

State Cases	
1977 or '78	325
Federal Statutes	
Bankruptcy Code in 1978	300
Federal Rules	
portfolio of 14	315

ROUNDTABLE DISCUSSION*

BANKRUPTCY REFORM: THEN AND NOW

G. Ray Warner: Good morning, welcome back. The final component of our program is this outstanding group of commentators, who will be able to bring us some fresh perspectives on the present, past and possibly even the future of bankruptcy reform. We are very fortunate today to have a collection of some of the people who were most instrumental in the creation of the current Code and also in the efforts that have been percolating through Congress recently to look at the Code again and to consider revisions.

I would like to thank the panel for their willingness to serve, and, particularly the moderator, Arthur Miller, for his gracious agreement to come help bring this together.

To our audience, we really appreciate your attending this Symposium over these two days. It's been a great success and everything we had hoped that it would be. I'm very pleased to be able to introduce the panelists for this last piece of our celebration of the 25th anniversary. In a sense, the 25th anniversary is like a family reunion, as we bring back many of the family here, both the old generation and the new.

Let me briefly introduce the panelists. Our first panelist is Christine Dugas. She's a senior reporter with the *USA Today* newspaper. She works on the Money section, where she covers retirement, consumer bankruptcy, and insurance issues. She's also the author of *Fiscal Fitness: A Guide To Shaping Up Your Finances For The Rest Of Your Life*. She started covering bankruptcy with the National Bankruptcy Review Commission and has continued to cover the various twists and turns as the proposed legislation has gone up, down and sideways in the legislative process.

Immediately to her left is Phil Corwin. He's a partner with Butera & Andrews, a Washington, D.C. law and lobbying firm. He has more than 20 years experience in the federal legislative arena in a number of areas, representing clients in the financial services and credit industry, as well as in the law of electronic commerce

* The participants in the Roundtable Discussion include Arthur Miller (Moderator), Hon. William T. Bodoh, Philip S. Corwin, Christine Dugas, Robert E. Feidler, Samuel J. Gerdano, Richard B. Levin, David A. Skeel Jr., Gerald K. Smith, Elizabeth Warren, and Brady C. Williamson.

and intellectual property. Phil is best known for his efforts on the current bankruptcy reform bill. We're very pleased to have him with us today.

Immediately to his left is Professor David Skeel, who teaches bankruptcy at the University of Pennsylvania School of Law. He brings us a little bit more of a long term perspective, I think, in light of his recent book, *Debts Dominion: A History Of Bankruptcy Law In America*. We thank him for agreeing to serve on the panel.

Immediately to his left is Robert Feidler. Bob served in the federal government for more than 20 years in both the legislative and judicial branches. Bob served as the President of the ABI from 1991-1994 and has been on the ABI Board of Directors for numerous terms. He was present at the birth of the current bankruptcy Code, when he served as chief counsel to the subcommittee of the Senate Judiciary Committee that developed the bankruptcy law. He was also intimately involved in the 1984 and 1986 amendments while on the Senate staff, and the 1990 amendments while with the Federal courts.

Immediately to his left is Gerald K. Smith, who is a Partner with Lewis and Roca in Phoenix, Arizona. He received an LL.B. from New York University, where he was a Root-Tilden Scholar and the editor of the New York University Law Review. He is currently a member of the National Bankruptcy Conference. He was the Deputy Director of the Commission of Bankruptcy Laws of the United States and thus instrumental in the 1973 Commission Report, which was the precursor to the current bankruptcy Code. He has continued as a very active, prominent bankruptcy practitioner through the current day. He brings us a very broad perspective of involvement in bankruptcy during this whole period.

Immediately to his left is Brady Williamson. Brady is a shareholder with LaFollette, Godfrey & Kahn in Madison, Wisconsin. Brady is best known for his role as Chair of the National Bankruptcy Review Commission in 1996 and 1997, which was the stimulus for the current reform debate.

To his left is Richard Levin, who is a partner of the Los Angeles office of Skadden, Arps, where he concentrates in corporate restructuring, insolvency and bankruptcy issues. His practice includes the representation of corporate debtors in both out of court workouts and chapter 11. His extensive knowledge of the bankruptcy laws comes from his service as counsel to the Subcommittee of the House Judiciary Committee from 1975 to 1978, where he was one of the principal authors of the [Bankruptcy Code in 1978](#). He remains involved in bankruptcy and legislative issues as a member of the National Bankruptcy Conference.

To his left is Professor Elizabeth Warren, who has been introduced several times this weekend. She is the Leo Gottlieb Professor of Law at Harvard Law School and was the Reporter for the National Bankruptcy Review Commission. She is the co-author with her daughter, of, *The Two Income Trap*, her most recent book on Americans in debt. We are pleased to have Elizabeth serve on the panel with us.

Immediately to her left is Judge William Bodoh, a United States Bankruptcy Judge for the Northern District of Ohio, in Youngstown. He's been very involved in

some of the prominent bankruptcy cases of late, particularly, virtually everything that has a piece of iron in it. Judge Bodoh has recently written a comprehensive law review article titled, *Bankruptcy Reform: An Orderly Development of Public Policy?*, which is critical of the efforts to pass bankruptcy reform today. He is a student of that legislative process, and has compared it to earlier efforts to reform the bankruptcy law.

Finally, our own Samuel Gerdano, is the Executive Director of the American Bankruptcy Institute, a position he's held since 1991. In his prior life, Sam was chief counsel to Senator Charles Grassley on the Senate Subcommittee on Courts and Administrative Practice and served as the Minority Chief Counsel and Staff Director to the Senate Judiciary Committee in the 1980s. Sam was also instrumental in drafting chapter 12, and I do have a bone to pick with him, although I realize he's learned since that time, that all bankruptcy chapters must have an odd number. [Laughter]

We are very pleased to have Professor Arthur Miller here as our moderator. He is the Bruce Bromley Professor of Law at Harvard Law School, where he has taught since 1971. He earned his undergraduate degree from the University of Rochester and his law degree from Harvard. Before joining the Harvard faculty, he practiced law in New York City and taught at both the University of Minnesota and the University of Michigan. He is nationally known for his work on civil procedure, a subject on which he has authored and co-authored more than 25 books. He's also very well known for his work in the field of privacy.

In recent years he's taught courses in civil procedure, copyright, complex litigation, and has recently taught a seminar on the law of information and technology. In addition, he carries on an active practice of law in the Federal appellate courts. I suspect that for the present purposes, he's best known as a regular moderator of various Socratic debates, including the acclaimed PBS series, *The Constitution: That Delicate Balance*. We're very honored to have you here with us, Professor, and I'll turn it over to you. [Applause]

Arthur Miller: Thank you very much. If you listen to that gracious introduction carefully, which no rational person would do, you might have been struck by the fact that the word "bankruptcy" never appeared, and I'm proud of it. Although I've flirted with it, I haven't a clue about it. To compensate, we have assembled this distinguished panel from all quadrants of the bankruptcy biz. You should know that they have prepared unbelievably hard for this session, a few of them even showed up for the preparation session, which lasted, I would guess, no more than four minutes.

What we are going to do is have a Socratic dialogue, that's what my TV mentor, Fred Friendly, would call it, a Socratic dialogue. But I'm a kid from Brooklyn, and what we call it is a bull session. There has been absolutely no preparation for this bull session. Everything that happens will be spontaneous, unpredictable, even intelligent. Who knows? We'll see.

I gather from Sam Gerdano, my boss today, that our job is partially historical, partially anthropological, partially predictive, with a cast that has been assembled from the creation of the Bankruptcy Code. Let's spend a few initial moments looking at what happened in 1978.

You were there, Richard. You were a young person then.

Richard Levin: About three years old, I think.

Arthur Miller: That's reflective in the work product. [Laughter]

Elizabeth Warren: Be easy on him, he's from Yale.

