

# FROM ORPHAN TO MATURITY: THE DEVELOPMENT OF THE BANKRUPTCY SYSTEM DURING L. RALPH MECHAM'S TENURE AS DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

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## I. LOOKING BACK

L. Ralph Mecham became Director of the Administrative Office of the United States Courts in July 1985, in the wake of a tumultuous and historic period in the bankruptcy court system. The United States Supreme Court had declared the then-existing bankruptcy system, which had been enacted by Congress in 1978, unconstitution-

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al.<sup>1</sup> While the Supreme Court had stayed its mandate for six months to allow Congress to revise the system, Congress did not react within that time period, and as a result, the jurisdiction of the bankruptcy courts was for a time in doubt.<sup>2</sup> Morale ran low among bankruptcy judges and divisions emerged within the judiciary about whether Congress should give bankruptcy judges Article III status, or retain them as adjuncts to the Article III courts.

During this period of uncertainty and upheaval, the bankruptcy system continued to function, much to the credit of the Judicial Conference, the Administrative Office, circuit and district courts, the bankruptcy courts, and the bankruptcy bar. Under the leadership of Director Mecham and others, the bankruptcy system has stabilized. Bankruptcy judges now participate on most Judicial Conference committees and have a voice in issues that affect them. This Article discusses some of the challenges that faced the bankruptcy system in the last decade, and the responses to them. It also offers some new ideas on bankruptcy court structure for future consideration.

### A. *Jurisdictional Background of Bankruptcy Courts*

The Bankruptcy Act of 1898<sup>3</sup> (1898 Act) allocated authority among bankruptcy referees (or bankruptcy judges as they were called after the adoption of the 1973 Rules of Bankruptcy Procedure), federal district courts, and state courts. Under the 1898 Act, federal district courts were "courts of bankruptcy,"<sup>4</sup> and bankruptcy referees were given limited power to assist the district courts in the exercise of their bankruptcy jurisdiction.<sup>5</sup>

The provisions of the Bankruptcy Act of 1898 also distinguished between summary and plenary jurisdiction. Under summary jurisdiction, the bankruptcy referee handled matters related generally to estate administration.<sup>6</sup> Under plenary jurisdiction, the district court

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1. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982).

2. *Northern Pipeline* was decided on June 28, 1982. *Id.* at 50. The Supreme Court mandated the stay of its judgment until December 24, 1982. *See id.* at 88 (staying mandate until October 4, 1982); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813, 813 (1982) (extending stay until December 24, 1982). Congress did not enact legislation to resolve the jurisdiction of the bankruptcy courts until July 10, 1984. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

3. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979).

4. *Id.* § 1.

5. *Id.* §§ 38-39.

6. *Id.* § 23(b); *see also* *Katchen v. Landy*, 382 U.S. 323, 328-29 (1966) (stating that provision for summary disposition "is one of the means chosen by Congress to effectuate" prompt and effectual administration and settlement of estate); *United States Fidelity & Guar. Co. v. Bray*, 225 U.S. 205, 218 (1912) (stating that "[a] distinct purpose of the Bankruptcy Act is to subject the administrations of the estates of bankrupts to the control of tribunals clothed with authority and

often exercised its bankruptcy authority over actions by the trustee against parties who had not consented to bankruptcy authority.<sup>7</sup>

The jurisdictional structure established by the 1898 Act potentially limited the progress of a bankruptcy case in a number of ways. For instance, litigation often needlessly centered on whether the court or trustee had possession of the estate property.<sup>8</sup> Similarly, important litigation arising under plenary jurisdiction awaited resolution in district or state court before the administration of the bankruptcy case could proceed. Such delays often frustrated the efforts of trustees and debtors-in-possession bringing claims against third parties, as well as those of corporate debtors who were attempting to liquidate estate property and carry on operations during the pendency of the bankruptcy process.<sup>9</sup>

The Bankruptcy Reform Act of 1978<sup>10</sup> was directed at improving aspects of the Bankruptcy Act, such as the divided jurisdictional structure.<sup>11</sup> Thus, section 1471 of the Act abolished the distinction between summary and plenary jurisdiction.<sup>12</sup> Under the new bankruptcy court system, bankruptcy judges were to be appointed by the President for fourteen-year terms.<sup>13</sup> These bankruptcy judges were to exercise jurisdiction over all cases under title 11,<sup>14</sup> and "all civil proceedings arising under [title 11], or arising in or related to"

charged with the duty of proceeding to final settlement and disposition in a summary way, as are the courts of bankruptcy").

