passed in 1938. Since 1938 there has been only one important revision of the Bankruptcy Act, and that amendment was passed in 1946. This latter amendment was called the Referees' Salary Act³ and it, among other important changes, abolished the old fee system of compensating referees in bankruptcy and placed them on annual salaries. It also established a self-supporting system under which the salaries and office expenses of referees are paid out of a special fund established in the Treasury, this fund to be maintained by the deposit of filing fees and certain charges collected from the assets of bankrupt estates. The present balance in the fund is approximately \$6,000,000.00.

¹ See page 22, Report of the Proceedings of the Judicial Conference of the United States, February 27-28, 1968, session.

² 52 Stat. 840-940 approved June 22, 1938.

³ 60 Stat. 323-332 approved June 28, 1946.

It is interesting to note that the sponsor of the Chandler Act, the late Walter Chandler, Member of Congress from Tennessee, stated that this Act was to revise the bankruptcy law to meet modern business and economic problems and to promote the welfare of all the people of the country.⁴

The Chandler Act of 1938 represented what was then regarded as modern concepts of bankruptcy law—rehabilitation and debtor relief. It took into account far-reaching social and economic changes which had occurred in the span of forty years since the present bankruptcy law was passed. The 1938 Act attempted to correct defects and inadequacies in the Bankruptcy Act.

In the thirty years since the Chandler Act was passed, there have probably been even greater changes in the social and economic conditions of the country. In 1938,⁵ for example, 57,306 bankruptcy cases were filed; by contrast, in 1967 the total was 208,329. In 1938 about seventy percent of the cases were filed by employees; today approximately ninety-two percent are filed by employees. The population of the country has grown in the last thirty years from approximately 130 million to more than 200 million. Installment credit has increased in that same period from approximately four billion dollars to more than 93 billion dollars today.⁶ Unquestionably the present Bankruptcy Act can be improved to make it a better instrument for debtor relief and rehabilitation in the courts; and the creation of a Commission to study bankruptcy administration, as it relates to conditions today, seems timely.

The enactment of the Referees' Salary Act of 1946, previously referred to, was a step in the direction of improved bankruptcy administration. That Act was the direct outgrowth of a comprehensive study conducted by the Attorney General's Committee on Bankruptcy Administration. This Committee was appointed by Attorney General Frank Murphy on April 19, 1939, and its report was transmitted to Chief Justice Hughes and to the Congress on January 7, 1941. Robert H. Jackson, who was Solicitor General at the time of the creation of the Attorney General's Committee, was named Chairman.

The members of the Committee were Robert P. Patterson, United States Circuit Judge for the Second Circuit and later Secretary of War; Jesse H. Jones, Chairman of the Board of Directors, Reconstruction Finance Corporation; Edward H. Foley, Treasury Department; Jerome N. Frank, Chairman of the Securities and Exchange Commission; Willard L. Thorp, Department of Commerce; William J. Campbell, now Chief Judge of the United States District Court for the Northern District of Illinois; Associate Justice Thomas McAllister of the Supreme Court of Michigan; Dean Lloyd K. Garrison, University of Wisconsin Law School; Dean Francis M. Shea, University of Buffalo Law School; and Max Loewenthal, Counsel, Subcommittee of the Committee on Interstate Commerce, United States Senate. Dean Shea was made Director and was succeeded by Charles A. Horsky of the District of Columbia Bar.⁷

It seems to me that past experience amply demonstrates that if a general overhaul of the Bankruptcy Act is to be accomplished, it can best be done by a Committee or a Commission composed of competent and knowledgeable members who can bring together in one document a comprehensive set of recommendations for the consideration of the Congress. This was true in the adoption of most of the recommendations of the Attorney General's Committee on Bankruptcy Administration, and it was also the case with reference to the passage of the Chandler Act, which was largely the culmination of efforts of the National Association of Credit Men, the National Bankruptcy Conference, Senator Joseph O'Mahoney, and of Congressman Chandler.

PIECEMEAL AMENDMENT OF THE BANKRUPTCY ACT

Piecemeal amendment of the Bankruptcy Act, although necessary from time to time, is a slow process and often seems to involve interminable delays. There are presently pending in the Congress a number of bills to amend various sections of the Act. Proposals in two of these bills⁸ were sponsored by the Judicial Conference of the United States and originally introduced in the Congress at its request.

⁴ Foreword to the Bankruptcy Law of 1938, published by the National Association of Credit Men.

⁵ Years referred to are fiscal years ending June 30.

⁶ Federal Reserve Bulletin, August 1969.

⁷ See Report of the Attorney General's Committee, 1940.

⁸ H.R. 6665 and H.R. 9772.

H.R. 9772, 91st Congress, is the Referees' Retirement and Tenure Bill, which would provide referees in bankruptcy, who are quasi-judicial officers, with a more adequate retirement system and provide greater security of tenure for full-time referees by increasing the term of office from six to twelve years. This proposal was first introduced in the 87th Congress as H.R. 5341 on March 8, 1961. This was eight years ago.

H.R. 6665, which I will discuss more fully later, is the so-called "Dischargeability Bill." This bill would give the bankruptcy court statutory jurisdiction to determine the effect of a discharge of debts as well as the right to it. Predecessor bills to correct these provisions of the Bankruptcy Act have been introduced in every session of the Congress since 1956. As things now stand, the bankrupt in a proper case is granted a discharge of his debts, thus enabling him to start his economic life free of the burden of prior debts. However, when a former creditor—notwithstanding the discharge—sues him in the State court upon the original debt, claiming the discharge is ineffective for one reason or another, the bankrupt is called upon to defend the discharge granted him by the bankruptcy court, and this situation occurs rather frequently.

While all of the bills sponsored by the Judicial Conference are meritorious, H.R. 6665 would correct one of the worst defects in the Bankruptcy Act relating to the discharge of bankrupts. Notwithstanding this, H.R. 6665 and predecessor bills similar to it have been pending before the Congress for over thirteen years. I say this not in criticism of the Congress but in illustration of the point—that a comprehensive study of the Bankruptcy Act and a thorough analysis of all of its sections and chapters in the light of present-day needs of the country seems a better method of bringing about complete legislative reform.

NEW RULES OF PROCEDURE

For several years the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, under the Chairmanship of Senior Circuit Judge Phillip Forman, has been engaged in the drafting of a set of rules of practice and procedure for the bankruptcy courts. It is expected that this work will be completed within the next year or so and that most of the sections of the Act relating to practice and procedure will be incorporated in the new rules. This will leave intact only substantive provisions of the Bankruptcy Act. The Commission contemplated by Senate Joint Resolution 88 will, therefore, have the benefit of the work of the Rules Committee with respect to practice and procedure and the opportunity to concentrate on the substantive provisions which, in its judgment, need to be changed to meet today's economic and social conditions.

BROOKINGS INSTITUTION STUDY

The Brookings Institution has since 1965 been conducting an "in depth" study of the bankruptcy courts and bankruptcy administration generally. I am informed that their report is tentatively scheduled for publication early in 1970. The recommendations contained in this report will also be available to the Commission. I mention this only as it relates to the timing of the proposed creation of the Commission.

One of the prime problems of the Judicial Conference and of the Administrative Office of the United States Courts relates to costs of administration in bankruptcy cases. We hope that the new rules will contribute to more economical and expeditious administration and that the Brookings report will, likewise, contain realistic recommendations to this effect. All of these recommendations would, of course, be available to the Commission.

THE IMAGE OF THE BANKRUPTCY COURT

A great deal has been done in recent years to improve the facilities and the image of the bankruptcy courts. More people appear in our bankruptcy courts than in all other federal courts combined. These people—many of them—have their one and only contact with the federal judicial system in the bankruptcy courts as bankrupts or creditors. If the Commission, through revision of the Bankruptcy Act and through the recommendation of improved methods of administration, can help establish more economical and expeditious administration of this form of debtor relief and rehabilitation, I am sure that its recommendations will be most welcome.

DISCHARGEABILITY BILLS H.R. 6665 AND 12250

H.R. 6665, which is sponsored by the National Bankruptcy Conference, was considered by the Bankruptcy Committee of the Judicial Conference on July 8, 1969, and the Committee has recommended that this bill be approved in principle by the Judicial Conference. Briefly, this bill—to which I have already referred—would authorize the bankruptcy court to determine the dischargeability or non-dischargeability of provable debts and render judgments thereon.

H.R. 12250 is a similar bill, but it was introduced shortly before the meeting of the Bankruptcy Committee, and the Committee therefore has had no opportunity to study it and prepare recommendations to the Judicial Conference with respect to its provisions. I understand that there is not a great deal of difference between the two bills and that the technical aspects of both bills will be fully explained by witnesses representing the National Bankruptcy Conference. I will, therefore, confine my comments to the need for revision of the present provisions of the Act relating to discharge.

Under the present provisions relating to discharge, the discharged bankrupt can never be certain that his creditors will not sue him in State court on discharged debts, and this frequently happens after the bankruptcy proceeding has been closed. When it does, the bankrupt must answer, pleading his discharge as a defense; otherwise, a judgment will be granted to the creditor bringing suit, and it will be enforceable. Many bankrupts do not realize the consequences of ignoring the State court proceeding. Others who do, have great difficulty obtaining counsel to represent them for, after all, they are bankrupt and, ordinarily, have no resources with which to pay the attorney's fee. Very few bankrupts will attempt to appear *in pro per*.

This situation has been difficult for bankrupts, who oftentimes are without funds to retain counsel and find themselves subject to creditor harassment and no better off than they were before bankruptcy. Thus, the concept of turning the bankrupt out of court with a clean slate and providing him with the opportunity to make a fresh start is lost.

In the fiscal year 1953, a total of 40,087 bankruptcy cases was filed in the courts. The number has increased each year for fifteen consecutive years to a new all-time high of 208,329 in fiscal year 1967. Of this latter total, ninety-two percent of the cases were filed by individuals, so-called consumer bankrupts. By the close of fiscal year 1969, the total filings had declined to 184,930, but the proportion of individual bankrupts has remained virtually the same. The problems of discharge of debts have grown with the increasing volume of bankruptcy business in the Federal courts, and the files of letters of complaint and protest from harassed bankrupts have grown in proportion.

The bankruptcy court determines whether a discharge should be granted under section 14 (11 U.S.C. 32), but under section 17 (11 U.S.C. 35), it usually is for the court in which the bankrupt is sued, before or after discharge, to determine whether the debt in question is or is not dischargeable. The overworked portions of section 17 provide that a discharge in bankruptcy shall not release the debtor from liabilities for obtaining money or property by false pretense or false representation or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition with intent to deceive. It is no difficult matter to contend that an unwary debtor—more often than not illiterate or ill-educated—has made a false statement in a loan or credit application if the debtor is inclined to be careless, or fills out these papers in haste, or does not completely understand the questions asked.

On September 21, 1966, hearings were held before this Subcommittee on a predecessor bill, H.R. 5643. The Committee reported that bill unfavorably, indicating the following reasons for its action.

1. That there would be a marked increase in litigation in the bankruptcy courts, causing inordinate delays;
2. That compelling either the bankrupt or the creditor to submit certain questions of fact to a "summary procedure" would constitute unjust deprivation of the right to trial by jury; and
3. That the bill did not authorize the bankruptcy court to enter a judgment in favor of a creditor whose debt was found to be non-dischargeable and therefore did not eliminate the need for that creditor to proceed in another forum to obtain relief.

The first objection—that there would be a marked increase in the work of the bankruptcy courts—seems relatively unimportant. Judges and referees who have

expressed themselves on this subject regard it as wholly irrelevant. When it becomes generally understood that the bankruptcy courts have the jurisdiction to determine the effect of a discharge as well as the right to it and that the courts intend to use it, the litigation most likely will dwindle away. Attempts by certain creditors with unfounded claims to defeat the clear intent of the Bankruptcy Act are bound to diminish. But assuming that there is an increase in litigation, the bankruptcy courts will readily accept it to protect the integrity of the court and to assure that the rights of the honest but unfortunate bankrupt are protected.

H.R. 6665 provides in the amendment to section 17c that nothing in the bill shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists. So I believe this objection is met in the present bill.

The same amended section 17c authorizes the bankruptcy court to enter a judgment in favor of the creditor if his claim is found to be for a non-dischargeable debt. The language of the amendment authorizes the bankruptcy court to determine any remaining issues, render judgment, and make all orders necessary for the enforcement of the judgment.

In summary, I believe this is the best dischargeability bill that has been introduced in the Congress, and I recommend its enactment.

* * * * *

I have a number of statements covering the filing of bankruptcy cases beginning with the year 1900 and continuing through the close of fiscal year 1969. I am glad to submit them for the record for whatever benefit they may be to the Subcommittee.

Total filings of all types of bankruptcy cases by fiscal years ending June 30 of each year from 1900 through June 30, 1968

Fiscal year:	Number of cases	Fiscal year—Continued	Number of cases
1900 -----	21,938	1935 -----	69,153
1901 -----	19,007	1936 -----	60,624
1902 -----	18,482	1937 -----	57,485
1903 -----	16,875	1938 -----	57,306
1904 -----	17,082	1939 -----	50,997
1905 -----	16,946	1940 -----	52,577
1906 -----	12,972	1941 -----	56,332
1907 -----	14,160	1942 -----	52,109
1908 -----	17,818	1943 -----	34,711
1909 -----	18,018	1944 -----	19,533
1910 -----	18,053	1945 -----	12,862
1911 -----	19,338	1946 -----	10,196
1912 -----	19,745	1947 -----	13,170
1913 -----	20,930	1948 -----	18,510
1914 -----	22,959	1949 -----	26,021
1915 -----	27,632	1950 -----	33,392
1916 -----	27,368	1951 -----	35,193
1917 -----	24,838	1952 -----	34,873
1918 -----	20,385	1953 -----	40,087
1919 -----	14,048	1954 -----	53,136
1920 -----	13,558	1955 -----	59,404
1921 -----	22,812	1956 -----	62,086
1922 -----	38,165	1957 -----	73,761
1923 -----	41,304	1958 -----	91,668
1924 -----	43,519	1959 -----	100,672
1925 -----	45,641	1960 -----	110,034
1926 -----	46,374	1961 -----	146,643
1927 -----	48,758	1962 -----	147,780
1928 -----	53,064	1963 -----	155,493
1929 -----	57,280	1964 -----	171,719
1930 -----	62,845	1965 -----	180,323
1931 -----	65,335	1966 -----	192,354
1932 -----	70,049	1967 -----	208,329
1933 -----	62,256	1968 -----	197,811
1934 -----	58,888	1969 -----	184,930

BANKRUPTCY FILINGS BY CLASS

Fiscal year	Ch. XIII	Employee	Nonbusiness	Business	Total bankruptcy case filings
1938	1,639				150,997
1940	3,260	36,843	39,073	13,248	52,577
1941	4,433	42,348	44,713	11,619	56,335
1942	4,100	40,180	42,251	9,858	52,109
1943	2,007	27,020	28,782	5,929	34,711
1944	1,249	15,460	16,752	2,781	19,533
1945	1,248	10,010	11,051	1,811	12,862
1946	1,371	7,618	8,566	1,630	10,196
1947	2,354	9,396	10,234	2,936	13,170
1948	3,315	12,546	13,537	4,973	18,510
1949	5,111	17,772	19,144	6,877	26,021
1950	6,007	22,933	25,040	8,352	33,392
1951	6,924	25,984	27,806	7,387	35,193
1952	7,397	26,527	28,331	6,542	34,873
1953	8,670	31,253	33,315	6,772	40,087
1954	9,634	40,889	44,248	8,888	53,136
1955	9,864	46,163	50,219	9,185	59,404
1956	9,535	48,784	52,608	9,478	62,086
1957	11,549	59,053	63,617	10,144	73,761
1958	13,391	73,379	80,265	11,403	91,668
1959	12,993	81,516	88,943	11,729	100,672
1960	13,599	89,639	97,750	12,284	110,034
1961	19,723	119,117	131,402	15,241	146,643
1962	22,880	120,742	132,125	15,655	147,780
1963	24,329	127,156	139,190	16,303	155,493
1964	27,292	141,550	155,209	16,510	171,719
1965	28,027	148,965	163,413	16,910	180,323
1966	28,261	160,299	175,924	16,430	192,354
1967	31,963	174,205	191,729	16,600	208,329
1968	31,065	162,879	181,266	16,545	197,811
1969	28,910	150,235	169,500	15,430	184,930

¹ From Attorney General's report.

FILINGS BY CHAPTER OF THE BANKRUPTCY ACT

Fiscal year	Total	Voluntary straight bankruptcy	Involuntary straight bankruptcy	Chapter					
				IX	X	XI	XII	XIII	XV
1940	52,577	43,902	1,752	117	320	990	149	3,247	6
1941	56,332	47,578	1,491	19	269	769	71	4,433	0
1942	52,109	44,366	1,295	43	183	520	52	4,100	0
1943	34,711	30,913	649	13	114	205	22	2,007	5
1944	19,532	17,629	277	5	68	58	10	1,249	0
1945	12,862	11,101	264	8	72	41	5	1,248	0
1946	10,196	8,293	268	7	54	79	1	1,371	1
1947	13,170	9,657	697	7	96	291	7	2,354	0
1948	18,510	13,546	1,029	7	137	442	20	3,315	0
1949	26,021	18,882	1,240	2	149	531	17	5,111	4
1950	33,392	25,263	1,369	4	134	583	31	6,007	0
1951	35,193	26,594	1,099	3	88	459	22	6,924	2
1952	34,873	25,890	1,059	15	74	413	21	7,397	1
1953	40,087	29,815	1,064	0	86	437	15	8,670	0
1954	53,136	41,335	1,398	2	104	649	12	9,634	2
1955	59,404	47,650	1,249	1	73	547	19	9,864	1
1956	62,086	50,655	1,240	1	40	597	15	9,535	0
1957	73,761	60,335	1,189	0	65	599	24	11,549	1
1958	91,668	76,048	1,417	2	67	720	23	13,391	0
1959	100,672	85,502	1,288	3	78	787	21	12,993	0
1960	110,034	94,414	1,296	0	90	622	12	13,599	1
1961	146,643	124,386	1,444	0	112	947	31	19,723	0
1962	147,780	122,499	1,382	1	77	903	37	22,880	1
1963	155,493	128,405	1,409	0	128	1,188	33	24,329	0
1964	171,719	141,828	1,339	0	125	1,088	47	27,292	0
1965	180,323	149,820	1,317	0	88	1,022	49	28,027	0
1966	192,354	161,840	1,165	0	93	909	75	28,261	0
1967	208,329	173,884	1,254	1	125	1,033	68	31,963	1
1968	197,811	164,592	1,017	3	112	953	69	31,065	0
1969	184,930	154,054	963	0	70	867	66	28,910	0

NUMBER OF BANKRUPTCY CASES FILED BY OCCUPATIONS IN THE BUSINESS AND NONBUSINESS GROUPS FOR THE FISCAL YEARS 1940 THROUGH 1958

Fiscal year	Nonbusiness		Business					Grand total	National population
	Employee	Others not in business	Total	Merchants	Manufac-turers	Farmers	Profes-sionals	Others in business	Total
1940	36,843	2,230	39,073	4,651	921	2,678	801	4,197	13,248
Percent of total	70.4	4.3	74.7	8.9	1.8	5.1	1.5	8.0	25.3
1941	42,348	2,365	44,713	4,278	765	2,367	744	3,461	11,619
Percent of total	75.2	4.2	79.4	7.6	1.4	4.2	1.3	6.1	20.6
1942	40,180	2,071	42,251	3,385	507	2,048	581	3,336	9,893
Percent of total	77.1	4.0	81.1	6.5	1.0	3.9	1.1	6.4	18.9
1943	27,020	1,762	28,782	1,775	286	1,151	395	2,322	5,929
Percent of total	77.8	5.1	82.9	5.1	.8	3.3	1.2	6.7	17.1
1944	15,460	1,292	16,752	554	181	512	211	1,323	2,781
Percent of total	79.2	6.6	85.8	2.8	.9	2.6	1.1	6.8	14.2
1945	10,010	1,041	11,051	287	153	305	152	714	1,811
Percent of total	77.8	8.1	85.9	2.2	1.2	2.4	1.2	7.1	14.1
1946	7,618	948	8,566	236	201	260	112	821	1,630
Percent of total	74.7	9.3	84.0	2.3	2.0	2.5	1.1	8.1	16.0
1947	9,396	838	10,234	631	596	183	111	1,415	2,936
Percent of total	71.3	6.4	77.7	4.8	4.5	1.4	.8	10.8	22.3
1948	12,546	911	13,457	1,338	808	167	114	2,946	4,673
Percent of total	67.8	5.3	73.1	7.2	4.4	9	6	13.8	28.9
1949	17,772	1,372	19,144	1,969	853	232	159	3,664	6,877
Percent of total	88.3	5.3	93.6	7.5	3.3	9	6	14.1	26.4
1950	22,933	2,107	25,040	2,565	803	290	126	4,363	8,352
Percent of total	88.7	6.3	95.0	7.7	2.4	8	12	14.1	25.0
1951	25,984	1,822	27,806	2,360	322	205	124	4,173	7,380
Percent of total	73.8	5.2	79.0	6.7	1.5	6	13	11.3	21.0
1952	26,527	1,804	28,331	2,319	332	196	137	3,358	6,542
Percent of total	76.1	5.2	81.3	6.6	1.5	.6	.4	9.6	18.7

1953	Percent of total	31,253	2,052	33,315	2,402	518	214	140	3,498	6,772	40,087	159,696,000
1954	Percent of total	40,889	3,359	44,248	3,191	743	322	154	4,877	8,888	53,136	162,409,000
1955	Percent of total	46,163	4,056	50,219	3,317	750	386	217	4,815	9,135	59,404	165,248,000
1956	Percent of total	48,748	3,824	52,608	3,155	730	400	212	4,981	9,178	62,066	168,091,000
1957	Percent of total	59,053	4,564	63,617	3,161	665	405	204	5,710	10,144	73,761	171,191,000
1958	Percent of total	73,379	6,896	80,265	3,504	758	332	283	6,525	11,403	91,668	174,000,000
1959	Percent of total	81,516	7,427	88,943	3,400	634	408	430	6,857	11,779	100,672	177,128,000
1960	Percent of total	89,639	8,111	97,750	3,157	624	453	485	7,555	12,284	110,034	180,670,000
1961	Percent of total	119,117	12,285	131,402	4,244	790	546	623	9,038	15,241	146,643	182,868,000
1962	Percent of total	120,742	11,383	132,125	4,295	735	548	771	9,305	15,655	147,780	186,482,000
1963	Percent of total	127,156	12,034	139,190	4,271	859	554	753	9,866	16,303	155,493	189,278,000
1964	Percent of total	141,550	13,659	155,209	5,064	819	565	785	9,277	16,510	171,719	191,851,000
1965	Percent of total	148,965	14,448	163,413	4,856	852	589	780	9,833	16,910	180,323	193,818,000
1966	Percent of total	160,299	15,625	175,924	4,583	747	551	632	9,817	16,430	192,354	196,843,000
1967	Percent of total	174,205	17,524	191,729	4,929	729	443	704	9,732	16,600	208,329	199,118,000
1968	Percent of total	162,879	18,387	181,266	4,567	749	567	1,087	9,575	16,545	197,811	200,996,000
1969	Percent of total	150,235	19,265	169,500	3,969	680	606	1,301	8,874	15,430	184,930	203,216,000
	Percent of total	81.3	10.4	91.7	2.1	4	3	.7	4.8	8.3	100	

STATEMENT OF ROYAL E. JACKSON, CHIEF OF THE BANKRUPTCY DIVISION OF THE
ADMINISTRATIVE OFFICE OF THE U.S. COURTS

Mr. Chairman, I am Royal E. Jackson, Chief of the Bankruptcy Division of the Administrative Office of the United States Courts. I was appointed Budget and Accounting Officer for the Administrative Office when it was organized in the spring of 1940. Following military service in World War II and upon my return to the Administrative Office, I joined the legal staff of the Bankruptcy Division, serving successively as staff member and Assistant Chief. Five years ago I was appointed Chief of the Division.

There is little I can add to the testimony of Judge Edward Weinfeld and the Director of the United States Courts regarding Senate Joint Resolution 88 and the so-called "Dischargeability Bills," H.R. 6665 and 12250.

STATEMENT OF LIMITATIONS

I should like to state that nothing contained herein is to be considered either as an effort to interfere with matters involving Congressional policy or as an expression of policy contrary to that established by the Judicial Conference of the United States.

SENATE JOINT RESOLUTION 88

As Judge Weinfeld and the Director have stated, there is a real need for overhaul of the substantive provisions of the Bankruptcy Act, and it would seem most advantageous for this work to be done in the near future—certainly it should be undertaken as soon as possible following the release of the new Rules of Procedure for Bankruptcy Administration and the release of the Brookings Report.

The Referees' Salary Act of 1946¹, as you know, created a self-supporting system under which the salaries of referees and the expenses of operating their offices are paid out of a special fund in the Treasury. This fund, since the effective date of the Act, July 1, 1947, has been maintained by payment into it of a portion of the filing fees and certain charges against the assets of bankrupt estates collected under regulations promulgated by the Judicial Conference.

This system has worked very well until recently. Now, however, rising costs and increasing salary rates have made it impossible to continue, indefinitely, increasing the charges against bankrupt estates to keep pace with the costs of operating the system. There is presently a balance of about six million in the Fund, but it will be exhausted within the next two years.

At the March 1969 session of the Judicial Conference of the United States, the charges in nominal asset, asset and Chapter XI (Arrangement) cases were increased effective July 1, 1969 to provide as follows:

Nominal Asset and Asset Cases.—Increased from 2½% to 3% the charge on the first \$50,000 of net realization, and from 2% to 2½% the charge on the balance of net realization, with a minimum charge of \$5.00 per case.

Arrangement Cases Filed Under Chapter XI.—Increased the fees to be charged in these cases from 1% to 2% on the first \$100,000 of total obligations paid or extended, continuing the fee of ½ of one percent on the balance of obligations paid or extended.

Wage Earner Cases Under Chapter XIII.—The Conference did not change the previously established fee of one percent of payments made by or for the debtor under the plan in Chapter XIII cases.

In authorizing these new fees to increase the payments into the Referees' Salary and Expense Fund, the Judicial Conference stated:

"In approving the foregoing, the Conference noted that the additional sum to be raised by the change of fees will still fall far short of raising the total payments into the fund to the level of annual obligations against it.

"The Conference agreed with the Committee's view that the principle of a self-supporting bankruptcy system is outdated and that it is no longer possible to maintain adequate payments into the fund without placing an inordinate burden upon bankrupts and the assets of bankrupt estates. The Conference approved a statement of policy that the legal limitation imposed in the Bankruptcy Act should be removed and that the concept of the Referee's Salary and Expense Fund should be abandoned."

¹ 60 Stat. 323-332, approved June 28, 1946.

I mention this recent action of the Judicial Conference to illustrate that this portion of the Bankruptcy Act needs revision reasonably soon. You already have before you H.R. 6665 and H.R. 12250 relating to the discharge of debts in straight bankruptcy cases. I will mention these bills later in this statement.

There are also pending bills to amend the provisions relating to partnerships (H.R. 6664) and to wage earner proceedings under Chapter XIII (H.R. 6792). It would seem to us that, under the circumstances, it would be advisable to overhaul the Act entirely rather than amend it by a piecemeal process over an extended period of time.

The American Bar Association has also in draft form another bill calling for extensive streamlining of Chapter XIII. The Chapter XIII bills are important because approximately ninety-two percent of all cases are non-business cases—the so-called “consumer” bankruptcy cases—filed by individuals. The wage earner proceeding under which the employed person undertakes to pay his creditors out of future earnings should be streamlined to make this form of debtor relief more attractive to debtors.

In the fiscal year 1969, about 29,000 debtors filed under Chapter XIII, and we estimate that at least twice that number were eligible for this form of relief but chose not to use it, electing instead to take straight bankruptcy. If a Commission is created, the interests of consumers should not be neglected, and I am sure these interests will not be.

There is still another bill of importance pending. It is H.R. 9772, to provide a more realistic and equitable retirement system for referees in bankruptcy and for greater security of tenure by lengthening the term of office for full-time referees from six to twelve years. This bill is sponsored by the Judicial Conference of the United States. If enacted, it will do a great deal to attract top quality lawyers to these positions and assure all referees of a better retirement system than they now have under the system applicable to the classified Civil Service employees generally. The proposal for legislation of this nature was approved by the Judicial Conference nine years ago at its March 1960 session.²

The appropriations for salaries and expenses of operating the bankruptcy courts approximate fifteen million dollars annually. Approximately seven million dollars of this amount is for salaries and personnel benefits of 890 clerical employees. Among other duties, these employees prepare and mail out annually an estimated 6½ to 7 million notices to creditors in pending bankruptcy cases.

The methods employed in producing and mailing these notices have not changed greatly in the last thirty years. They are governed by the requirements of the statute. If this one phase alone can be improved and made more efficient, the savings would help offset the cost of establishing the Commission.

Likewise, the method of handling claims has not changed materially since the Act was passed. There have been proposals made recently that the filing of claims in no-asset cases be dispensed with unless assets are developed and there appears to be a possibility of some distribution to creditors. Such a change would, if found feasible, lift a great burden of clerical paper work from the bankruptcy court. The savings in supply costs and clerical salaries would, indeed, be important.

While these changes could possibly be accomplished by regular amendment of the Act, it would be a slow process. Such proposals really need greater study than we have been able to give them and, I think, could more advantageously be made a part of a broad, overall study by a Commission such as is proposed in Senate Joint Resolution 88.

H.R. 6665 AND H.R. 12250—TO AMEND THE BANKRUPTCY ACT WITH RESPECT TO THE DISCHARGE OF DEBTS

As Judge Weinfeld and Mr. Friesen have said in their statements, the Judicial Conference has had no opportunity to consider either of the present bills relating to discharge of debts. The Bankruptcy Committee of the Judicial Conference has considered H.R. 6665 and has recommended that it be approved in principle by the Judicial Conference.