Arthur Miller: Oh, a dangerous piece of information. Rich, when you were putting it together, you and your colleagues, what apprehensions did you have, what were your concerns about what was doable, what was not doable, how the Congress would react? Do you stay awake late at night thinking about those things?

Richard Levin: You know at age three I slept a lot. Being young and idealistic and energetic, I had a lot more energy then. We never imagined that this bill, this enormous bill, wouldn't pass. We were too inexperienced to know how difficult it is to get legislation through. All of us who were working on it just assumed that it was, just get the work done and it'll get through.

One of the difficult issues everybody remembers is the structure of the court system, whether we would have an Article III bankruptcy court or whether there would be any elevation in the status of the bankruptcy judges at all. There was a little bit of concern about the consumer debtor reforms that we were proposing. But, for the most part, that was it. It was a question of getting the staff work done, pushing the bill through and crafting a product. First of all, it was a bipartisan effort. It was completely a bipartisan effort on both sides of the Hill. That had a lot to do with it.

Arthur Miller: Were you waving at him?

Richard Levin: I'm waving at Bob. Even though he and I were on the same side of the aisle, we were on opposite sides of the Hill.

Gerald Smith: Arthur, he's forgotten one point, and that was a very nice summary. The one point that was so vivid to me, sticks in my mind, were the many, many years of letters that Frank had to write Rich and Ken [Klee] correcting their drafting style. When you start out, you don't know how to draft. Same thing was true of what I tried to do for the Commission. I can remember, and I still have boxes and boxes of Frank's letters, and at times he'd get a little testy about the drafting style.

Arthur Miller: Now, Gerry, I'm getting this impression that you guys sat around worrying about the non-temporal ware and conjunctive commas and things like that, but you really didn't worry about it being a bipartisan effort. Was it really bipartisan, or was the other party so weak you didn't give a damn about them?

Richard Levin: I, personally, didn't give a damn about them, but the Chairman of my Subcommittee, Don Edwards, and the ranking minority member, Caldwell Butler, actually agreed, at the beginning of the process, that they were going to work completely together on this process, and they did.

Admittedly, there were some issues that leaned a little more to the Democratic side, the majority, but they were all done in the spirit of compromise. Ken may disagree with me on some of those, but, for the most part, it was bipartisan. I think the same was true in the Senate, Bob, wasn't it?

Robert Feidler: It was so bipartisan that in the Senate we did not even need a normal Subcommittee markup. There was total agreement. We only had four members, only two of whom—the chairman, Senator Dennis DeConcini (D-Ariz.) and Ranking Minority Member, Senator Malcolm Wallop (R-Wyo.)—actively participated. Senator Wallop was a non-lawyer. At the full committee it took less than ten minutes to markup the bill, and on the floor, less than two hours of debate.

Arthur Miller: How do you account for that?

Gerald Smith: Well, keep in mind that when this earlier Commission was set up, you had Rep. Chuck Wiggins, a conservative, but a very fine person, and you had Rep. Don Edwards, a liberal, but also a very fine person, who attended every meeting of the Commission and were very active. Although Sen. Marlow Cook never showed up, except at the inaugural meeting, Sen. Burdick, through Tom Bergen was very active in staying on top of it. We had people from the Congress that were thoroughly familiar with it, had signed off on the proposals, and took it forward from that point. They were very credible Congressmen.

Arthur Miller: What about external pressure? Industries? Pressure groups?

Richard Levin: It was stealth legislation. For one thing, bills of that magnitude and scope didn't normally pass on the first try. There were some lobbyists, there were various groups, and I can list a half a dozen or so that made their views known, tried to push the legislation one direction or the other, but for the most part, bankruptcy was not a big issue in 1976-77.

Arthur Miller: Why?

Richard Levin: Why? Because there were a lot fewer of them, it was not in the news. There were no major corporations going through bankruptcy. The filing rate of about 180,000 consumer bankruptcies seemed like a high number at the time, but it is one-tenth of what it is now. It just was on nobody's radar screen.

Arthur Miller: No one's radar, not even the media?

Richard Levin: Very little.

Arthur Miller: Oprah wasn't doing a weekly segment on it?

Richard Levin: There you are, that's it.

Gerald Smith: Well, we did have the Brookings Report that had just come out. That certainly did stir some interest in the media and other places, academia, but it was primarily focused on the consumer, although it did severely criticize the system in other respects as being too expensive, and without adequate administration. It was rather critical of what we had at that time.

Arthur Miller: David, you've studied all of this as a historian would. Are these folks romanticizing, are they remembering accurately?

David Skeel: I think there's a little romanticism here about how everybody got together, but I do think there was a dramatic shift in the politics of bankruptcy. There has recently been a reversion back to the 19th century style. In the 19th century, bankruptcy was a pitched battle between populists and creditors. In the 1930s that was transformed and bankruptcy for the next 40 or 50 years became largely a non-partisan affair. I think it is a little bit of an overstatement, but not a dramatic overstatement, to say it wasn't partisan for most of the second half of the twentieth century.

Arthur Miller: Reflect on that from Mt. Olympus, where you sit, why? Why?

David Skeel: Why was it non-partisan?

Arthur Miller: Yes, why was it stealth, below the public radar screen, why was the media disinterested?

David Skeel: A number of reasons. As I said, it was seen as a non-partisan issue. The traditional concern about bankruptcy had been from the debtor side. In the 1930's, debtors were pacified. We passed a very pro-debtor set of reforms, at least on the consumer side, so there was less controversy from that perspective.

William Bodoh: Well, Arthur, that certainly has changed in 30 years now. Reflecting, of course, this is the first time I recall ever being to the left of anyone from Yale. That aside, what we have now is a less bipartisan procedure and it is a stealth bill again.

Richard Levin: Different kind of stealth.

William Bodoh: Certainly a different kind of stealth.

Samuel Gerdano: Wait! Wait! Wait! It's very easy to be bipartisan when there's only one party in control. Arthur, as a Yankee fan, you need to realize this bill was created by the 1927 Yankees of political liberals.

Arthur Miller: I'm going to sue you for \$2 million for invasion of privacy. I've got to go back to Boston as a branded Yankee fan. [Laughter]

William Bodoh: Well, and we won't bring up anything about Michigan vs. Ohio State.

Samuel Gerdano: Seriously, Peter Rodino, Don Edwards, Father Drinan. This is the Ruth, Gehrig and DiMaggio of modern liberalism. It's no surprise that they would create a very pro-debtor, debtor-oriented bill with little political opposition. [Cross-talking]

Richard Levin: But why would Caldwell Butler (R-Va.) and Malcolm Wallop (R-Idaho) sign on to that?

Samuel Gerdano: Because they had no power. The Republican minority in those days were barely allowed to be in the room. They were a dormant party with no power relative to the majority. It's not like that today. Weren't you paying attention yesterday at lunch when Norm Ornstein described Congress today? We've got a Congressional system that is now in balance in terms of relative power.

David Skeel: Another issue we should probably throw in is that there was a real controversy in the 1970s, but the controversy was about bankruptcy judges. The controversy was about whether bankruptcy judges would be true Article III judges. It seems to me that in a weird sort of way that controversy provided cover for the bill. It's as if bankruptcy now were rolled up with the prescription drug program. Once people sorted out prescription drugs, they would just pass the bankruptcy bill. I think that's a little bit of what happened in the 1970s.

Arthur Miller: You mean the Article III issue was partisan then?

David Skeel: Absolutely.

Arthur Miller: You mean the federal judges . . . ? [Cross-talking]

David Skeel: Believe it or not.

Arthur Miller: The largest group of Casper Milktoasts when it comes to politics, marched on Congress?

David Skeel: It's funny. You heard words like patronage and things like that in connection with the judgeship debates. It's hard to believe now that we've moved past all of that.