7. Bankruptcy Act of 1898, ch. 541, § 23(a), 30 Stat. 544, 552; *see also* 1 COLLIER ON BANKRUPTCY ¶ 3.01(1)(b)(iv), at 3-9 (Lawrence P. King ed., 15th ed. 1995).

8. *See* 1 COLLIER, *supra* note 7, at 3-9 to 3-10 (noting that "primary battleground between trustees and defendants [was] often . . . one of jurisdiction rather than merits").

9. *See* 1 COLLIER, *supra* note 7, at 3-10 to 3-11.

10. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C., 28 U.S.C.). The jurisdictional structure of the bankruptcy courts is set forth in title 28 of the United States Code, informally denominated the "Judicial Code."

11. 1 COLLIER, *supra* note 7, at 3-9 (stating that 1978 statute was designed to avoid procedural battle between "summary" and "plenary" jurisdiction).

12. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668. This provision enacted a new 28 U.S.C. § 1471, subsequently repealed, which granted to the bankruptcy courts "all of the jurisdiction conferred by this section on the district courts," including "civil proceedings arising under title 11 or arising in or related to cases under title 11." Act of Nov. 6, 1978, 92 Stat. at 2668. The House Report on an earlier version of the 1978 Act described the jurisdictional grant by stating that "[t]he bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H.R. REP. NO. 595, 95th Cong., 1st Sess. 445 (1977), *quoted in* 1 COLLIER, *supra* note 7, ¶ 3.01[iv], at 3-9. Section 1471 was found unconstitutional in *Northern Pipeline*. *Northern Pipeline*, 458 U.S. at 87; *see also infra* Part I.B (discussing *Northern Pipeline* decision). Prior to the abolishment of the distinction between summary and plenary jurisdiction, a bankruptcy court was basically limited to in rem jurisdiction.

13. *See* 28 U.S.C. § 152(a)(1) (1988 & Supp. V 1993).

14. Title 11 is commonly called the "Bankruptcy Code."

a bankruptcy case.<sup>15</sup> Thus, the Bankruptcy Reform Act shifted the resolution of most bankruptcy litigation from the district and state courts to the bankruptcy court.

### B. Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

Four years after the enactment of the Bankruptcy Reform Act of 1978, a contract dispute between a chapter 11 debtor and one of its customers presented the Supreme Court with the opportunity to review Congress' section 1471 delegation of authority to the bankruptcy courts. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*<sup>16</sup> involved the constitutionality of a bankruptcy court's authority to decide a state law breach of contract claim. After Northern Pipeline filed for bankruptcy, it brought a non-bankruptcy action against Marathon Pipe Line in bankruptcy court under the provisions of the Bankruptcy Reform Act.<sup>17</sup>

The Supreme Court invalidated section 1471 because it delegated too much judicial authority to non-Article III bankruptcy judges. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, rejected a functional approach to analyzing the constitutionality of legislative courts, ruling that bankruptcy courts did not fit into any of the existing categories of permissible Article I courts, and that their jurisdiction violated Article III.<sup>18</sup> While Justices Rehnquist and O'Connor concurred in the judgment, they contended that it was unconstitutional for Congress to vest in the bankruptcy court broad authority to adjudicate questions of state law that were only tangentially related to federal bankruptcy law.<sup>19</sup> The three dissenters focused on whether the bankruptcy court undermined separation of powers, concluding that it did not.<sup>20</sup>

### C. The Emergency Rule

The Supreme Court, perhaps realizing the effect of declaring unconstitutional the bankruptcy system as it was then structured, stayed its mandate until midnight, December 24, 1982.<sup>21</sup> When it

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15. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, ch. 90, § 1471(b), 92 Stat. 2549, 2668.

16. 458 U.S. 50 (1982).

17. Interestingly, *Northern Pipeline* ended up being a successful chapter 11 proceeding—albeit under a somewhat different jurisdictional basis than the one under which it began.

18. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70-71, 76 (1982).

19. *Id.* at 90 (Rehnquist, O'Connor, J.J., concurring in judgment).

20. *Id.* at 98-100 (White, J., dissenting, joined by Burger, C.J., and Powell, J.).

