NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT

THURSDAY, NOVEMBER 13, 1997
House of Representatives,
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:00 p.m., in Room 2237, Rayburn House Office Building, Hon. George W. Gekas (chairman of the subcommittee) presiding.

Present: Representatives George W. Gekas, Ed Bryant, Steve Chabot, Jerrold Nadler, Martin T. Meehan, and William D. Delahunt.

Also present: Representative John Conyers, Jr.

Staff present: Raymond V. Smietanka, chief counsel; Charles E. Kern II, counsel; Susana Gutierrez, clerk; Perry Apelbaum, minority general counsel, and David Lachmann, professional staff member.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. **GEKAS** [presiding]. The hour of 1:00 having arrived, the subcommittee will come to order. But because of a longstanding custom that will require us to await the presence of at least one other member to establish a hearing quorum, we can do no further business.

I have kept faith with my own edict that we will start every subcommittee meeting on time; now we will start the recess on time.

[Recess.]

Mr. **GEKAS.** With the appearance of the gentlemen from Massachusetts, Mr. Delahunt and Mr. Meehan, we have now established a hearing quorum and, therefore, the subcommittee will come to order.

The first order of business, of course, is to welcome all who have come to the chamber for the purpose of this hearing, and, particularly, we greet the members of the Commission. The product of their work and their recommendations will become the focal point of a great debate, as I envision it, over the next months, perhaps for the entire new year.

But the Commission's recommendations and report, whether adopted in whole or in part, will form the fulcrum from which any bankruptcy legislation will flow. So we are grateful for the opportunity to launch this entire essay of purpose in bankruptcy with the report directly from the statements of the commissioners themselves.

The use of credit, of course, has become an addiction for many people in this country, as serious as drugs, alcohol, gambling, or gluttony. Organizations such as Alcoholics Anonymous, Gambler's Anonymous, the Betty Ford Clinic, Weight Watchers—you're familiar with all of them—all emphasize treatments that revolve around individuals taking control of addictions by changing their lifestyle.

The first step in any support group is for a person to admit that there is a problem, signifying that the person is willing to take responsibility for the addiction. Our current bankruptcy system, which allows debtors to wipe the slate clean, does not force individuals to admit to the problem and to take personal responsibility for a financial debacle of their own making.

The bankruptcy crisis is epidemic. A record 1.3 million or more Americans are expected to declare bankruptcy this year, more than double the number of a decade ago, with losses expected to reach $40 billion. This translates into $400 for every household in the form of higher interest rates and merchandise prices each and every year.

More than 1.1 million Americans filed for bankruptcy last year, more than triple the number of 1980. Ironically, despite the current economic boom, the bankruptcy rate per household so far in the 1990's is nearly eight times higher than the rate of the economically-depressed 1930's, and it is climbing every year.

Since 1995, in my home State of Pennsylvania, chapter 7 cases have increased by 81 percent. The Bon-Ton Department stores, popular in my congressional region, reported $1.6 million in bankruptcy losses last year. This is almost a quarter of their earnings and an increase of 35 percent in losses over the previous years. Bankruptcy losses in 1997 are expected to increase another 32 percent over 1996. These bankruptcy losses not only impact the company's balance sheet, but also trigger a trickle-down effect on the employees, their families, the number of new hires, layoffs, and salaries. In short, Bon-Ton's situation is typical of many businesses that offer their customers credit, and obviously this trend is unsustainable.

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Our bankruptcy laws and societal attitudes have created a system that is unfair to debtors, to creditors, and to all of us as consumers. About $30 billion in consumer debt was discharged through bankruptcies in 1996, and it is estimated that the amount will total $40 billion this year. This has cost retailers and bank credit card issuers $7 billion last year. Mortgage, auto, and other consumer lenders are suffering significant losses due to personal bankruptcy.

Although many are not sympathetic to the large consumer credit providers, the ease with which Federal bankruptcy laws allow consumers to have their debts forgiven is driving up the cost to those who are fiscally responsible in the form of higher prices and interest rates. Responsible consumers, themselves, are also suffering because bankruptcy losses are prompting creditors to tighten their lending practices. Even worse, families with limited means who do not abuse the system can be shut out of the credit system entirely.

The current system, which in my judgment breeds financial irresponsibility, is not the cure-all presumed by those who live beyond their means. By allowing people to escape from their financial obligations, we are doing those individuals a disservice by not encouraging them to manage their finances and control their debt.