Arthur Miller: I loved it.

David Skeel: But, that was a big part of the debate.

Gerald Smith: Now, wait, it was with the reforms that came after the 1940 administrative study that they gave up the fee system. Referees used to get paid by fees assessed against the cases they handled. It wasn't until after the '40s, 1947, that we got rid of that unbelievable system. Would you feel like you were getting a fair shake with the referee getting paid out of the fees if you were a creditor?

William Bodoh: I'm much in favor of that. [Laughter]

Arthur Miller: They never gave you Article III status though?

William Bodoh: Just show me the money. [Laughter]

Arthur Miller: Okay! Are you asking Ohio State for tenure? [Laughter]

Gerald Smith: Arthur, let me come back to the question of Article III. That really doesn't surface at the Commission level because we had your great friend and co-author, Charles Wright, give us an opinion that an Article I court would be constitutional. With that opinion in hand, and the insistence of District Judge Weinfeld, that we not create Article III judges out of bankruptcy referees [Cross-talking]

Male Speaker: Judge Weinfeld, an Article III judge himself, I might add.

Gerald Smith: Well, everybody has a few blemishes.

Richard Levin: A quick word about Charlie Wright. When we were investigating this issue on the staff, we contacted the leading constitutional experts of their time, I'm sorry we left you out.

Arthur Miller: I was only two then. [Laughter]

Richard Levin: It showed. [Laughter]

We contacted the leading constitutional experts of their time and asked if they would write us a letter about the issues on Article III versus non-Article III courts in the bankruptcy area. Those letters are published in the House Committee Report on this bill. The only expert we wrote that refused to write us a letter, was Charlie Wright. So his letter is not reflected in there. That debate, though, was not cover for the rest of the bill.

Robert Feidler: Rich, I was going to say, you are giving a correct and academic answer. Permit me to share the practical acts that drove the Senate on this issue. Remember, it was 1977-78. What had just happened? Carter had just become President, the first Democratic President in eight years. The Democrats controlled both the House and the Senate. They had controlled it the previous eight years and they had not given Nixon or Ford any judgeship bills—that is, new judgeships. The number one priority for Democrats in the United States Senate was to get a huge omnibus judgeship bill passed. Congress ultimately did pass a judgeship bill with about 155 new Article III judgeships in September 1978 at about the same time that the bankruptcy bill was in its final stages. I was lead counsel on both bills.

As Rich will remember, I was running back and forth between the conferences on the bankruptcy and judgeship bills. Our main goal was to get the judgeship bill. And who was our Chairman? Sen. James Eastland of Mississippi. Who did he hate most in life? Federal judges. He had one word of advice to his subcommittee Chairman, my boss, and that was this, "you will not return from the bankruptcy conference with the House with any more Article III judgeships—I won't let such a bill pass." There was no thoughtful jurisdictional or no constitutional theory applied. Simply, we will not, in addition to 155 Article III judgeships, add 250 bankruptcy Article III judgeships. End of story. That's how we got to that point over the status of bankruptcy judges with the House.

Richard Levin: Bob is absolutely right. But my point to David was that the Article III issue was not cover for all of the substantive bankruptcy law issues. That's not why those issues fell.

William Bodoh: But the law didn't pass during that time, either. The gestation of the law was about ten years and it passed when this judgeship issue rose to the surface and was finally resolved.

Richard Levin: I think you've got it backwards. The law went through and rose to the surface, and, during the course of that, the judgeship issue popped up and became a politically charged issue for the reasons that Bob says, and for a variety of other reasons, but it was the tail, it wasn't the dog.

Arthur Miller: Was it a quid pro quo? No Article III status [Cross-talking]

Richard Levin: On the House side we were able to get a few concessions out of the Senate on some of the substantive law, in conference, in exchange for giving up Article III. But they were very few because, as the Republicans and the Democrats weren't far apart, the House and the Senate weren't very far apart on this bill either.

Robert Feidler: I would agree with Rich, but I would say that the macro deal was, no Article III judges for a unitary reorganization chapter.

Richard Levin: Yes [Cross-talking]

Gerald Smith: I thought Justice Berger said that he would actually make sure the Supreme Court upheld the constitutionality in return for that.

Arthur Miller: He gave you an advice or an opinion?

Gerald Smith: Senator DeConcini, not me.

Arthur Miller: Now I've got to ask Brady, as you listen to this, is this descriptive of your life? [Laughter]

Brady Williamson: Lately, no. Arthur, so much has changed in the 25 years since 1978 that the words our friends here are using almost don't mean the same. The definition of partisanship has changed. The definition of legislation and legislative has changed. The definition of debt and the position of the American consumer and American corporations has changed. In the mid-1970's there were, what, 150,000 consumer bankruptcies a year? Now, at least 1.6 million. Not only hadn't we heard of Enron, WorldCom or all of the other corporate giants that have filed for bankruptcy, that simply was not in the lexicon.

I happen to have been on the Hill in those days, although working in a totally different area than bankruptcy, and the fact that I can't even remember hearing about bankruptcy when I was a student at this law school and working on the Hill, tells you something about the visibility of the issue. It simply wasn't, in the large scheme of things, controversial.

What's happened, I think, is that as the Congress has become more politicized, issues—whether it's pharmaceuticals or bankruptcy—have become more politicized. The fact that you have 1.6 million American families and some of this country's most distinguished businesses filing for bankruptcy, has made this an issue that has to be in the pages of *USA Today*, and has to be given attention by people in both parties who care about American economic and social life.

Arthur Miller: So stealth doesn't apply?

Brady Williamson: No, nor should it.

Phil Corwin: And, yet, the remarkable thing about the pending bankruptcy bill is that, at a time when things have become much more partisan, much more polarized, the current bill has remarkable bipartisan support. This is a bill that has passed numerous times by veto proof margins.

Arthur Miller: That isn't achieving universal acceptance.

Phil Corwin: It has passed numerous times by veto proof margins, and you don't achieve those margins without substantial numbers from both sides of the aisle voting for the bill. That is the fact.

I want to give a little bit of history back to the early '90s related to the current bill and the genesis of the Commission. This week as I've been preparing for this, you start to remember things you didn't even know you remembered. I remembered sitting in the office of then Subcommittee Chair Senator Howell Heflin in 1992, at 10:00 p.m. in the evening, working the phones, along with my colleagues from the credit union, and having calls made from bankers in Texas and credit union heads in Texas to Senator Phil Gramm, who had a hold at that moment on what was the 1992 bankruptcy bill.

As a result of those calls, Senator Gramm took his hold off, but then something remarkable happened, proving that past is indeed prologue. Just before the bankruptcy bill was about to come up, Senator D'Amato (R-NY) stood up and began what turned out to be the third longest filibuster in the history of the United States Senate, over a provision in a tax bill which was going to save 400 jobs at a typewriter factory in Upstate New York, and he spoke for 17 hours until the Senate went out for the year.

The '92 bankruptcy bill died that night, along with lots of other bills, but Senator D'Amato got re-elected, a month later, which achieved his purpose.

William Bodoh: By 400 votes. [Laughter]

Philip Corwin: What I want to stress here is two key things. We got that bill passed two years later, which created the Commission. So, one, weird things have happened to bankruptcy bills over the last decade or so. Things have just come out of nowhere and derailed a bankruptcy bill, that no one could have foreseen, and yet the groups that wanted them, keep coming back. I think one of the great neglected stories is the critical role that the credit unions have played in pushing through the current bill. Everyone in the House and Senate banks with the House and Senate credit unions. The credit unions are tied to labor. They are tied to the consumer

groups. They've been even stronger advocates on some of the consumer provisions than the credit card issuers have been. Their role has been critical.

Richard Levin: When the members join the credit union, aren't they required to sign the pledge to support that bill? [Laughter]

Philip Corwin: No, they're not, but I would never want to speak for the credit unions.