H.R. 6665 was drafted by the National Bankruptcy Conference. Witnesses representing that body will discuss the technical aspects of both bills, and I will therefore confine my remarks to the great need for remedial legislation in this area.

² Report of JCUS, March 1960 session, page 14.

For the more than twenty years that I have served in the Bankruptcy Division, this matter of discharge of debts has been a source of complaint. These complaints have come largely from bankrupts and members of the bankruptcy bar, who have been plagued by the harassment of creditors who ignore the discharge granted in the Federal court and continue to sue bankrupts on discharged debts in State courts after the bankruptcy proceeding has been closed. In my judgment, this is the worst defect in the Bankruptcy Act. It has grown in importance with the increasing volume of cases in the bankruptcy courts and with the growing proportion of cases filed by individuals. Business cases now constitute only about eight percent of the cases filed; the remaining 92% are filed as non-business cases by individuals.

We have letters in our files showing that, in one instance, twenty-four out of fifty-seven cases on the calendar of a State court were suits filed by creditors against discharged bankrupts. In some instances, the discharged bankrupt is threatened with the loss of his job because of harassment at his place of business; in others, the creditor has threatened the bankrupt with "fraud or imprisonment" unless he pays the discharged debt.

I recall one case several years ago in Ithaca, New York, in which a discharged bankrupt was sued by the same creditor three times in three states; first in New York, then in California, and finally in Ohio. The residence of the bankrupt was changed by his employer for reasons quite apart from the bankruptcy proceeding, and the creditor followed him wherever he went, filing new suits on the discharged debt. Each time a suit was filed, the bankrupt was obliged to obtain counsel and plead his discharge as a defense in the State court proceeding.

It seems to us of the utmost importance that the bankruptcy court ought to be able to grant a discharge that will mean what it says so that the honest but unfortunate bankrupt can have the fresh start the Bankruptcy Act was intended to give him. By the same token, the creditor whose debt is found to be non-dischargeable should not be forced to proceed in another forum; i.e., the State court, to collect his debt. The bankruptcy court should be empowered to grant him a judgement and save him the delay and expense of a State court proceeding, unless he prefers to seek relief in the State court.

As far as we know, H.R. 6665 meets all objections heretofore made to predecessor dischargeability bills, and we hope that H.R. 6665 will be enacted into law.

Mr. ROGERS. Thank you, gentlemen.

Mr. FOLEY. Thank you, sir.

Mr. JACKSON. Thank you, sir.

Mr. ROGERS. Our next witnesses are Referee Daniel R. Cowans, president of the National Conference of Referees in Bankruptcy; and Referee Gene E. Brooks, Referee in Bankruptcy of Evansville, Ind.

STATEMENT OF DANIEL R. COWANS, PRESIDENT, THE NATIONAL CONFERENCE OF REFEREES IN BANKRUPTCY, SAN JOSE, CALIF.; ACCOMPANIED BY GENE E. BROOKS, REFEREE IN BANKRUPTCY, EVANSVILLE, IND.; AND CLIVE W. BARE, REFEREE IN BANKRUPTCY, EASTERN DISTRICT OF TENNESSEE

Mr. COWANS. Mr. Chairman, Mr. Jackson alluded to the fact that Mr. Clive Bare is also present. He is not scheduled as a witness. If it is desired and it is not objectionable he could join us at the witness table.

This is Referee Clive Bare, of Knoxville, Tenn., vice president of the national conference.

Mr. ROGERS. Gentlemen, you may sit down.

I understand you are the author of "Cowans Bankruptcy Law and Practice With Forms."

Mr. COWANS. Yes, sir, I must admit to that.

Mr. ROGERS. And Mr. Jacobs testifies as to Mr. Brooks to be one of the greatest.

Mr. JACOBS. I neglected to say what. I am sure one of the greatest lawyers and referees. Certainly, the greatest in Evansville.

Mr. ROGERS. Mr. Cowans, do you have a prepared statement?

Mr. COWANS. Yes, sir; I do.

I would also ask leave to make a part of the record in reference to Senate Resolution 88, about which I will not talk, copies of an article I wrote in two installments in the Journal of the National Conference of Referees in Bankruptcy.

(The article referred to is in the files of the subcommittee.)

Mr. ROGERS. We will file these with the committee and make good use of them.

We will put your statement in the record at this point. You may proceed in whatever manner you desire.

(The statement follows:)

STATEMENT OF DANIEL R. COWANS, REFEREE IN BANKRUPTCY, PRESIDENT, NATIONAL CONFERENCE OF REFEREES IN BANKRUPTCY

I. THE OBJECTIVES OF BANKRUPTCY LAW

Bankruptcy law has two principal aims. For the debtor or bankrupt with more debts than he is able to pay, its aim is to grant relief in order to return him to a more productive life. It is sometimes said that that we wish to give an honest man a fresh start.

For the creditors, we seek maximum possible recovery of debts owned. Prevention of collection of debts is a drastic step and we should take it only with deference and caution.

I contend that there are other persons whose interests should be considered. The families of the bankrupts and of creditors and the present and future employers of bankrupts are affected. Inevitably the bankrupt will continue to exist and to purchase things. The interests of those with whom he will do business are entitled to some consideration. The general public also has a stake. A man with more debts than he can pay and no hope for the future can be an expense to the public and some such debtors can be a menace. If not as a matter of mercy, relief to debtors can perhaps be justified as a sort of safety valve.

The courts have regarded the policy of relief as an important one. However, Congress and the courts have agreed that the relief is not to be at the expense of certain other persons. Section 17 of the Bankruptcy Act lists debts which are still owed despite the granting of a bankruptcy discharge. The list includes those whose interests Congress regards as more deserving than the policy of a fresh start such as support obligations for children or taxes or those debts created by the misconduct of the bankrupt, which misconduct makes the bankrupt a less deserving person in our eyes.

II. THE HISTORY AND NATURE OF THE PROBLEM

Unfortunately the present state of the law frustrates Congressional policy and the law needs to be changed. I would like to stress two points at this juncture.

1. *The difficulty is a matter of procedure and not of substantive law.*—We are not here to argue for any change in the grounds of objections to discharge or in the debts excepted from discharge.

2. *The procedural difficulties are not the result of anything that has been done by Congress.*—We are not here to ask you to change any laws that this body has ever passed. Let me explain this briefly. Many years ago transportation was such that it was difficult for many litigants to get to remote federal courts. Consequently, it was more expensive and cumbersome to try the question of dischargeability of a debt in a federal court. Congress had made no provision for jurisdiction to determine these matters so the courts wisely said that it was best to try these matters in state courts. The years went by and in 1934 the Supreme Court in *Local Loan v. Hunt*¹ said that as each court has jurisdiction to deter-

¹ *Local Loan Co. v. Hunt* (1934) 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230.

mine the effect of its own orders and decrees, the bankruptcy court has jurisdiction to determine the effect of its own order of discharge and thus could determine whether a debt was non-dischargeable and give appropriate orders. But the Court said the jurisdiction should be exercised only in unusual circumstances. The subsequent efforts of the courts to determine what circumstances were sufficiently unusual has been unsatisfactory as there is no clear pattern.

Recently the Supreme Court recognized and stated that bankruptcy proceedings are quicker and less expensive than state court proceedings.² The policy of the bankruptcy administration has been to take the courts to the people. Court is held in so many cities that no one is now far from a place where bankruptcy court is held. The reason for the old rule has ceased and it is time for the old rule to cease. This is what we are requesting you to do.

III. THE REASONS FOR THE CHANGE

We ask for this change because :

1. It will give the bankrupt a day in court.

2. It will bring greater clarity to the bankrupt's situation. The bankrupt, his family, his creditors, his employees, present or future and others with whom he will deal in the future will be able to understand and plan accordingly.

On the first point, we must recall that the price of a discharge to the bankrupt is the surrender of all of his non-exempt assets. If the question of applicability of the discharge to a particular debt arises, the present law forces the bankrupt into state courts to defend a suit brought there. Our federal bankruptcy law, however, has just stripped him of every asset except those things which the states say are the minimum necessary to sustain life. If there is to be a state court action most attorneys will demand compensation in addition to the fee charged for work in the bankruptcy court. If the case is fought in the bankruptcy court, our observation is that the attorney for the bankrupt generally tends to stay with his client often without any extra fee. The difference in attitude of attorneys is economically justified. The Supreme Court understood the situation when it recently stated in *Katchen v. Landy* that actions in the bankruptcy court are more rapid and less expensive than those in the state court. There is less work to present the same evidence in the bankruptcy court than there is in the state court.

Were there enough assets in each case to permit the payment of a fee to the attorney for the bankrupt in state court, this might be a solution but not only is that untrue in most cases it would also seem contrary to the policy I stated at the outset of providing maximum return to creditors. It would be unfair to take the money from the pool for creditors to settle the problem between the bankrupt and one of his creditors. Therefore under the present law many bankrupts cannot afford a day in court. We have failed to deliver on our promise to provide relief.

The inability of the bankrupt to afford counsel in the state court in many cases has produced artificial and undesirable results. Many of the suits in the state court go by default. Even if a creditor does not have a good reason to believe his debt is non-dischargeable, there is a good chance that by bringing suit in the state court, there will be a default. I believe this is being done in a number of cases and that the purpose of the discharge provisions is being frustrated. Those who wish to be plaintiff against a defendant who cannot afford to litigate will oppose this legislation.

Little explanation should be needed of the point that more certainty and clarity would be brought to the law by passage of this legislation. Under the present law, the bankrupt must sit and wait to be sued. Varying statutes of limitations make his situation highly uncertain. Referees in bankruptcy are unable to give a satisfactory answer to the employers or other interested persons who call to ask when the bankrupt's problems will be decided. These people make unstable employees as they do not know what their situation is. Employment requiring fidelity bonds may be denied to them pending settlement of their affairs. I am well aware that most of us have some financial uncertainty in our lives and it may be questioned whether there would be a case of special relief for some people. My reply is that as long as we have a bankruptcy law which contemplates relief, it is not desirable to suspend bankrupts in mid-air so to

² *Katchen v. Landy* (1966) 382 U.S. 323, 86 S.Ct. 467.

speak half way between relief and the lack of it. Particularly is this so when it is an accidental by-product of procedural rules rather than a Congressional policy. Only a few creditors derive a special benefit from it. It does not benefit creditors generally. A change in the rules would not deny the specially benefitted creditors a day in court in a tribunal which could give them rapid and relatively inexpensive relief.

Passage of this legislation will enhance the possibility of a fresh start for American bankrupts.

Mr. ROGERS. Did I understand you to make reference to Senate Joint Resolution 88 and express your thoughts that such commission should be created?

Mr. COWANS. Yes. Our conference has taken the position in favor of the Senate joint resolution. To my memory we have not discussed in any detail the questions of the composition that have been discussed here. I am sure we have some views, but not detailed views because I think, at least speaking for myself, I do not have sufficient experience to be able to comment, say, on the different procedural methods of conducting a study. I am not really, as I say, in a position to discuss that.

Mr. ROGERS. In your view is there such a change in the complexion of the economy or business world that it requires a reexamination of the Chandler Act?

Mr. COWANS. I would cite one brief paragraph in my article and perhaps I might read that comment:

The last major legislation in which basic viewpoints and principles were evolved or altered occurred in 1938. Among the more important economic and social changes from the world of 1938 which make it manifest that the complexion is substantially different now are: widespread ownership of homes, "peacetime" budgets dominated by defense expenditure, development of the television and air conditioning industries, two and three car families, complex social security and unemployment programs backed or supplemented by employer financed welfare programs, Medicare, huge increases in the numbers of persons obtaining higher education, the rudimentary beginnings of participation in economic life beyond the menial by members of the minority groups, vast geographical shifting of businesses within the country, mechanization of agriculture and the urbanization of the population.

I think these are major changes that I have seen in my lifetime and I think any act framed prior to all those changes almost necessarily is obsolete.

Mr. ROGERS. Thank you.

You may proceed.

Mr. COWANS. I am going to address my remarks briefly to the question of the dischargeability problem that we have. I want to speak largely on the problem and the need for change.

Bankruptcy law has two principal aims. For the debtor or bankrupt with more debts than he is able to pay, its aim is to grant relief in order to return him to a more productive life. It is sometimes said that we wish to give an honest man a fresh start.

For the creditors, we seek maximum possible recovery of the debts owed. Prevention of collection of debts is a drastic step and we should take it only with deference and caution.

I contend that there are other persons whose interests should be considered. The families of the bankrupts and of creditors, and the present and future employers of bankrupts are affected. Inevitably the bankrupt will continue to exist and to purchase things. The interests of those with whom he will do business are entitled to some consid-

eration. The general public also has a stake. A man with more debts than he can pay and no hope for the future can be an expense to the public and some such debtors can be a menace. If not as a matter of mercy, relief to debtors can perhaps be justified as a sort of safety valve.

The courts have regarded the policy of relief as an important one. However, Congress and the courts have agreed that the relief is not to be at the expense of certain other persons. Section 17 of the Bankruptcy Act lists debts which are still owed despite the granting of a bankruptcy discharge. The list includes those whose interests Congress regards as more deserving than the policy of a fresh start such as support obligations for children or taxes or also those debts created by certain misconduct of the bankrupt, which misconduct makes the bankrupt a less deserving person in our eyes.

Unfortunately the present state of the law frustrates congressional policy and needs to be changed. I would like to stress two points at this juncture.

First, the difficulty is a matter of procedure and not of substantive law. We are not here to argue for any change in the grounds of objection to discharge or in the debts excepted from discharge.

Second, the procedural difficulties are not the result of anything that has been done by Congress. We are not here to ask you to change any laws that this body has ever passed.

I would like to explain this briefly. Many years ago transportation was such that it was difficult for many litigants to get to remote Federal courts. Consequently, it was more expensive and cumbersome to try the question of dischargeability of a debt in a Federal court.

Mr. WIGGINS. Excuse me, sir. At this point in the record, would you give us a definition for the record of what you are talking about when you say dischargeability?

Mr. COWANS. That the bankruptcy law, if a man is entitled to what we call a discharge, says that the debtor, the bankrupt, is entitled and is granted a discharge from his debts as of the date of bankruptcy, except such debts as are by law not dischargeable, not telling the debtor which debts those are. So in a sense we give to you what we give to you but not the rest. And in this sense it is ambiguous. This, I think, is the crux of the problem.

Congress has made no provision for jurisdiction to determine these matters so the courts wisely said that it was best to try these matters in State courts and not have the expense or difficulties in transportation and so on.

The years went by and in 1934 the Supreme Court in *Local Loan v. Hunt* said that as each court has jurisdiction to determine the effect of its own orders and decrees, the bankruptcy court has jurisdiction to determine the effect of its own order of discharge and thus could determine whether a debt was nondischargeable and could give appropriate orders. But the court said that the jurisdiction should be exercised only in unusual circumstances. The subsequent efforts of the courts to determine what circumstances were sufficiently unusual has been unsatisfactory. There is no clear pattern. There is no general agreement. It is strictly on a case-to-case basis.

Now, recently the Supreme Court recognized and stated that bankruptcy proceedings are quicker and less expensive than State court

proceedings. The policy of the bankruptcy administration has been to take the courts to the people. Court is held in so many cities that no one is now far from a place where bankruptcy court is held. I believe, then, that the reason for the old rule has ceased and it is time for the old rule to cease. This is what we are requesting you to do.

The reasons for the change are these:

One, it will give the bankrupt a day in court, which for all practical purposes he doesn't have. And, two, it will bring greater clarity to the bankrupt's situation. The bankrupt, his family, his creditors, his employers, present or future and others with whom he will deal in the future will be able to understand and plan accordingly.

To amplify briefly about the bankrupt to have his day in court, we must recall that the price of this discharge, this piece of paper that we give to him is the surrender of all of his nonexempt assets. If the question of applicability of the discharge to a particular debt arises, the present law forces the bankrupt into State courts to defend a suit brought there. But Federal bankruptcy law has just stripped him of every asset except those things which the States say are the bare necessities to maintain life.

If there is to be a State court action most attorneys will demand compensation in excess to the fee charged for work in the bankruptcy court. If the case is fought in the bankruptcy court, our observation is that the attorney for the bankrupt generally tends to stay with his client often without any extra fee. The difference in attitude of attorneys is economically justified. The Supreme Court understood the situation when it recently stated in *Katchen v. Landy* that actions in the bankruptcy court are more rapid and less expensive than those in the State court. I have contended, having practiced law, that there is less work to present the same evidence in the bankruptcy court than there is in the State court. Were there enough assets in each case to permit the payment of a fee to the attorney for bankruptcy in the State court, this might work, but not only is that untrue that there are enough assets in most of these cases, but it would also seem contrary to the policy stated at the outset of providing maximum return to creditors. I think it unfair to take the money from the pool for creditors to settle the problem between the bankrupt and one of his creditors. Therefore, under the present law, many bankrupts cannot afford a day in court. I believe we have failed to deliver on our promise to provide for relief for this man.

Mr. ROGERS. Now, are there many instances where the question of dischargeability is arising in State courts?

Mr. COWANS. Yes.

Quite often the suit is frequent. For one thing, creditors who believe that they have a nondischargeable debt know that it is a situation where most of the past creditors cannot go after the bankrupt. They know that he is at a point where he has very few if any assets left. It is an ideal time, from a creditor's point of view, to sue.

Mr. ROGERS. Under H.R. 6665 or H.R. 12250 would the assets of the bankrupt be decreased any as a result of having to decide the question of dischargeability in the bankruptcy court?

Mr. COWANS. The assets which are a part of the pool in bankruptcy would not be affected.

Mr. ROGERS. They wouldn't be affected at all?

Mr. COWANS. No.

Mr. ROGERS. But you do feel that a lawyer who may have started with the bankrupt, but who has been limited in the amount that he can collect as a fee, would continue to serve the bankrupt?

Mr. COWANS. We find this is true in the bankruptcy court to a substantial extent. Because in unusual cases you can ask for a permanent restraining order, you will find that a number of attorneys will come in and ask for that permanent restraining order and we know the fee situation. They seem to defend their client in the bankruptcy court. They are attorneys of record. I say this to the credit of the American bar that they are defending these people in the bankruptcy court often without an additional fee.

Mr. ROGERS. Thank you.

Proceed.

Mr. COWANS. The inability of the bankrupt to afford counsel in the State court in many cases has produced artificial and undesirable results. Many of the suits in the State court go by default. Even if a creditor does not have a good reason to believe his debt is nondischargeable, there is a good chance that by bringing suit in the State court there will be a default. I believe this is being done in a substantial number of cases and that the purpose of the discharge provisions is being frustrated. Those who wish to be plaintiff against a defendant who cannot afford litigation will oppose, I think, this legislation.

Little explanation should be needed of the point that more certainty and clarity would be brought to the law by passage of this legislation. Under the present law, the bankrupt must sit and wait to be sued. Varying statutes of limitations make this highly uncertain and this is particularly true in this economy where people move across State lines. Referees in bankruptcy are unable to give a satisfactory answer to the employers or other interested persons who call to ask when the bankrupt's problems will be decided. These bankrupts make unstable employees as they do not know what their situation is. Employment requiring fidelity bonds may be denied to them pending settlement of their affairs.

If I may characterize it, it is something like the bankrupt sitting there waiting for the other shoe to drop.

I am well aware that most of us have some financial uncertainty in our lives and it may be questioned whether there would be a case of special relief for some people. My reply is that as long as we have a bankruptcy law which contemplates relief, it is not desirable to suspend bankrupts in mid-air so to speak half way between relief and the lack of it. Particularly is this so when it seems to be an accidental by-product of procedural rules rather than a congressional policy. Only a few creditors derive a special benefit from the law the way it is. It does not benefit creditors generally. A change in the rules would not deny the specially benefited creditors a day in court in a tribunal which could give them rapid and relatively inexpensive relief.

Passage of this legislation will enhance the possibility of a fresh start for American bankrupts.

This concludes my prepared remarks. I don't know if the chairman would like to proceed to questions at this point. I have not commented about the facts and the situation of the two bills. I think it might be in

order to state that the bills face in the same direction, walk a substantial way in the same direction, and I am prepared to indicate many areas in which they are in agreement.

The National Bankruptcy Conference representatives are here, the National Conference of Referees are here. I think it quite likely in a short time we could arrive at a common ground.

Mr. ROGERS. Do you feel that the differences between the contents of these two bills can be resolved?

Mr. COWANS. Yes, I certainly do. We had some discussion last night and went over some of the problems and I think it could be done rather soon.

Mr. ROGERS. May I inquire, have you statistics concerning State cases where the creditor may raise the question of dischargeability of the certificate that has been issued, whether it is based upon fraud or something of that nature?

Mr. COWANS. I do not have available statistics. May I ask the counsel, Mr. Zeifman, is it not true that you received some kind of a communication from an attorney or professor of law who had prepared some statistics?

Mr. ZEIFMAN. We should be receiving them very soon, from Prof. Paul Garrity of Boston College Law School.

Mr. COWANS. I understood that his statistics were approximately 18 to 20 percent of the cases in which there were action; I recall that offhand.

Mr. ROGERS. And you feel that referees in a better position are to decide questions of dischargeability than a justice of the peace in my State or county judge or superior court judge?

Mr. COWANS. Better position is something of a difficult word. I read in national publications, legal and otherwise, about the great press of cases in the State courts. I read about months and years to get to trial. I would be interested in the reaction of the two gentlemen with me, but to my experience the average amount of time from the filing of the pleadings to the commencement of the trial of a contested matter in bankruptcy court is perhaps 3 weeks. I don't think you can do it anyway near that rapidly in the State courts. State court proceedings are more complex, procedurally. The rules of evidence are substantially the same. So that I think we can proceed more rapidly.

It is true that these are in a field that we deal with constantly and the State court judge is called upon to know all sorts of law. He does not have the extent of familiarity that the referees in bankruptcy proceedings do, the simple matter of exposure and experience.

Mr. ROGERS. Of course, you know that a number of large companies have a rule allowing two garnishments before firing the employee. In that regard we know about 90 percent of the bankruptcies involve wage earners and consumers.

Now one complaint that I received from a superior court judge in my area, is that a judgment may have been entered in the State court even though the bankrupt thought he was discharged. The creditor would then ask for and get an execution and garnishment. Yet the debtor probably took bankruptcy because he got one garnishment and this is the second one, and out goes his job.

Mr. COWANS. Precisely the problem.

Mr. ROGERS. And this judge particularly says his docket is loaded down with these cases.

Mr. COWANS. Might I add to the record, we had some hearings in the Senate in 1967. Included in that record is a letter from a municipal court judge in my area discussing the problem that he has observed by the filing of cases in small claims court and how the problem is affected there.

In essence, I think he is reiterating the experience that you relate the judges have had. My only personal experience is that State court judges would like to be rid of bankruptcy problems.

Mr. ROGERS. No doubt that is one of the objectives, first on the theory that the State courts don't have the time; second on the theory that they don't have the expertise; and third, the embarrassment that comes when they issue an execution on a judgment that has been discharged.

Now, do you feel that if it is generally known among the collection lawyers, who make good use of the present procedure, that if they do get out one of these executions or garnishments and it will go back to the bankruptcy court, they are not likely to carry on the present procedure.

Mr. COWANS. I think this is the case. I believe that the unfounded cases would disappear. I think we would get the cases where there genuinely is an issue. I don't mean to insinuate that there are no bankrupts guilty of misconduct in section 17. There are. And indeed they should have to account for that conduct.

But I think the result of passing this legislation is that the unfounded cases, the flimsy cases, would disappear and we could get down to the real cases.

Mr. ROGERS. Do you have anything to add to that?

Mr. BROOKS. I have some typewritten remarks, Mr. Chairman. I don't wish to read them, but would like to make a few observations.

Mr. ROGERS. If you want to, we will accept your remarks for the record and then you may go ahead and point out what you would like. (The statement follows:)

STATEMENT OF GENE E. BROOKS, REFEREE IN BANKRUPTCY, SOUTHERN
DISTRICT OF INDIANA

Mr. Chairman: I shall keep my remarks very brief—I was appointed a Referee in Bankruptcy on March 1, 1968, having been in the private practice for some 10 years and a Prosecuting Attorney for some 9½ years. I am a member of the National Conference of Referees in Bankruptcy and serve on the Legislative Committee.

I am here today to speak in support of Senate Joint Resolution 88 and the so-called Dischargeability Bill, and to answer any questions you may have. Having served as a Referee for some 19 months, I cannot state that my "long" experience has demonstrated that these changes and studies need to be made. Rather, I can state that my relatively "short" experience has clearly demonstrated this need. I think perhaps, that as a new Referee, one can often view the Bankruptcy Act and its administration more objectively than a Referee who has been so close to its workings for such a period of time that he may tend to become stereotyped as to possible solutions and does not seek new approaches to old problems. Certainly, this is not true as to Referee Cowans and many other distinguished Referees of the Country, who are working very hard each day in seeing that the Bankruptcy Act is administered in accordance with its provisions, and are actively seeking and proposing those changes they feel are needed to make it a better tool.

I shall not belabor my feelings and views, but I do want to particularly say in support of Senate Joint Resolution 88 that aside from the many specific

changes or improvements that would no doubt emulate from its study, we just need to know more about the causes of bankruptcy and find solutions, or at least ideas, as to how bankruptcies may be prevented. We need to know how we can better meet the prime objective of the Bankruptcy Act—that of rehabilitation—giving the bankrupt some time to get on his feet and be free of oppressive debts, enabling him to support his family and enjoy at least a minimum of recreation, without the constant fear of being fired from his work, creditors telephoning and writing demanding payment or else, or knocking on his front door. In addition, I feel that such a study would bring about greater uniformity of practice and procedure in the Bankruptcy Court; realizing that it will necessarily be impossible to attain uniformity in every respect due to the applicability of state law.

As to the Dischargeability Bill, I can only say that it is very difficult to explain to a bankrupt that he has been discharged from all his debts, but that he may be sued later by his creditors to collect the debt, and that if this is done it will be necessary for him to employ a lawyer. In many instances, these discharged bankrupts neither have the money to employ an attorney or feel that it is necessary. They have a paper showing they were discharged of all debts; therefore, they think this creditor who is suing is just wasting his time, and this is just a gimmick to induce him to pay. How surprised he must be when he discovers this creditor has obtained a judgment against him and is now seeking to garnishee his wages, which will mean his being fired. What! he must be saying, was accomplished by filing bankruptcy!

The most logical and most suitable place to determine the dischargeability of any debt is in the Bankruptcy Court and not a state court. It is more convenient, less costly, less time consuming, and heard and decided by someone who is more trained and skilled in this area of the law. Of course, I am talking about the Referee in Bankruptcy. We are saying that the bankrupt has a right to receive a discharge, but we can't really determine its effect or success. We wish him good luck and say, sorry, that's all we can do. We need "total" jurisdiction if we are to effectively serve the purposes of the Bankruptcy Act, both for the betterment and interests of debtors and creditors.

Hanging in my Court Room in Evansville is a framed quotation presented to me by the Evansville Bar Association, at my robing ceremonies. The author is Judge Alfred P. Murrah, Chief Judge, Tenth Circuit, and it reads as follows:

"For hundreds and even thousands of citizens of this country, the only Courts they will ever know, and the only kind of Justice they will ever have, will be at the even hand of the Referee in Bankruptcy. The quality of Justice you dispense symbolizes the Federal Courts of this land. Indeed, you speak for the Federal system of which you are an integral and important part."

In order that we can better serve these thousands of citizens who will pass through the Bankruptcy Court in the years ahead, and for many this will be their one and only contact with the Federal judicial system, we need a Bankruptcy Act which is attuned to the times, and one that attempts to solve today's problems by today's methods, and if this is done, the quality of justice we as Referees dispense, when we speak for the Federal system, will be such as to give complete, equitable and just relief to all persons affected by the Act.

Thank you Gentlemen.

Mr. BROOKS. Mr. Chairman, as I indicated, I am from Evansville, Ind. I certainly am not an old referee in terms of years or in terms of service. I have only been a referee since March 1, 1968. This is a full-time job in Evansville.

I point out in my statement I don't come here as an expert because of long experience, but I come here because I don't think you have to be in the bankruptcy field very long to know that there are certain flagrant inequities in the Bankruptcy Act. And I think perhaps as a new referee you are more aware than perhaps someone who has been around for a long time and has discussed a lot of the ramifications.

I would like to say in regard to Senate Joint Resolution 88 something that hasn't been mentioned, is the fact that if you make a study, in-depth study, which Senate Joint Resolution 88 certainly is intended to do, then one of the chief reasons as far as I am concerned, and I know

other referees agree, is not only the changes in the act, its substantive law, but finding out some causes and ways of preventing future bankruptcies. And also this to me means rehabilitation—the role the bankruptcy court has in seeing that these bankrupts aren't repeaters and don't come back into the bankruptcy court.

And certainly more uniformity is needed in the field of bankruptcy. And you are not going to get absolute uniformity because State laws apply in many instances. There has been some suggestion by people who have testified before, that perhaps we need uniform exemption laws. We certainly do need some greater uniformity in the Bankruptcy Act.

In that regard, Mr. Chairman, you asked Judge Cowans if you think bankruptcy court is the proper place. I did direct my attention to that in page 2, in the last paragraph and it seems to me that the most logical and most suitable place to determine the dischargeability of any debt is in a bankruptcy court and not a State court. It is more convenient, less costly, less time-consuming, and heard and decided by someone who is more trained and skilled in this area of the law. Of course, I am referring to the referee. But we can't really determine its effect or success. We wish him good luck and say, sorry, that is all we can do.

And I close my remarks by referring to a quotation which is hanging in my court, which was presented to me by the Evansville Bar Association, which I think is apropos. The author is Judge Alfred P. Murrah, chief judge of the tenth circuit. It reads as follows:

For hundreds and even thousands of citizens of this country, the only courts they will ever know and the only kind of justice they will ever have, will be at the even hand of the referee in bankruptcy. The quality of justice you dispense symbolizes the Federal courts of this land. Indeed, you speak for the Federal system of which you are an integral and important part.