The end result is a citizenry caught in a never-ending cycle of debt. With bankruptcy filings expected to reach historic levels this year, I, personally, have tremendous concerns for the stability, both economic and emotional, of the core American family.

Historically, bankruptcy was intended as a last resort, pursued only under the most dire of situations; for instance, the loss of a job, an illness in the family, death of a spouse. Unfortunately, bankruptcy has become a way for reckless spenders to escape their debts.

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As chairman of this subcommittee which has been tasked to reform the Bankruptcy Code, I am committed to ensuring that the code will help those in dire circumstances get back on their feet, while protecting the costs of goods and services that all Americans encounter every day of their lives.

During this upcoming recess, my subcommittee will undertake the task of reestablishing the balance between creditor and debtor in the form of a bill. I plan to introduce the resulting comprehensive legislation at the beginning of the second session of the 105th Congress. The area of consumer bankruptcy will focus primarily on the individual's personal financial responsibility.

While addressing many of the concerns of business bankruptcy, the Commission's report that we have before us today falls considerably short in the area of consumer bankruptcy, thus necessitating the need for my legislation and the consideration of others that may be offered or have already been offered.

As all of you are aware, many of the Commission's votes were divided 5 to 4. In my judgment, that leaves a tremendous gap that has to be filled by the Congress, and I'm hoping that the members of the Commission will look upon the legislation that we will be offering with the satisfaction that at least an approach has been developed, which may or may not find the same kind of division of support as the Commission itself eventually entertained. So, my intent is to restore bankruptcy to its original purpose—as a final last resort after all the options have been explored.

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With the holiday season upon us, our Nation's reliance on credit becomes even greater, making our consideration of bankruptcy reform at this time even more poignant. As the holiday bills start to pile up and families ponder how to get out from under them, the Subcommittee on Commercial and Administrative Law will guide the debate and set the legislative agenda that will bring about a bankruptcy reform that balances the interests of creditors, debtors, and consumers.

I yield to the gentleman from New York who has joined us, the ranking member, Mr. Nadler.

Mr. **NADLER.** Thank you, Mr. Chairman. Let me start by commending you for scheduling this hearing today. The work of the National Bankruptcy Review Commission has made an invaluable contribution to the work of the Congress in modernizing our bankruptcy law and in responding to new developments in the field of bankruptcy law.

I want to join my colleagues in commending the members of the Commission for their dedication and professionalism. I also want to recognize the truly outstanding work of the Commission staff, as well as of the many scholars, judges, and practitioners who contributed to the final report. I would even note the many important contributions of those who do not practice in New York State.

The fact that the Commission's report has already drawn significant and sometimes heated debate demonstrates just how important a job the Commission and its staff has done. There is little of importance that gets done around here that fails to attract vigorous debate, and by that measure the Commission has produced a work of monumental importance.

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I hope, however, that as we debate the more high-profile issues raised by the Commission, we do not lose sight of the many recommendations on which there is broad agreement. There is much we can do; for example, enacting the UNCITRAL model law on cross-border insolvency that will benefit debtors and creditors alike and secure this Nation's leadership position in international business law.

Most of all, I would urge caution on the part of my colleagues as they approach the issues raised by the Commission, to allow these matters to be explored carefully through the legislative process, through a series of hearings, to allow a full airing of opposing views and opposing versions of the facts, and to weigh the potentially far-reaching effects of any actions we might take before rushing to conclusions.

Congress had always made changes to the Bankruptcy Code with the greatest of care. There has never been a rush to judgment following the release of a Commission set of recommendations, even where there are fewer differences

among commissioners on the merits of particular proposals than we have before us now.

Rather than act precipitously, I would hope that all members would allow the legislative process to do what it does best—receive input from the experts, explore fully the potential consequences of particular proposals, and in the words of Hippocrates, "First, do no harm."

I welcome our witnesses, and I look forward to their testimony in what I trust will be the first in a series of hearings before we get down to the business of seriously considering legislation on the more controversial subjects explored by the Commission. I thank you, Mr. Chairman.

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Mr. **GEKAS.** I thank the gentleman for quoting from my great, great uncle, Hippocrates. [Laughter.]

I recognize the presence of the gentleman from Ohio, Mr. Chabot, and would recognize him.

Mr. **CHABOT.** Thank you, Mr. Chairman. I just have a brief statement here. I thank the chairman, again, for holding this very important hearing.

Because of the record number of consumer bankruptcies that have occurred in the last few years—over 1.2 million this year—particularly in a period of strong economic growth and low employment, bankruptcy has become an issue that deserves much of the focus of this Congress.