William Bodoh: When I speak of stealth, consider the attempt to use the American Embassy Security Act as a vehicle. For those of you who don't recall it, the American Embassy Security Act had passed both Houses. It was taken to a conference and several hours later the Conference Committee Report came back, but all the embassy security language was gone, replaced with the bankruptcy bill.

Gerald Smith: I'd like to remind us of another issue that really wasn't so politically divisive at the congressional level, but it certainly was at the earlier Commission level, and among the people that were following the Commission's work. That is the independent administrative agency that was recommended by the Commission. We ended up eventually with only a program that tested the concept, and it wasn't the concept that the Commission had really proposed. But that was highly controversial. The judges were very much opposed to that. They felt the independent agency would take away much of what they did. And we did, in large part, take away what they did that was paper shuffling. Unfortunately, the Commission's approach wasn't adopted because they still shuffled papers in 7 and 13, and it's unnecessary. Ken Klee would be proud of eliminating that cost.

Arthur Miller: Now, again, Professor, having studied this from womb to tomb, are you hearing accurate descriptions of what's happening now, at least from your perspective?

David Skeel: I'm hearing pieces of the descriptions. It seems to me that it would be worthwhile to focus them a little bit more precisely. The one issue that keeps coming up is partisanship. It is clear that there is more partisanship now than there has been in a generation. There are a number of ideological measures that show this.

One way to think about it is to think about which committee is dealing with bankruptcy. Primarily it's the Judiciary Committee. What have they handled in the last five years? They've handled impeachment and judicial nominations. This is about as partisan a committee as you could imagine. I think it's reflected in the bankruptcy debates.

Arthur Miller: Now, is this understandable simply because of the shift from a Democratic dominated Congress and White House, to a Republican dominated or not quite dominated Senate, House and President?

David Skeel: I think that's part of this story, but the real story is simply that, particularly on this Committee, and I think more generally through Congress, there's just more partisanship because more of the Democrats are fairly left as Democrats and more of the Republicans are further to the right. Rather than clustering towards the middle of the ideological spectrum, we have both ends, and the Judiciary Committee magnifies this trend. It's a particularly polarized committee. That's part of the debate.

I think another part of the debate is not directly tied to politics, but to the change in the consumer credit industry over the last twenty or thirty years. As credit cards have been made available to everybody, the entire nature of the credit relationship has changed. Credit card offers come in the mail every day to most of us; debtors don't look at the relationship quite the same way when they're just filling out forms rather than meeting with the banker face-to-face. And I think it really changes the way people look at their obligations, and it's really transformed the debate as a result, I think.

Arthur Miller: The change in scale, 180,000 to a million and a half, is that it?

David Skeel: It's all tied up together with that.

Arthur Miller: Because 180,000 is pretty close to the population of certain states.

David Skeel: And 1.6 million is more than the population of many states. Another piece of the puzzle—I think you can go round and round and round on the effect of changes in consumer credit—but another piece of the puzzle to me is that we have this odd situation where credit card companies are the principal advocates of the morality of paying your debts. There's a longstanding view in American culture that we ought to pay our debts. Someone gave me a biblical quote earlier that's consistent with that, a little sleep, a little slumber, and poverty will come upon you. That's one part of capitalism. The other part is that we have to provide for failures. There's always the tension. [Cross-talking]

Male Speaker: There's always jail.

David Skeel: There's always jail, and we've had that. There's always been a tension and it seems to me one of the problems with the current debate is we have the wrong people arguing the moral issue. The credit card companies are not the best people in the world to be saying, what this is about is people repaying their

debts, because credit card companies are not really focused on morality, in my view, they are more focused on the bottom line.

Arthur Miller: Now, journalistically Christine, are you the right pew to be dealing with this? From a journalistic perspective, what's the story here?

Christine Dugas: Well, I'm perfectly objective, as you would know.
[Laughter]

Arthur Miller: That's written into the First Amendment.

Christine Dugas: That's right. But I think that the job of journalism in this debate has been maybe to try to keep people honest. I think early on in the debate it was really dominated by the credit industry because all the research that came out was how much abuse there was in the system, how many people were getting away with filing for chapter 7 and getting out of paying debts they could afford to repay.

Over time, I think that the press, we are not experts or statisticians, but the GAO came out and discounted some of the early research, which I think helped to even out the debate a little bit. Now you no longer hear quite so much about the abuse, but we're so far into the process that I think that we're stuck with this bill that we have a lot of disagreement on.

Having said that, covering this, I agree with Phil, there is a lot of bipartisan support for this bill that we have right now.

Arthur Miller: Then why did you say stuck with this bill?

Christine Dugas: Well, I don't see that the bill itself has been changed all that much, despite people's criticisms of it from the outside. If it doesn't pass, it's because of issues like abortion having gotten tacked onto it, not because people seem to disagree with the basic premise of the bill, in Congress anyway. But, I want to add one other thing, the bipartisan nature of the support, it seems to me, has more to do with the fact that the financial services industry has contributed so much to members, I don't think debtors have anybody on their side making contributions to Congress. So it's not surprising to me, as a journalist, that there is bipartisan support.

Philip Corwin: Bankruptcy attorneys who oppose the bill have plenty of influence on Congress. This legislation is old business. Look what happened, the House bill is being held at the desk in the Senate. Chairman Hatch is saying that, this isn't even worth another hearing. We've been through this three times. We've all voted on this three times. We know what's in here and it's just a matter of when is the right time to bring it up.

Male Speaker: That's one interpretation.

Philip Corwin: But the changes were made. The changes were made in the process. I know some people on this panel think that this bill is a creditor's "wish list." But this is a very watered down bill. This is a long way from what we originally started out trying to get. Many changes were made along the way, but those deals were made years ago and the most dangerous thing for any politician to do, of any party, of any political stripe, is to change their vote on any given bill once they've taken it. This is a bill where most of the members who will vote on it again in the Senate have already voted on it two or three times. Unless there's a damn good reason, they are not going to change their vote. They're going to ask their staff, how did I vote on this one last time—if they don't remember—and vote exactly the same way, because it's exactly the same bill, and it's being held hostage.

There are other bankruptcy issues building up. There are judgeships that are needed, but the Senate leaders, on their own, really, at no urging from any outside parties, have said "no." Senator Grassley, in particular, said nothing would move. He even told Chairman Greenspan of the Federal Reserve, that the netting provision would not be broken out regardless of economic circumstances, regardless of its importance to financial system stability. This is a whole package and everything is being held hostage to everything else until we get the whole deal.

Arthur Miller: I sense from your body movements, Rich, that you have a slightly different view?

Richard Levin: I do have a slightly different view. I do agree with Phil on one thing, and that is, it is not everything the credit industry wants. They're not getting total repeal of the Bankruptcy Code. [Laughter]

Philip Corwin: I don't recall ever asking for that.

Richard Levin: Well, you're a little bit realistic, I appreciate that, but the fact that judgeships, cross-border insolvency, financial netting, chapter 12—important in Senator Grassley's home state—farmer bankruptcies, are all being used to pressure this bill through is because Senator Grassley knows that once those things are taken out and passed by themselves, there will be no support for what's left behind. That's what's going on and why it's being held at the desk. So there isn't any full debate and press coverage so that Christine can actually go.

Philip Corwin: But that's just the process. Every bill has pieces in it that couldn't pass on their own, that have to be packaged up with other things for which there's broader support. There's nothing unique about that to the bankruptcy bill.

Samuel Gerdano: If you could get a Senate vote today, this bill would get 80 votes. You may not like that, but that's the reality. That's its history. We've been there, done that, everybody's got the t-shirt. This bill at one time got 98 votes. In a Senate today, where it takes 60 votes to declare today Saturday, that is true bipartisanship. Now, we may not like the bill, I don't like it either, by the way, I'm playing the role of Judge Edith Jones, who couldn't be here. [Laughter]

How am I doing? [Laughter]

Arthur Miller: Boy, I don't think I'll touch that line, Sam.