In order that we can better serve these thousands of citizens, to which Judge Murrah refers, who will pass, and for many, as the judge pointed out, this will be their only time they will see a Federal court—the only contact with the Federal judicial system—we need a Bankruptcy Act which is attuned to the times and one that attempts to solve today's problems by today's methods. And if this is done, when we speak for the Federal system, it will be such as to give complete, equitable, and just relief to all persons affected by the act.

Mr. ROGERS. The gentleman from Knoxville.

Mr. BARE. I have nothing to add to the oral statements made by Referee Cowans and Referee Brooks.

I agree wholeheartedly with the presentation that they have made.

I do have a prepared statement which I will file with the committee.

Mr. ROGERS. We will be glad to receive it.

(The statement follows:)

STATEMENT OF CLIVE W. BARE, REFEREE IN BANKRUPTCY,
EASTERN DISTRICT OF TENNESSEE

Mr. Chairman and members of the Committee: I am Clive W. Bare, Referee in Bankruptcy for the Eastern District of Tennessee with headquarters at Knoxville. I have served as Referee for the past twelve years and have heard and administered approximately 15,000 bankruptcy cases during that time. My present case load averages about 1500 cases per year. Tennessee ranks fifth in total filings among the fifty states of the United States and third in percentage

of filings according to population. Although adequate information is not available upon which to base definite conclusions for the large number of bankruptcy filings in Tennessee, the primary reason appears to be the low wage exemptions now prevailing. It is possible that the national wage exemption provided for in the Truth-in-Lending Act which becomes effective on July 1, 1970, (wage exemption part of the statute) will have an impact on present filings for the Federal wage exemption will in many instances be some 50 percent higher than the present Tennessee statute.

The type of cases filed in Tennessee follows generally the same pattern as that in other states with one exception. Filings in wage earner proceedings under Chapter XIII of the Bankruptcy Act amount to approximately 45 percent, whereas in the United States as a whole this percentage is only about 18 percent.

During the past few years I have become increasingly aware that the present Bankruptcy Act does not adequately meet the present needs of our economic system. I am not alone in this view. One Referee has observed that no court was ever more noble in conception but more inadequate in function.

In far too many instances the present Act does not result in a prompt and economical liquidation and distribution of insolvent estates; nor does the present Act in many instances relieve the honest debtor from oppressive indebtedness and permit him to start afresh. The relief and reorganization procedures of the debtor chapters, particularly Chapter XIII, were drafted in an earlier era and are not suitable for the solution of current problems. The Bankruptcy Act of 1898 as amended by the Chandler Act in 1938 and by other amendments does not take into consideration the vast changes that have occurred in our present commercial, financial, and technical society. The Bankruptcy Act, however, is a sophisticated legal document serving a very useful purpose and should not be changed drastically without a careful study being made upon which needed changes can be based. Past experience teaches us that major problems in judicial administration of the Bankruptcy Act ensue when changes are made without the careful evaluation of consequences. The socio-economic conditions that prevail in our country today should be explored to determine their impact on bankruptcy. The passage of the resolution now pending before the committee will meet a major need in the bankruptcy field. It will provide the information necessary for a reevaluation of the present Act in the light of today's changing commercial and social needs.

The vast and complex changes which have taken place in all phases of our society since the Act of 1898 was passed are too well-known to require serious discussion. At that time the American system of consumer credit that exists today was entirely unknown. At the end of August, 1969, consumer credit outstanding totaled \$116.0 billion of which \$22.9 billion was non-installment. Of the \$93.1 billion installment credit outstanding \$35.8 billion was for automobiles, \$25.0 billion for other consumer goods, \$28.3 billion in personal loans, and \$4.0 billion in home repairs and modernization loans. This, of course, does not include home mortgage indebtedness. A comparison between credit outstanding today with that of twenty to twenty-five years ago shows a startling change. In 1946 total consumer credit outstanding stood only at \$8.38 billion.

The increase in bankruptcy filings during the past several years is well-known both to members of Congress and to the business community. Can the increase in bankruptcy filings that has occurred during the past few years be attributed to our present installment credit system? If not, what is the cause for the increase in filings? What is the basic philosophy of those who resort to Bankruptcy Court for relief? Is there a moral breakdown in a segment of our society that is causing many to resort to the discharge of debts when, in fact, they could pay their debts if they were willing to do so? Should they be required to do so? Is economic illiteracy responsible or is it insufficient credit investigation? Increased population is certainly not the answer because bankruptcy filings percentage-wise have far exceeded the increase in population. Unemployment is certainly not the answer as there is almost total employment in our country today. Only an adequate study can furnish sufficient information upon which to base sound judgments.

Can something be done to prevent bankruptcies? What effect do wage garnishment statutes have on the number of bankruptcy filings? In Tennessee the number of bankruptcies per 100,000 population stands at 260, in Texas 5. Tennessee permits the garnishment of wages; Texas does not. Is this the reason for the vast difference? If so, what is the ultimate proportionate losses to creditors in the two

states? Should the Bankruptcy Act set up a Federal exemption statute uniform throughout the 50 states? Would there be a significant decrease in consumer bankruptcies if greater restrictions were placed on an individual creditor's right to enforce a judgment against a consumer? Should wage garnishments be prohibited entirely? Numerous questions can be asked but definitive answers cannot be given until more information is available. The purpose of the Commission's study would be to furnish information upon which sound solutions could be fashioned.

Referees constantly are being cautioned that expense of administration in bankruptcy proceedings is too high with resultant payments to creditors too low, yet no serious study has been made of the comparative costs of administering bankruptcy estates with that of liquidation proceedings in state courts. The present Act is specific—all expense of administration must be paid in full before any distribution can be made to priority or general creditors. This means that compensation to the receiver and trustee and their attorneys as well as attorneys for the bankrupt and petitioning creditors together with all expense of preservation of the estate, use and occupancy, appraisers, auctioneers, and accountants must be paid in full before there is any distribution of dividends to creditors. Is 22.8 percent to 26.6 percent, the range of expense of administration during the past few years, excessive when the complexity of bankruptcy proceedings and the necessity for preservation and liquidation of assets is considered? Should bankrupts and creditors bear the total cost of bankruptcy administration as is now the case which requires the bankrupt to pay a \$50 filing fee (compare this with the \$15 filing fee for a multi-million dollar anti-trust suit or any other civil action filed in Federal Court) and requires creditors to contribute 2 and $\frac{1}{2}$ percent of net assets realized. (This has recently been raised to 3 percent on the first \$50,000 of net realization and 2 and $\frac{1}{2}$ percent on the balance of net realization.)

I do not believe in change for the sake of change, but I certainly do not believe that we should be trapped within the present bankruptcy system if the errors and omissions of the past and the economic and social changes which have taken place in the past few years point to a better way. We must find means of giving the greatest assistance possible to those who become enmeshed in financial difficulties. In a bankruptcy proceeding today we grant a discharge but furnish no assistance or guidance to debtors that will assist them in preventing future financial difficulties. We must also find ways to minimize losses to creditors and the business community when debtors elect figuratively to throw in the sponge and resort to bankruptcy. We should not say there is no better way to meet the problem until we have investigated all avenues that could lead to a more equitable solution. A thorough review of the present Act and present and future economic conditions will show whether or not major revisions are necessary and, if so, the areas in which such revisions should be made.

A mountain of paper work and administrative detail is involved in the processing of every bankruptcy case including the no-asset, employee proceedings which result in no payment of dividends to creditors. A study should be made to determine whether all cases, the large and the small, the business and the non-business, the asset and the no-asset, should be administered by the Bankruptcy Court in the same procedural way at all stages.

Creditor control in bankruptcy cases has long been recognized as a myth. Should legislation be enacted that would authorize the Bankruptcy Courts to appoint official trustees in bankruptcy cases? The difficulty in many districts of obtaining competent trustees to perform the duties required by the present Act for the compensation provided therein is an increasing major problem and one that must be met. As one Referee stated, when creditors are uninterested and trustees are impossible to get, the present law does not function properly.

91 percent of all bankruptcy cases produce no distribution of funds to unsecured creditors, and the remaining 9 percent which are in the asset category result in average dividends to unsecured creditors of only 6.8 percent. Is it possible to revise the present Act so that creditors will benefit to a substantially greater degree? Is the Bankruptcy Act responsive to the needs of our times? Only an analysis in depth can furnish the answer.

If a Bankruptcy Commission is authorized, its study might indicate that, with substantial revision, the present Act is adequate and that the solution to many existing problems lies in amendments to other related laws. If this is true, then we will know in which direction our efforts should be directed. Exemption

statutes, garnishment laws, lien laws, the Uniform Commercial Code, and many other statutes have a decided impact on the administration of bankruptcy laws. The entire legal environment of debtors should be studied.

The requirements of the present Act that the salaries and expenses of Bankruptcy Courts be paid from a special fund in the United States Treasury which is made up from a portion of the filing fees in bankruptcy cases and certain other charges against the assets of bankruptcy estates is an anachronism that should be thoroughly reviewed and then discarded.

One of the primary purposes of bankruptcy administration, and certainly the primary purpose as far as creditors are concerned, is the prompt liquidation of the bankrupt's estate and the payment of dividends. The split personality of the present Act, however, which often requires litigation by bankruptcy receivers and trustees in various State and Federal Courts—not the Bankruptcy Court—involving “controversies” often results in diminution of funds available to creditors and delay for months and years in ultimate distribution of assets. The Bankruptcy Act creates rights in the trustee (Secs. 60, 67, and 70), yet the trustee absent consent of the adverse party often cannot litigate those rights in the forum of the Bankruptcy Court. He is relegated instead to State and Federal Courts where delays of two and three years are not uncommon. Summary jurisdiction is a constant problem in bankruptcy proceedings. In one case where hearings continued for many days before a Referee in Bankruptcy, the Court of Appeals ultimately determined that he did not have jurisdiction to hear the matter and the case had to be remanded for new hearings; hence, the decision reached by him was a nullity. Consideration must be given to remedying this problem.

Failure of the present statute to vest the Referee with contempt power is a glaring weakness. Many problems encountered in the administration of estates are traceable to this fact. It is submitted that such authority should be incorporated in the Act. The presence of contempt power by the Referee is substantially all that would be needed; its use would be seldom necessary.

Chapter XIII of the present Act was passed by Congress in 1938 to encourage wage earners to pay their debts out of future earnings rather than go into straight bankruptcy. Only to a limited extent has the purpose of the Act been fulfilled. The weaknesses of Chapter XIII are legion, and its use varies widely in different states (less than 1 percent of employee filings in New York State to 81 percent in Alabama) and even within districts in the same states (19 percent in the Middle District of Tennessee to 8 percent in the Western District). The lack of uniformity in the administration of wage earner proceedings is a known fact. Wide differences, exist among the circuits, districts, and Referees in interpreting and applying the provisions of this chapter. Great disparity exists, and not all of these disparities are due to the differences in individual State law. Chapter XIII is often cumbersome and difficult to administer. In many instances secured creditors hold a favored position which restricts greatly the court's authority to meet the ends of justice. One Referee observes that the process employed in Chapter XIII confuses and compounds in complexity a very simple Congressional purpose, that the procedural requirements of the chapter are deplorable and unrealistic. Obviously a sensible, efficient, and uniform system must be devised if the historic purpose of the chapter is to be achieved. It is generally recognized that major revisions will be necessary before Chapter XIII can be administered with efficiency and uniformity.

Among the areas that need to be closely examined are the rights of secured creditors to block confirmation of the plan; the treatment of interest on secured and unsecured claims; the necessity for acceptance of the plan by creditors; the role of the trustee and his rights as a lien creditor, also the trustee's rights to avoid preferences, transfers, et cetera; deficiency claims, unconscionable claims, priority claims; authority to restrain collection from accommodation makers; whether the debtor should bear the entire cost of the wage earner proceedings which usually amounts to 18 to 20 percent of his debts; whether employers should be prohibited from discharging an employee for resorting to wage earner proceedings (this question is now pending before the Court of Appeals for the Seventh Circuit); and priority of payment for attorneys' fees, the only areas in which a study of Chapter XIII proceedings is needed. The suggested areas of study just related do not purport by any means to be entire approach to wage earner proceedings and the procedural and substantive requirements of the present Act require extensive review and revision.

Attempts have been made recently to amend the present Bankruptcy Act to empower the court, in effect, to deny releases under ordinary bankruptcy to any debtor whom the court believes could pay his debts under Chapter XIII. Although some proponents of the bill attempt to minimize its import, it is generally recognized that the passage of the amendment would be a major departure from the recognized principle that the right to a discharge in ordinary bankruptcy is open to all. Under no previous Bankruptcy Act has future earnings of an individual been considered assets for the future liquidation of his debts. Hearings before a sub-committee of the House in the last session of Congress show conclusively the need for a thorough review before any so-called "compulsory" Chapter XIII should be enacted. As Judge Wesley Brown (District of Kansas) pointed out at the hearings, the policy of Congress with respect to the right of the individual should not be altered without an appropriate Congressional study of its ultimate effect on the entire bankruptcy picture; that the historic purpose of the Bankruptcy Act should be reviewed before amending it by one provision which would change Congressional policy.

It was suggested in hearings before the Senate on a similar resolution that the scope of this Commission's function be broadened to include the study of possible alternatives to the present system of bankruptcy administration, and this suggestion merits consideration. Bankruptcy matters, however, require the adjudication of many complex legal and factual questions. Judicial decisions are made relating to the validity of liens; the avoidance of preferences and fraudulent and voidable transfers; the allowance and disallowance of claims; the rights of the bankrupt to a discharge; exemption rights; and various other issues in controversy. Restraining orders and injunctions to preserve estates and protect bankrupts are often requested and frequently granted. Courts are by definition forums for administering justice and bankruptcy proceedings are essentially a determination of the rights of the various parties in accordance with legal and equitable principles. Reforms, improvements, and modernization of the present Act can make the Bankruptcy Court so advantageous that desires for an alternative system will cease to be heard.

In the Congressional Record on October 30, 1968, Congressman Rodino inserted some conclusions of a 10-part series of articles by Robert P. Kalter in the Newark, New Jersey, *Star-Ledger*. One of these conclusions is as follows:

"Since passage of the original Bankruptcy Act in 1898 the law makers have tinkered and toyed with legislative changes. They have never, however, undertaken a thorough investigation to find out how well or how poorly the system they enacted is functioning; how well or how poorly it is carrying out their intent to protect creditors and to provide for the relief and rehabilitation of debtors."

To conclude my remarks with reference to the creation of a Commission to study the bankruptcy laws of the United States, I would like to say that I have only one fixed opinion regarding the present Bankruptcy Act and that is that its effectiveness as it relates to the social and economic and other related conditions that exist in our society today, together with the entire problem of consumer credit and causes of consumer bankruptcy, require extensive examination before firm conclusions can be reached. I believe that major improvements can be made—improvements that will prove beneficial to debtors, creditors, and society. I sincerely hope that Congress will authorize the creation of a Commission so that an in-depth study can be made.

In regard to the Dischargeability Bill pending before the committee, it is my opinion that the greatest weakness in the Bankruptcy Act today is the lack of protection it affords the honest but unfortunate debtor after he has received his discharge. Federal Courts have declared time and time again that one of the primary purposes of the Bankruptcy Act is the privilege granted to bankrupts who have given up all their property toward settling their debts, of obtaining releases from the unpaid remainder of their debts. Yet daily this primary purpose is being defeated by creditors who are ignoring the bankruptcy proceeding and ignoring the bankrupt's discharge even though they know their debts are provable and dischargeable. They are resorting to harassing tactics in the form of letters, telegrams, and telephone calls to bankrupts as well as to the bankrupts' employers in an effort to coerce the bankrupts into paying discharged debts. In many instances they are instituting suits in State Courts hoping that the bankrupt is too ignorant to plead his discharge as a bar to the recovery of the debt.

First I think we should consider the type of bankruptcy case that dominates filings today. Over 90 percent of all cases filed are "employee-type" as distinguished from "business-type" cases. With total filings of approximately 200,000 per year, this means that 180,000 of this number will be employees or wage earners. The bankrupts are principally indebted to loan companies, doctors, hospitals, jewelry stores, furniture stores, and used car dealers. Frequently the debtor's accounts have been turned over to collection agencies. These are the individuals who need the full protection of the Bankruptcy Court. In many instances they are the underprivileged, the poverty-stricken, the underemployed, and the uneducated. They do not understand that the Bankruptcy Court under the present Act determines the bankrupt's right to a discharge but does not determine the effects of that discharge. They firmly believe that the discharge means exactly what it says—that they are discharged from all of their provable debts. In many instances, when they are sued by creditors who were listed in the bankruptcy petition, they believe that the debt was discharged and they do not believe it necessary that they appear and defend that suit by pleading their discharge as a bar.

Sec. 17a of the Bankruptcy Act states that "a discharge shall release a bankrupt from all of his provable debts" with some six exceptions enumerated therein. In spite of the plain language of the Act, however, there are scores of instances when the granting of the discharge is only the beginning of litigation as to the effects of such discharge. Many State Court actions are not filed by creditors in good faith but are filed in an effort to harass and coerce the bankrupt into paying debts that have been discharged in the bankruptcy proceeding. As soon as a case is closed by the Bankruptcy Court, certain creditors and collection agencies immediately institute suits in State Courts. The bankrupt does not answer, for he believes the debt has been discharged. In a few days, however, he finds that his wages have been attached by a creditor whose claim was duly scheduled and whose debt was actually discharged in the bankruptcy proceeding. If the bankrupt does appear in the State Court, he is frequently faced with continuances and, even though he ultimately defeats the creditor's attempt to obtain the judgment, he has no assurance that he will not be faced in a few days with another suit by the same creditor attempting to collect the same discharged debt. The debtor cannot afford to lose several days' work in attending numerous hearings. In most instances he cannot afford to pay an attorney to represent him.

In *Local Loan Company v. Hunt*, 292 U.S. 234, the Supreme Court held that the Bankruptcy Court as a Federal Court of equity had jurisdiction to secure and preserve the fruits and advantages of a decree rendered therein. The court went on to say, however, that the Bankruptcy Court was not bound to exercise its authority and that it probably should not do so except under "unusual circumstances." In some jurisdictions it has been held that a bankrupt must exhaust his State Court remedies even up to an appeal to the Supreme Court of the state before seeking relief from the Bankruptcy Court. *Kriskin v. White*, 296 F.2d 132. How many bankrupts after surrendering all their property for the liquidation of their debts (except non-exempt property) are financially able to bear this burden?

The present amendment would insure uniformity throughout the various jurisdictions. It would eliminate the uncertainty that now exists. It would further the purpose of the underlying principle of the Bankruptcy Act. It would avoid the bankrupt's present dilemma of not knowing which of his debts have actually been discharged and how many State Court actions he must face before being insured the benefits granted to him by the Bankruptcy Court.

One of the objections, I understand, that has been made to the pending amendment is that it would increase the work of Referees in holding hearings to determine whether or not particular debts are discharged. To many this objection is wholly irrelevant. If additional work is required on my part, I am perfectly willing to assume the added duties in order to protect the integrity of the court and to assure to bankrupts the rights they are presently being denied. I do not believe, however, there will be any appreciable additional time involved. Once it becomes known that Bankruptcy Courts have the jurisdiction to determine both the right to a discharge and the effects of a discharge, the attempts of creditors to evade the clear provisions of the Bankruptcy Act will cease. Legitimate questions to the dischargeability of certain debts do arise, and it will be these matters that properly come before the court for decision.

Referees in Bankruptcy are qualified to interpret and administer the Bankruptcy Act. They are attorneys who attend seminars, both national and regional, the primary purpose of which is to improve bankruptcy administration. Uniformity in practice and procedure is stressed. Is it not more logical to assume that full justice will be done both to the bankrupt and to creditors when a Referee passes upon their respective rights rather than a State Court which in most instances is reluctant to become involved in bankruptcy matters. In my particular area State Judges have time and time again expressed their preference that all matters pertaining to bankruptcy be decided by the Bankruptcy Court.

I also understand that it has been suggested that the adoption of the amendment would interfere with the "speedy" settlement of bankruptcy estates. This is not correct. The liquidation of the estate and the granting of the discharge and the effects of that discharge are entirely separate matters. The determination of dischargeability of debts would not in any way delay a speedy liquidation and distribution of the bankrupt's assets.

In 1956 Chief Judge Duncan of the Western District of Missouri aptly expressed my view when he stated in *Gore v. Goreman*, 143 F.Supp. 9:

"If a creditor may continue to bring actions in state courts, or otherwise, on a claim which has been discharged in bankruptcy, wherever service may be had upon the bankrupt, well knowing that the claim has been discharged in bankruptcy, thus making it necessary for the bankrupt to employ counsel and incur expenses in defending the action upon a claim, for the payment of which he has been released, the whole purpose for which the bankruptcy act was enacted has been completely lost and destroyed so far as he is concerned."

This is exactly the situation that prevails in bankruptcy administration today. Recently one prominent individual commented that the court was almost committing a fraud on the bankrupt when it took his money, gave him a piece of paper, and told him, in effect, to go into State Court and attempt to convince that court that the discharge was valid against the debt upon which he was being sued.

Almost daily I have calls from attorneys and bankrupts complaining of pending or threatened suits and asking what relief they can obtain from the Bankruptcy Court. My reply under the present Act must be that, unless an ancillary petition is filed to reopen the bankruptcy proceeding, no relief can be forthcoming from the Bankruptcy Court and, even if this procedure is followed and the proceedings are reopened, then only upon a finding that "unusual circumstances" exist can the Bankruptcy Court grant the relief sought.

I will close with one specific example that occurred in my district. The debtor filed a petition in bankruptcy and listed a hospital as one of his creditors. The hospital was duly notified by the Referee's office. The debtor received a discharge. Shortly after the bankruptcy proceeding was closed, a collection agency holding a general power of attorney from the hospital instituted suit against the debtor in a State Court at a place other than his residence. The debtor employed an attorney who pleaded the bankruptcy discharge as a bar. The hospital admitted receiving notice of the bankruptcy proceeding and conceded that its debt had been discharged. Thereupon, the suit was dismissed by the State Judge. Thereafter, however, without notice to the debtor, the hospital filed an appeal. The debtor upon learning indirectly that an appeal had been filed requested relief from the Bankruptcy Court.

At a subsequent hearing in the Bankruptcy Court the hospital (collection agency), although again conceding that its debt had been discharged in the bankruptcy proceeding, insisted that the Bankruptcy Court did not have jurisdiction to entertain the bankrupt's petition as "unusual circumstances" were not present. The hospital (collection agency) also contended that the bankrupt had not exhausted his state remedies. *Briskin v. White*, 296 F.2d 132. The hospital (collection agency) further insisted that it had a right to litigate the dischargeability of its debt up to the highest court in Tennessee and that there was nothing the Bankruptcy Court could do about it. Needless to say, the hospital's (collection agency's) position was rejected and a restraining order issued. The point is, however, that the debtor under the present Act was required to attend three hearings and pay an additional attorney's fee to obtain the relief that he had been granted originally when he received his discharge. Another point to be noted is that my decision in granting the restraining order placed me in conflict with the

holding of the Referee, the District Judge, and the Court of Appeals in the *Briskin* case. Frequently, as in this instance, it is the collection agency rather than the creditor that continues to harass the bankrupt after a discharge has been granted. This particular hospital, however, admitted that even after bankruptcy it never withdrew accounts of bankrupts from the collection agency, that that agency was free to enforce collection if it could do so, even after bankruptcy.

Under the present amendment a speedy and economical determination can be made as to whether or not debts are dischargeable or nondischargeable. Bankrupts will then know exactly where they stand and will receive the protection they are now being denied or which is available only to them after undue confusion, hardship, and expense.

I respectfully urge the adoption of the amendment now pending before the committee.

Mr. BARE. Now, I would like to make one observation. I have been a referee for some 12 years. I have handled approximately 15,000 cases during that time. Ninety-one percent of those cases have been consumer bankruptcy cases. My remarks are directed to the increase in workload in the referee's office.

I do not believe that the workload in the referee's office would be increased in any appreciable amount. I think that once it is known that the bankruptcy court has not only the right to determine the effects of the discharge that these suits that are constantly being filed in State court, as referred to by the chairman, I think those suits will cease to be filed.

Here again, though, if it did increase the workload in the referee's office, I think the Federal court is the proper place for the determination of this issue. The Federal court grants the discharge. I think it is only proper that the Federal courts determine the effects of that discharge.

I will file my statement for the record.

Mr. ROGERS. We have filed the statement for the record.

Mr. BARE. I will be glad to answer any questions of course.

Mr. ROGERS. Mr. Wiggins?

Mr. WIGGINS. Thank you, Mr. Chairman.

I have a few brief questions. I will direct them principally to Mr. Cowans, but certainly the rest of you may answer them.

These questions are intended to develop the record a little bit, recognizing that hopefully it is going to be read by all the Members of Congress, some of them are skilled and others are not truly skilled in this very highly specialized field.

Mr. Cowans, it is true that there are grounds for avoiding the effect of the bankruptcy because the debt is not dischargeable. Would you give us an illustration?

Mr. COWANS. The primary ones, the ones most directly concerned are debts incurred by false pretenses, false representations, by a false financial statement in writing, debt created by the fraud or embezzlement, misappropriation of the bankrupt serving in any kind of a fiduciary capacity or an officer. The support and alimony problems or alimony debt, tax debts to a certain extent, wage obligations within a limited period of time, limited amount of money.

Mr. WIGGINS. What we are saying is that under the present law a creditor believing that he has been parted with his money or property as a result of fraud, raises that issue in a State court; isn't that correct?

Mr. COWANS. Yes; he sues the obligation.

Mr. WIGGINS. And the State court thereupon determines whether or not the obligation incurred as a result of fraud and if it finds that it was the discharge is not effective. The bankruptcy is not effective as to that debt?

Mr. COWANS. Right.

Mr. WIGGINS. And the problem we are getting at is that this creates an unconscionable burden upon a man who has just been deprived of his assets to go into a State court to defend against that claim. If he does not defend against it a default judgment is entered and he loses the effect of that bankruptcy, at least as to that debt.

Mr. COWANS. That is correct.

Mr. WIGGINS. Under either bill, how is that problem solved?

Mr. COWANS. Well, the bills differ to some extent in which is the proper forum. The bills both have in common that all actions may be brought in either State or Federal court. Both courts have jurisdiction. They differ to the extent that 12250 makes the jurisdiction of the bankruptcy court exclusive as to more different elements or types of debts. As far as the fraud case, both of them agree that the fraud case is to be brought in the bankruptcy court. To that extent they are in agreement.

Mr. WIGGINS. Must the creditor, under the bills, in the fraud case, assert this issue at the time of the original bankruptcy proceeding? Specifically, I am concerned about the requirement that a debtor is going to have to go back to any court later on, because if so he is going to feel obliged to hire an attorney that he can ill afford, perhaps, even to appear once again in a bankruptcy court.

Mr. COWANS. The creditor presumably if he wishes to share in the bankruptcy assets must file a claim. If he feels there is no possibility of any assets for distribution he won't file a claim and therefore does not appear in a bankruptcy court at all. Then if he chooses to do anything about the debt, he then goes into the State court and commences the action.

Mr. WIGGINS. That is the problem we are seeking to avoid. Under the bill, what does he do?

Mr. COWANS. Under the bill, the creditor, if he desires to raise the point, goes into the bankruptcy court and asks for a determination of dischargeability and for the relief that he would have sought in the State court.

Mr. WIGGINS. At what time?

Mr. COWANS. He seeks a judgment. There is some variation between the bills. The 12250 provides that this is to be done within a year of the date of the filing of the bankruptcy. The 6665, if my memory serves me correctly, it is not to be done prior to the granting of the discharge. There is a period of 90 days after the granting of the discharge, if memory serves me correctly, during which it must be filed.

Mr. WIGGINS. Now, I suspect that the debtor is put to some financial burden in hiring an attorney to prepare his petition schedules, and so forth, scrape up a filing fee. Do you feel it is going to be a problem that he is going to be put to another financial burden which he can ill afford, that is to hire an attorney to resist the claim of the creditor at a subsequent proceeding, 6 months down the road?

Mr. COWANS. Yes, in some cases. As the law now exists if the matter is brought into the bankruptcy court a number of attorneys will take it. The answer, in general, is that you may well incur additional expense.

Mr. WIGGINS. Do you see any value in requiring the creditor to assert his claim earlier for example, when the bankrupt first comes to court? We require a creditor if he wishes to share in the bankruptcy assets to appear and assert his claim. Would there be any problem or any reason for not requiring the creditor to appear and assert his claim of fraud, for example, at that time when the bankrupt is in court and has an attorney by his side?

Mr. COWANS. I think out of fairness to the creditors there is an objection. Say a firm has 4,000 customers, they may get seven or eight bankrupts a day. To get back to their records in time for the first meeting in a couple of weeks may impose an impossible burden. Particularly in a State line situation. Suppose there is a mail-order house in Chicago and receives a bankrupt in New York.

Mr. JACOBS. Would the gentleman yield to me on that point?

Don't you think that the emergence of computer data or consolidation among national mercantile organizations is rapidly changing that inconvenience?

Mr. COWANS. Yes, sir; it is. To the extent that the computer system gets in order and is working.

Mr. JACOBS. I might just say I had the pleasure of visiting the home office of the carrier of my automobile insurance just a week or two ago. I forget how many hundreds of thousands of policy risks they carry. I was astounded simply to give a little girl my name in the office and literally within split seconds she came back not only with a copy of my policy but pretty near everything that had happened with respect to that policy during the life of the entire policy and the computer was getting data from a distant point.

So I thought I would interject that.

Mr. COWANS. This is true with a large mercantile organization, but we still have some professional people and small businesses who don't have that kind of an arrangement.