21. *See id.* at 88 (staying mandate until October 4, 1982); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982) (extending stay until December 24, 1982).

became clear that Congress would not be able to correct the constitutional defect before the stay expired, the Judicial Conference of the United States moved to fill the vacuum created by the *Northern Pipeline* decision. The Judicial Conference proposed an Emergency Rule<sup>22</sup> to be adopted as a local rule by district courts, which would have otherwise faced critical expansion of their dockets by jurisdictionally orphaned bankruptcy cases.<sup>23</sup>

The Emergency Rule interpreted *Northern Pipeline* narrowly. It left intact the portions of section 1471 that provided that cases and civil proceedings falling within the section be referred to bankruptcy judges. Also, the Emergency Rule neither precluded bankruptcy courts from adjudicating traditional bankruptcy matters nor prevented them from exercising limited authority with respect to related matters.<sup>24</sup> The Emergency Rule permitted the district court to withdraw any part of a case or civil proceeding "on its own motion or on a timely motion by a party" and, in related matters, provided for a de novo review in the district court of a bankruptcy court's findings.<sup>25</sup>

#### D. *The Bankruptcy Amendments and Federal Judgeship Act*

The Bankruptcy Amendments and Federal Judgeship Act of 1984<sup>26</sup> (1984 Act) essentially adopted the structure contained in the Emergency Rule. It vested bankruptcy jurisdiction in the district courts, but permitted the district courts to refer all bankruptcy

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22. See Memorandum from William E. Foley, Director of the Administrative Office of the United States Courts, to the Judges of the U.S. Courts of Appeals, District Courts, Bankruptcy Courts, and the Clerks of the Bankruptcy Courts (Sept. 27, 1982) (on file with author). The Emergency Rule maintained the bankruptcy system established by the Bankruptcy Reform Act of 1978 except "that in certain civil proceedings . . . 'related' to cases commenced under the Bankruptcy Code, bankruptcy judges could not enter final judgments or dispositive orders." 1 COLLIER, *supra* note 7, at 3-15.

23. The Emergency Rule was initially proposed under authority of the Judicial Conference and the Judicial Councils of the Circuits. The Judicial Conference requested that the Administrative Office draft a model rule under the Conference's statutory authority "to submit suggestions to the various courts in the interest of uniformity and expedition of business." 28 U.S.C. § 331 (1988 & Supp. V 1993). The Circuit Judicial Councils, pursuant to their authority "to make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," *id.* § 332, directed the district courts to adopt the model rule. See *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 262 (6th Cir. 1983) (noting that grant of power to Circuit Judicial Councils enables them "to adopt emergency measures to prevent the collapse of the bankruptcy system").

24. Emergency Rule, *reprinted in* 1 COLLIER, *supra* note 7, at 3-15 to 3-18.

25. Emergency Rule (c)(2), (e)(2)(B), *reprinted in* 1 COLLIER, *supra* note 7, at 3-16, 3-18.

26. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in scattered sections of 11 U.S.C., 28 U.S.C.).

matters to bankruptcy judges.<sup>27</sup> The 1984 Act established two categories of bankruptcy proceedings: (1) "core" proceedings that may generally be regarded as more central to the bankruptcy adjudication than those that merely "relate to" the case,<sup>28</sup> and (2) all other (or "non-core") matters, which for the most part involve claims that would survive outside of bankruptcy, and in the absence of bankruptcy, would have been brought in a state or district court, and claims collateral to the bankruptcy administration.<sup>29</sup>

The 1984 Act gave bankruptcy judges authority to enter final judgments in core matters, but restricted their authority to enter final judgments in non-core matters absent the consent of the parties.<sup>30</sup> The Act further provided for de novo review by a district judge in non-core matters where this consent was lacking, and designated bankruptcy judges as "a unit of the district court to be known as the bankruptcy court for that district."<sup>31</sup>

While the 1984 Act settled the controversy regarding whether bankruptcy judges would receive Article III status, it created yet another brief crisis. When passing the 1984 Act, Congress neglected to provide a mechanism to keep the bankruptcy courts functioning until the Act became fully effective. Thus, for a time there was no authority for bankruptcy courts to function at all.

During this period, some bankruptcy judges were designated as "bankruptcy consultants" so that the work of the courts could continue.<sup>32</sup> Other judges were appointed as special magis-

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27. See 28 U.S.C. § 157 (1988). The 1984 Act also provided for the appointment of bankruptcy judges by the circuits, rather than by the President. See *id.* § 152(a)(1).