Samuel Gerdano: But those who don't like it have to acknowledge the modern reality. The modern reality of today's Senate is, it is as partisan and more than was described at lunch yesterday. In 1978, there wasn't a Chuck Schumer, there wasn't a Paul Wellstone, willing to jump on the hand grenades to stop the bill. There was no one in 1978 who could have pulled one strand of an issue out of the bill, and said, because of this, it shall not happen.

In today's Senate, one Senator, is permitted to do that. That is a bigger issue than bankruptcy, but it affects many, many other issues, and it's why the Senate is dysfunctional today.

Arthur Miller: Elizabeth?

Elizabeth Warren: It's not law. There is so much support for it, but it's still just not law. I'd like to hear the explanation of why, and I don't think you can lay it all at Chuck Schumer's feet. There are things that have changed since this bill was first introduced. One of the principal things that has changed is how the industry has to give a new excuse for why this bill is needed. This bill was first introduced in 1996. The big claim was, we're in the middle of a long running economic boom, unemployment is at the lowest point ever, surely the only people who are filing for bankruptcy are people who are somehow cheating the system. Look at what's happened in that time. That rhetoric heated up, heated up, heated up, until, bang, we're in a recession.

Now we have more people than ever without health insurance. We have more middle class families who are out of work. The amount of debt per family in just the period of time that we have been debating this bankruptcy bill has gone through the roof. Loan to value ratios on American homes have surged. Look at CitiFinancial. At a time when interest rates on mortgages average 5%, this company was carrying an average loan [portfolio of 14%](#) on home mortgages.

The world has changed, but the question then is: What's the story for the need for bankruptcy? This puts it back at David's point. You are telling me the credit industry is going to claim that the reason we need this bill is to push for personal responsibility? Can't we argue that the people who voted for this bill earlier did so

in a very different world. They voted for it at a time when American families, at least as a group, were under a lot less pressure than they are under today.

The reason this bill hasn't passed is that Congress has taken more money to pass this bill than any other bill in recent memory, which means that nobody wants to get out and change their vote. But that sure as heck doesn't mean anybody actually wants to get out there and vote for it or that everyone is happy with it.

Philip Corwin: Well if you could go out with money and buy a bill, the life for lobbyists in this town would be a lot easier. That is so far removed from the reality of what goes on, with all the various interests interacting on this bill. What you said is all very interesting, but has nothing to do with the debate over this bill. It is not about the reasons for bankruptcy, or whether people going into bankruptcy are good or bad, or moral or immoral, but what the rules are when they choose to enter the system. The whole debate has been so blown out of proportion. The debate over the means test is a debate over whether there should be an objective test for the term substantial abuse. That's all. What's remarkable is that the critics on the consumer movement, when the banks, and the credit unions—I have to keep emphasizing the credit unions and their leadership, if it was just Citicorp and Bank of America pushing for this it would have been very different politics and not as bipartisan. But

Arthur Miller: Credit unions.

Philip Corwin: Yes, but [Cross-talking]

Elizabeth Warren: They are the ones the sponsors always go to.

Philip Corwin: The key thing here is that it's about a test for whether someone going in should have the choice of chapter 7 when it looks like they can reasonable fund a chapter 13.

Male Speaker: There's a lot more in this bill than that.

Elizabeth Warren: Right.

Philip Corwin: There's a great deal more. And all of it's been thoroughly debated.

Elizabeth Warren: If you drop the entire rest of the bill and bring the debate down to means testing, we'd have a very different debate. But that is not the debate. This bill doesn't impose one cut on families who file for bankruptcy. It doesn't impose 100 cuts on families who file for bankruptcy. It imposes 1,000 cuts. The means test is about four pages in a bill that's more than 400 pages long. The rest of

the bill is loaded with more ways to drive up the cost of going into bankruptcy, ways to reduce the protection available when someone is in bankruptcy and to make the debate over those changes as impenetrable as possible.

Why? Because the bill maximizes the advantage of money. I presume you've looked at Howard Rosenthal's study. He's the political scientist at Princeton who uses bankruptcy as the ultimate example of how money will buy votes in Congress. He says that this bankruptcy bill is the strongest example he can find anywhere in the American legislative system that a dollar contributed to a Congressman or a Senator will produce a favorable vote. That's what this bill is about.

Philip Corwin: If money bought the votes, then why isn't the bill already law? There are other things going on here.

Elizabeth Warren: That is the question. I'm telling you, \$400 million just doesn't buy what it used to. [Laughter and Cross-talking]

Philip Corwin: Larry King had the theory that Congress didn't pass it in the 106th Congress because they wanted another round of contributions [inaudible, laughter].

Gerald Smith: Let me switch the focus just for a second. Go back to the 1930's when the Chandler Act Amendments were passed in 1937 and went into effect in 1938. There you had chapter XIII come into existence. And what was it? It was nothing more than a desirable collection system for creditors. It had been developed in Alabama as a result of referees suspending discharges and then dismissing the case after certain amounts were paid in by the debtor to pay creditors. It was a wonderful device. It was so much better than a straight liquidation case.

I ask you today, why should the federal government be financing a collection system for unsecured and secured creditors under the guise of a chapter 13? How do we justify this? What we need for debtors is simple and efficient relief. There has been a debate forever, Vern Countryman was the primary opponent, of compulsory chapter 13 versus permissive chapter 13.

The Commission I worked for tried to make it an enhanced package so people would voluntarily use it, but now what they're doing is trying to come in the back door to a compulsory 13 so that creditors will have a higher return because the federal government, through the bankruptcy system, is their collection agent.

Philip Corwin: That just isn't so.

Gerald Smith: That is so.

Philip Corwin: It is not so. This is not a bill for a compulsory chapter 13 system. The creditors say that the means test would shift somewhere between 5 and 10% of those who currently file chapter 7 to chapter 13. And our critics on the left, from the consumer movement, are not out there saying, that's a real low-ball figure, it's really 20, 30, 40, 50%, or it really is a compulsory chapter 13.

Instead, their argument's been, you are overestimating it! It's only going to shift 1 or 2% into 13 and it isn't worth the cost to the system to pick up that few 13s. That's what our critics have been saying. So how could this be a compulsory chapter 13 when the critics say that 98% of the people who can file 7 today would still file it if this bill became a law.

Gerald Smith: Strange things happen when bankruptcy judges start interpreting very ambiguous provisions in the bankruptcy laws, and there will be a tightening of the use of 7 that is far more dramatic than.

Elizabeth Warren: This is a reminder that the bill is at war with itself. Compulsory chapter 13 is not there because they want to get more people into chapter 13. Heck, the bill raises the barriers, making it harder to get into chapter 13 and confirm a plan. This bill is about keeping people out of the bankruptcy system altogether, about leaving them at the mercy of their creditors, not for five years in chapter 13, but for the rest of their lives.

The combination of negatively amortized credit cards and default rates of interests means that any person who cannot afford to get consumer bankruptcy relief has simply become a lifetime annuity for the credit card company that just wants to collect, collect, collect, until they die.

Arthur Miller: Is that resonating with the journalist here? I mean, she is speaking in some tongue that I don't understand.

Christine Dugas: I understand her completely. I would add another question, and that is, if the credit industry is looking for trying to get more money back, stop abuse, and get people to repay their debts, why are they cutting back on their fair share payments to credit counseling agencies? Why are they making it more difficult for people who, pre-bankruptcy, try to go to a credit counseling agency and work out their debts? I'm just asking a question because I don't have an answer to these things, but it seems like everywhere you go it is getting harder for people to work on their debts.