Mr. JACOBS. In any case, we are moving in that direction?

Mr. COWANS. Yes, we are.

Mr. WIGGINS. In the drafting of this legislation, did you or the conference consider the practical problem to a bankrupt recognizing that the average bankrupt, according to your statistics is a wage earner situation with a no asset estate, the problem of him defending in any form, in a separate lawsuit, the dischargeability of a particular debt?

Now, I realize the creditor must be protected and they must have a right to assert that. But I would think that it might be possible to devise legislation where it could be handled if not at the same time at least as a part of the original appearances in court.

Have you thought about the problem?

Mr. COWANS. Yes.

If I may be permitted, I believe, Professor Countryman, am I correct, that you have given some thought to that subject?

Mr. COUNTRYMAN. Yes.

Mr. WIGGINS. Fine, I will ask the gentleman those questions.

Now, we have been talking about a problem of a creditor who believes that the fraud taints the obligation. And accordingly if he can prove it the debt is not discharged. He goes into a State court at the present time to prove that. Isn't it so that under most, if not all, of the State jurisdictions a discharge in bankruptcy is an affirmative defense which must be asserted?

Mr. COWANS. Yes.

Mr. WIGGINS. And accordingly is a waiverable defense?

Mr. COWANS. Right.

Mr. WIGGINS. Do you have the problem of creditors simply filing a lawsuit and putting the debtor to the burden of asserting his defense, believing a substantial percentage of the time they won't do so and will be able to get a valid judgment?

Mr. COWANS. Yes.

Mr. WIGGINS. Does the legislation that you are supporting address itself to that problem?

Mr. COWANS. Yes, I think that it does to the extent that not only does it authorize the bankrupt to seek relief in the bankruptcy court, but in certain instances requires that the matter be brought in the bankruptcy court. If it is required and the matter is brought in a State court, there are injunctive relief provisions in the bills which would abate the State court action taken to the bankruptcy court.

Mr. WIGGINS. The injunctive relief right exists now to stop the harassment of a debtor. Do you have any notion of how often it is used?

Mr. COWANS. The seeking of a permanent restraining order? Of course, there is a temporary restraining order, which I think is somewhat related, although not really closely. I allude to restraints under section 11A of the Bankruptcy Act. It is possible to restrain temporarily an action in the State court if it is believed to be a dischargeable debt to allow the bankrupt time to get his discharge to plead it in that State court action. That is used with fair frequency and usually is uncontested. There it is supposed to be a dischargeable.

Now, you are talking about permanent restraint as far as nondischargeable debts.

Mr. WIGGINS. No.

Mr. COWANS. I have no statistics.

Mr. WIGGINS. If you have no statistics—

Mr. COWANS. If you are talking about injunctions against actions on dischargeable debt.

There is no basis on a restraining order—I have it exactly the opposite. Excuse me, I am confused.

If the debt is dischargeable then you have your permanent restraining order. In speaking of restraining actions on nondischargeable debts, I had it just the complete opposite.

Mr. WIGGINS. Is there any value in your mind in attaching that relief as a matter of routine in all cases without requiring it to be raised affirmatively in a particular case?

Mr. BROOKS. Congressman, I am not quite clear. If it is a nondischargeable debt, of course you couldn't have any injunctionable relief because you would waive your right to have your day in court.

Our discharge simply says that a person is discharged from all his debts. And of course any actions in the State court which they have a right to bring then the determination is made at that time whether in fact it was dischargeable. Any injunctive relief at that point would not be proper by the bankruptcy court.

Mr. WIGGINS. The problem that I wish to direct your attention to, really, I think deals with perhaps unscrupulous creditors, that is, people who will file a complaint on a debt that has been discharged and about which there is no argument, but they will file it seeking in 50 percent of the cases to get a default judgment and in the other 50 percent they will abandon their case, expecting to make a few dollars on that ratio. I suspect that happens.

I notice that you are nodding your head, for the record, and maybe it does happen. In that kind of a case, what is to prevent a creditor from filing a lawsuit in a State court?

Mr. COWANS. There have been cases where the fact of harassment is grounds for the Federal decision for a permanent restraining order. That if the creditor persists after he has, say, been defeated once, if he makes a practice of harassing, this is proper grounds for a Federal decision.

Mr. WIGGINS. Do you think there is any value in granting, as a part of the original relief in all cases, restraining orders against the filing of subsequent lawsuits in State courts of the debt that has been discharged?

Mr. COWANS. Do you mean a blanket restraining order?

Mr. WIGGINS. As a routine matter couldn't it be just one of the other orders that you might give in any case?

Mr. COWANS. As long as consistent with it, we provide somebody a day in court at some point to allege, if proper, that it was a debt that could not be discharged.

Mr. WIGGINS. Under the legislation pending before this committee, is there any device for stopping the unscrupulous creditor from filing the lawsuit in a State court and putting the debtor to the burden of asserting his affirmative defense?

Mr. COWANS. Well, when we provide, to the extent that we do that the bankruptcy court is the only place that the thing is to be tried, then we are providing some forum, but I don't know how we can handle the problem at the point of preventing them from filing in the State court where they don't assert there was a bankruptcy.

If it is just a plain suit on a note, there is no way of the statement knowing. If we notify that creditor, the creditor is listed and we notify him, then presumably if we issued some kind of blanket restraining order he would be in contempt and possibly the existence of the contempt sanction would tend to stop it.

I know of no way from preventing a man from filing a suit if he pays a filing fee in a State court.

Mr. WIGGINS. There is no way I know of under the present law. I can suggest a way. I don't think it is a matter for Federal legislation, but certainly the force of your organization, if you believe in the merit of my comments, and that is to require in a contract claim affirmative allegation in complaints that the debt has not been dis-

charged. This is usually a matter of State law and has been done in some cases. I think there is some merit in that idea so that the clerk is put on notice that they can't even accept a complaint.

You see, sir, I don't think that anything we do that requires this fellow, who is broke, to go into any court to prove that he is right, is really going to be effective. We have to find some way to prevent the action from arising. To give him a defense really means giving him the duty of hiring an attorney to assert that defense. And that is not much of an answer to his pressing problem.

Mr. BROOKS. I think a number of cases that we are having filed by creditors on dischargeability because of the false financial statement and fraud will be greatly reduced by the fact that, the very reason you said, that many times you said they go into court of lesser jurisdiction and are successful for various reasons. But I think they know they won't be successful because they know they will be in bankruptcy court and they will have people who understand it.

Mr. WIGGINS. You say that they will be in the bankruptcy court, but what makes you so sure? There is nothing on the face of a debtor complaining that lets the J.P. judge know that there was a previous bankruptcy matter. The fact that a Federal statute says that exclusive jurisdiction is granted in the Federal court does not help the J.P. If this is known to the J.P. judge he will consider it a great success, but in most cases where jurisdiction is lacking, unless it appears on the face of the pleadings, it must be asserted by somebody and that somebody usually is an attorney hired by the defendant to assert that lack of jurisdiction in the State court. Do you really think that the force of the statute is going to persuade creditors not to file in the wrong court even though they know it is wrong?

Mr. COWANS. I would quite agree with you that it would be more desirable if we do get some system of stopping the cases from being brought. I think the bills that we have are a substantial step in the right direction. I have heard suggested that under some of the powers of the administrative agency that some blanket order might be sought against a certain creditor that seemed to make a practice of it. I haven't studied that, but that has been suggested as a possible way that the Department of Labor, possibly under the truth-in-lending bill, may have some power to do this sort of thing.

But, here, again, it might have to be on a business-to-business basis and not covering everyone.

Mr. WIGGINS. I understand that it may be unconstitutional to garnish a man's wages now. That procedural remedy is risen to the stature of being a constitutionally prohibited act. Anyway, have you noticed that the decision recently announced by the U.S. Supreme Court has had any effect on your business?

Mr. COWANS. Not yet.

Mr. WIGGINS. Perhaps it is a little early. Do you anticipate that it will?

Mr. COWANS. Not to the extent that it goes prior to judgment, the attachment garnishment. I think they didn't get to the point of the execution garnishment. When they get to that—

Mr. WIGGINS. Of course, the attachment garnishment is often the thing that drives the guy to filing a petition?

Mr. COWANS. Yes, it is. Or the threat of it. But it seems to me as long as employers have the policy of discharging people, to do away with attachment garnishment would delay the problem but would not wipe it out.

Mr. WIGGINS. I would like to say that I think that the bills, both of them, before this committee are constructive steps, but they are only steps toward a perfect solution, if one is ever attainable. Some way is going to have to be found to prevent these cases from arising in the first place in order to give any real justice to a man who is down and out. And I hope that your conference will consider that problem.

I think that any solution is going to require the cooperation of 50 States and I wouldn't be surprised if they would cooperate.

Mr. COWANS. Would this not appear to be an excellent subject for the commission, under Senate Joint Resolution 88, to work on?

Mr. ROGERS. I have just been handed a letter from the Deputy Attorney General and they point out that they are in favor of Senate Joint Resolution 88 but they say that if this Commission is to be created we recommend that legislative proposals such as H.R. 6665 and H.R. 12250 be deferred until the Commission has had an opportunity to consider the problems to which these bills are directed and to make their recommendation with respect to desirable legislation.

I just wanted you to know that that is what the Deputy Attorney General has just supplied us with.

Mr. JACOBS. I might observe for the record that that Department has been very apt in recommending delays in various matters in the past weeks and months. Also, justice delayed is justice denied. And I believe that the glaring errors don't need to be studied to be corrected.

I commend these witnesses for their enlightened and aggressive and forthright testimony with respect to this matter. I don't think that the very salient, obvious need to streamline or make more convenient and more certain bankruptcy laws in this respect need await a long study.

I have no questions because I think these gentlemen made quite clear that point and have convinced me, in any case, beyond a shadow of a doubt that we have the opportunity to do good immediately.

And I am proud of my old classmate from Indiana University who helped me study nights to get through the examinations and bar examinations, Mr. Brooks, especially for his testimony.

Mr. ROGERS. Mr. Fish?

Mr. FISH. Mr. Chairman, I have no questions. I would like to join in thanking these witnesses and making a very clear case for the need for a complete study of our bankruptcy law.

Mr. ROGERS. Mr. Coughlin?

Mr. COUGHLIN. I have a couple of questions, just to clarify my inadequate knowledge of bankruptcy laws.

First of all, as I understand it at the present time there is sort of joint jurisdiction over the question of dischargeability. This can be decided either by the State courts or by the bankruptcy court.

Mr. COWANS. The cases have said that primarily it should be in the State courts. As I tried to point out, I think this is something for an anachronism looking to the physical situation a number of years ago.

The Supreme Court has stated that the bankruptcy court does have jurisdiction but that it should only be exercised in unusual circumstances without defining the circumstances.

Mr. COUGHLIN. You do now have that jurisdiction?

Mr. COWANS. Yes, within those limits, right.

Mr. COUGHLIN. Is it your feeling then that the bankruptcy court should have the exclusive jurisdiction to decide questions of dischargeability?

Mr. COWANS. Substantially so. There are, as I say, some differences between the two bills which I think can be resolved but this is the general approach that I take, yes.

Mr. COUGHLIN. Let me ask another question: The proposal is not, as I understand it, to change the nature of which debts are dischargeable and which are not dischargeable?

Mr. COWANS. That is correct.

Mr. COUGHLIN. Is the question of dischargeability established by a statute or is that established by a court decision?

Mr. COWANS. Section 17 of the act is a congressional provision of which debts are nondischargeable.

Mr. COUGHLIN. So that from the standpoint of eliminating the problem of the debtor not knowing whether he is actually discharged of his debt this does not resolve that problem completely?

Mr. COWANS. It only works as to the forum and the timing. To some extent we are doing something about the timing to somewhat expedite the determination.

Mr. COUGHLIN. Thank you very much.

Mr. ROGERS. Mr. Zeifman?

Mr. ZEIFMAN. Mr. Cowans, under your bill if we assume that the bankrupt is a defendant in a negligence action and schedules the plaintiff's claim, that would place the burden on the plaintiff, so to speak, to come into the bankruptcy court and have a determination made as to the question of dischargeability. The plaintiff then, as I understand your bill, would be precluded from obtaining a trial on the issue of negligence in the district court or in the State court unless the defendant agreed.

Is my understanding of your bill correct?

Mr. COWANS. The bill envisions that the dischargeability issue be tried first. In the case of a negligence action, this in a sense confines itself to characterizing the conduct of the defendant. It does not contemplate all the rest that goes into an action.

Now, I think if I can state it correctly, under both bills: one you have determination of that dischargeability, the debt to it and the nature of the defendant's action, then there is the option to take the rest of the case back to the State court.

Mr. ZEIFMAN. But under your bill, would the plaintiff have that option?

Mr. COWANS. To the extent that my bill provides on the matter, I think it is in error and I will seek leave to make an amendment to that effect.

Mr. ZEIFMAN. Can you suggest some language that would?

Mr. COWANS. Yes; I can very shortly.

Mr. ROGERS. We would appreciate it if you would.

Mr. ZEIFMAN. In the consideration of the question of the Commission under Senate Joint Resolution 88, is it your view that in addition to studying the question of the technical operations of the bankruptcy laws, the Commission should also direct its attention to the problem of the education of consumers with respect to credit, handling of credit problems and the prevention of situations in which people overextend themselves by taking on too many credit obligations?

Mr. COWANS. Yes; to me bankruptcy is in a sense a result, a symptom. I think the Commission should be concerned with causes. Bankruptcies result when people have gotten themselves into a situation and I think the Congress should be concerned with why. And maybe something can be done to improve the economy in that sense.

Mr. ROGERS. Thank you, gentlemen. We certainly appreciate you coming and giving us the benefit of your thinking.

Mr. ROGERS. We now have Charles Seligson of New York, chairman of the National Bankruptcy Conference and Prof. Vern Countryman of Harvard Law School. Would you two gentlemen come up please?

STATEMENTS OF CHARLES SELIGSON, CHAIRMAN OF THE NATIONAL BANKRUPTCY CONFERENCE, NEW YORK, N.Y.; AND PROF. VERN COUNTRYMAN, VICE CHAIRMAN OF THE NATIONAL BANKRUPTCY CONFERENCE, HARVARD LAW SCHOOL, CAMBRIDGE, MASS.

Mr. SELIGSON. May I say that I have prepared a written statement and the reporter asked me for the statement in advance and I gave it to him.

Mr. ROGERS. We will accept the statement and place it in the record at this point.

(The statement follows:)

STATEMENT BY CHARLES SELIGSON, ESQ., CHAIRMAN OF THE NATIONAL BANKRUPTCY CONFERENCE, NEW YORK

My name is Charles Seligson. I live in New York City. I am a member of the North Carolina and New York Bars and am admitted to practice in the federal district courts in North Carolina, New Jersey, Connecticut and New York, the Courts of Appeals for the Second and Third Circuits and in the United States Supreme Court. I have devoted almost all of my adult life so far to work in the area of Creditors Rights with particular emphasis upon bankruptcy and corporate reorganization and federal jurisdiction and practice and am keenly interested in the just and efficient administration of the Bankruptcy Act.

I am a member of the New York law firm of Seligson & Morris; am fulltime Professor of Law at New York University where I teach Creditors Rights (which includes bankruptcy), Business Reorganizations Under Chapters X and XI of the Bankruptcy Act (Seminar) and Federal Practice; am co-author of 4 volumes of Collier on Bankruptcy and Reorganization, 14th Edition; have contributed articles each year for more than twenty years on the subject of bankruptcy and related topics for the Annual Survey of American Law published by New York University; have lectured and written frequently on bankruptcy topics; am a member of the United States Judicial Conference Advisory Committee on Bankruptcy Rules; and am Chairman of the National Bankruptcy Conference.

I appear here today on behalf of the National Bankruptcy Conference in support of S. J. Res. 88 which was introduced in the Senate in the First Session of the 91st Congress by Senator Burdick and which, I understand, has been adopted by the Senate.

The National Bankruptcy Conference is a non-profit unincorporated organization composed of representatives of different groups which are interested in the improvement of the bankruptcy law and practice thereunder. Although I speak only for the National Bankruptcy Conference, for the information of this Honorable committee, I desire to state that the National Bankruptcy Conference is sponsored by the American Bankers Association, the American Institute of Certified Public Accountants, the Commercial Law League of America, the National Association of Credit Management, the National Conference of Referees in Bankruptcy, the National Commercial Finance Conference, Inc., the Board of Trade of San Francisco, the New York Credit and Financial Management Association and the Section of Corporation, Banking and Business Law of the American Bar Association.

The National Bankruptcy Conference has approximately forty-eight active members and three conferees emeritus. It includes faculty members who teach the subject of bankruptcy at the following universities: Harvard, Chicago, Michigan, New York, California (Boalt Hall, Berkeley), Texas, U.C.L.A., California (Los Angeles), Yale, Case-Western Reserve and Southern California, eleven referees from different parts of the United States and twenty-four practicing lawyers in the field of bankruptcy from Portland, Oregon, to Houston, Texas, and from Boston to Los Angeles, all of whom are specialists in the field and are lawyers of high repute. Until his death, the Honorable Walter Chandler, former member of the House of Representatives, and Congressional sponsor of the sweeping amendments to the Bankruptcy Act which were made in 1938, was a conferee emeritus.

S.J. Res. 88 proposes to create a commission to study the bankruptcy laws of the United States. The resolution provides that "(t)he Commission shall study, analyze, evaluate and recommend changes to the Act * * *, in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities." This "study, analysis, and evaluation shall include a consideration of the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, and all other matters which the Commission shall deem relevant."

The Commission shall submit its report with recommendations "to the President and the Congress within two years after the date of enactment of the joint resolution." When the report is filed "the Commission shall cease to exist."

The resolution provides that the Commission shall be composed of nine members. The President of the United States shall appoint three members, including one designated by him as Chairman, "and two of whom shall be active practitioners in the field of bankruptcy law;". The President of the Senate and the Speaker of the House shall each appoint two members and the Chief Justice of the United States shall appoint the remaining two members, who shall be active full-time referees in bankruptcy.

The Commission will, of course, have power to appoint and fix the compensation of necessary personnel and shall have the authority generally to take needed action which is consistent with the stated objectives of the Commission.

S.J. Res. 88 is substantially the same as S.J. Res. 100 which was introduced in the Senate in the 90th Congress by Senator Burdick and which was approved by the Senate. The only changes which might be regarded as material are in the composition of the Commission. S.J. Res. 88, as did S.J. Res. 100, provides for the appointment of three members by the President of the United States but the former specifies that two shall be active practitioners in the bankruptcy field instead of all three being businessmen knowledgeable in that field. S.J. Res. 88 makes provision for two active full-time referees appointed by the Chief Justice as opposed to two referees appointed by the President under S.J. Res. 100. Under both resolutions there would be two members of the Commission appointed by the President of the Senate and two by the Speaker of the House.

The National Bankruptcy Conference strongly endorses S.J. Res. 88 in its present form and respectfully urges its adoption by the House of Representatives. It believes that the time has come when the basic objectives and philosophy of the existing bankruptcy statute, the manner in which it is functioning and the effectiveness of its administration should be studied and analyzed in the light of present day social and economic needs of society. As Senator Burdick pointed out, at the hearing on S.J. Res. 100 before the special Sub-committee of the Committee on the Judiciary of the United States Senate on July 16, 1968, our

present Bankruptcy Act is based upon the statute which was passed in 1898 and which has been amended eighty-one (81) times, most extensively in 1938. These amendments have been made on a more or less piecemeal basis without the benefit of an in depth study of the philosophy and objectives of the Bankruptcy Act and its relationship to the current and economic problems existing in the United States.

It is encouraging that Congress has now evidenced an interest in the subject of bankruptcy and the administration of the present Act and it is noteworthy that this comes at a time when various studies have been made and are being made into the general structure of our society and the ability of that structure to satisfy the needs to be served. Studies have already resulted in the enactment of the federal truth in lending bill and the proposal for a uniform consumer credit code and a very recent study sponsored by the American Bar Association at the request of the President of the United States brought forth a critical report on the operations of the Federal Trade Commission. Additionally, many studies have been made and hearings have been held in relation to consumer affairs. While these studies have attempted to deal with the day to day problems of the general citizenry, none has focused on the important areas of bankruptcy legislation and its ability to contribute to the solution of social and economic problems.

The proposed joint resolution offers a means of determining the effectiveness of the present bankruptcy law in dealing with these problems and of ascertaining whether the basic philosophy of that law and its objectives are consistent with the general thinking with respect to the role of the government in the solution of those problems. It is time for a fresh look at existing bankruptcy legislation and for a general study of its effectiveness and its administration.

Statistics of all kinds are maintained by the Bankruptcy Division of the Administrative Office of the United States Courts but obviously statistics alone cannot tell a complete nor the human story. There are many new ideas that can be considered after a study of the effectiveness of the present system. For example, simply by way of illustration and without in any wise expressing an opinion as to the desirability thereof, it would be worthwhile, as Referee Herzog of New York suggested at the Senate Sub-Committee hearing on S.J. Res. 100 in July, 1968, to consider the propriety of some sort of federal control of credit sales and lending which went beyond the recent federal truth in lending legislation.

The question as to whether bankrupts should get unqualified discharges or whether under some circumstances discharges should be limited or perhaps the bankrupt placed on probation for a reasonable period of time, is one which merits study. Would it be more economical as well as more efficient to have a unitary administration in ordinary bankruptcy cases as we do in proceedings under Chapter X. In other words, is there any need for the appointment of a receiver to take charge of bankrupt's property and to protect the interests of creditors until the trustee has qualified when a trustee could be appointed immediately by the court and he could continue to function unless at a meeting specially called for that purpose, as in the case of Chapter X, the creditors made an adequate showing that a different trustee should be appointed. This leads into the question as to whether the whole theory of creditor control supposedly embodied in the Act, actually exists or whether it is mythical for practical purposes and should be removed from the Act.

Another question which ought to be considered is the wisdom of the establishment of a separate court of bankruptcy. That raises questions which can only be answered after a careful study of the administration of the present Act, as to whether the jurisdiction now vested in the court, which, of course, includes the referee after a reference, is sufficiently broad to insure a just, efficient and economical administration of the Act. Absent consent of the adverse party, the bankruptcy court cannot adjudicate the rights of parties in summary proceedings unless the court has possession of the property involved in the controversy or as it has done in a few instances, Congress has specifically conferred summary jurisdiction upon the court. As Referee Cowans, now President of the National Conference of Referees in Bankruptcy, indicated at the hearing on July 16, 1968, and as many referees can attest, the lack of summary jurisdiction by the bankruptcy court has tended to make the administration of bankruptcy cases more expensive and has unnecessarily delayed the closing of estates and the distribution of available funds to creditors entitled thereto. In this regard,

it must be noted that a summary proceeding before the bankruptcy court does not involve a denial of due process of law.

The separation of judicial from administrative functions of the bankruptcy court also bears upon the wisdom of creating a separate bankruptcy court. Congress in the truth in lending bill has placed a limitation on garnishment. That raises the question as to whether Congress should consider going further and creating a national exemption statute.

It may be that the business bankrupt should be treated in a separate statute and on a completely different basis from that of the non-business debtor. Is the concept of Chapter XIII appropriate and if so, does it grant adequate relief to the distressed wage earner. The Uniform Commercial Code which has been adopted in every state but one poses serious problems of administration when the borrower becomes bankrupt. Is the policy of the code consistent with the philosophy and objectives of the bankruptcy statute. Developing experience under the code and the Act would seem to indicate that unsecured creditors can expect little or nothing by way of dividends in business bankruptcies and that reorganization of the debtor under the rehabilitation chapters of the Act will in large measure prove to be abortive because of the ease with which existing and future assets of the borrower-debtor can be pledged.

Only a commission which has the power and authority encompassed by S. J. Res. 88 can make the in depth study which is needed in order to determine whether any change should be made in the basic objectives of the existing Bankruptcy Act to insure a just and equitable distribution of the assets of the debtor and to relieve the honest debtor from the weight of oppressive indebtedness. Only such a commission can decide whether these objectives are still appropriate and whether the Act is being administered in conformity therewith in a uniform manner throughout the United States. Only such a commission after study and research could be in position to make a recommendation as to whether the basic approach of the government to the whole problem of creditor-debtor relations should be changed. A commission such as the one proposed is the most sensible agency to explore the situation on a national basis, to accumulate all needed data and to make recommendations on changes, if any, in basic approach or in philosophy or objectives.

It should be noted that S.J. Res. 88 provides for some expertise in the Commission itself. It mandates the appointment of two practitioners active in the field of bankruptcy law and two active full-time bankruptcy referees. The practitioners will provide the Commission with the benefit of their experiences, which I am sure will be extensive and the referees will bring a unique insight into the problems of administration not possessed by judges, teachers or practitioners. The other five members of the Commission would undoubtedly reflect a wide public approach to the problems. Thus, the Commission would be well constituted and would be in a most favored position to make the necessary explorations and studies required for the effective fulfillment of its functions.

Mr. ROGERS. You may proceed in your own manner.

Mr. SELIGSON. This is Prof. Vern Countryman of Harvard Law School, who is the vice chairman of the National Bankruptcy Conference.

Mr. ROGERS. We only had him listed as coming out of Harvard Law School.

Mr. SELIGSON. He does come from "the school" as they say, but more important he is the vice chairman of the National Bankruptcy Conference.

I want to apologize for not having enough copies to distribute. I do have one copy. Would you like to have this? The original copy has been marked. This is one extra copy.

With your permission, I should like to address myself to S.J. Res. 88 and Professor Countryman will address his attention to H.R. 6665.

Mr. ROGERS. What about H.R. 12250?

Mr. SELIGSON. I am sure Professor Countryman would be glad to answer questions in regard to that. In fact, at the conclusion of the statement if you desire to ask me questions in that regard or to any one of them I would be delighted to answer them in any way that I can.

Mr. ROGERS. Proceed in your own manner.

Mr. SELIGSON. I am a member of the North Carolina and New York bars. I have been a lawyer, practicing lawyer, for some 40 years. I have, during all of this period of time, specialized, so to say, in work in Federal courts, particularly in the field of bankruptcy and reorganization.

I am a full professor of law at New York University Law School. I wear a number of hats, I might say. I am a member of a law firm in New York City, the firm of Seligson & Morris. I am a member of the U.S. Supreme Court Advisory Committee on Bankruptcy Rules, which for the last 9 years has been endeavoring to formulate a new code of procedure for bankruptcy practice.

And, as you know, I am chairman of the National Bankruptcy Conference. And I appear here in behalf of the conference in support of the Senate Joint Resolution 88.

I have a rather wide background in the bankruptcy field. I am co-author of Collier on Bankruptcy and Reorganization, 14th edition, and I have contributed articles on the subject to many law reviews and I have lectured throughout the country on the subject.

I have served as a receiver or bankruptcy trustee, and reorganization trustee, in many, many cases. I have been attorney for trustees and receivers, and presently I am involved in probably all the large reorganization cases in the East.

Mr. ROGERS. May I ask you this: Do you feel that there has been such a change in the economic conditions since the Chandler Act was enacted in the 1930's that we ought to go now and rewrite the whole thing?

Mr. SELIGSON. I was going to address myself to that, which is really not covered in any detail in my prepared statement.

Mr. Chairman, I remember as a boy that the streets of Raleigh, where I was born and raised, had cobblestones. And this was in the early 1900's, 1908, 1909, 1910, 1911, and how we gradually changed and we paved the street and we didn't have lights on the business section of the city and eventually as progress came along we got lights to illuminate the streets so people could walk on the streets at night, electric lights rather than gas lights.

I have lived through a number of changes in the economy of this country and have seen technological developments that have taken place throughout the years, but I have not seen corresponding changes in the Bankruptcy Act.

And I would like to recognize, as Mr. Jacobs pointed out, that we are living now in a computerized society. We are about to get into it. And there have been so many, many changes and we must remember, if nothing else, that this statute under which we are now operating is still the act of 1898. It was passed 71 years ago. There have been

piecemeal changes from time to time in an effort to meet a specified need, for example, changes in the preference section; and in 1938 the Chandler Act was adopted. But that Chandler Act was not the result of an indepth study of the entire statute, nor of the approach to the Bankruptcy Act or the basic philosophy of the bankrupt statute.

It was a change that was made, and I might say the National Bankruptcy Conference sponsored the change and worked with Congressman Chandler to bring it about. It was a change that was made because of the distressed conditions that existed earlier in the 1930's and was addressed directly to these economic conditions brought about as a result of the stock market crash of 1929 and following that the severe depression in 1931, 1932, and 1933.

And so we haven't had an indepth study of the bankruptcy statute since it was adopted in 1898. Not only of the statute itself and its operation and its administration, but into the background, the whole background of the bankruptcy statute, as to why we need a bankruptcy statute, as to what it contributes to the economy of the country, as to whether the basic philosophy that was accepted originally and which has continued to persist until this date, is the sort of philosophy that we ought to retain.

One objective, as you were told by Referee Cowans, is to relieve the honest debtor and give him a new start economically in life. And the other objective is to make a fair and equitable distribution of the assets.

Is that all we are to be concerned about? These two objectives?

For example, should we have qualified discharges; should we have a probationary period as Referee Herzog pointed out in hearings on Senate Joint Resolution 100; should we have a probationary period in which we find out whether a debtor should be entitled to a discharge; should we have a separate bankruptcy court; should we separate the judicial from the administrative functions of the bankruptcy court today; should we revise and reconsider the approach to chapter 13, the so-called wage earner chapter?

I have had many referees tell me over the years that as a result of their inability to determine all questions relating to property which ought to come to the custody and control of the bankruptcy court, their inability to determine issues with respect to that property, that administration of estates has been unduly delayed. Trustees have had to go into other courts to determine these questions.

Should we enlarge the jurisdiction of the referees in bankruptcy to give them power to make these determinations?

There are so many possibilities that ought to be explored but over and beyond all is the basic question: Do we have the right approach?