28. Examples of core proceedings are set out in § 157(b)(2). Although not exclusive, the list of core proceedings includes: estate administration; permissibility "of claims against the estate or exemptions from property of the estate"; proceedings related to preferences and fraudulent conveyances; motions related to the automatic stay; dischargeability determinations; plan confirmations; proceedings affecting the liquidation of assets; and matters concerning the liquidation of the estate's assets. 28 U.S.C. § 157(b)(2) (1988).

29. See 1 COLLIER, *supra* note 7, ¶ 3.01(1)(c)(iii), at 3-27 to 3-29. An example of a non-core proceeding is a debtor's right to recover damages for a tort or breach of contract committed by a third party prior to the bankruptcy.

30. 28 U.S.C. § 157(c)(1) and (2) (1988).

31. *Id.* § 151.

32. See Memorandum from William E. Foley, Director of the Administrative Office of the United States Courts, to Chief Judges, United States Courts of Appeals, Chief Judges, United States District Courts, Circuit Executives, and District Court Executives (June 28, 1984) (on file with author) [hereinafter Memorandum of June 28, 1984] (setting forth procedures to be used in handling bankruptcy matters); Memorandum from William E. Foley, Director of the Administrative Office of the United States Courts, to all Chief Judges, Bankruptcy Judges, Circuit Executives, District Court Executives, and Clerks of Court (Aug. 18, 1984) (on file with author) (indicating that many individuals still were on courts' payrolls as consultants).

trates.<sup>33</sup> The judiciary's authority to pay bankruptcy judges was questioned.<sup>34</sup>

The survival of the bankruptcy system through this period of instability is a tribute to the ingenuity of the Judicial Conference, the Administrative Office, the courts, and individual practitioners. On many occasions, challenges and obstructions could have further disrupted the system. Instead, entities and individuals got involved, and are still involved, in working together to keep the bankruptcy system functioning.

### *E. Evolution of the Bankruptcy Rules*

The Bankruptcy Rules also underwent significant transformations to conform with changes in the bankruptcy system. Bankruptcy Rules, designed to govern the procedural implementation of bankruptcy law, were first adopted in 1973.<sup>35</sup> Those rules contained separate sections for each operating chapter under the Bankruptcy Act of 1898.

Once Congress passed the Bankruptcy Reform Act of 1978, the Advisory Committee on Bankruptcy Rules began revising the Bankruptcy Rules. As an initial matter, it decided to integrate fully the rules under all chapters of the Bankruptcy Code and in all civil proceedings arising under or cases related to title 11.<sup>36</sup> This effort reflected Congress' intent to elevate the newly created bankruptcy courts and make them functionally independent. The Bankruptcy Rules became effective on August 1, 1983, and superseded all previous rules.<sup>37</sup>

Enactment of the Bankruptcy Amendments and Federal Judgeship Act in 1984, of course, required further revision of the 1983 Rules. The reconstituted Advisory Committee began preparing amendments to the Bankruptcy Rules to de-emphasize the functional independence of the bankruptcy courts and reflect the changes in the bankruptcy

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33. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 43-44 (1995); Memorandum of June 28, 1984, *supra* note 32.

34. See *Lundin v. Mecham*, 980 F.2d 1450, 1454, 1460 (D.C. Cir. 1992) (noting that William E. Foley was original defendant, and L. Ralph Mecham was substituted upon his becoming Director of the Administrative Office of United States Courts); Memorandum from William E. Foley, Director of the Administrative Office of the United States Courts, to Judges, U.S. Courts of Appeals, Judges, United States District Courts, and former Bankruptcy Judges (July 11, 1984) (on file with author).

35. See Order of Apr. 24, 1973, 411 U.S. 989, 991-92 (1973) (approving Bankruptcy Rules and authorizing Chief Justice to transmit rules to Congress).

36. Letter of Transmittal of 1983 rules from Advisory Committee (Hon. Ruggiero J. Aldisert, Chairman) to Judicial Conference and Supreme Court (Aug. 9, 1982).