Elizabeth Warren: We've talked about the credit industry as if it were monolithic. At a minimum, there are two credit industries out there. There is a credit industry that still does prime lending, and it looks very hard at whether or not a borrower will be able to repay.

Then there is a sub-prime credit industry. That sub-prime credit industry just wants to get those minimum monthly payments. Who is their number one profitable customer? It's the customer who looks just like the guy who files for bankruptcy, but, for some reason or another, can't afford to file for bankruptcy and so keeps missing payments, making payments, missing a few more. The real push and the real money behind this bill is the group that wants to do the sub-prime lending.

There's also a real issue about what bill of goods the lobbyists have sold to their customers. I think that there are folks in the credit industry who have decided that this bill is very thin gruel and is not going to give them what the lobbyists initially promised because the initial promises all depended on the assumption that the debtor really has a lot more money. They sold this bill on the claim that there's a pot of gold at the end of this rainbow.

Well, guys, there is no pot of gold at the end of the rainbow. The debtors are broke. The lobbyists have promised that the credit card issuers are going to be richer, and the car lenders are going to be richer, and the mortgage guys aren't going to be hurt, and the future of the consumer credit industry isn't going to be hurt. Those promises are literally not all possible. These creditors are stealing from each other, and I think some of them are beginning to figure that out.

William Bodoh: I think emblematic of what she says is the reality that sub-prime loans fueled much of the boom of the '90s and part of what happened was that the sub-prime lending pool was exhausted. The 125% loans on what you claim the value of your real estate is, the credit cards and so forth that bought the computers, the cars, the swimming pools, the addition to your house, people exhausted that pool of lending and the sub-prime industry has to go out and look for other customers now.

Philip Corwin: Actually, the 125% of home equity loans were disposed of by the marketplace when the companies making them couldn't get funding in the securities market place. The market worked in that case. It's amazing that you can debate about a bankruptcy bill and hear about everything but bankruptcy. You hear about credit counseling and sub-prime lending. Nobody wants to talk about what is actually in the bill.

William Bodoh: That's what the bill is about.

Philip Corwin: Is this compulsory 13 and denial of access to the bankruptcy system, or, is it thin gruel? It can't be both, Professor.

Elizabeth Warren: Thin gruel. I think some of the creditors have figured out that \$1.00 that goes to the car industry in chapter 13 because the bill would prevent a strip down on car loans is \$1.00 that does not go to the credit card companies.

There are some creditors out there who started to run the numbers and say, "Wait a minute. How is it I'm supposed to get more money after having paid the lobbyists millions of dollars to get this bill through?"

Philip Corwin: We don't have specialized financial institutions. Whether it's Citicorp or the local credit union, they are issuing the credit card and making the car loan. One way or the other, that dollar is going into one of their pockets.

Elizabeth Warren: But you are just moving it around—out of one pocket into another—not creating more money. Part of this game is stealing from tomorrow too. So long as these people stay mired in consumer debt forever and ever, we're just moving the money around. We're not making the creditors any richer in total. It's not as if you can keep these people from going into bankruptcy that somehow they're going to get rich and pay 100 cents on the dollar to their creditors. It's just a question of which creditor is going to drain off whatever they have, who will get the right to continue to collect from these folks for years and years and years.

Back in the early 1980s, most of the debt listed in bankruptcy had already been written off long before filing. Nobody was trying to collect that debt anyway. That really reduces the pressure on whether or not you need to lobby Congress in the 1970s to beat the debtors up. If you've already written off a huge amount of the consumer debt, and you gave full protection to mortgage loans, bankruptcy is just about declaring an end and putting the debtor back at flat broke. The difference today is that investors are buying securitized shares in debt discharged in chapter 7 because they think there's something there that they can still collect on.

The world has changed. It is now where it's cheap to collect from consumers forever and ever and ever. But the only way that industry works is if the customers can't get a discharge in bankruptcy. The way to keep them from getting a discharge in bankruptcy is to keep them out of the system altogether or to put them in chapter 13 where two out of three already fail. This bill raises the bar in chapter 13 to reduce the success rate even lower. The credit industry ends up with millions of families that they can continue to feast off for years into the future.

Arthur Miller: Sam, you either have something very important to say or you have slipped into a catatonic state. Which is it?

Samuel Gerdano: Well, Professor Warren makes a very compelling argument. I think I even agree with it. But my point is, that's not why this Symposium is not instead titled the "First Anniversary of the Reform Act of 2002." The reason why the Symposium isn't titled that, and why the bill is still stalled, is entirely different than all of those legitimate reasons that Elizabeth just explained. And that is because the bill is hung up by some killer amendment, which, as a former member of the Senate staff union, I'm very envious of. I mean, when your goal is to design a killer amendment that brings to bear opponents in the pro-life movement, for

example, to kill an economic bill on bankruptcy reform, I mean, that is nirvana. As a minority side staffer you go to sleep at night dreaming of the opportunity to come up with an amendment like this that will crater the U.S. Senate. [Laughter]

I love that, at least as a former member of the union. But, let's be serious, it has nothing to do with the merits of the bill. Yet that's why we're here today talking about a bill that is apparently hopelessly stalled. And I agree with the prognostication yesterday, that it's not going to happen in the 108th Congress either.

Arthur Miller: If I were a person from Mars and I had been sent down to this planet to look around for possible colonialization, because of problems we've got back at Mars, what would I say when I return to Mars? I would say, they've got this very interesting process called legislation. What they do, is, everybody in the legislature lines up and commits to support a piece of legislation, and then they spend years figuring out ways to avoid voting on the legislation, or, they use a technique where someone puts a poison pill into it so it self destructs.

Samuel Gerdano: Excellent. That's it.

Arthur Miller: So I would describe the American legislative process as one of complete stasis.

Samuel Gerdano: Dysfunctional.

Arthur Miller: It's dysfunctional. Now you are our legislative guru, you have written on the process of this particular subject, what do you make of all of this? You've only got one more year with your black robe so you can be honest.

William Bodoh: Oh, it's less than that.

Arthur Miller: But who's counting, eh?

William Bodoh: A problem, I think, with the bill is that what it says is not what it does. Let me give you just one example. There is a provision entitled, "Protection of Retirement Savings and Bankruptcy," but which seems, ironically, to actually impose a cap on the amount of retirement savings which debtors can keep beyond the reach of creditors. Now, the cynic would say, that's a systemic problem of the bill, that what it intends is not what it does. I truly think that's what bothers some members of Congress and why it's not getting up on the floor, because it doesn't do what it says it's going to do.

Arthur Miller: Do you buy into Elizabeth's theory that even though they may, as Sam has said, be committed, they don't want to pay off on the commitment because they believe life has changed since '94, or that the bill is too draconian? How do you, as an outsider to Washington, how do you interpret the inaction?

William Bodoh: I have this notion that any time Congress passes a bill that has "reform" in the title it's probably not. That's the cynic in me, but I think the problem with this bill currently is that there was wide investigation of the public policy backing of the 1978 bill, and there was wide agreement on the public policy reasons for that bill. I see an absence of agreement on the public policy spine of the bill, if you will, this time.

Arthur Miller: How so?

Philip Corwin: That's never going to happen again. You are never again going to return to a world where a bunch of self-appointed bankruptcy elite experts are going to be able to get together and work something out and hand it to the Chairmen of the Judiciary Committees and have it go through with no one else involved in the process. Bankruptcy is just way, way too big, way too important for the economy.

William Bodoh: I could not agree with you more.

Philip Corwin: Way too much money involved in the system. But the notion that this bill--while it may be comforting to some on this panel to believe--that this bill is not going anywhere, that's not the truth. I have to even disagree with Sam.