Now, one of the things that distresses me very much these days, frankly, is the impact of the uniform commercial code upon the economy of our country. We have made it easy for people to get security, for lenders to get security and in doing that we find, I have found now in the last few years, that in almost every case that gets into the bankruptcy court all of the assets are pledged to secure the payment of loans, leaving no assets, no free assets whatever, available for distribution to unsecured creditors.

Is that the kind of approach that we ought to permit? Should we permit debtors to pledge all of their assets? What happens to the un-

secured creditor who has extended credit and who has helped to build up inventories and accounts receivable and comes in and finds out that they are all pledged?

Only this last week I was consulted in a matter by a creditor in a matter in New York who said he had a claim against a company in Chicago, Ill. And I happened to know the lawyer in Chicago and I called him on the telephone to find out what the situation was. He said, "Stay out of it. There is nothing in this case." He represented the debtor, \$2,400,000 of liability, \$1,200,000 of debt held by a bank in Chicago and every asset of that company pledged to secure the bank and there are not enough assets to satisfy the bank's claim. That will go down on the records ultimately I am afraid as a no asset case and over a million dollars of unsecured debt will go up in smoke.

The unsecured creditors will collect nothing on their claims. But these are problems that ought to be considered by a commission. I recognize that they are alternative methods. The Attorney General of the United States many, many years ago made an investigation into bankruptcy administration. We have had investigations throughout the country. There have been congressional investigations but limited in scope in this area. But I don't think that the kind of investigation, the kind of study that is needed, the economy study of social conditions that are affected by bankruptcy, that this kind of study should be made by the congressional committee or should be made by the Attorney General.

Mr. ROGERS. Would you think that a consumer member on this Commission may help solve the situation?

Mr. SELIGSON. I think that there ought to be broad representation. And I think you, Mr. Chairman, wanted to know whether the Brookings study might, or rather whether this study might duplicate what was done by the Brookings study. Let me point out to you here that in 1965 an address was delivered by Mr. David T. Stanley of the Brookings Institution in regard to the study and he made this comment. He said:

This study is not a detailed analysis of the legal strength and weaknesses of the bankruptcy act as a basis for possible further amendment. It is not a sociological study of the effects of insolvency upon the fiber of American Society. It is not a procedural or cost analysis of how bankruptcy cases are handled. Nor is it an investigation of the probity with which estates in bankruptcy are administered. It is not an economic study of commercial or consumer credit in relation to other factors in the economy, nor is it a sociological review of the motivation of debtors and creditors although it relates to all of them.

These are the very things that ought to be studied by this Commission. The things that they are not doing, that the Brookings Institution did not do. I think this tells you most effectively the kind of a work, such as a Commission that is contemplated by Senate Joint Resolution 88, will do.

Now, the composition of the Commission, I think that it is good to have some expertise on this committee. And the requirement of the President to appoint two practicing lawyers with experience is a good one. I am sure the President will make a wise selection of lawyers with wide backgrounds and broad experience in this field. I think it is good to have referees, two referees, on the Commission so they can bring that unique experience that they have and that day-to-day

experience that they accumulate over the years. And now you have five members who can represent the public, bringing to bear the broad public viewpoint.

And I think that this Commission as it is now constituted under Senator Bardick's resolution is excellent. I think the scope of inquiry which is to be made by this Commission is splendid.

Mr. WIGGINS. Would you comment on the desirability of an SEC member?

Mr. SELIGSON. I was going to comment on that. As I indicated earlier today, I probably am involved in one way or another in every corporate reorganization case, certainly around the Northeast, every large case. But these are very few in number, as compared to the number of bankruptcy and the problems that we have are infinitesimal. Frankly, I have great respect for the SEC and I think they have a special expertise in the field of corporate reorganization. The judges under chapter X of the Bankruptcy Act use the SEC for the advisory purposes. That is contemplated by chapter X. And I think that is a function that they should serve in in this situation and not be represented on the Commission.

I don't think they have the broad approach that is needed for membership on this Commission.

Mr. ROGERS. They point out in a letter that we have received that the Commission was a party to 92 chapter X proceedings in the district court and 35 States and the District of Columbia.

Mr. SELIGSON. 92 and there are about 200,000 bankruptcies in a year, which would give you an idea of the extent of their interest.

Mr. ROGERS. Is that chapter X proceedings?

Mr. SELIGSON. 92 on chapter X proceedings. As a matter of fact, there are more chapter XI proceedings which are of, I think, even greater importance to more people than chapter X proceedings and the SEC is not involved in these except to determine at the outset whether the case is properly in chapter XI and ought to be in chapter X, in which event they make the appropriate motion under section 328 of the act.

I think apart from what I have said, I have talked about the needs to be served and why I think there ought to be a study at this time. I think it is absolutely essential.

For example, should there be a national exemption statute? We have gone pretty far in this national garnishment statute, which limits garnishment to 25 percent of earnings. Should this Commission study the credit situation to see whether the credit should be extended as freely and easily as it is presently being extended? Is that one of the causes of economic problems that come upon the consumer in the United States today?

There are so many areas of importance that I could spend the next 30 or 40 minutes or longer even talking to you about them. But I don't think it is necessary. I didn't tell you what the National Bankruptcy Conference represents, but I think you are familiar with it. It is a very small group, but it is a very active and dedicated group of men consisting of the members of the faculties of all of the leading law schools of America and referees in bankruptcy and practicing lawyers of high repute.

I should be happy to answer any further questions.

Mr. ROGERS. Let's go to Professor Countryman and then we will ask questions of the two of you.

Mr. COUNTRYMAN. Mr. Chairman, I do have ample copies of my written statement. If I could submit them to the committee, I could abbreviate my testimony somewhat.

Mr. ROGERS. We will place your statement in the record at this point and then you may epitomize or give us the benefit of your thinking in this regard as you wish.

Proceed in your own fashion.

(The statement follows:)

STATEMENT OF VERN COUNTRYMAN, VICE CHAIRMAN, NATIONAL BANKRUPTCY CONFERENCE

My name is Vern Countryman. I am a Professor of Law at the Harvard Law School and Vice-Chairman of the National Bankruptcy Conference. I appear in support of H.R. 6665 which would amend provisions of the Bankruptcy Act dealing with the bankrupt's discharge and which was drafted by the National Bankruptcy Conference.

Since its enactment in 1898 the Bankruptcy Act has provided that the honest bankrupt, who surrenders all of his non-exempt property for liquidation and distribution among his creditors and who makes a full disclosure of his affairs, is entitled to a discharge of his existing debts so that he may have an opportunity to make a fresh start.

But this relief, for many bankrupts, has long proved more illusory than real. This is so because of two features of the present Bankruptcy Act.

(1) Not all debts provable in the bankruptcy proceedings are covered by the bankruptcy discharge. Section 17 of the Act excepts from the operation of the discharge certain claims thought to deserve special treatment, principally certain tax and wage claims, claims based on the bankrupt's fraud or misrepresentation or willful and malicious injuries to person or property, and claims for alimony and support.

(2) The bankruptcy court does not usually determine which claims are covered by the discharge and which are not. The order of discharge which it enters, following a form prescribed by the Supreme Court in Official Form No. 45, merely recites that the bankrupt is "discharged from all debts and claims which are . . . provable against his estate, except such debts as are . . . excepted from the operation of a discharge in bankruptcy." It is then left to the bankrupt, when later sued in another court by a creditor on a claim which was provable in the bankruptcy proceeding, to plead his discharge as a defense and to litigate in that other court the question whether the claim is one of those excepted by § 17 of the Bankruptcy Act from the operation of the discharge.

Because of growing awareness of the abuses to which this system is subject—abuses which I will get to in a moment—there have in recent years been several bills introduced in Congress to change this system. H.R. 6665 and 12250, now before this subcommittee, are the latest of those proposals. Neither of these bills would change the first feature of the system—nor would the earlier bills have done so. There is no proposal before the committee to add to or subtract from the list of debts excepted from the bankruptcy discharge. The proposal before the committee is to change the second feature of the system—that feature under which the bankruptcy court grants a discharge in general terms and leaves the bankrupt to litigate its meaning in later and separate proceedings in another court.

In hearings on H.R. 106 in the 85th Congress, this subcommittee and a corresponding subcommittee of the Senate Judiciary Committee heard testimony from experienced bankruptcy referees and practitioners and from the Bankruptcy Division of the Administrative Office of the United States Courts on the abuses of the present system. This subcommittee heard more such testimony in hearings on H.R. 5643, 89th Congress, and the Senate subcommittee heard more in the hearings on identical S. 578, 90th Congress. I do not intend to repeat that testimony today. It will suffice to say that it reveals the following picture:

In all too many cases a creditor whose claim is *not* excepted from the bankruptcy discharge will initiate a post-bankruptcy suit against the bankrupt. This suit culminates in one of four ways. *First*, through "sewer service" and a false return by the process server, a default judgment is entered against the bankrupt without any inquiry into the dischargeability of the creditor's claim. *Second*, if the bankrupt is actually served he may believe, because he does not understand the present system, that his bankruptcy discharge somehow gives him automatic protection so that he does not appear in the action to plead it as a defense. Again a default judgment is entered against him without any inquiry into the dischargeability of the claim. *Third*, even though the bankrupt may realize the necessity for defending the action, he has just been stripped of all of his property in the bankruptcy proceeding and may be unwilling—or, indeed, unable—to retain a lawyer to represent him. Again a default judgment is entered against him without any inquiry into the dischargeability of the creditor's claim. *Fourth*, even if the bankrupt retains a lawyer and appears in the action, many of these cases are brought before justices of the peace who are not lawyers or before judges completely unfamiliar with the body of case law interpreting § 17 of the Bankruptcy Act, with the consequence that the creditor may still get judgment on a claim which should have been barred by the bankruptcy discharge.

There is, of course, no statistical evidence of the extent of this abuse. But the testimony of experienced referees and lawyers in previous hearings has been that it is very widespread. The result is that many bankrupts are being deprived of the relief for which they have qualified under the Bankruptcy Act and that the Congressional policy of rehabilitation for honest bankrupts has been thwarted.

True, there is in some instances a possibility of vindicating that policy in the bankruptcy court. In *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), the Supreme Court held that a bankruptcy court has jurisdiction under the present Act to preserve and protect the effect of its own discharge order by enjoining a creditor from suing in a state court on a claim which the bankruptcy court finds to be covered by the bankruptcy discharge. But, in view of the present scheme of the Act, it was held that the bankruptcy court should not exercise that jurisdiction save "under unusual circumstances." While a few bankruptcy courts in some areas where the abuse is very great have developed a rather tolerant view of the "unusual circumstances" limitation, the possibility of injunctive relief in most bankruptcy courts is very small.

But even if there were no abuse, or even if the bankruptcy courts were subject to no limitations on the granting of injunctive relief, the system has little to commend it. The honest debtor who has complied with the requirements of the Act and gone through a bankruptcy proceeding should know where he stands at the end of the proceeding. He should not be sent forth with a piece of paper whose efficacy has to be litigated anew in a separate lawsuit or a reopened bankruptcy case at the whim of as many of the pre-bankruptcy creditors as choose to bring post-bankruptcy suits against him.

Hence, the main purpose of H.R. 6665 as it bears on this problem is (1) to give the bankruptcy courts the jurisdiction in every case to determine which claims are dischargeable and which are not, and (2) to provide a simplified procedure for invoking that jurisdiction and obtaining that determination.

One question which immediately arises in any such endeavor is whether the jurisdiction should be confined exclusively to the bankruptcy courts or whether it should be shared with the state courts.

In answering this question, the National Bankruptcy Conference proposes a different treatment for those instances where the abuse is greatest—which happen to be also those instances involving the most highly technical provisions of § 17 which except some claims from the operation of the bankruptcy discharge. Both the experience of referees and practitioners and the reported cases reveal that in most instances of abuse the creditor is asserting that his claim is excepted from the discharge because it is (first) a liability for obtaining money or property by false pretenses or false representations, or (second) a liability for obtaining money or property on credit through use of a false financial statement, or (third) a liability for willful and malicious conversion of property.

All three of these exceptions—and more—are contained in present § 17a(2) of the Bankruptcy Act, which excepts from the discharge:

liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation

Solely for purposes of convenience in dealing with the three exceptions with which we are concerned. H.R. 6665 would, in lines 3 to 10 on page 3 of the bill, restrict § 17a(2) to liabilities for false pretenses or false representations, liabilities incurred by the use of false financial statements, and liabilities for willful and malicious conversion. The remainder of present § 17a(2)—liabilities for other willful and malicious injuries, for alimony and support, and for the "morals counts"—are moved, absolutely unchanged, to a new § 17a(7) on lines 15 through 22 on page 3 of the bill.

The exceptions left in § 17a(2) are, as I have said, the ones most commonly invoked in instances of abuse and the ones whose meaning is most highly technical. Few of the justices of the peace who now rule on dischargeability are well equipped, for instance, to distinguish between that conversion of property which is willful and malicious because done in a "willful disregard of what one knows to be his duty. . . . against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally," and other conversions which are not willful and malicious. Yet that is the distinction required by the Supreme Court's interpretation of § 17a(2) in *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916). Few of those justices of the peace are probably even aware that a surety's obligation on a bond obtained by a false financial statement is "property" obtained on "credit" although the surety was paid in advance.

[*Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66 (1933)], but that an attorney's unpaid fee similarly obtained is not with § 17a(2) because an attorney's services are not "property" [*Gleason v. Thaw*, 236 U.S. 588 (1915)]. And certainly those justices of the peace are not well equipped to deal with the intricacies of the law of false pretenses or to analyze financial statements.

For the three excepted classes of claims left in § 17a(2), H.R. 6665, in a new § 17c(2), beginning at line 24 of page 4 of the bill, provides that the proceeding to determine dischargeability must be commenced within 90 days after the discharge order becomes final and, unless the court of bankruptcy otherwise orders, must be commenced and maintained in that court. Since it also provides that a debt shall not be excepted from discharge unless the court so holds in a proceeding brought pursuant to § 17c(2), it would put the burden on the creditor to come forward promptly with any claim which he considers to be excepted from the discharge under § 17a(2) and hence would enable the debtor to know where he stands with respect to the most commonly invoked exceptions soon after his discharge order becomes final.

(Since H.R. 6665 was introduced, it has been pointed out to us that, with the 90-day period in new § 17c(2) running from the time the discharge becomes final, it may be difficult for the parties to keep themselves advised of when it becomes final, since there may be a petition to review the discharge order by the district judge, an appeal to a Court of Appeals and the possibility of review by the Supreme Court on certiorari. We consider this point well taken, and would meet it by adding a sentence at the end of § 14b of the Act reading "After the order of discharge becomes final, notice of that fact should be given to all parties in interest as provided in section 58b of this Act." We would then delete, in lines 1 and 2 on page 6 of the bill, the words "order granting the bankrupt's discharge has become final" and substitute "date of mailing of notice that the order of discharge has become final as provided in Section 14b of this Act.")

Unlike H.R. 12250, which would give the bankruptcy court exclusive jurisdiction to determine the dischargeability of all debts save those for taxes, H.R. 6665 would disturb traditional allocation of judicial business between state and federal courts only in the area of greatest abuse.¹³ With respect to all other claims excepted from the bankruptcy discharge, H.R. 6665 would not necessarily change the existing practice in any particular case. Under the procedure prescribed in new § 17c(1), beginning at line 24 on page 4 of the bill, the bankrupt

or any other party in interest may apply to the bankruptcy court for a determination by that court of the dischargeability of a particular debt. This application may be made even though an action is pending on the debt in another court and the bankruptcy court may enjoin the action until it makes its determination on dischargeability.¹⁴ (On this point, it has occurred to us that perhaps H.R. 6665 should be amended by inserting at the beginning of line 4 on page 5 the words "a party to"—thus making it clear that we do not intend to authorize the bankruptcy court to enjoin another court.) If the bankruptcy court determines the debt to be dischargeable, it may make such orders as are necessary to protect or effectuate the determination.

If the bankruptcy court determines the debt to be nondischargeable it may—for the purpose of disposing of the matter in a single proceeding—determine the remaining issues, render judgment on the claim, and make all orders necessary for the enforcement of the judgment. This last provision is intended to make clear that the court's judgment may be enforced as federal court judgments usually are enforced, by writ of execution and proceedings in aid thereof pursuant to Federal Rule of Civil Procedure 69a. Both FRCP 81(a)(1) and General Order 37 in bankruptcy make the Federal Rules applicable in bankruptcy . . . "insofar as they are not inconsistent with the Act or these general orders." But this power to render judgment is subject to two limitations: (1) It may not be exercised upon a timely objection by either debtor or creditor if the claimed exception was under § 17a(2). Since the determination of dischargeability on such claims is required by new § 17c(2) to be made by the bankruptcy court, H.R. 6665 would leave both parties an option as to whether the bankruptcy court should proceed to render judgment after it has found the claim nondischargeable. In further implementation of this policy, the last sentence of new § 17c(2), beginning at line 6 on page 6 of the bill, provides that a creditor who brings a proceeding under § 17c(2) does not thereby submit to the jurisdiction of the bankruptcy court for any other purpose and may object to the court proceeding further after it has held his debt not to be discharged. (2) The bankruptcy court may not proceed to enter judgment after finding a claim nondischargeable in any other case if timely objection to its doing so is made by the party who did not ask for the determination of dischargeability.

The net result is that the only party who cannot object to the bankruptcy court rendering judgment after finding a claim nondischargeable is a party who, of his own free choice, asked for the determination on dischargeability in the first place.

This feature of the bill is consistent with the decision of the Supreme Court in *Katchen v. Landy*, 382 U.S. 323 (1966), holding that where a creditor files a proof of claim and the trustee counterclaims for a preferential payment received by the creditor, the referee in bankruptcy may enter a judgment against the creditor for the amount of the preference.

I have some difficulty understanding H.R. 12250 on this point. It would provide in § 17b(2) that a creditor who brings a proceeding to determine dischargeability does not thereby submit to the jurisdiction of the bankruptcy court for any other purpose, but in § 17c(1) authorizes the bankruptcy court, if it finds the debt nondischargeable, to proceed to enter judgment unless objection is filed by a party not invoking jurisdiction to determine dischargeability. Either these provisions contradict themselves when it was the creditor who invoked jurisdiction, or a creditor may prevent judgment in any case, whether or not he invoked jurisdiction. If the two provisions contradict themselves, § 17c(1) of H.R. 12250 seems to say that even an unsecured creditor who is forced by § 17b(1) to seek a dischargeability determination under § 17a(3) within two years or have his claim discharged cannot object to the bankruptcy court entering judgment, although the bankrupt may do so.

Finally, new § 17c(1) of H.R. 6665 provides that the bankruptcy court on its own initiative may elect not to render judgment after determining the debt to be nondischargeable, leaving the remaining issues to be determined in an action commenced or continued in another court.

In hearings on earlier bills, some concern was expressed about depriving the debtor or the creditor of his right to jury trial. That right is preserved by the last sentence of new § 17c(1), beginning at line 20 on page 5 of the bill, which provides that "Nothing herein shall be deemed to affect the right of any party,

upon timely demand, to a trial by jury where such right exists." What this would mean is that, if either debtor or creditor claimed a jury trial, and demonstrated that he was entitled to it by state or federal constitution or statute, one of two results would follow. Either the bankruptcy court would decline to hear the matter, leaving it to another court, state or federal, in which the objecting party would receive his jury trial, or the matter would be heard before the bankruptcy court, with a jury. This would doubtless mean that it would be heard before the federal district judge, rather than the referee. The Bankruptcy Act is not clear on the power of referees to preside over jury trials. The only jury trials now provided for by the Act itself are, under §19, on questions of insolvency and the commission of an act of bankruptcy arising on the filing of an involuntary petition. The Judicial Conference of the United States in 1960 adopted a resolution that "it is the sense of the Judicial Conference that referees in bankruptcy should not preside upon jury trials of involuntary petitions in bankruptcy" and the referees have been conforming to that resolution.

Since new §17c(1) prescribes the procedure to be followed in determining dischargeability regardless of the exception asserted by the creditor—including the §17a(2) exceptions—this provision in new §17c(1) would save a party's right to jury trial in all cases.

In order to avoid forcing the parties to seek a ruling on dischargeability which may never be needed with respect to the exceptions from dischargeability less commonly invoked, H.R. 6665 puts no time limit on applications for rulings on dischargeability save for the §17a(2) exceptions. This means that, when the need therefore does arise, an application for a ruling may be made after the bankruptcy proceeding has closed. If an additional \$50 filing fee were required to reopen the case, the parties would still be under some pressure to seek rulings before closing of the proceeding although those rulings might never be needed. Hence, new §17c(3), beginning at line 12 on page 6 of H.R. 6665 provides that if a case is reopened for the purpose of seeking a dischargeability ruling, no additional filing fee shall be required.

H.R. 12250, by putting a one year limit on all but one class of excepted claims, and by providing that if no application is filed within the required time the debt is discharged, will force creditors to seek determinations which may never be needed. Indeed, it will force them in some cases to seek determinations before it has been decided whether the debtor will get a discharge, since the one-year period runs from the filing of the petition.

With respect to debts excepted from the discharge by §17a(3) because not scheduled by the bankrupt, H.R. 12250 fixes a two-year limit. This seems an open invitation to the bankrupt to engage in gamesmanship by omitting creditors who might object to a discharge, or stimulate searches for property concealed or fraudulently conveyed, or prod the FBI to investigate him, in the hope that such creditors will not learn of the proceeding in time to seek a determination of dischargeability.

With respect to one class of excepted debts, those for support of spouses or children (though not those for alimony), H.R. 12250 would reverse the effect of failure to apply for a determination of dischargeability within one year, and would provide that such debts will not be discharged. I am not sure what the effect of this provision would be. In the past, creditors who have supplied necessities to wives and children of the bankrupt—creditors whose identity may be unknown to the bankrupt—have sought to bring their claims within this exception to the support order. By the weight of authority they are not covered by it. Does H.R. 12250 mean that if the debtor does not within the one-year period seek a determination of the nondischargeability of such a claim of which he is unaware the claim is not discharged?

There are in H.R. 6665 two implementing amendments which complete its treatment of the dischargeability issue. By a provision beginning at line 6 on page 1 of the bill it would amend §2a(12) of the Act to add to the bankruptcy court's jurisdiction to grant or deny and revoke discharges the further jurisdiction to "determine the dischargeability of debts and render judgment thereon." Another provision beginning at line 15 on page 6 of the bill would make a corresponding amendment to §38 of the Act, which separately defines the jurisdiction of referees.

Before leaving §17, I should note that H.R. 6665 would make one further

amendment in § 17a. As I said earlier, the bill neither adds to nor subtracts from the claims excepted for discharge, but it does amend one of those exceptions. When added § 17a in 1922, § 17a(5) excepted from the discharge liabilities:

for wages due to workmen, clerks, traveling or city salesmen or servants, which have been earned within three months before the date of commencement of the proceeding in bankruptcy.

In that form, it corresponded exactly to wage claims given priority by § 64 save that the priority was limited to "not to exceed three hundred dollars to each claimant." The Chandler Act of 1938 cast § 17a(5) in its present form. The Chandler Act also revised the wage priority in § 64a(2) to correspond exactly, save that it was limited to "not to exceed \$600 to each claimant." In 1956 § 64a(2) was amended to include traveling or city salesman:

whether or not they are independent contractors selling the products or services of the bankrupt on a commission basis, with or without a drawing account or formal contract.

Apparently by oversight, no corresponding amendment was made to § 17a(5). To correct this oversight and to provide against similar oversights in the future, H.R. 6665, at line 10 on page 3 of the bill, would amend § 17a(5) to except from the bankruptcy discharge liabilities:

for wages and commissions to the extent that they are entitled to priority under subdivision a of section 64 of this Act.

While this amendment would also incorporate the present limitation of \$600 to each claimant now contained in § 64a(2), this limitation would probably not prove significant in very many cases. Moreover, to the extent that this represents a change it conforms to the 1966 amendment of § 64a(4) and § 17a(1) under which all tax claims not entitled to priority are covered by the bankruptcy discharge.

[I note, in this connection, a technical error in H.R. 6665. Section 3 of the bill, at line 24 on page 2, purports to amend only § 17a(2), whereas it also amends § 17a(5) and adds § 17a(7).]

H.R. 6665 would also deal with two other matters not dealt with by H.R. 12250.

First, it would add a new § 17b, at line 1 of page 4 of the bill, to clarify the operation of denial of a discharge or failure to get a discharge, under the doctrine of *res judicata*, as a bar to the discharge, in a subsequent bankruptcy proceeding, of debts scheduled in the earlier proceeding where no discharge was obtained. New § 17b would provide that failure to obtain a discharge would not bar discharge of such debts in a subsequent proceeding if:

(1) Discharge was denied in the prior proceeding solely under § 14c(5) because the bankrupt had obtained a discharge in a still earlier bankruptcy proceeding initiated within six years of the proceeding in which discharge was denied. This is the view of most of the courts which have passed on the question, *Prudential Loan & Finance Co. v. Roberts*, 52 F. 2d 918 (5th Cir. 1931); *In re Masterson*, 240 F. Supp. 543 (N.D. Calif. 1963); *Matter of Newman*, 48 Am. B.R. (N.S.) 781 (N.D. Ohio, 1942); *Matter of Dierck*, 37 Am. B.R. (N.S.) 198 (S.D. N.Y. 1938), and the view indorsed by Collier on Bankruptcy (14th Ed.) ¶ 14.53. *Chopnick v. Tokatyan*, 128 F. 2d 521 (2d Cir. 1942), *cert. denied*, 317 U.S. 667 (1942), *In re Turner's Estate*, 268 F. Supp. 918 (D. Ore. 1967), and *In re McCausland*, 9 F. Supp. 129 (S.D. Calif. 1934), appeal dismissed 79 F. 2d 1001 (9th Cir. 1935), are to the contrary, but in the *Chopnick* case there was evidence that the debtor was filing repeated petitions solely to harass his creditors.

(2) Discharge was denied in the prior proceeding solely under § 14c(8), because the debtor failed to pay in full the \$50 in filing fees required by the Act. To allow a denial for this reason to bar later discharge of the scheduled debts if the bankrupt does later succeed in raising the \$50 fee seems too harsh a consequence to attach to the first denial, which does not represent an adjudication that the debtor was not entitled to a discharge.

(3) The prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs. This proposed amendment is believed to be merely clarifying, and to state what would otherwise be the law with respect to a dismissal without prejudice. This is the effect of a dismissal without prejudice under Federal Rule of Civil Procedure 41b, which is believed to be applicable here since not inconsistent with any provision of the Act or General Orders in bankruptcy. See *Perlman v. 322 West Seventy-Second Street*; *Col-*

well v. Epstein, 142 F. 2d 138 (1st Cir. 1944); *In re McDonald*, 61 F. Supp. 133 (D. Mass 1945).

(4) Discharge was not obtained because the debtor filed a written waiver of discharge to which he was entitled under § 660 of the Act, or the court failed to order a discharge under that section. This is a special problem under Chapter XIII of the Act dealing with wage earner's plans. Section 660 of that chapter provides that, where the debtor has completed all payments under the plan, the court "shall" enter a discharge. If the plan was an extension plan, under which the debtor paid 100% of his debts, the value to him of this mandatory discharge is not apparent. If the plan was a composition, under which the debtor paid a percentage of his debts, the mandatory discharge will cover the unpaid balances of debts covered by the plan but will not affect new debts incurred while the debtor was performing under the plan. And the granting of the discharge will, under § 14c(5), bar the debtor from obtaining another discharge in any subsequent proceeding initiated within six years of the Chapter X proceeding. Hence, the debtor may be well advised to waive his mandatory § 660 discharge. Obviously, such a waiver should not be treated as an adjudication that the debtor was not entitled to that discharge, nor should the failure of the court to order the discharge as a consequence of the waiver.

New § 17b would go on to provide that, save for the four exceptions described above, denial of or failure to obtain a discharge in a bankruptcy proceeding for any other reason will bar discharge in any subsequent proceeding of the debts provable in the prior proceeding, thus removing uncertainty as to debts which are barred from later dischargeability as well as to those which are not.

Finally, the last sentence of new § 17b, at line 20 on page 4 of the bill, deals with a related but somewhat different matter. Even though a discharge was granted in the prior proceeding, it will not under § 17a(3) discharge a debt not scheduled in time for proof and allowance unless the creditor had notice or knowledge of such a proceeding. The last sentence of new § 17b provides that if, in a subsequent proceeding, the claim not scheduled in the prior proceeding is properly scheduled, it may be discharged by a discharge granted in the subsequent proceeding. Obviously, the doctrine of *res judicata* does not operate here since the court, in granting the discharge in the prior proceeding, decided nothing about the unscheduled claim. The amendment would codify the rule of the few cases which have ruled upon the point. *In re Berkowitz*, 51 F. Supp. 80 (S.D. N.Y. 1942); *In re Baker*, 275 Fed. 511 (S.D. N.Y. 1920); *Matter of Dierck*, 37 Am. B.R. (N.S.) 781 (N.D. Ohio 1942). See also *In re Lyons*, 287 Fed. 602 (E.D. N.Y. 1922).

The final matter dealt with by H.R. 6665 is the revocation of discharges under § 15 (at line 5 on page 2 of the bill). Section 15 now provides for revocation of a discharge, upon application of any party not guilty of laches filed within one year after the discharge was granted, on proof that the discharge was obtained through fraud of the bankrupt and that the actual facts did not warrant the discharge. That ground for revocation is preserved in amended § 15, but two additional grounds are added, with the same one-year limitation and the same requirement that the party seeking revocation not be guilty of laches:

(1) That the bankrupt, before or after discharge, received or became entitled to receive property which will become a part of the estate and knowingly and fraudulently failed to report or deliver the property to the trustee. This amendment would fill a gap in the Act. Under § 14c(4) a discharge may be denied to a bankrupt who has, within one year preceding bankruptcy, concealed property from his creditors. But § 14c—stating the grounds for denial of discharge—takes no account of 1938 amendments to § 70a(5) under which the bankruptcy trustee becomes entitled to (1) future interests in property which were nonassignable by the bankrupt prior to bankruptcy but which became assignable within six months thereafter, (2) all property which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance, and (3) all property in which the bankrupt has an interest by the entirety and which within six months of bankruptcy becomes transferable solely by the bankrupt. Since the events which entitle the trustee to this property may occur before or after the discharge is granted, the simplest way to fill this gap seems to be to provide for revocation of the discharge where the bankrupt conceals such property.