37. Order of Apr. 25, 1983, 97 F.R.D. 57, 57 (S. Ct. 1983) (approving amended Bankruptcy Rules and authorizing Chief Justice to transmit rules to Congress).

system brought about by the Bankruptcy Amendments and Federal Judgeship Act of 1984. The amended rules became effective August 1, 1987.<sup>38</sup>

In late 1986, however, the enactment of the Bankruptcy Judges, United States Trustee, and Family Farmer Bankruptcy Act of 1986<sup>39</sup> brought about yet another structural change in the bankruptcy system. The 1986 Act transformed the United States Trustee program from an experimental pilot program to a virtually nationwide system,<sup>40</sup> and necessitated extensive further amendments to the Bankruptcy Rules, which took effect August 1, 1991.<sup>41</sup>

Director Meham has consistently championed the representation of bankruptcy judges and former bankruptcy judges on the Advisory Committee on Bankruptcy Rules. Whereas the reconstituted Advisory Committee had only one bankruptcy judge in 1985, by 1987 the Committee had been further restructured to include two sitting bankruptcy judges and three former bankruptcy judges. Today, the chairman of the Advisory Committee on Bankruptcy Rules, appointed by the Chief Justice, is a bankruptcy judge.

#### F. *Bankruptcy Reform Act of 1994*

On October 22, 1994, the President signed the Bankruptcy Reform Act of 1994.<sup>42</sup> The Bankruptcy Reform Act of 1994 establishes the National Bankruptcy Review Commission, prescribes bankruptcy appellate panel services consisting of bankruptcy judges as the ordinary forum for deciding bankruptcy appeals, and allows bankruptcy judges to conduct jury trials in certain proceedings.<sup>43</sup>

Among other things, the nine-member Bankruptcy Review Commission will be entrusted with the important responsibility of maintaining the delicate balance of leverages necessary to achieve bankruptcy dispute resolutions. Pursuant to the 1994 Act, it will conduct hearings, evaluate issues and problems relating to the bankruptcy system, and report its recommendations within two years from the date of its first meeting.<sup>44</sup>

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38. Order of Mar. 30, 1987, 114 F.R.D. 193, 193 (S. Ct. 1987) (approving amended Bankruptcy Rules and authorizing Chief Justice to transmit rules to Congress).

39. Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 28 U.S.C. § 581 (1988 & Supp. V 1993)).

40. See 28 U.S.C. § 581(a) (1988 & Supp. V 1993). Six districts (three in North Carolina and three in Alabama), however, opted to retain the bankruptcy administrator system. See *id.* § 581 note.

41. Order of Apr. 30, 1990, 500 U.S. 965, 965 (1991).

42. Pub. L. No. 103-394, 108 Stat. 4106 (to be codified at 11 U.S.C. § 101 note).

43. See *id.* §§ 601-610.

44. See *id.* §§ 603, 608.



*G. Other Improvements in the Bankruptcy System During Director Mecham's Tenure*

Having weathered the constitutional crisis of the early 1980s, the bankruptcy court system in the latter half of the decade still faced major challenges. They were: (1) attracting qualified individuals to the bench who would devote their careers to judicial service, and (2) affording justice to the parties and expediting the processing of cases as bankruptcy filings nearly tripled from 1984 to 1992.<sup>45</sup>

In 1988, years of effort culminated in the enactment of a special retirement system for bankruptcy judges and federal magistrate judges.<sup>46</sup> That year also saw the enactment of a statutory salary level for bankruptcy judges, set at ninety-two percent of the salary of a federal district judge.<sup>47</sup>

In 1991, the Judicial Conference approved an empirically developed case-weight system for evaluating bankruptcy judgeship needs, bringing greater certainty to the process of evaluating requests for additional judges made by individual districts.<sup>48</sup> In these times of budgetary constraint and increased congressional scrutiny of all government expenditures, the case-weight formula will provide fairness to the districts and ensure credibility with Congress concerning judgeship requests.

In the bankruptcy clerks' offices, automation was a major factor in enabling staff to process the surge in filings that began in the mid-1980s in the oil-producing states and rippled across the country in the early 1990s. The bankruptcy court clerks have progressed from scattered pilot automation projects in 1985 to full electronic docketing capability in every bankruptcy court today.

Each of these achievements is significant. Each contributed to the building of a respected court system staffed by judges of exceptional

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45. In the reporting year ending June 30, 1984, there were 344,275 bankruptcy cases filed. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 414 (1984). In the reporting year ending June 30, 1992, there were 977,478 cases filed. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 55 (1992). During this same period, the number of bankruptcy judgeships increased only by about one-third. In large part, the dedication of the bankruptcy judges and the streamlining of the process permitted the bankruptcy system to handle the increased caseload.

46. Act of Nov. 15, 1988, Pub. L. No. 100-659, 102 Stat. 3910 (codified as amended at 28 U.S.C. § 377 (1988 & Supp. V 1993)).

47. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1988, Pub. L. No. 100-202, tit. IV, § 408, 101 Stat. 1329-1, 1329-27.

48. JUDICIAL CONFERENCE OF THE U.S., REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12-13 (1991).

quality who are supported by efficient, well-managed clerks' offices. Each owes much to the leadership and commitment of Ralph Meham.

## II. LOOKING AHEAD

The peculiar structure and specialized nature of the bankruptcy system in the United States invites appraisal and experimentation. For instance, bankruptcy law is inherently associated with commercial law, and new ideas on court structure may well take advantage of such characteristics. The stability and innovation brought to the bankruptcy system during Director Meham's tenure has made it possible to consider new ideas for the future.

Perhaps one suggestion that is ripe for consideration is the establishment of a bankruptcy court system with Article III judges in a bankruptcy appellate division, and non-Article III bankruptcy judges in the trial court division. Under this structure, the bankruptcy trial courts would become adjuncts of the bankruptcy appellate court, deriving their authority by delegation from the bankruptcy appellate court rather than the district courts.

A bankruptcy appellate court would be established in each circuit with a bankruptcy caseload to justify it, or a bankruptcy appellate court could be assigned to several circuits with less bankruptcy activity. In most cases, a bankruptcy appellate court could be composed of as few as three judges, with judges from other bankruptcy appellate courts sitting by designation as the need arises.

The Article III judges of the bankruptcy appellate court would be vested not only with appellate jurisdiction, but also with jurisdiction to exercise the same bankruptcy authority that district courts now exercise. Under such an approach, separate judges of the bankruptcy appellate court, while principally acting as appellate judges, would also function as bankruptcy trial judges in cases where non-core matters must be resolved.<sup>49</sup> The concept of a dual trial and appellate role for judges is not new. Currently in the Ninth Circuit, the Bankruptcy Appellate Panel, which is a non-Article III tribunal, is staffed by sitting bankruptcy judges.

Under the present system, the option of demanding that a district court hear non-core issues is often used by litigants for purposes of

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49. Of course, a bankruptcy appellate judge would not participate on a panel reviewing his or her own decisions as a bankruptcy trial judge. Rather, if the bankruptcy appellate court numbered only three, a bankruptcy appellate judge from another circuit could be designated to sit in the place of the judge being reviewed.

delay. Under the proposed structure, a bankruptcy appellate judge with a high level of expertise would be available to hear non-core matters within a shorter time period. This would arguably invite waivers of the Article III judge requirement, and allow more of those issues to be determined by the bankruptcy trial judges.

Furthermore, because bankruptcy law is closely related to commercial law and other areas of law reviewed by circuit courts, the decisions of an independent bankruptcy appellate court could potentially conflict with circuit precedent, and introduce uncertainty into the market system. Therefore, the circuit courts should be permitted to review bankruptcy appellate court decisions en banc if conflicts arise between the bankruptcy law and the commercial law of a circuit.

This sort of restructuring of the bankruptcy system would provide a number of benefits. The establishment of an Article III bankruptcy appellate court would create a body of uniform bankruptcy law with precedential value within the circuits. This is in contrast to the current status of decisions by the bankruptcy appellate panels, which are not binding on Article III courts, and may hold persuasive value only for bankruptcy courts.<sup>50</sup> Bankruptcy cases would remain in a specialized court where they can be more efficiently resolved.

The proposed structure would also eliminate the unjustified dual-appellate nature of the current system, which allows a bankruptcy litigant "two bites at the apple" by providing an appeal to the district court, as well as a second appeal to the circuit court. Under this proposal, only one as-of-right appeal to the bankruptcy appellate court would be available, lifting the burden of bankruptcy appeals from congested district and circuit court dockets.

### III. CONCLUSION

Through the Mechem years, the bankruptcy system, once bereft of authority and identity, has developed into a stable and progressive organization. It is able to manage efficiently and bring to conclusion large numbers of cases and highly complex litigation and reorganizations. The system enters this new and challenging era with a stronger voice, a stature fortified by dedicated and qualified jurists, and the potential and maturity to adapt to the changing needs of society.

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50. See, e.g., *Bank of Maui v. Estate Analysis*, 904 F.2d 470, 472 (9th Cir. 1990) (noting that "district courts must always be free to decline to follow BAP [Bankruptcy Appellate Panel] decisions and to formulate their own rules within their jurisdiction").