The Schumer Amendment is not a killer amendment. The Schumer Amendment was adopted in 2000 in the Senate, stripped out of the Conference Report, and the Conference Report passed in the Senate by a veto proof margin, and the bill would be law but for President Clinton's pocket veto. Then we had this very bizarre incident at the end of 2002 where the rule on a Conference Report was defeated in the House because a small group of dissident far right members revolted over the Schumer Amendment—which was in there because the Democrats at that time controlled the Senate and insisted that something be there, which won't happen this time around.

Samuel Gerdano: That's the definition of a killer amendment, Phil. It worked exquisitely.

Philip Corwin: It won't work this time. [Cross-talking]

Samuel Gerdano: I saw it in private email traffic from the staff who dreamed up the strategy. They were having a wet dream over this. [Laughter]

They couldn't believe their good fortune that the groups they wanted to influence were behaving exactly like the Pavlovian dog they wanted.

Arthur Miller: Is that a bankruptcy term? [Laughter]

Philip Corwin: It's a long way from now to the end of this Congress. There's no reason to believe that this bill can't be brought up in the Senate, disposed of in two or three days, and it will pass again by a veto proof margin. If the Schumer Amendment gets in, it will be stripped out in the one hour Conference Committee. And the bill will be sent back to the Senate and will pass again. [Cross-talking]

Brady Williamson: Let me respond to Phil, and also inject a conservative note here. First, Phil, people have been making that precise statement every year for five consecutive years.

Elizabeth Warren: Six.

Brady Williamson: Six. It may happen, it may not. But let's not lose sight of the fact that the framers of the Constitution designed this to be difficult. Passing legislation should not be easy. I think this bill is still not law for three reasons. One is the tenacity of a relatively small group of members of Congress, mostly members of the U.S. Senate, and I would add, the framers had that in mind as well. Second, we have the unwillingness of the proponents of the bill at key junctures to compromise, because I think this bill could have become law in 1997, 1998 and 2000, had there been a willingness to compromise.

Ironically Phil, it's the very bipartisan strength of the bill that, in effect, made it muscle bound because there was an unwillingness to consider other views and to make relatively small changes. The third reason is because, at least since 1998, the news media have paid attention not only to the legislative process, but to the bill itself. I can identify at least three instances where an article or articles—*Time Magazine*, *USA Today*, *The New York Times*—literally caused a pivot in the legislative progress of this legislation. I say that's neither good nor bad, but it's the way our system ought to be working.

William Bodoh: But the current process, this kind of stealth legislation is consistent with a Congress that treats us as subjects, rather than citizens, hiding what they're doing. The Embassy Security Act gambit is the poster child for my point.

Philip Corwin: This is the farthest thing from a stealth bill. It's been debated, ad nauseum, for dozens of hours in the House and Senate. [Cross-talking]

Samuel Gerdano: Most people think the bill is already law. Reporters call me up and say, do you remember when Congress changed the law a couple of years ago? No. [Laughter]

It didn't happen. Most people think this has already happened.

Philip Corwin: That embassy thing was an end of session ploy by the House leadership. They were so embarrassed by the defeat of the rule on the Conference Report last year, that they grabbed up another bill that was going nowhere, stuck a bankruptcy bill in so they could say they'd actually passed something, and sent it over to the Senate knowing it was going to die as soon as it got there, but there was nothing stealth about this process. It's been the most public process—with many, many compromises made.

Robert Feidler: And I would say the '78 process was not stealth either. As Richard recalls, there were hundreds of witnesses that testified over years of time following a public commission that was in place for three years. There was nothing stealth about it. But there was, as Brady said, compromise. I know that, just a number that I've used over the years, and nobody has contradicted it. But you might recall the Senate passed its bill in September 1978 at the end of a session, the House had passed it a few months before that. The four key staff—Rich Levin and Ken Klee from the House and Harry Dixon and myself from the Senate—got together and resolved approximately 2,000 points in difference in five days!

That's compromise. I agree with whoever made the comment about compromise. I know there's been some compromise, Phil, but I mean, you've got to get to the finish line. You can't stop short of it.

Arthur Miller: What's your prediction, Bob, based on what you experienced back then and what you see now, what's tomorrow? Is Phil's perception of what's going to happen accurate?

Robert Feidler: I think it is.

Arthur Miller: That produced silence around the table.

Philip Corwin: I'm not predicting with 100 percent certainty that we're going to get this bill through in this Congress. What I am saying is that this bill, or something that looks very much like it, is going to pass at some point. I've been involved in legislative efforts that took twenty years before they reached fruition. When groups and members get committed to something, they will stick to it, and unless there's either a very major break with the current political makeup of Washington, or a major economic debacle in this country, this bill—at some

point—this bill or something very much like it is going to pass at some point. There's that much patience and persistence.

Elizabeth Warren: And money.

Richard Levin: I think this discussion underscores the difference between '78 and now. We wouldn't have had this kind of discussion in [1977 or '78](#). Bob's right. We sat in a room. We sat in public hearings. We sat in private meetings. We had discussion, we had compromise, we had tradeoff. We didn't get everything we wanted in the House. Bob didn't get everything they wanted in the Senate. But we got a bill that was widely supported, almost vetoed, but not vetoed at the last minute because there was broad support.

As I heard the story, one of the key legislative people in the Department of Justice actually encouraged President Carter to sign that bill at a time when it was getting controversial because of the judgeship issue, but, for the most part, was a non-controversial bill.

Robert Feidler: Rich, if I could add just a quick, maybe an interesting historical note, picking up on what you had just said. The setting was that in early October, 1978, a compromise had been reached between the House and the Senate. Technically, there never was a conference on the bankruptcy bill. The House had just passed a House amendment—reflecting the compromise—to a Senate amendment to a House bill. It was back in the Senate for final acceptance, and then on to the President.

That's when the Chief Justice realized the expanded role bankruptcy judges would have within cases and judicial governance and Senator Thurmond stopped the compromise bill from coming up for consideration as a favor to the Chief Justice. Picking up on what Rich just said, do you know who his negotiators were to work through the impasse? Rich and Ken Klee and Harry Dixon had all left town, as you recall. I was left with the bag, as it were. Pat Wald, who went on to become Chief Judge of the District of Columbia Federal Court of Appeals, was then the Legislative Chief for Attorney General Griffin Bell, who was the designated negotiator for the Chief Justice. Pat Wald, Griffin Bell, Senators Dennis DeConcini and Malcolm Wallop, and Congressmen Don Edwards and Caldwell Butler, sat in a room and cut the final deal on the judicial aspects of the bill. [Cross-talking]

Not just on limiting judicial powers, but on representation on the judicial branch governing bodies. That's how they got to the compromise that led to passage.

Richard Levin: What happened was the House and the Senate conferees reached an agreement. It passed the House, went back to the Senate, it stalled in the Senate because of a problem with the court system. The Chief Justice blowing up, Senator DeConcini supporting that, Senator Thurmond supporting that. What

happened? The key members got back together and they cut a new deal and the bill passed. That's the difference in the process from now.

Gerald Smith: Let's not forget one item of controversy that we did have earlier after the Commission's work. It was extraordinarily controversial. It caused the bankruptcy judges, then referees, to actually propose a competing bill. It came back again somewhat to money, I guess, but one of the reasons was that we would not recommend that the sitting judges not be folded in. That became highly controversial.

Eventually that was worked out, though. It was resolved. That was about as contentious a point as we had from the Commission's bankruptcy proposal. It was resolved, worked out, and a different bill evolved out of that.

Richard Levin: There's another difference, I think, between then and now. I want to challenge a little bit of what you said, Elizabeth, about buying votes. I think what that money has bought is sound bites. I think there's more, we saw it in the '70s.

Bob, I'm sure you'll agree with this. As members came to the floor to vote, what's the bill about? If you had a good phrase to say that this bill, you know, this bill is for motherhood, we'll vote for that because of the title or what spin it had. We had some of that. But for the most part, the staff work, both sides of the Hill, both parties, was professional in the staff work.