(2) That the bankrupt, during the bankruptcy proceeding, refused to obey any lawful order of, or answer any material question of the court. This is now a ground for denial of discharge under § 14c(6) of the Act but, once a discharge

is granted, that sanction no longer attends subsequent refusals to obey lawful orders or to answer material questions of the court. For that reason, some referees delay ruling on a discharge until just before the case is closed in order to save the force of this sanction, thus perpetuating a period of uncertainty for both the debtor and his creditors. The amendment would preserve the sanction but remove the occasion for delay.

Mr. Chairman, we do not believe that H.R. 6665 is either a "debtor's bill" or a "creditors' bill," but that it is a well balanced bill, in the interests of both. New § 17c would protect the debtor from many existing abuses which rob him of the protection of his bankruptcy discharge and would remove much of the uncertainty as to the effect of the discharge which now attends it. At the same time it would expedite the final disposition of many claims asserted to be non-dischargeable, while preserving the free choice of both debtor and creditor to have the ruling on the merits—as distinguished from the dischargeability—of the underlying claim in the court of their choice. It would also, in all cases, preserve the right of any party to a jury trial.

New § 17b would clarify the effect of a denial of discharge or other failure to obtain a discharge in a subsequent bankruptcy proceeding—a clarification which is in the interest of both debtor and creditor.

Finally, just as new § 17c recognizes that there are some overreaching creditors against whom honest debtors need protection, new § 15 recognizes that not all debtors are honest, and extends the protection which present § 15 gives to creditors against those debtors who are not.

Mr. COUNTRYMAN. As Professor Seligson said I appear on behalf of the National Bankruptcy Conference in support of H.R. 6665, which would amend provisions of the bankruptcy act dealing with the bankrupt's discharge.

Since its enactment in 1898, the Bankruptcy Act has provided that the honest bankrupt, who surrenders all of his nonexempt property for liquidation and distribution among his creditors and who makes a full disclosure of his affairs, is entitled to a discharge of his existing debts. At least he is entitled to one no oftener than every 6 years as the act now reads.

But this relief, for many bankrupts, has long proved more illusory than real. This is so because of two features of the present Bankruptcy Act.

One feature is that not all debts provable in the bankruptcy are covered by the bankruptcy discharge. Section 17, as you have already been told, lists a number of types of debt which are excepted from the discharge, principally certain tax and wage claims, claims based on the bankrupt's fraud or misrepresentation or willful and malicious injuries to person or property, and claims for alimony and support.

The second feature which helps to create the problem is that the bankruptcy court does not usually determine which claims are covered by the discharge and which are not. The order of discharge which it enters, following a form prescribed by the Supreme Court, merely recites that the bankrupt is "discharged from all debts and claims which are * * * provable against his estate, except such debts as are * * * excepted from the operation of a discharge in bankruptcy."

In other words, all it really says is you are discharged of all debts except those debts which you are not discharged of. And that is the piece of paper the bankruptcy gets. It is then left to the bankrupt, when later sued in another court by a creditor on a claim which was provable in the bankruptcy proceeding, to plead his discharge as a defense and to litigate in that other court the question whether the claim is one of those excepted by section 17 of the Bankruptcy Act from the operation of the discharge.

Because of the growing awareness of the abuses to which this system is subject—abuses which I will get to in a moment—there have in recent years been several bills introduced in Congress to change this system. H.R. 6665 and 12250, now before this subcommittee, are the latest of those proposals. Neither of these bills would change the first feature of the system—nor would the earlier bills have done so. There is no proposal before the committee to add to or subtract from the list of debts excepted from the bankruptcy discharge. The proposal before the committee is to change the second feature of the system—that feature under which the bankruptcy court grants a discharge in general terms and leaves the bankrupt to litigate its meaning in later and separate proceedings in another court.

In hearings on H.R. 106 in the 85th Congress, this subcommittee and a corresponding subcommittee of the Senate Judiciary Committee heard testimony from experienced bankruptcy referees and practitioners and from the Bankruptcy Division of the Administrative Office of the U.S. Courts on the abuses of the present system. This subcommittee heard more such testimony in hearings on H.R. 5643, in the 89th Congress, and the Senate subcommittee heard more in the hearings on identical S. 578 in the 90th Congress. I do not intend to repeat that testimony today. It will suffice to say that it reveals the following picture:

In all too many cases a creditor whose claim is not excepted from the bankruptcy discharge will initiate a post-bankruptcy suit against the bankrupt. This suit culminates in one of four ways. First, through “sewer service” and a false return by the process server, a default judgment is entered against the bankrupt without any inquiry into the dischargeability of the creditor’s claim. Second, if the bankrupt is actually served in the suit, he may believe, because he does not understand our bankrupt system, that his bankruptcy discharge somehow gives him automatic protection so that he does not appear in the action to plead it as a defense. Again a default judgment is entered against him without any inquiry into the dischargeability of the claim. Third, even though the bankrupt may realize the necessity for defending the action, he has just been stripped of all of his property in the bankruptcy proceeding and may be unwilling—or, indeed, unable—to retain a lawyer to represent him. Again, a default judgment is entered against him without any inquiry into the dischargeability of the creditor’s claim. Fourth, even if the bankrupt retains a lawyer and appears in the action, many of these cases are brought before justices of the peace who are not lawyers or before judges completely unfamiliar with the body of the case law interpreting section 17 of the Bankruptcy Act, with the consequence that the creditor may still get judgment on a claim which should have been barred by the bankruptcy discharge.

There is, of course, no statistical evidence of the extent of this abuse. I don’t know how such statistics could be compiled. But the testimony of experienced referees and lawyers in previous hearings has been that it is very widespread. I might say, parenthetically, that I have been working on the Brookings Institution study and when that study is released it will corroborate what I just said. This is a substantial abuse.

The result is that many bankrupts are being deprived of the relief for which they have qualified under the Bankruptcy Act and the congressional policy of rehabilitation for honest bankrupts has been thwarted.

True, there is in some instances, as earlier witnesses have said, a possibility of vindicating that policy in the bankruptcy court. In *Local Loan Co. versus Hunt* in 1934, the Supreme Court held that a bankruptcy court has jurisdiction under the present act to preserve and protect the effect of its own discharge order by enjoining a creditor from suing in a State court on a claim which the bankruptcy court finds to be covered by the bankruptcy discharge. But in view of the present scheme of the act, it was held that the bankruptcy court should not exercise that jurisdiction save "under unusual circumstances." Now, I believe about two of our 10 Federal circuits, where the abuses are apparently very great, bankruptcy referees and district judges have taken a rather tolerant view of the "unusual circumstances" limitation. But in other circuits the possibility of injunctive relief is very small.

But even if there were no abuse, or even if the bankruptcy courts were subject to no limitations on the granting of injunctive relief, the present system, it seems to me, has very little to commend it. The honest debtor who has complied with the requirements of the act and gone through a bankruptcy proceeding should know where he stands at the end of the proceeding. He should not be sent forth with a piece of paper whose efficacy has to be litigated anew in a separate lawsuit or a reopened bankruptcy case at the whim of as many of the prebankruptcy creditors as choose to bring postbankruptcy suits against him.

Hence the main purpose of H.R. 6665 as it bears on this problem is, one, to give the bankruptcy courts the jurisdiction in every case to determine which claims are dischargeable and which are not, and, two, to provide a simplified procedure for invoking that jurisdiction and obtaining that determination.

One question which immediately arises in any such endeavor is whether the jurisdiction should be confined exclusively to the bankruptcy courts or whether it should be shared with the State courts.

In answering this question, the National Bankruptcy Conference proposes a different treatment for those instances where the abuse is greatest—which happen to be also those instances involving the most highly technical provisions of section 17 which except some claims from the operation of the bankruptcy discharge. Both the experience of referees and practitioners and the reported cases reveal that in most instances of abuse the creditor is asserting that his claim is excepted from the discharge for one of three reasons: First, a liability for obtaining money or property by false pretenses or false representations, or, second, a liability for obtaining money or property on credit through use of a false financial statement, or, third, a liability for willful and malicious conversion of property. And there have been a number of bankruptcy court decisions under *Local Loan against Hunt* which have found that loan companies deliberately set about to get a false financial statement from a debtor so that they will be able to escape any bankruptcy that he may get.

The third exception is usually asserted by a creditor who has security and contends that the willful and malicious injury of property consisted of the debtor converting the collateral. There are some States in this country where merchants sell to workmen shirts and work pants on conditional sale contracts, not because they are acquiring any security but because a justice of the peace can be persuaded that he willfully converted the pants when he wore them out and give a judgment for the price.

All three of these exceptions—and more—are contained in the present section 17a(2) of the Bankruptcy Act. It covers liabilities for obtaining money or property by false pretenses or false representations, for obtaining credit on a false financial statement, for all sorts of willful and malicious injuries. In addition it covers alimony and claims for maintenance and support of a wife or child, or for seduction of an unmarried female, or a claim for breach of promise of marriage accompanied by seduction, or a claim for criminal conversation. That is just one subsection of section 17a.

Solely for purposes of convenience in dealing with the three exceptions with which we are concerned, because they represent most of the abuse, H.R. 6665 would, in lines 3 to 10 on page 3 of the bill, restrict section 17a(2) to liabilities for false pretenses or false representations, liabilities incurred by the use of false financial statements, and liabilities for willful and malicious conversion. The remainder of present section 17a(2)—liabilities for other willful and malicious injuries, for alimony and support, and for the "morals counts" as I have chosen to call them—are moved, absolutely unchanged, to a new section 17a(7) on lines 15 through 22 on page 3 of the bill.

Few of the justices of the peace who now rule on dischargeability are well equipped, for instance, to distinguish between that conversion of property which is willful and malicious because done in, quoting from the Supreme Court, "willful disregard of what one knows to be his duty . . . against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally." That is the willful and malicious injury, and all other conversions left out of that description are not. Yet that is the distinction required by the Supreme Court's interpretation of section 17a(2) in *McIntyre v. Kavanaugh*. Few of those justices of the peace are probably even aware that a surety's obligation on a bond obtained by a false financial statement is "property" obtained on "credit" although the surety was paid in advance. Because, said the Supreme Court, there is still an obligation to reimburse a surety so his obligation is obtained on credit.

But under another Supreme Court decision an attorney's unpaid fee similarly obtained by false financial statements is not accepted because the attorney's services are not "property." And certainly those justices of the peace are not well equipped to deal with the intricacies of the law of false pretenses or to analyze financial statements.

For the three excepted classes of claims left in section 17a(2), H.R. 6665, in a new section 17c(2), beginning at line 24 of page 4 of the bill provides that the proceeding to determine dischargeability must be commenced within 90 days after the discharge order becomes final and, unless the court of bankruptcy otherwise orders, must be commenced and maintained in that court. Since it also provides that a

debt shall not be excepted from discharge unless the court so holds in a proceeding brought pursuant to section 17c(2), it would put the burden on the creditor to come forward promptly with any claim which he considers to be excepted from the discharge under reconstituted section 17a(2) and hence would enable the debtor to know where he stands with respect to the most commonly invoked exceptions soon after his discharge order become final.

Now, if I could here address myself, Congressman Wiggins, to your question. It seems to us that this would bring the question forward while the bankruptcy case is still open, that the attorney for the debtor is not going to have much work to do on the trying of that issue and that whatever additional fee he may require of the bankrupt for having done that work is under section 60d of the act, subject to review by the bankruptcy referee as to the propriety of its amount.

So that I think that while some additional fee might be involved in some cases, that at least the referee has the jurisdiction to overlook that fee and decide whether he thinks it proper or not—something which would not be at all available if the bankrupt had to get a lawyer to go litigate this question in a State court.

Mr. WIGGINS. Yes.

Mr. COUNTRYMAN. Also, Referee Cowans said such a matter could be handled in the bankruptcy court in 30 days, in a very short period of time. I can testify that in my own State if you file an action in the superior court you have to wait 40 months to get to trial. And I understand that that is not at all an uncommon phenomenon among the State courts.

Mr. WIGGINS. On that point of delay, isn't it envisioned that both the creditor and debtor will have all of the procedural rights guaranteed any other litigant in the Federal court in terms of discovery and the case can be as complicated as it wants.

Mr. COUNTRYMAN. Yes, sir. I wouldn't even suggest that there would be much difference in the time taken actually to try the issue in the bankruptcy court or in the State court, but it is being brought on for trial so much faster.

Mr. ROGERS. Let me ask you this: Do you feel that as long as we have certain debts that are not dischargeable, that it is possible under the system we have to throw it all into the bankruptcy court and have it make that determination?

Mr. COUNTRYMAN. Well, I think it is possible. We had tried to limit that to what are quite generally agreed to be the instances of abuse. As I will explain in a minute, for all but these three grounds which I have just been describing we have a somewhat different procedure, but one which can still be invoked very rapidly.

Mr. ROGERS. Well, you heard Referee Cowans testify that probably the National Conference of Referees and the National Bankruptcy Conference may get together.

Mr. COUNTRYMAN. I am very confident we will, Mr. Chairman. As Referee Cowans said, we had some discussions last night looking to that end and I am quite sure that we can quite promptly resolve such differences that we have. There is no difference in our objective whatsoever.

Mr. ROGERS. Your objectives are the same, but it is a question of trying to work it out.

Mr. COUNTRYMAN. Yes; the best procedure.

Mr. ROGERS. Proceed. Pardon me for interrupting.

Mr. COUNTRYMAN. Since H.R. 6665 was introduced, it has been pointed out to us that, with the 90-day period in new section 17c(2) running from the time the discharge becomes final, it may be difficult for the parties to keep themselves advised of when it becomes final, since there may be a petition to review the discharge order by the district judge, an appeal to a court of appeals and the possibility of review by the Supreme Court on certiorari. We consider this point well taken, and would meet it in this way: We would at the end add a sentence to section 14b of the act reading:

After the order of discharge becomes final, notice of that fact shall be given to all parties in interest as provided in section 58b of this act.

We would then delete, in lines 1 and 2 on page 6 of the bill, the words "order granting the bankrupt's discharge has become final" and substitute "date of mailing of notice that the order of discharge has become final as provided in section 14b of this act." So that the 90-day period would start to run from the time the bankruptcy court sent out the notice that the discharge order has been final.

Unlike H.R. 12250, which would give the bankruptcy court exclusive jurisdiction to determine the dischargeability of all debts save those for taxes, H.R. 6665 would disturb traditional allocation of judicial business between State and Federal courts only in the area of greatest abuse, they are of the three grounds I have just been discussing.

With respect to all other claims excepted from the bankruptcy discharge, H.R. 6665 would not necessarily change the existing practice in any particular case. Under the procedure proscribed in new section 17c(1), beginning at line 24 on page 4 of the bill, the bankrupt or any other party in interest may apply to the bankruptcy court for a determination by that court of the dischargeability of a particular debt. This application may be made even though an action is pending on the debt in another court and the bankruptcy court may enjoin the action until it makes its determination on dischargeability. It may make such other orders as are necessary to protect or effectuate that determination. That would clearly authorize the court, I think this reaches another of your points Congressman Wiggins, to enjoin any further action elsewhere.

If, on the other hand, the bankruptcy court determines the debt to be nondischargeable it may—for the purpose of disposing of the matter in a single proceeding—determine the remaining issues, render judgment on the claim and make all orders necessary for the enforcement of the judgment. This last provision is intended to make clear that the court's judgment may be enforced as Federal court judgments usually are enforced, by writ of execution and proceedings in aid thereof pursuant to Federal rule of civil procedure 69a. Both Federal rules 81(a) (1) and general order 37 in bankruptcy make the Federal rules applicable in bankruptcy * * * "insofar as they are not inconsistent with the act or these general orders."

But this power to render judgment is subject to two limitations: One, it may not be exercised upon a timely objection by either debtor or creditor if the claimed exception was under section 17a(2), that is for fraud or false financial statements or willful conversion of property. Since the determination of dischargeability on such claims is required by new section 17c(2) to be made by the bankruptcy court, H.R. 6665 would leave both parties an option as to whether the bankruptcy court should proceed to render judgment after it has found the claim nondischargeable. In further implementation of this policy, the last sentence of new section 17c(2), beginning at line 6 on page 6 of the bill, provides that a creditor who brings a proceeding under section 17c(2) does not thereby submit to the jurisdiction of the bankruptcy court for any other purpose and may object to the court proceeding further after it has held his debt not to be discharged. Two, the bankruptcy court may not proceed to enter judgment after finding a claim nondischargeable in any other case if timely objection to its doing so is made by the party who did not ask for the determination of dischargeability.

The net result is that the only party who cannot object to the court going on to render judgment on it is a party who, of his own free choice, asked for a determination of dischargeability. Finally, new section 17c(1) provides that the bankruptcy court on its own initiative may elect not to render judgment after determining the debt to be nondischargeable, leaving the remaining issues to be determined in an action or continued in another court.

If we get back to this negligence case that we talked about, if the bankruptcy court determines the claim is not covered by the bankruptcy discharge it does not have to go on and try the negligence case and send it back to the State court.

In hearings on earlier bills directed at this problem we have before us today, some concern was expressed about depriving the debtor or the creditor of his right to jury trial. That right is preserved by the last sentence of the new section 17c(1), beginning at line 20 on page 5 of the bill, which provides that "nothing herein shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists." What this would mean is that, if either debtor or creditor claimed a jury trial, and demonstrated that he was entitled to it by State or Federal Constitution or statute, one of two results would follow. Either the bankruptcy court would decline to hear the matter, leaving it to another court, State or Federal, in which the objecting party would receive his jury trial, or the matter would be heard before the bankruptcy court, with a jury. This would doubtless mean that it would be heard before the Federal district judge, rather than the referee. The Bankruptcy Act is not clear on the power of referees to preside over jury trials.

The only jury trials now provided for by the act itself are, under section 19, on questions of insolvency and the commission of an act of bankruptcy arising on the filing of an involuntary petition. The Judicial Conference of the United States in 1960 adopted a resolution that "it is the sense of the Judicial Conference that referees in bankruptcy should not preside upon jury trials of involuntary petitions in bankruptcy" and the referees have been conforming to that resolution.

In order to avoid forcing the parties to seek a ruling on dischargeability which may never be needed with respect to the exceptions from dischargeability less commonly invoked, H.R. 6665 puts no time limit on applications for rulings on dischargeability save for the section 17a(2) exceptions. The idea here is that, if we put a time limit on one party the other will be forced to ask for a ruling on every claim, although you may never need such a ruling even after the bankruptcy proceeding is closed. If an additional \$50 filing fee were required to reopen the case, the parties would still be under some pressure to seek rulings before closing of the proceeding although those rulings might never be needed. Hence, our new bill provides that if a case is reopened for the purpose of seeking a dischargeability ruling, no additional filing fee shall be required.

Mr. ROGERS. Professor, as you heard, the bell has rung and that means they are calling the role over there.

You have inserted your statement in the record. I wonder if you would be satisfied for us to consider that or do you want to come back at some later time?

Mr. COUNTRYMAN. Whichever the Chair would prefer. I might say I had covered the features of this bill which deal with the dischargeability issue. Our bill, unlike the other one, has two other matters in it, which are covered in my written statement and I think so far as we are concerned we would be content to let it rest on that.

Mr. ROGERS. Let's do this: Inasmuch as it was indicated here that the referees and your association, the National Bankruptcy Conference, are trying to work this thing out, let us have the benefit of your thinking and we will try to develop something from that. Maybe we can come up with a new bill that will cover the whole waterfront and meet the problem.

Mr. SELIGSON. That is quite agreeable to us.

Mr. WIGGINS. Just a quick question: Did I understand you to say that you agree with the limitation contained in Senate Joint Resolution 88 that the President's three appointees must include two who are active practitioners?

Mr. SELIGSON. Yes; I do, because a practitioner brings a different view, a different approach than the referees do. The referee has one point of view and the lawyer who is in and out of the courts and runs the whole gamut, reorganization and arrangements and straight bankruptcy and chapter XIII, he develops another point of view.

Mr. WIGGINS. The second question I would like to ask is, Whether you believe that the problem of dischargeability is of such urgency and is sufficiently well known to being acted upon independently of any study?

Mr. SELIGSON. Very definitely, I feel that way. So many years have gone by and the problem has become exacerbated. I have talked to so many referees who feel there is a pressing need for remedial legislation and we need not wait upon what may happen and what the study may disclose and recommend. While the study may be completed in 2 years, it may take another year or so before any legislation is enacted.

So we are talking about something which Congress may or may not do in 3 or 4 years from now when there is a need now for relief.

Mr. ROGERS. I appreciate your response.

We will keep the record open until October 20 for any additional statements.

Thank you very much.

(Whereupon, at 12:38 p.m. the hearings closed.)

(Subsequently the following materials were submitted for inclusion in the hearing record:)

STATEMENT OF FRANCIS F. QUITTNER, ESQ., MEMBER OF THE CALIFORNIA BAR RE
S.J. RES. 88

I am the senior member of the Los Angeles law firm of Quittner, Stutman, Treister & Glatt Professional Corporation. I have specialized in the field of bankruptcy law since my admission to the Bar in 1926 in Florida, and later, commencing with 1929, in California. Our firm devotes its entire time and attention to matters arising in the field of insolvency and especially in the field of arrangements and reorganizations under Chapters X and XI of the Bankruptcy Act.

My statement is mailed to the Committee at the invitation of Hon. Emanuel Celler, the Chairman thereof, under date of September 22. Although I am a senior member of the National Bankruptcy Conference, and was for ten years, from 1954 to 1964, the chairman of the Ninth Circuit Judicial Conference bankruptcy committee, and am a member of numerous other similar organizations, I do not speak for any of them officially, and the views expressed herein are my own.

I enthusiastically support S.J. Res. 88.

I have carefully studied the hearings before the Subcommittee on Bankruptcy of the Committee on the Judiciary, United States Senate, which were held on July 16 and 17, 1968. Much of the testimony covered the field of consumer bankruptcies. Some of the witnesses referred to the need for an in-depth study or overhauling of the reorganization chapters and made particular reference to Chapter X 1/2, of which I am the author and original proponent. See statement of William W. Golub, at p. 43.

There is no question in my mind that part of the in-depth study of bankruptcy reform should, in addition to considering consumer bankruptcy problems, consider the chief business problem, and that is a relief proceeding for the middle-sized corporation, particularly the publicly-held one. In this connection, I am the co-author of an article published in the "Santa Clara Lawyer," entitled "A New Debtor Relief Proceeding for the Middle Size Corporation: Some Concrete Proposals (Chapter X-1/2)." I attach a copy of the article for further study of the Subcommittee considering the resolution. (The article referred to is in the Subcommittee's file.)

I noted the comments of Hon. Edward Weinfeld, United States District Judge, Southern District of New York, in his testimony before the Senate committee last year, and in particular, his proposal generally that judges be included among the members of the Commission. I agree with this proposal, but believe that the resolution need not be amended to cover it. The provision for the appointment of the chairman of the Commission in the joint resolution could most happily serve the proposal of Judge Weinfeld, and I believe it would be most appropriate that the chairman should be a United States judge or justice with expertise in the field of bankruptcy. Likewise, there is room for the appointment of judges, in that the President of the Senate or the Speaker of the House could include in their appointments some prominent United States judge, who would be of invaluable assistance and a substantial contributor to the Commission.

It is very important that Referees in Bankruptcy be members of the Commission. While it is true that the District Judges have contact with bankruptcy proceedings, it is only in the rare instance where an application for review is filed that the District Judge has first-hand knowledge of the case. It is the Referee in Bankruptcy who meets the bankrupt and various witnesses face to face; it is he who solves the problems of administration and who determines discharges, as well as confirmation of arrangements, and who often does the legwork in a Chapter X, as a special master. While attending the Ninth Circuit Judicial Conference this summer, I had the opportunity to discuss the proposed

resolution with a number of the District Judges of this Circuit. They unanimously agreed that it is the Referee who is most knowledgeable in the field of bankruptcy, and that the holder of this office would make the most substantial contribution to the Commission. Therefore, this provision in the resolution should, in my opinion, be left untouched.

STATEMENT OF ROY E. WILLY, OF SIOUX FALLS, S. DAK.

My name is Roy E. Willy. I am now, and since 1912 have been, a member of the South Dakota Bar engaged in the practice of law. I am the senior member of Willy, Pruitt and Matthews of Sioux Falls, South Dakota. I have been active in the general practice of law and to some extent have specialized in corporation law, particularly banking and insurance. For over 21 years I served as a part-time Referee in bankruptcy for the Federal Judicial District of South Dakota and its four divisions. During this time I handled slightly less than 2,000 bankruptcy cases. I also continued to remain in the active practice of law.

I have been active in the organized bar since 1920 and belong to numerous professional associations. I have served as president of both the Minnehaha County and South Dakota State Bar Association. I have been a member of the House of Delegates of the American Bar Association since it was organized in 1936 and served as its chairman from 1950 to 1952. I have served on numerous committees of the association and was for 13 years a member of the Federal Judiciary Committee, and as such investigated the professional qualifications of the members of the Federal Judiciary who were appointed during that period. I was also for some 18 years a member of the Board of Editors of the American Bar Journal, as well as serving either as chairman or as a member of numerous committees of both the House of Delegates and the American Bar Association. I am a member of the American Law Institute and of the Institute of Judicial Administrators and a Fellow of the American Bar Foundation.

I am submitting this statement to you at the request of the Legislative Committee of the National Conference of Referees in Bankruptcy in lieu of a personal appearance. I have no personal interest in the pending legislation as such. I do have a very strong interest in all matters which affect the efficient administration of justice and the stability of our judicial structure, both State and Federal.

There are several matters pending before your Committee involving bankruptcy legislation. This statement is directed to Senate Joint Resolution 88, which would, if adopted, authorize creation of a Commission to study bankruptcy laws of the United States and make recommendations to Congress for legislation.

I am convinced from my experience as a part-time Referee in bankruptcy that the bankruptcy system under which we now operate is thoroughly archaic and should be completely overhauled. Piecemeal amendment of the Bankruptcy Act is somewhat comparable to an attempt by patching the roof to insure the stability of an otherwise outmoded structure.

There has been no major revision of the Bankruptcy Act since 1947 when the Chandler Act was enacted. This was the first major revision in the Bankruptcy Act since the basic law of 1898 was adopted. One of the important features of the Chandler Act was to eliminate the fee basis as compensation for Referees and give them a fixed term and a fixed salary.

There has been a tremendous growth in the number of bankruptcies filed since 1947. There were 13,170 bankruptcies filed in 1947. In the ten-year period that followed, there were 436,463 new bankruptcy cases filed. The number of cases increased in the next ten-year period by over 1,000 per cent. From 1959 to 1968 there were a total of 1,611,158 new filings.

Most of this increase in bankruptcy filing in the last 20-odd years has come about as a result of the tremendous growth in personal credit extended to wage earners. In its original inception, both in England as well as in this country, bankruptcy contemplated an orderly liquidation of the assets of an insolvent debtor and the equitable distribution of the results to his creditors. Well over 90 per cent of the present bankruptcies are filed by individuals not engaged in business, trade, or commerce, but who are classified as wage earners. Most of their cases are either non-asset or of a nominal character in which there is no dividend paid to any creditor.

There are many problems in connection with bankruptcy legislation both with reference to the Act itself and the Court which administers it that cry for remedial revision.

1. The Act uses the term "summary" in connection with the jurisdiction of the Court. There should be no summary jurisdiction, and the term should be entirely eliminated. All trials conducted before a Bankruptcy Court should be on the basis of a public hearing subject to the court rules of procedure now found in Federal Courts as well as in most State Courts. The term "summary proceedings" to the average person envisions some sort of a kangaroo court which is operated outside the ordinary court rules. Lawyers, as well as creditors, tend to shy away from invoking its use.

2. The term "plenary" should likewise be eliminated from the Act. Bankruptcy Courts should be courts of original jurisdiction in all matters relating to or affecting the administration and liquidation of the estate of a bankrupt, and the rights of creditors with reference thereto. Such a jurisdiction would involve the determination of disputed questions of fact, and the provision should be made to give to the Bankruptcy Court the same right to invoke a trial by jury as is now found in all trial courts, both State and Federal.

3. The title "Referee" is a complete misnomer and should be entirely eliminated. The title of "Referee" is a carry over from the old practice where the District Court Judge was in complete charge of the Bankruptcy Court and Referees were appointed by him to serve as his aids in administering the Bankruptcy Act. The term "Referee" to a lawyer means an inferior officer and aid of the Court with limited powers and limited jurisdiction. The "Referee" under our Bankruptcy Act performs the functions of a Judge and as such should carry the appropriate title.

4. The Bankruptcy Court should have complete jurisdiction of all phases of the administration of a bankrupt's estate, and the Judge of the Court should have the right to pass on all questions of fact and law arising therefrom. Under the limited jurisdiction afforded to the Bankruptcy Court under the present act, many such questions which arise during the administration of an estate are presented for determination to either a State Court Judge or a Federal Court Judge who in many instances has little, if any, familiarity with bankruptcy practices.

5. Under the present Act, the Referee in Bankruptcy has no control over his own Court, and has no right to punish for contempt proceedings. At best, he can only certify to the Federal District Judge the facts that a contempt has been committed in his Court and ask the District Judge to hear and determine the matter. The right to punish for contempt proceedings committed in a Court in the presence of the presiding Judge exists even in the most inferior of the Courts. Even a Justice of the Peace possesses that right.

6. The Bankruptcy Court is one of record and has general jurisdiction in bankruptcy matters. As a Court possessing such jurisdiction, appeals therefrom should go either directly to the Circuit Court of Appeals, or in the alternative, to a Special Appeals Court set up similarly to the Court of Tax Appeals. In the latter case, the Judges would be composed of lawyers with substantial experience in the administration of the Bankruptcy Act. Under the present practice, appeals from the decisions made by the Referee in Bankruptcy are certified to the Federal District Court. There is no trial de nova, and the record goes to the District Judge on a certificate as to fact and law signed by the Referee. The same appellent practice should prevail with reference to appeals from decisions of the Referee in Bankruptcy as now prevails with reference to decisions by the Federal District Judge.

7. The Judge of the Bankruptcy Court should be given sole responsibility for the appointment, compensation, control and discipline of all receivers and trustees as well as their attorneys. In some jurisdictions, the Federal District Judge still retains the responsibility for appointing and fixing the compensation for trustees and receivers.

8. In more than 90 per cent of the cases now filed in bankruptcy, the ultimate aim and purpose of such filing is to secure a discharge for the bankrupt. Under the present act, the Court gives a general discharge, which is at best ambiguous as to the debts affected, and quite often results in separate litigation in a State Court to determine whether or not the debt affected was covered by the discharge in the Bankruptcy Court. The act should give to the Bankruptcy Court the power to determine and specify the debts that are discharged. This power would be conferred by the terms of one of the bills now pending before this Committee, being House Resolution 12250, which would give a Bankruptcy Court power to determine dischargeability of a particular debt and render

judgment thereon. This legislation, while commendable, is only another case of piecemeal amendment, and the act itself should be studied and possibly completely revised to meet the needs of modern economic and social conditions.

9. The Judge of the Bankruptcy Court should be appointed in the same manner and under the same practice as that which is followed in the selection of other members of the Federal Judiciary System, including members of the Court of Claims, the Court of Military Appeals, the Court of Customs, the Court of Patent Appeals, and the Tax Court. Judges of the Bankruptcy Court should have the same lifetime tenure with the same salary and the same retirement pensions as are available to the other members of the Federal Judicial structure. As a member for some 13 years of the Federal Judiciary Committee of the ABA, I examined during this time the records and qualifications of hundreds of names of lawyers who had been proposed for consideration for appointment to one or another of the various Federal Courts. The Judge of the Bankruptcy Court should have, and most of them do have, much the same background, experience and professional qualifications as any other member of the Federal judicial system. Fortunately, most Referees in Bankruptcy do possess those qualifications and do perform a work comparable to that of other Federal Judges.

10. The matter of the fees charged and collected in Bankruptcy Courts should be given a full review and study. Bankruptcy Courts are the only judicial tribunals in existence in this country, aside from Justices of the Peace, in which the Court is self-sustaining, both as to salaries and expenses, from fees derived from the litigants who appear before it. In South Dakota, you can start a multi-million-dollar lawsuit on the civil side of the Federal Court by filing your papers and paying a \$15.00 filing fee to the clerk. An insolvent debtor in that same jurisdiction, with few or no assets and large liabilities, must pay a filing fee of \$50.00 to file his schedule. If his wife, who is equally obligated, wishes to likewise be relieved of her debts, she must pay an additional filing fee of \$50.00.

11. The bankruptcy courts of the United States are now averaging close to 200,000 new cases a year. These, with the backlog which inevitably accumulate as the result of the time required for the orderly liquidation and the litigation normally arising therefrom, means that the judges of the bankruptcy courts during the course of a year have pending before them almost 400,000 cases. To handle this great volume of work, there are, as of July 1 last, 179 full-time referees and 40 part-time referees. In giving to the judge of the bankruptcy court the same status as is accorded to all other members of the Federal Judiciary, it would be necessary and advisable to eliminate entirely the "part-time" referee. In practically all State courts of record, the judges are required to devote their full time to their official duties and are not permitted to engage in the private practice of law. The only exception has been in the county courts. Gradually these county courts have either been eliminated by incorporation with trial courts of general jurisdiction, or have been consolidated, as was recently done in South Dakota, into county district courts with sufficient additional jurisdiction added in the case of the smaller counties so that the county judge now receives a salary comparable to that of a circuit court judge and can no longer carry on a general practice of law. The same procedure can easily be accomplished in the case of part-time referees by adding sufficient territorial jurisdiction to those areas in which the part-time referee has heretofore been employed.

This is not a novel situation. In North Dakota a few years ago, the administrative office found it necessary to increase the jurisdiction of the Referee in order to provide an adequate salary. This was done by incorporating additional counties from the adjoining State of Minnesota to provide a base for an adequate salary for the Referee. The elimination of the office of part-time Referee would present no serious problem to the administrative office and involves no constitutional question.

Senate Resolution 88 affords an opportunity for Congress to create a Commission to study and evaluate the whole structure of the Bankruptcy Court and its administration. In turn, the report of this Commission will give to the Congress of the United States a real opportunity to modernize the bankruptcy statutes in the light of our present day economic and political needs. What legislation may result from such a report is, of course, solely a matter for the Congress of the United States to determine. I have merely endeavored by this statement to bring to the attention of this Committee some of the reasons which those of us who are familiar with the bankruptcy practice feel justify the adoption of Senate Resolution 88 and the creation of a Commission to consider the entire field of bankruptcy, both its administration as well as the basic philosophy of bankruptcy and all of the matters connected therewith, which the Commission shall deem relevant.

In conclusion, I wish to make a brief comment with reference to the composition of the Commission which is proposed to be created by Senate Joint Resolution 88. This resolution provides for the Commission to be composed of the following:

- (1) Three members appointed by the President of the United States, one of whom shall be designated as Chairman by the President and two of whom shall be active practitioners in the field of bankruptcy law;
- (2) Two appointed by the President of the Senate;
- (3) Two appointed by the Speaker of the House of Representatives; and
- (4) Two active full-time referees in bankruptcy appointed by the Chief Justice of the United States.

Five members of the Commission shall constitute a quorum.

There has been some opposition expressed by the Bankruptcy Committee of the Judicial Conference to the composition of the Commission as set forth in the resolution for the reason that it includes in its membership two active, full-time Referees to be appointed by the Chief Justice of the United States.

In the creation of a Commission whose function it is to study, evaluate, review and recommend changes in the bankruptcy statute, it seems only logical that there should be included in its membership some representatives at least of the men who from experience have a full and working knowledge of the bankruptcy law and a firsthand contact with its many problems. To exclude such men from membership on the Commission and deny to them a voice in shaping its recommendations and conclusions would be to deprive the Commission of the benefit of the men best qualified from experience to speak out in the Commission conferences, which will ultimately result in the shaping of the recommendations to be made to the Congress.

The full-time Referees to be appointed on the Commission are better qualified from experience and firsthand knowledge with the problems arising in bankruptcy administration than the average Federal Judge, who has had little or no exposure to bankruptcy practice.

I strongly support the composition of the Commission as is now set out in Senate Joint Resolution 88, and urge that any Commission created by this resolution should include among its members one or more active full-time Referees.

STATEMENT OF MAX A. DENNEY, EXECUTIVE VICE PRESIDENT OF THE AMERICAN INDUSTRIAL BANKERS ASSOCIATION

This statement is presented on behalf of the American Industrial Bankers Association and also the Consumer Bankruptcy Committee of the Corporation, Banking and Business Law Section of the American Bar Association of which I am a member.

The A.I.B.A. is a national trade association consisting of approximately 350 member companies with some 12,000 branches doing about 20 billion dollars a year in consumer credit. The members of this association have a vital interest in the personal bankruptcy problem.

The Consumer Bankruptcy Committee is made up of some 25 attorneys who have, by virtue of their practice or position, a direct interest in all bankruptcy problems and the administration of the Federal Bankruptcy Act.

At this point, I should make it clear that I am not speaking on behalf of the American Bar Association or the Corporation, Banking and Business Law Section thereof, as the matter before this Subcommittee has not yet been presented to these bodies.

As an attorney for some 33 years, I have watched with a great interest the tremendous increase in personal bankruptcy filings. As a member of the Consumer Bankruptcy Committee and Executive Vice President of A.I.B.A. it has been my privilege to have participated in various studies and discussions of the many problems involving bankruptcy. So, I felt it was important that this statement be filed with this Subcommittee.

It is obvious to anyone who has been involved in any way with the Federal Bankruptcy Act that because of the many and varied changes, both socially and economically, that have taken place in this country, any Act passed back in 1898 just is not going to meet the problems of today.

From time to time a college or university around the country has come up with a report on some of the problems, but generally these studies have been limited in scope, and very little, if any, change in the Act itself has resulted therefrom. It is our understanding that the Brookings Institution of Washington, D.C. has made a somewhat more detailed study of bankruptcy than any other yet undertaken. However, I've been told that report will not be available for at least a year and even when available it will not have covered the depth and breadth contemplated by Senate Joint Resolution No. 88.

It has always been my belief that when the Bankruptcy Act was first passed it was intended primarily to meet the problems then being confronted by the commercial business world. I am sure no one anticipated the tremendous impact that consumer credit has had on this country's economy. While there were some changes made in 1938 and 1964, they certainly have not met all the problems to date. As an attorney, it has been my observation that piecemeal amendments or changes in any law as far reaching as bankruptcy is not the answer to the problems involved.

Although an increasing number of bankruptcies have been recorded in most fiscal years, this was not the case in 1968 when there was about a 5 percent decrease. However, when in an affluent society such as ours there are 197,811 cases of bankruptcy filed in one year, surely it can be said, there is something wrong.

If the Commission established by this Joint Resolution fully studies, analyzes, and evaluates all the problems connected with bankruptcy in the United States, we believe that the results will be a benefit for all concerned. We also believe that such a study in depth should commence as soon as possible. Therefore, on behalf of the American Industrial Bankers Association and the Consumer Bankruptcy Committee, I respectfully urge this Subcommittee to report favorably on Senate Joint Resolution No. 88.

STATEMENT OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association represents some 14,000 banks throughout the country who are active in providing credit facilities and services at a reasonable cost to the average man in the street. These banks hold between 30 to 35 million active installment loan accounts with a total dollar investment of some \$32 billion. This dollar investment is approximately double that of the nearest competitive group.

S. J. Res. 88

The American Bankers Association, like other witnesses appearing before your Subcommittee, is deeply concerned with the mounting number of bankruptcies in our country. S. J. Res. 88, which creates a commission to study the bankruptcy law, certainly has a worthy objective. The American Bankers Association is most anxious to take steps to reduce bankruptcies which do so much to destroy the moral fiber of those Americans that become involved as well as result in losses to sellers which will increase the cost of credit generally. S. J. Res. 88 as presently worded and statements made at these hearings seem to indicate that it is envisioned that this commission will not only study the technical aspects of the bankruptcy law, but will explore the philosophy behind the law and will search for the causes of bankruptcy and for new concepts in its treatment.

In view of the broad issues which this commission will apparently be expected to deal with, we would suggest that, in addition to the nine-member commission provided for in S. J. Res. 88, the Secretary of the Treasury and the Chairman of the Federal Reserve Board be automatically included as members. The Commission would certainly make use of the talents of referees in bankruptcy, attorneys, and other persons knowledgeable in the technicalities of the Bankruptcy

Act, but it is believed that the Chief Justice of the United States should be given complete freedom in making his appointments.

The Commission then would be composed of eleven members as follows: (1) Three appointed by the President of the United States; (2) two by the President of the Senate; (3) two by the Speaker of the House; (4) two by the Chief Justice of the United States; (5) the Secretary of the Treasury; (6) The Chairman of the Board of Governors of the Federal Reserve.

Chapter 13 of the Bankruptcy Act represents an area which we believe may be utilized more fully in avoiding unnecessary bankruptcies and recommend that any study consider methods of increasing its use. In the 90th Congress, this Association at hearings before your Committee supported legislation which was designed to give the bankruptcy courts authority to encourage greater use of Chapter 13. Chapter 13 provides a means of accomplishing the financial rehabilitation of a very large percentage of the wage earner bankrupts without a sacrifice of their self-respect and without losses to creditors. This authority was incorporated in a House Bill, H.R. 1057, introduced in the 90th Congress. It has not been introduced in the 91st Congress to date.

H.R. 6665 and H.R. 12250

These bills are not identical, but both grant jurisdiction to the Bankruptcy Court to determine the dischargeability or nondischargeability of debts. The American Bankers Association opposes enactment of H.R. 6665 and H.R. 12250. Bankruptcy Court jurisdiction to determine the dischargeability and nondischargeability of particular debts, would in some jurisdictions greatly overburden these courts and make it more difficult to secure expeditious administration of bankruptcy proceedings.

Giving Bankruptcy Courts jurisdiction over ordinary civil suits, in our opinion, would constitute an invasion of the rights of the States in the exercise of their judicial powers. It may also mean that many banks would have to bring witnesses a great distance, in some instances as much as several hundred miles, to attend the hearing before the Federal Court or bankruptcy referee, with the resultant additional expense.

Giving the court the right to determine the dischargeability of particular debts will result in a multiplicity of suits unless the Court has authority to enter a money judgment against the bankrupt in favor of the creditor if the nondischargeability of the claim is established, because in the absence of such authority the creditor would have to bring a separate proceeding in the State court to obtain judgment. H.R. 6665 and H.R. 12250 both attempt to solve this problem, but there is considerable doubt that they accomplish this objective, for (1) under the legislation the debtor can prevent a money judgment being issued by the Bankruptcy Court, and (2) the bankruptcy referee does not seem to have jurisdiction to cause the entry of a monetary judgment in the United States District Court on which an execution will be made by the United States Marshal.

BOSTON COLLEGE LAW SCHOOL,
Brighton, Mass., October 14, 1969.

HON. BYRON G. ROGERS,
Chairman, Subcommittee No. 4, House Judiciary Committee,
Rayburn Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: A few weeks ago Mr. Benny L. Kass, consultant to the National Consumer Law Center at Boston College Law School, forwarded to me copies of H.R. 6665 and H.R. 12250. Mr. Kass has known of my interest in the subject matter treated by this legislation and was aware of an empirical study I conducted this past summer concerning the effectiveness of the discharge in bankruptcy received by non-commercial debtors. My library and field research into this area form the basis for a law review article which will be completed in the near future, but when Mr. Kass informed me of the hearings which were conducted on September 30 I suggested, and he agreed, that I should make my views known to your Subcommittee, since they result both from extensive representation of bankrupts and from empirical data gathered from a rather complete survey of bankruptcy practice and procedures.

The purpose of the Bankruptcy Act, as restated most concisely in *Local Loan Co. v. Hunt*,¹ is that "it gives to the honest but unfortunate debtor who

¹ 292 U. W. 234, 54 S. Ct. 695, 699 (1934).

surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clean field for future effort, unhampered by the pressure and discouragement of pre-existing debt." The enactment of either H.R. 6665 or H.R. 12250 is necessary to ensure the effectuation of these purposes. By explicitly defining courts of bankruptcy as the preeminent forums and by creating in effect a statute of limitations to finalize a bankrupt's discharge, much progress will be realized in reversing the erosions of bankruptcy as a debtor's remedy. The uncertainty which plagues the bankrupt who attempts to commence his "fresh start" after discharge will be ended. Creditor recourse to unsympathetic and unknowledgeable state courts will, hopefully, be a thing of the past. In sum, this proposed legislation will, in my opinion, restore to the concept of bankruptcy its original and intended meaning.

On July 16, 1968, in hearings before a Senate Subcommittee gathering evidence concerning a proposed joint resolution to create a commission to study the Bankruptcy Laws, Referee Daniel R. Cowans was requested to summarize his views "on the dischargeability issue." Mr. Cowans' response is, I believe, the strongest argument I have read in support of the principles embodied in H.R. 6665 and H.R. 12250:

"It seems a consummate piece of injustice to me to say to a man: 'You have a great deal of financial trouble and very few assets; give us all of those assets except a few that are exempted under the law and we will give you a piece of paper that you do not understand. Once we have given you this piece of paper and you leave here you must then litigate with any creditor who says it does not apply to him.'"²

For some years prior to the 1960 amendment to § 14c(3)³ which removed the false financial statement as a ground for objecting to the discharge in bankruptcy of the *non-business* bankrupt, there was voiced much concern about the abuses which generated this reform. For instance, in 1957, during Senate Hearing obtaining testimony concerning a proposal to authorize courts of bankruptcy to determine the dischargeability of provable debts, a Chicago attorney specializing in filing voluntary petitions for wage earners noted:

"These financial statements that are taken by small loan companies are taken for no other purpose than to endeavor to beat the bankruptcy law . . . [i]t has become a general practice for the small loan companies to take a financial statement from every borrower . . . I would say that it would work . . . if the bankruptcy court would have the right to determine the dischargeability . . . of all provable debts at the time of discharge."

The 1960 amendments to the Bankruptcy Act, however, focused on dischargeability rather than on the jurisdiction of the courts of bankruptcy. One commentator observed at that time:

"The abuses by these small loan companies take two forms. First is the carelessness or collusion of loan companies in obtaining financial statements from loan applicants. The second is the loan company harassment of bankrupts . . . The extent to which loan companies either tacitly induce or encourage loan applicants to fill out financial statements in an incomplete or incorrect manner is indeterminable. However, many courts and referees state that the practice is widespread and presents a serious problem. . . . From a policy aspect, removing the jurisdiction to determine the effect from state courts is questionable. . . . If the bankrupt's state court remedy is inadequate in certain instances, the solution does not lie in a complete change in procedures, but in solving particular problems."

Unfortunately, the millennium was not achieved in 1960. What apparently occurred was that loan companies continued to harass and to intimidate bankrupts and resorted to state court remedies when their threats and cajolery were not successful.⁴

From October 1964 until September 1968 I worked with Legal Services Programs, first as a neighborhood lawyer and then as Assistant Director of Harvard Law School's Community Legal Assistance Office. I represented scores of debtors, mostly wage earners or unemployed heads of households, who requested as-

² Hearings on S.J. Res. 100 Before the Subcommittee on Bankruptcy of the Senate Committee on the Judiciary, 90th Cong., 2nd Sess. 17 (1968).

³ Pub. L. No. 86-621, 86th Cong., 2nd Sess. (July 12, 1960), 74 Stat. 409 (1960).

⁴ Hearings on H.R. 106 Before a Subcommittee of the Senate Committee on the Judiciary, 85th Cong., 2nd Sess. 89 (1957).

⁵ See Boroff, *The Proper Forum for the Determination of the Effect of a Discharge in Bankruptcy*, 34 Ref. J. 81, 84, 85 (1960).

⁶ See Brendes and Schwartz, *Schlockmeister's Jubilee: Bankruptcy for the Poor*, 40 Ref. J. 69 (1966).

sistance in filing voluntary individual petitions in Bankruptcy. In many of these cases I later represented the same client in a defense to a state court action, where a creditor's attorney would usually allege that a particular debt to the plaintiff, usually a finance company, was non-dischargeable, since a false financial statement was executed by the defendant debtor when the loan was negotiated. I lost most of these cases which involved, in many instances, petitioning to remove defaults entered against a debtor. In this latter situation, a wage garnishment usually caused the debtor to seek my counsel.

This past summer, after my first year as a law professor, I finally had an opportunity to pursue several research projects, one of which was testing several hypotheses I had postulated in my own mind while representing bankrupts. Boston College Law School made available to me the services of a third year law student, Jerome Soloman, who gathered the necessary empirical and other information in accordance with a research design I had devised last spring.

The initial empirical research step involved a survey of every voluntary individual petition in bankruptcy filed in the Federal District Court in Boston during the period from September 1, 1967 through December 31, 1967. This time period was selected to ensure that all petitions surveyed were closed. After that time, although discharge had been granted, there were matters still pending with many of the petitions. This, incidentally, should furnish support to any legislative proposal which includes a statute of limitations feature after discharge. There is no valid reason why a bankruptcy should remain in limbo for an extended period, speculating concerning the results of his discharge.

During the four month survey period, there were 580 petitions filed. 510 (87.9%) of the petitioners were noncommercial debtors. This latter figure included only 8 Chapter XIII Voluntary Wage Earner Plans, which is far less than the percentage cited by Professor Countryman in his survey.⁷

In surveying the petitions, Mr. Solomon noted a large percentage of incomplete petitions which were subsequently allowed by the court. Accordingly, complete results were unavailable for all categories of information sought, but the returns were certainly large enough to produce definite patterns.

Mechanically, certain relevant information was compiled by completing a form entitled "Survey of Bankruptcy Petitions" for every petition surveyed. See Appendix A to this letter for a copy of this form. Most of the information gathered came from "The Statement of Affairs" and from Schedule A, "Statement of All Debts of the Bankrupt," to the petition. This information provided a rather comprehensive analysis of the financial status of the average noncommercial bankrupt.⁸ Other data obtained focused upon the scope of the indebtedness of the petitioner, to whom and why he was so indebted, and to what extent a petitioner was indebted to finance companies and credit unions.

On the basis of all the petitions surveyed, the following conclusions were reached:

1. A high percentage (86%) of the petitioners were found to be employed either on a full-time or part-time basis. This refutes in part the notion that bankruptcy is an easy way out for an individual who desires to avoid his debts by simply not trying. The rather low wage level enjoyed by most petitioners demonstrates how difficult it is to "make it" on such a salary in our credit economy and thus the heavy reliance bankrupts have placed on finance companies and credit unions in order to dig out of one's financial hole. See Appendix B to this letter for an analysis of the income earned by the bankrupts surveyed.

2. Despite the high percentage of salaried wage-earners, there was reluctance to file under Chapter XIII. This apparently, to repeat, points up a desire by debtors to achieve some degree of finality to the proceedings instituted by them to resolve their financial status.

3. Very few bankrupts resorted to paying the filing fee in installments. Less than 5% did so. This, in my experience, is due in great measure to pressure from trustees who let it be known that action will not be forthcoming until the filing fee is paid in full.

4. The preliminary survey indicated the deep financial involvement by the typical bankrupt with finance companies and credit unions. Nine of ten petitioners owed money to a finance company or to a credit union. See Appendix C for these results.

⁷ See Countryman, *The Bankruptcy Boom*, 77 Harv. L. Rev. 1452 (1964).

⁸ See Dolphin, *Consumer Bankruptcy: A Continuing Problem*, 41 Ref. J. 27 (1967) for a survey yielding similar preliminary information.

During the second phase of the survey, data was gathered by questioning the attorney who represented the debtor during the bankruptcy proceedings. It was felt that significant patterns could be determined in regard to practices in this area by using a random sample. 117 petitions were used to form the sample (every fifth petition of the original 580 in consecutive order) for this portion of the survey.

A questionnaire was designed to promote not only a free dialogue between the attorney and the interviewer, but was worded carefully so that it maintained a high degree of confidentiality concerning the actual circumstances of the particular case. See Appendix D to this letter for the questionnaire which was used in personally contacting all attorneys. All interviewing was conducted by telephone or in person.

Of the 117 sample petitions, 84 were pertinent to the study. There were 16 (15%) petitions that were business bankrupts and there were 17 (16%) additional petitions that, although they were noncommercial, had no debts due to finance companies. See Appendix E which is a summary of results from interviewing attorneys in 84 (69%) of the bankruptcy proceedings.

Generally, attorneys were aware of the problem of the recurring false financial statement and would warn their clients that they may face this issue in a state court proceeding following their discharge. However, there were differing results as to the scope of the problem according to geographical areas. In large cities such as Boston, Springfield, and Worcester, attorneys were alert to such practices. In smaller cities and towns, finance companies were generally more amiable to the extent that one local attorney noted that he was aware of the problem but could not recall its happening during his tenure in practice. The same was the case with a number of attorneys who practiced in the rural western part of the State.

The overall opinion of attorneys was that finance companies and credit unions were overly persistent in their attempts to have bankrupts renew the debt after hearing of the petitioner's discharge. Surprisingly, the statistics reveal that finance companies did not try to dissuade clients from filing after such clients had retained counsel.

Of those cases tried after bankruptcy, there was a high percentage of judgments in favor of finance companies. A common characteristic of most of the pleadings in these cases was an allegation of incomplete disclosure, fraud, or some type of deception on the part of the defendant. Finally, the obvious failure of the finance companies to make an objection at the time of filing (less than 2% made an objection) or to participate in the meeting of creditors (less than 8%) shows a disregard by finance companies and credit unions of the purpose of bankruptcy proceedings.

Parenthetically, it was determined that the tactics of finance companies and credit unions differed. Of the 53 law actions instituted by finance companies and credit unions during the one year's preceding the filing of the petition, 38 (71%) were begun by credit unions. Very few claims were begun by credit unions after bankruptcy. This demonstrates perhaps a tendency by the typical finance company to disregard bankruptcy relying on harassment techniques and refinancing of the debt, before they use their ace-in-the-hole, i.e., Section 17a(2).

The statistics gathered in the conduct of the survey indicate, I would suggest, a significant distortion and frustration of the purposes of the Bankruptcy Act. They amply document the need for legislative reform. H.R. 6665 and H.R. 12250 have my complete support in this regard, but I wonder whether they continue to allow the same opportunities to unscrupulous creditors to emasculate bankruptcy as a remedy. To be sure, courts of bankruptcy are more appropriate forums to litigate fairly and with finality the rights of debtors, but I suggest that a drastic abuse calls for a more drastic remedy than is provided by either H.R. 6665 or H.R. 12250. Why not enact criminal sanctions punishing creditors who solicit or facilitate the executing of false financial statements or, more appropriately, repeal clauses one and two of § 17a(2) as to nonbusiness debtors with, say, scheduled debts of less than \$10,000. In any event, I would suggest that H.R. 12250 be amended to treat § 17a(5) in a similar way to the way the bill treats debts to spouses or children, since the interests of both cases appear quite similar.

Sincerely,

PAUL G. GARRITY,
Professor of Law.

APPENDIX A

SURVEY OF BANKRUPTCY PETITIONS

Docket Number: _____
Filing Date: _____
Date of Discharge: _____
Filing Fee in Installments:
Yes () No ()
Bankrupt: _____
Address: _____
Phone: _____
Employed () Unemployed ()
Attorney for Bankrupt: _____
Address: _____
Phone: _____
Financial Status:
Income for 196__ : _____ 196__ : _____
Total Assets: _____
Total Secured Claims: _____
Total Unsecured Claims: _____
Total Debts: _____
Debts Due Finance Companies:
Company _____
Amount _____
Date of Loan _____
Purpose _____
Gross Amount _____
Secured/Unsecured _____
Objection: Yes () No ()
If so, when and where:

APPENDIX B—ANALYSIS OF INCOME OF NONCOMMERCIAL BANKRUPTS (SEPT. 1, 1967–DEC. 31, 1967)

Amount	June 1965–May 1966		June 1966–May 1967	
	Number	Percent	Number	Percent
0 to \$2,000.....	51	11.6	47	10.9
\$2,001 to \$3,000.....	47	10.9	39	9.0
\$3,001 to \$4,000.....	77	17.7	70	16.3
\$4,001 to \$5,000.....	97	22.3	86	20.8
\$5,001 to \$6,000.....	76	17.6	84	19.1
\$6,001 to \$7,000.....	33	7.9	41	9.8
\$7,001 to \$8,000.....	20	4.6	32	7.4
Above \$8,000.....	32	7.4	29	6.7
Total.....	433	100.0	428	100.0

¹ Discrepancy caused by the fact that some petitioners reported no income in 1 of the 2 years.

Note: This chart takes into account each petition individually. Thus, where both the wife and husband file for bankruptcy the total income for the family unit would be higher. However, approximately only 1 out of every 10 petitions involved a situation where a wife filed on her own.

APPENDIX C—RATIO OF BANKRUPT'S DEBTS TO FINANCE COMPANIES AND CREDIT UNIONS TO THE BANKRUPT'S TOTAL DEBTS

Percentage of involvement	Number of petitioners	Percentage of total
0 to 10	146	29.2
11 to 25	128	25.6
26 to 35	56	11.2
36 to 50	66	13.2
51 to 65	43	8.6
66 to 75	23	4.6
76 to 85	20	4.0
86 to 100	18	3.6
Total	500	100.0

¹ Only 42, or less than 10 percent, of the petitioners owed no debts to finance companies or to credit unions.

APPENDIX D

QUESTIONNAIRE FOR ATTORNEYS REPRESENTING BANKRUPTS AND THE CLIENTS THEMSELVES

ATTORNEY: Called Yes () No ()
 Responded: Yes () No ()
 Petition # _____ Attorney _____ Date Called _____

1. In your initial interview with your client, did you counsel him in regard to the probable ineffectiveness of discharge in relation to debts owed finance companies or credit unions if he executed an incomplete statement of his debts at the time he applied for and obtained his loan.
 Yes () No () Comments _____

2. Did any finance company or credit union, who found out that your client was about to file for bankruptcy, try to dissuade him from filing? Yes () No () Don't know () Client didn't tell me () Comments _____

a. If yes, did the finance company or credit union use an argument to the effect that your client's debts were non-dischargeable due to the execution of an incomplete loan application? Yes () No ().

3. Did any finance company or credit union try to dissuade your client from proceeding with the bankruptcy after the petition was filed?
 Yes () No () Don't know () Comments _____

4. At any time, after the petition was filed, did a finance company or credit union attempt to have your client affirm the debt owed?
 Yes () No () Don't know () Comments _____

5. Did a finance company or credit union bring litigation in a state court to collect the debt after either the petition was filed or the discharge granted?
 Yes () No () Don't know () Comments _____

a. If your answer is yes to this question, was there a judgment in the litigation?
 Yes () No () Don't know ()

b. If yes, in whose favor?

Finance Company or Credit Union () Client ()

6. At the First Meeting of Creditors after the petition was filed, did a representative of a finance company or credit union appear to contest discharge on the basis of fraud? Yes () No () Didn't attend First Creditor's Meeting () Comments _____

7. Do you have any general comments about this problem? Yes () No () Comments: _____

8. Do I have permission to call your client to obtain the information that was unavailable to you? Yes () No ().

Client (Note: Only those questions are asked where Attorney did not know the answer).