Now what I sense, this bill is driven by, "people ought to pay their debts." Nobody can argue that people ought to pay their debts. Even those of us on the crazy left say, yeah, people ought to pay their debts. This bill got that title. The industry was able to put that title on the bill, and, I'll tell you, I saw bills in the '70s, but I've seen it much more so in the '90s and in the 2000s, that, you put a title on a bill, it doesn't matter what it says in the bill, it's the title that wins.

Samuel Gerdano: You mean like the Violence Against Women Act?

Richard Levin: Exactly.

Samuel Gerdano: A bill declared unconstitutional by the Supreme Court?

Richard Levin: Yep.

Samuel Gerdano: Like that?

Richard Levin: Yeah, exactly like that. [Cross-talking].

Arthur Miller: No, it's the Judge's point.

Richard Levin: It's only one side that does that. That is the game.

Arthur Miller: This is reform, right?

Philip Corwin: Nobody in Washington takes those titles seriously.

David Skeel: Can I change the subject just for a second? One of the things that strikes me is that we've been talking for an hour and haven't said anything about corporate bankruptcy. In the last two years we've had WorldCom and Enron and some of the biggest corporate scandals in our nation's history, but we're not talking about corporate bankruptcy at all. It seems to me that on the corporate side the system works pretty well, and, for the most part, most people think it works pretty well.

Elizabeth Warren: Most people except for the employees of Enron and the retirees, small creditors, investors and other people who have been cheated by these companies. I think that should be the real question now about bankruptcy reform. Bankruptcy reform is not about how to squeeze out more payments out of families on behalf of poor pitiful Citibank. It should be how to redirect some of these resources to help out the employees, the people who are left holding the bag on their pensions, the people in companies like Polaroid who found that their companies had cancelled all of their rights. And now it turns out that this same company has made a \$26 million profit in the first nine months post sale. That's the reform that's needed.

David Skeel: But many of those aren't really bankruptcy issues. I think the pension issue is a pension issue, that we ought to have some sort of pension insurance scheme, which is not directly a bankruptcy issue, I don't think.

Elizabeth Warren: Then I don't know what a bankruptcy issue is. A bankruptcy issue is when the business fails and it comes time to divide up the assets, bankruptcy law says how that's going to work. Right now there are a whole lot of folks in America who are standing on the short end of that distribution line, and who want to know how come the law worked out that high paid executives got million-dollar contracts approved by the judge, and they ended up with nothing.

David Skeel: Now the judges can do that now, right?

Elizabeth Warren: Yes, and maybe that's the kind of reform we ought to be talking about. But don't tell me it's not bankruptcy.

Samuel Gerdano: Reconciling the tension between the pension laws and the Bankruptcy Code was one of the purposes we had in mind when we created the Bankruptcy Commission, to have a group of experts resolve those differences and conflicts between other federal laws, and even state laws, such as state tort laws, environmental laws, and other labor and employment issues. I was in the Senate when the Commission bill was first drafted. Bob Feidler was there too, I think. We had great hopes for that process because Congress doesn't have the expertise, either at the staff level or certainly the member level, to dive into those conflict issues and study them thoroughly. We were hoping the Commission would do that and provide a clear roadmap so that we wouldn't be talking ten years later about a Polaroid or about an Enron, that maybe we could have had a better solution to those tough cases. We could have anticipated those problems and had an answer ready when those cases came down.

Arthur Miller: I don't understand how two distinguished legal academics could have such different views about corporate bankruptcy. That doesn't happen to us in the procedure field. [Laughter]

Gerald Smith: You want to go into the class action rule, Professor?

William Bodoh: The 1997 Commission Report was the result of a lot of study, a lot of input from many knowledgeable people, and it showed up on Capitol Hill like Uncle Harry's bastard son showing up at the family reunion.

Elizabeth Warren: Indeed, wasn't it somebody at this table who announced that the Commission Report was dead on arrival and got Congressman McCollum to introduce the creditor's bill before the commission bill came out, to step on any publicity that the Commission Report might get? That's my recollection of the facts.

Gerald Smith: I'd like to say, just from a personal perspective, I no longer feel that it's even worth the effort to try and ask Congress to make a reform that should, by and large, be largely non-controversial. There are a number of those reforms I think all of us would agree on, but you don't see anything going to Congress or through Congress in that manner.

A technical correction bill for example, you wouldn't have a chance of getting a technical bill through. You don't have a chance of doing things in the partnership area, or making LLC's expressly subject to the Bankruptcy Code, little things that don't, maybe, mean a lot, but if you add them all together they do mean a lot. I don't feel there is any possibility of my efforts ever coming to fruition. And, frankly, I don't care to work with Congress anymore.

Elizabeth Warren: I'm struck by what Sam says. When he describes what the bill says, what was supposed to be on the spine of this legislation, Sam is exactly right. This legislation was supposed to be the hard intellectual work that hadn't quite been finished by the '78 Code—how bankruptcy intersected with pensions law and how it intersected with labor law.

The statute itself had only two prescriptions: It said, don't mess around with consumer bankruptcy because we like it the way it is. That's what the language said. And second, it said to fix the future claims problem. That was the charge to the Commission, and I think the spine of the statute was supposed to be that. The Commission tried. It set out this ambitious agenda, and then it got hijacked by the consumer credit industry and well-paid lobbyists.

Samuel Gerdano: Well, the political world changed too, in terms of Congressional control. Again, you might not like it, but you've got to accept it for what it is and you've got to work with it, or work around it. I know Gerry's frustration with the legislative process is understandable, but that doesn't mean that you are entitled to ignore political issues or belittle them. You just have to deal with it. The problem today is that we are dealing with these completely extraneous issues, like abortion. If it's not abortion, it would be something else. There could as easily have been a gun amendment, making all debts arising out of the discharge of a firearm not dischargeable. [Laughter]

Who do you think that provokes? The gun lobby would blow up the capital to beat an amendment like that.

Male Speaker: So to speak.

Samuel Gerdano: Exactly. You offer it because you know it's going to have that reaction. Homestead exemptions are the same way. Hard exemption caps will provoke an adverse reaction, but why this fixation on homestead? Gee, is it because Texas is a state with an unlimited homestead exemption? Who is from Texas that we know of who runs this town? What's another famous state with a generous homestead? [Cross-talking]

Richard Levin: No, we want to pay the creditors. That's a good source.

Samuel Gerdano: Tell me, who's the current governor of Florida? The fact is it's all about embarrassing people, it's all about making difficult votes. It's not about bankruptcy. It's about killing a bill. Again, from my perspective as a former staffer, hey, that's your job if you are in the minority. When you are in the minority, your charge is, you've got to derail this sucker and you will do anything possible to do it. And they've done a spectacular job. It's not that they've been convincing about their other arguments, as compelling as they might be.

Christine Dugas: As a reporter who is outside the Beltway but has covered related topics, I think that the financial services industry has real tenacity on some of these issues. If you just look to Glass, Steagall and Gramm-Leach-Bliley to see how many years they fought to get these passed, you have to stop and think that eventually this bill will probably be passed. [Cross-talking]

Arthur Miller: What's your prediction? We've heard Phil's prediction.

Christine Dugas: I don't have a prediction.

Arthur Miller: Do you have a prediction?

Samuel Gerdano: Seventy years, like last time. [Laughter]

Arthur Miller: I mean, I love Phil's analysis because it's a Boston Red Sox view of the world. [Laughter]

We didn't win the series this year because we sold Babe Ruth. We didn't get into the World Series this year because Bucky Dent hit a homerun. But this is the year. Right?

Okay. Our time has expired, my thanks to this group for participating. [Applause]

G. Ray Warner: Before you leave, I just wanted to thank you on behalf of the ABI for attending the conference and especially thank the panelists today. [Applause]