Called: Yes () No () Responded: Yes () No ()

Date Called: _____

1. In your initial interview with your attorney, did he advise you in regard to the probable ineffectiveness of discharge in relation to debts owed finance companies or credit unions if you executed an incomplete statement of his debts at the time you applied for and obtained your loan. Yes () No () Comments _____

2. Did any finance company or credit union, who found out that you were about to file for bankruptcy, try to dissuade you from filing? Yes () No () Comments _____

a. If yes, did the finance company or credit union use an argument to the effect that your debts were non-dischargeable due to the execution of an incomplete loan application? Yes () No ()

3. Did any finance company or credit union try to dissuade you from proceeding with the bankruptcy after the petition was filed? Yes ()
No () Comments-----

4. At any time, after the petition was filed, did a finance company or credit union attempt to have you affirm the debt owed? Yes ()
No () Comments-----

5. Did a finance company or credit union bring litigation in a state court to collect the debt either the petition was filed or discharge granted? Yes ()
No () Comment-----

a. If your answer is yes to this question, was there a judgment in the litigation? Yes () No ()

b. If yes, in whose favor?

Finance Company or Credit Union () Yours ()

APPENDIX E.—RESPONSES TO QUESTIONNAIRES CONCERNING PRACTICES OF FINANCE COMPANIES AND CREDIT UNIONS DURING BANKRUPTCY PROCEEDINGS

[All results expressed in percentage terms]

Question	Yes	No	Don't know	Client didn't tell me
1. In your initial interview with your client, did you counsel him in regard to the probable ineffectiveness of discharge in relation to debts owed finance companies or credit unions if he executed an incomplete statement of his debts at the time he applied for and obtained his loan?-----	78	22	-----	-----
2. Did any finance company or credit union, who found out that your client was about to file for bankruptcy, try to dissuade him from filing?-----	37	40.5	15	7.5
3. If yes, did the finance company or credit union use an argument to the effect that your client's debts were nondischargeable due to the execution of an incomplete loan application?-----	44	28	28	-----
4. Did any finance company or credit union try to dissuade your client from proceeding with the bankruptcy after the petition was filed?-----	29	62	9	-----
5. At any time, after the petition was filed, did a finance company or credit union attempt to have your client affirm the debt owed?-----	69	29	2	-----
6. Did a finance company or credit union bring litigation in a state court to collect the debt after either the petition was filed or the discharge granted?-----	19	77	4	-----
(a) If yes, was there a judgment?-----	69	31	-----	-----
(b) Was it in favor of the finance company?-----	88	12	-----	-----
7. At the first meeting of creditors after the petition was filed, did a representative of a finance company or credit union appear to contest discharge on the basis of fraud?-----	8	86	6	-----

Note: In 6 of the cases where an attorney could not be reached, the bankrupt was contacted and asked the same questions as the attorneys were asked. Only 4 responded and their responses were filled with uncertainties about details and a general reluctance to discuss their cases with a stranger. Generally they all experienced various types of harassment practices, such as visits and calls at home and work to all members of his family and their friends. In 1 case, suit was brought in the State court and a judgment was secured by the finance company when the discharged bankrupt defaulted. This is a common occurrence and the costs and inconveniences are enough to discourage a bankrupt from even raising his discharge as an affirmative defense in the State court.

NATIONAL BANKRUPTCY CONFERENCE,
October 23, 1969.

Hon. BYRON G. ROGERS,

U.S. House of Representatives, Chairman, Subcommittee No. 4, Committee on the Judiciary, Washington, D.C.

DEAR CONGRESSMAN ROGERS: I am enclosing an additional copy of the bill affecting dischargeability of debts in bankruptcy proceedings to accompany Enclosures #2 and #3 which could not be submitted on October 17, 1969 when the bill was delivered. These enclosures complete the package.

As I mentioned earlier this bill is supported by the National Bankruptcy Conference and the National Conference of Referees in Bankruptcy and is in substitution of H.R. 6665 and H.R. 12250. It also includes suggestions made by members of the Subcommittee during the hearing held on October 1, 1969.

Both the NBC and the NCRB desire and urge that this bill be introduced at the earliest possible moment.

Thank you for your consideration and assistance.

Sincerely,

LAWRENCE P. KING,
Chairman, Committee on Legislation.

(Enclosure No. 1)

A BILL To amend the Bankruptcy Act, sections 2, 14, 15, 17, 38, and 58, to permit the discharge of debts in a subsequent proceeding after denial of discharge for specified reasons in an earlier proceeding, to authorize courts of bankruptcy to determine the dischargeability or nondischargeability of provable debts, and to provide additional grounds for the revocation of discharges

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause (12) of subdivision a, section 2, of the Bankruptcy Act (11 U.S.C. 11(a)(12)) is amended to read as follows:

"(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon."

Sec. 2. Subdivision b of section 14 of the Bankruptcy Act (11 U.S.C. 32 (b)) is amended to read as follows:

"b. (1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 58b of this Act. The court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications.

"(2) Upon the expiration of the time fixed in the order for filing objections or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this Act have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

Sec. 3. Section 14 of the Bankruptcy Act (11 U.S.C. 32) is amended by adding at the end thereof the following new subdivisions:

"f. An order of discharge shall—

"(1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and

"(2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt."

"g. Within forty-five days after the order of discharge becomes final the court shall give notice of the entry thereof to all parties in interest as specified in subdivision b of section 58 of this Act. Such notice shall also specify the debts, if any, theretofore determined by the court to be nondischargeable, the debts if any, as to which applications to determine dischargeability are pending, and those contents of the order of discharge required by subdivision f of this section."

Sec. 4. Section 15 of the Bankruptcy Act (11 U.S.C. 33) is amended to read as follows:

"SEC. 15. DISCHARGES, WHEN REVOKED.—The court may revoke a discharge upon the application of a creditor, the trustee, the United States attorney

ney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer."

SEC. 5 Clauses (2), (5), and (6) of subdivision a of section 17 of the Bankruptcy Act (11 U.S.C. 35(a) (2), (5), (6)) are amended to read as follows:

"(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another;"

"(5) are for wages and commissions to the extent they are entitled to priority under subdivision a of section 64 of this Act;"

"(6) are due for monies of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment;"

SEC. 6. Subdivision a of section 17 of the Bankruptcy Act (11 U.S.C. 35(a)) is amended by adding at the end thereof the following new clauses:

"(7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or"

"(8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision."

SEC. 7. Section 17 of the Bankruptcy Act (11 U.S.C. 35) is amended by adding at the end thereof the following new subdivisions:

"(b) The failure of a bankrupt or debtor to obtain a discharge in a prior proceeding under this Act for any of the following reasons shall not bar the release by discharge in a subsequent proceeding under the Act of debts that were dischargeable under subdivision a of this section in the prior proceeding: (1) discharge was denied in the prior proceeding solely under clause (5) or clause (8) of subdivision c of section 14 of this Act; (2) the prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs; (3) the debtor filed a written waiver of discharge to which he was entitled under section 660 of the Act, or the court failed to order such a discharge under that section. If a bankrupt or debtor fails to obtain a discharge in a proceeding under this Act by reason of a waiver filed pursuant to section 14a of this Act or by reason of a denial on any ground under section 14c of this Act other than clause (5) or clause (8) thereof, the debts provable in such proceeding shall not be released by a discharge granted in any subsequent proceeding under this Act. A debt not released by a discharge in a proceeding under this Act by reason of clause (3) of subdivision a of this section 17 may nevertheless be dischargeable in a subsequent bankruptcy proceeding."

"c. (1) The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt.

"(2) A creditor who contends that his debt is not discharged under clauses (2), (4), or (8) of subdivision a of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision b of section 14 of this Act and, unless an application is timely filed, the debt shall be discharged. Notwithstanding the preceding sentence no application need be filed for a debt except by clause (8) if a right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if either the bankrupt or a creditor submits a signed statement of an intention to do so.

"(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof. A creditor who files such application does not submit himself to the jurisdiction of the court for any purposes other than those specified in this subdivision c.

"(4) The provisions of this subdivision c shall apply whether or not an action on a debt is then pending in another court and any party may be enjoined from instituting or continuing such action prior to or during the pendency of a proceeding to determine its dischargeability under this subdivision c.

"(5) Nothing in this subdivision c shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists.

"(6) If a bankruptcy case is reopened for the purpose of obtaining the orders and judgments authorized by this subdivision c, no additional filing fee shall be required."

SEC. 8. Clause (4) of section 38 of the Bankruptcy Act (11 U.S.C. 66) is amended by adding at the end thereof the following: ", determine the dischargeability of debts, and render judgments thereon."

SEC. 9. Subdivision b of section 58 of the Bankruptcy Act (11 U.S.C. 94(b)) is amended to read as follows:

"b. The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge and for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act to determine the dischargeability of debts (1) to the creditors, in the manner prescribed in subdivision a of this section; (2) to the trustee if any and his attorney if any, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective addresses as filed by them with the court."

SEC. 10. The provisions of this amendator Act shall take effect on and after sixty days from the date of its approval and shall govern proceedings in all cases filed after such date.

(Enclosure No. 2)

EXPLANATORY MEMORANDUM TO ACCOMPANY BILL AMENDING SECTIONS 2, 14, 15, 17, 38 AND 58 OF THE BANKRUPTCY ACT

This bill proposes to amend Sections 2a, 14, 15, 17, 38 and 58 of the Bankruptcy Act, adding to classes of dischargeable debts, extending the bankruptcy courts jurisdiction to determine dischargeability of individual debts and effecting some change in the revocation of discharges.

The proposed addition of Section 17b deals with debts in existence during two or more bankruptcy proceedings of the same bankrupt, the earlier of which did not result in the bankrupt's obtaining a discharge. Section 14 of the Bankruptcy Act sets forth the statutory and only grounds upon which a discharge may be denied. With the exception of the grounds specified in clauses (5) and (8), all such grounds have their foundation in some form and degree of dishonesty or lack of cooperation on the part of the bankrupt. On the other hand, the grounds listed in clauses (5) and (8) are entirely distinct from such type of activity and, in fact, are such that some conflict of application and interpretation has arisen among the courts. For example, clause (5) prevents a discharge in a proceeding commenced within six years after the commencement of a proceeding in which a discharge had been granted. Where there have been two such proceedings and the discharge is denied in the second one because of the six-year limitation, the question has arisen with regard to the status of debts not discharged in the second proceeding but still in existence in a third proceeding where a discharge may be granted. As stated in 1 Collier on Bankruptcy, ¶14.53,

p. 1423 (14th ed.): "Although the contrary has been held, the better view is that in the third proceeding the bankrupt can be discharged from debts scheduled in the second proceeding." Footnotes 14 and 15 exemplify the split of authority on this point as well as the need for statutory clarification. Accordingly, the proposal in Section 17b(1) would adopt the "better view" and render such debts dischargeable in a third proceeding. There is no question but they would have been dischargeable had the second proceeding been commenced more than six years after the first one. The effect of the amendment would treat the third proceeding, assuming a discharge therein is otherwise obtainable, as if it were the second proceeding, only commenced beyond the six-year limitation. It is difficult to see how creditors could be prejudiced by this proposal, considering that their debts would have been discharged had the debtor waited a while longer before filing the second petition.

Clause (8) of Section 14c prohibits a discharge where the bankrupt failed to pay the filing fees in full. While there may be a sound basis for considering this failure as a ground barring discharge in one proceeding, for the reasons already expressed it should not bar a discharge of those same debts in a subsequent proceeding in which the filing fees have been paid in full.

Proposed Section 17b in clause (2) would enable a bankrupt to obtain a discharge from debts existing in an earlier proceeding which was dismissed without prejudice for failure to pay filing fees or to secure costs. As long as the dismissal of the prior proceeding is without prejudice it should not be considered tantamount to the denial of a discharge having any res adjudicata effect upon debts then existing. There is case authority standing for the proposition that dismissal with prejudice would bar discharge of the same debts in a subsequent proceeding; there is also authority that dismissal without prejudice does not have the same effect. Certainly if debts can be discharged in a subsequent proceeding when the earlier discharge *was denied* for failure to pay the filing fees as proposed in new Section 17b(1), then the same principle should apply where the earlier proceeding is dismissed without prejudice.

Clause (3) of proposed Section 17b is not presently operative under the existing version of the Bankruptcy Act. It has reference to a waiver and order of discharge entered in Chapter XIII (Wage Earners' Plans) under Section 660 thereof. The Section 660 referred to is not the present one but rather an amendment contained in a bill proposing comprehensive changes to Chapter XIII of the Act which bill was introduced in the House of Representatives as H.R. 6792. The present proposal in Section 17b(3) would be inapplicable and have no bearing whatsoever until and unless the amendment to Section 660 is adopted. It need not, therefore, be considered within this explanatory memorandum.

To clarify the position taken by the proposed changes affecting existing debts in a subsequent proceeding, the first unnumbered sentence was inserted after clause (3) in Section 17b. This provision assures that failure to obtain a discharge in an earlier proceeding because of a waiver of the right, in writing filed with the court under Section 14a, or because of one of the grounds in Section 14c other than those in clauses (5) and (8), precludes discharge of then existing debts in a subsequent proceeding.

The second unnumbered sentence, being the last sentence of proposed Section 17b relates to debts which were not scheduled in time for proof and allowance and for this reason were not discharged in an earlier proceeding although a discharge had been granted. If, in a subsequent proceeding, the debt is duly scheduled and a discharge is granted, this debt will be subject to the discharge. This provision is in line with judicial authority in the instances where the issue has been raised but, as is true with the situations encompassed by the immediately preceding unnumbered sentence it is not presently controlled by specific statutory mandate.

The proposed amendments adding Sections 14 g and f and 17c and adding to Sections 2a, 14b, 38 and 58 would empower the bankruptcy court, which would include the referee, to determine the dischargeability or non-dischargeability of particular provable debts, upon application, and after notice and hearing.

The National Bankruptcy Conference has for many years been in favor of a bill such as this. It believes that one of the primary objectives of the Bankruptcy Act, to wit, to give the bankrupt a fresh start in life free from the burden of oppressive indebtedness, can best be achieved by legislation of this kind.

It has been the generally accepted rule that the bankruptcy court determines whether a discharge should be granted and the court in which a claim is sought to be enforced determines the effect of the discharge on that particular claim.

In theory this is an excellent division of labor but in practice it does not work out well so far as bankrupts are concerned and in many cases, it does not work out well for the creditors.

It should be emphasized that the power to determine dischargeability of a particular claim upon the application of the bankrupt in the exception case presently resides in the bankruptcy court by virtue of the decision of the Supreme Court in *Local Loan v. Hunt*, 292 U.S. 234 (1934). That power, however, under the guidelines laid down by the Supreme Court in the *Local Loan* case should not be exercised unless exceptional circumstances exist. Consequently this bill will not effect any startling changes in the law. It will permit the bankruptcy court to do as a matter of course what it would otherwise do only where exceptional circumstances exist.

One of the strongest arguments in support of the bill is that if the bill is passed a single court, to wit, the bankruptcy court, will be able to pass upon the question of dischargeability of a particular claim and it will be able to develop an expertise in resolving the problem in particular cases. The state court judges, however capable they may be, do not have enough cases to acquire sufficient experience to enable them to develop this expertise. Moreover, even under the present system, in the last analysis, it is the United States Supreme Court which has the ultimate word on the construction of Section 17 of the Bankruptcy Act. Section 17 makes provision for the debts to be released by a discharge and those which shall be excluded from a discharge. Since this is a federal statute, the federal courts necessarily have the final word as to the meaning of any terms contained therein.

It is true that the enactment of this bill will impose additional responsibilities upon the referees. However, these are responsibilities which should be imposed upon them since they are really the people who administer the Bankruptcy Act and by whose action the public makes a judgment as to whether the administration is good or bad.

The overwhelming majority of the cases in which dischargeability of claims is an issue are those on alleged false financial statements issued to finance companies. This bill in added Section 17c(2) places in the bankruptcy court the exclusive jurisdiction to determine the issue of dischargeability with respect to those claims, claims for fraud, and claims allegedly arising from willful and malicious conversion of property.

Although it may be unnecessary in view of the little utilization made of it at the present time, the right to trial by jury is preserved in added Section 17c(5). Where timely demand for jury trial is made, trial would be had in the United States District Court under the policy enunciated by the Judicial Conference of the United States even though nothing in the Bankruptcy Act itself prevents a referee from conducting a jury trial.

To prevent the abuses inherent in the present system, the proposed amendment adopts the following procedure:

When the referee fixes a date for the filing of objections to a discharge he will at the same time fix a date for the filing of applications to determine the dischargeability of debts falling within the excepted clauses of Section 17a(2), (4), and (8). That date must be not less than thirty nor more than ninety days after the first date set for the first meeting of creditors. The fixing of the time is required in Section 14b which will also require that notice thereof be sent to all parties in interest as provided in Section 58b which Section is correspondingly amended for the purpose of conformity. Thus, creditors asserting such claims are told that they must file applications within the time fixed, and added Section 17c(2) renders such debts discharged if no application regarding it is so timely filed. Because of the nature of the action, liabilities falling within new Section 17a(8), i.e., those based upon willful and malicious injury to person and property other than conversion, need not be brought to the bankruptcy court if, in the pending action, a timely demand for trial by jury has been made by either party or a written statement of intention to do so timely is filed with the bankruptcy court by either party. As to all other debts not within the excepted classes of Section 17a(2), (4) and (8), the bankruptcy court is given concurrent jurisdiction with the state courts under Section 17c(1). Either the bankrupt or the creditor may apply to the bankruptcy court for a determination of dischargeability and these applications are not subject to the time limitations of Section 14b.

In the ordinary course of events, the bankruptcy court will first determine whether or not the bankrupt is entitled to a discharge. If discharge is denied, there is no need to hear individual applications if any are filed. Only after the order granting the discharge has become final, will the court have to proceed to hearing, under Section 17c(3), any filed applications to determine the dischargeability of those particular debts.

To effectuate the discharge, and render it unnecessary for a bankrupt to raise it as an affirmative defense in a later state court action in the multitude of cases where abuses have become apparent, the order granting the discharge will contain two directives: any judgment previously or subsequently obtained in another court is null and void as a determination of personal liability with respect to debts not excepted from discharge under Section 17a, debts for which applications were not timely filed as required by Section 17c(2), and debts determined to be discharged after hearing upon notice pursuant to Section 17c(3); creditors whose debts are so discharged shall be enjoined from commencing or continuing actions on such debts as personal liabilities of the bankrupt. These directives apply only to the personal liability of the bankrupt upon discharged debts and, therefore, would not apply in those situations where judgments may be necessary under state law to enforce valid secured claims upon particular collateral and to preserve or enforce certain rights against persons other than the bankrupt arising from guaranteed obligations. This proposed legislation also does not affect in any way a bankrupt's obligation upon a discharged debt which is subsequently revived by a new promise. In the absence of any statutory directive, the case law has permitted enforcement of such new promise made after the commencement of the bankruptcy proceeding. 1 Collier on Bankruptcy, ¶¶ 17.33-17.38, pp. 1752-1764 (14th ed.).

After the order of discharge has become final and within forty-five days of that date, notice thereof containing the directives of the order must be mailed to parties in interest specified in Section 58b. The contents of the order and the requirement of notice are contained in added Sections 14g and f. In addition to the contents of the order, the notice should specify the debts already determined to be nondischargeable and those for which applications for such determination are still pending, if any. Thus creditors, in particular, are informed expressly that if their claims are discharged they may not thereafter seek to obtain personal liability upon them in another court and, in fact, are enjoined from doing so. Thus, harassment lawsuits should be eliminated and the bankrupt freed of the necessity to retain legal assistance in another court to assert his discharge and to be unburdened from the effects of judgments which today are not rightfully obtained either through default or "sewer service."

The other provisions of added Section 17c are protective measures for bankrupts and creditors necessary in light of the new procedures. Under Section 17c(3), when the court determines a debt to be nondischargeable, it shall complete the matter entirely by determining any remaining issues, rendering judgment and making the orders necessary for the enforcement of the judgment. But by filing an application to determine the dischargeability of his debt, a creditor does not subject himself to the jurisdiction of the court for any other purpose. Thus, for example, by filing such application, he does not subject himself to the summary jurisdiction of the bankruptcy court for the purposes of avoiding preferences, fraudulent transfers and the like.

In those instances where it may be necessary to reopen a bankruptcy case for the purposes of utilizing Section 17c, paragraph (6) thereof eliminates the necessity of paying an additional filing fee.

By their nature proceedings under the debtor rehabilitation chapters of the Bankruptcy Act are quite different from the liquidation proceeding in straight bankruptcy under Chapters I to VII of the Act. The proposed amendments are intended to relate solely to straight bankruptcy proceedings and have no application in proceedings under Chapters X, XI, XII and XIII. The same would be true for Section 77 proceedings and Chapter IX proceedings.

The proposed changes place in clause (2) of Section 17a the claim for willful and malicious conversion of property and remove debts arising from willful and malicious injury to person or property other than conversion, alimony, maintenance, or support, seduction, breach of promise of marriage accompanied by seduction, and criminal conversation to new clauses (7) and (8) of Section 17a. Clause (5) of Section 17 is changed to correlate it with the wage priority in Section 64a(2). Nondischargeable wages and wages entitled to priority would

be the same in terms of maximum dollar amount and time within which they were earned.

The proposed changes in Section 2a(12) and Section 38 are merely complementary to the provisions of proposed Section 17c both granting jurisdiction to the courts of bankruptcy to determine dischargeability of debts and render judgments thereon. Section 58b contains added language conforming it to new Section 14b.

The proposed changes to Section 15 of the Bankruptcy Act expand and make more explicit the causes for which discharges, once granted, may be revoked. Some proposed changes are merely stylistic. Revocation, under the proposal, would be proper in addition to the present ground of fraud, where the bankrupt withheld information with regard to, or failed to deliver property to which he became entitled before or after discharge which property rightfully was part of the bankrupt estate, and also where the bankrupt refused to obey a lawful order of the court or answer any material question approved by the court anytime during the pendency of the action. For such refusal the time to apply for revocation is the present one-year period or anytime during the pendency of the proceeding, whichever is longer. This change would render it unnecessary for the bankruptcy court to delay determining whether the bankrupt is entitled to a discharge in order to make sure that the bankrupt complies with orders and responds to questions after granting of the discharge. Revocation of discharge rather than delay in granting would be a preferable procedure and is of sufficient strength to prevent abusive tactics by a bankrupt.

(Enclosure No. 3)

CHANGES IN EXISTING LAW

There is printed below in roman existing law in which no change is proposed by the bill. Matter proposed to be stricken by the bill is enclosed in brackets. New language proposed by the bill is italicized.

BANKRUPTCY ACT

SEC. 2. CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. . . .

(12) Discharge or refuse to discharge bankrupts [and] set aside discharges, [and reinstate the cases] *determine the dischargeability of debts, and render judgments thereon;*

SEC. 14. DISCHARGES, WHEN GRANTED.—a. . . .

b. (1) The court shall make an order fixing a time for the filing of objections to the bankrupt's discharge *and a time for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act to determine the dischargeability of debts*, which times or times shall be not less than thirty days *nor more than ninety days* after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 58b of this Act. [If the examination of the bankrupt concerning his acts, conduct, and property has not or will not be completed within the time fixed for the filing of objections to the discharge the] *The court may, upon its own motion or, for cause shown, upon motion of [the receiver, trustee, or creditor, or] any [other] party in interest, [or for other cause shown] extend the time for filing such objections or applications.*

(2) Upon the expiration of the time fixed in [such] *the order for filing objections or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed and if the filing fees required to be paid by this Act have been paid in full; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.*

f. *An order of discharge shall—*

(1) *declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: (a) debts not excepted from the discharge under subdivision a of section 17 of this Act; (b) debts discharged*

under paragraph (2) of subdivision c of section 17 of this Act; and (c) debts determined to be discharged under paragraph (3) of subdivision c of section 17 of this Act; and

(2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

g. Within forty-five days after the order of discharge becomes final the court shall give notice of the entry thereof to all parties in interest as specified in subdivision b of section 58 of this Act. Such notice shall also specify the debts, if any, theretofore determined by the court to be nondischargeable, the debts, if any, as to which applications to determine dischargeability are pending, and those contents of the order of discharge required by subdivision f of this section.

SEC. 15. DISCHARGES, WHEN REVOKED.—The court may [,] revoke a discharge upon the application of [parties] a creditor, the trustee, the United States attorney, or any other party in interest, who [have] has not been guilty of [undue] laches, filed at any time within one year after a discharge [shall have] has been granted, [revoke it] if it shall [be made to] appear (1) that [it] the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the [petitioners] applicant since the [granting of the] discharge was granted, and that the [actual] facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

SEC. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for wilful and malicious [injuries to] conversion of the [person or] property of another [, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation]; . . . (5) are for wages [which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt] and commissions to the extent they are entitled to priority under subdivision a of section 64 of this Act; [or] (6) are due for monies of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for wilful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

b. The failure of a bankrupt or debtor to obtain a discharge in a prior proceeding under this Act for any of the following reasons shall not bar the release by discharge in a subsequent proceeding under the Act of debts that were dischargeable under subdivision a of this section in the prior proceeding: (1) discharge was denied in the prior proceeding solely under clause (5) or clause clause (8) of subdivision c of section 14 of this Act; (2) the prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs; (3) the debtor filed a written waiver of discharge to which he was entitled under section 660 of the Act, or the court failed to order such a discharge under that section. If a bankrupt or debtor fails to obtain a discharge in a proceeding under this Act by reason of a waiver filed pursuant to section 14a of this Act or by reason of a denial on any ground under section 14c of this Act other than clause

(5) or clause (8) thereof, the debts provable in such proceeding shall not be released by a discharge granted in any subsequent proceeding under this Act. A debt not released by a discharge in a proceeding under this Act by reason of clause (3) of subdivision a of this section 17 may nevertheless be dischargeable in a subsequent bankruptcy proceeding.

c. (1) The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt.

(2) A creditor who contends that his debt is not discharged under clauses (2), (4), or (8) of subdivision a of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision b of section 14 of this Act and, unless an application is timely filed, the debt shall be discharged. Notwithstanding the preceding sentence no application need be filed for a debt excepted by clause (8) if a right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if either the bankrupt or a creditor submits a signed statement of an intention to do so.

(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof. A creditor who files such application does not submit himself to the jurisdiction of the court for any purposes other than those specified in this subdivision c.

(4) The provisions of this subdivision c shall apply whether or not an action on a debt is then pending in another court and any party may be enjoined from instituting or continuing such action prior to or during the pendency of a proceeding to determine its dischargeability under this subdivision c.

(5) Nothing in this subdivision c shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists.

(6) If a bankruptcy case is reopened for the purpose of obtaining the orders and judgments authorized by this subdivision c, no additional filing fee shall be required.

SEC. 38. JURISDICTION OF REFEREES.—Referees are hereby invested, subject always to a review by the judge, with jurisdiction to . . . (4) grant, deny, or revoke discharges, determine the dischargeability of debts, and render judgments thereon;

SEC. 58. NOTICES. a. . . .

b. The court shall give at least thirty days' notice by mail of the last day fixed by its order for the filing of objections to a bankrupt's discharge and for the filing of applications pursuant to paragraph (2) of subdivision c of section 17 of this Act to determine the dischargeability of debts (1) to the creditors, in the manner prescribed in subdivision a of this section; (2) to the trustee if any and his attorney if any, at their respective addresses as filed by them with the court; and (3) to the United States attorney of the judicial district wherein the proceeding is pending. The court shall also give at least thirty days' notice by mail of the time and place of a hearing upon objections to a bankrupt's discharge (1) to the bankrupt, at his last known address as appears in his petition, schedules, list of creditors, or statement of affairs, or, if no address so appears, to his last known address as furnished by the trustee or other party after inquiry; (2) to the bankrupt's attorney, if any, at his address as filed by him with the court; and (3) to the objecting parties and their attorneys, at their respective addresses as filed by them with the court.

THE NATIONAL CONFERENCE
OF REFEREES IN BANKRUPTCY

November 5, 1969.

HON. BYRON ROGERS,

Chairman, Subcommittee No. 4 House Committee on the Judiciary, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: At its annual conference, just concluded, the National Conference of Referees in Bankruptcy expressed its support of the revised dischargeability bill which was delivered to Counsel to Subcommittee No. 4 on Friday, October 17.

This bill results from the efforts of representatives of the National Bankruptcy Conference and of the Referees Conference to resolve the differences between H.R. 6665 and H.R. 12250 which were the subject of the Subcommittee's hearing on October 1, 1969.

The insight which we gained into the Subcommittee's views in the course of that hearing was most helpful in providing guidance to us in revising these bills. We believe that the resulting legislation provides a fair and workable means for giving effect to a discharge in bankruptcy. The Conference respectfully urges the Subcommittee to report the bill favorably.

The Subcommittee also has before it S.J. Res. 88, a bill to create a commission to study the bankruptcy laws of the United States. While there appears to be broad agreement as to need for a complete overhaul of the Bankruptcy Act and its administration, questions have arisen as to the cost of such a study.

At the hearings on this bill, it was estimated that the cost would be \$300,000 per year for each of two years. We are convinced that the improvements in the administration of the Act, especially in the reduction of paperwork, which will result from this study will produce savings many times the cost of the study.

To assure that adequate emphasis will be given to this aspect of the study, the Subcommittee might wish to amend S.J. Res. 88 as follows:

On Page 2, line 16, insert after "administration,"

"the applicability of advanced management techniques to achieve economies in the administration of the Act,"

On behalf of the National Conference of Referees in Bankruptcy, I should like to express to you and the other members of Subcommittee No. 4 our appreciation for your continuing interest in helping us improve the bankruptcy law and its administration.

Very truly yours,

CLIVE W. BARE,
President.