I'd also like to thank the commissioners for their work on the project, even though I disagree with many of the proposals. I want to thank them for the time that they put into this, but I don't particularly agree with many of the things that they've come up with here. Now that the Bankruptcy Review Commission has released its report, the focus should shift to congressional initiative.

As we move forward to reform our Nation's bankruptcy laws, we must keep in mind that there truly are some people who have a legitimate need to declare bankruptcy. At times, hardworking people who face a serious family illness, disability, unemployment, or the loss of a spouse may certainly need to seek protection from bankruptcy.

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However, far too frequently, people who have the financial ability or earnings potential repay their debts are seeking an easy way out. They choose a path of convenience and stick their friends and neighbors with the bankruptcy bill, with the cost of their expenses. Bankruptcy losses for creditors inevitably translate to higher prices for their fellow consumers.

Last year, the over 1 million consumer bankruptcies cost every American household $400. That's a hidden tax of $400 on every American family, which means less money for college tuition, clothing, food, child care, a family vacation, and on and on. It's estimated that it takes 14 creditworthy borrowers to pay for just one bankruptcy, yet the recommendations of the narrow majority of the Bankruptcy Review Commission would make it easier for debtors to declare bankruptcy and do little to stem the record tide of consumer bankruptcies.

Again, I want to state very clearly that I am very disappointed with the proposals that have been put forward by the Bankruptcy Review Commission. I believe that the Congress should do as much as possible to reduce the $400 hidden tax on every American family due to the increasing number of bankruptcies that are filed in this country.

I look forward to the testimony of today's witnesses, and, again, I want to thank the chairman for holding this important hearing.

Mr. **GEKAS.** We thank the gentleman, and we recognize the gentleman from Massachusetts—well, a toss-up.

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Mr. **MEEHAN.** Thank you, Mr. Chairman.

Mr. **DELAHUNT.** Both of us, Mr. Chairman.

Mr. **GEKAS.** Congressman Meehan.

Mr. **MEEHAN.** Thank you, Mr. Chairman. Initially, I want to commend you on having the foresight to schedule a hearing on today's date. When this hearing was first scheduled three weeks ago, it struck me that the Congress wouldn't be in session today. After all, we were supposed to adjourn for the rest of the year on November 7, but the chairman's years of legislative experience have taught him not to underestimate Congress' inability——

Mr. **GEKAS.** Actually, I was foiled. [Laughter.]

Mr. **MEEHAN** [continuing]. Congress' inability to stick to its plans or abide by a deadline. Accordingly, our presence today is, I think, very much a testament to the wisdom of Chairman Gekas.

Let me also congratulate the other chairman here today in the room, Mr. Williamson, as well as the other members of the National Bankruptcy Review Commission, on a job well done. Your report will surely be an important resource to this subcommittee as it undertakes to make our bankruptcy system fairer and more efficient.

The Commission's consumer bankruptcy recommendations, in particular, have been criticized by creditors for being too lenient with respect to debtors and by consumer bankruptcy attorneys for being too harsh to debtors. Some might take this as a sign that the Commission came up with precisely the right answers. Today's hearing will help us find out whether that assumption is, in fact, valid.

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Clearly, the explosion in the number of consumer bankruptcy filings is a matter of great concern to this subcommittee. It would be irresponsible for us to merely stand by and shrug our shoulders at such a disturbing trend. At the same time, I greatly hope that we will approach this problem in a rational manner, insistent upon securing ample and certain data to evaluate the situation, resistant to drawing broad conclusions from mere anecdotes, open to all perspectives, and cautious in prescribing legislative remedies. Only then can we live up to the impressive precedent set by the previous attempts to revise our bankruptcy laws.

Thank you, Mr. Chairman. I look forward to the testimony of today's witnesses, and I yield back the balance of my time.

Mr. **GEKAS.** The gentleman from Massachusetts is recognized.

Mr. **DELAHUNT.** Yes; thank you, Mr. Chairman I'll be brief, but let me make a few points.

It's clear after just perusing the Commission report that an extraordinary effort was made in terms of making a thoughtful and exhaustive review of our Bankruptcy Code. And I really do want to echo what everyone else has said in complimenting to all members of the Commission.

I also want to suggest to the chairman—and he's received more kudos from this side of the aisle than he is normally accustomed to the fact that we're listening to only two panels today I think is very important.

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What I have discovered during the course of most hearings is that the amount of information that is presented to members of this subcommittee and other subcommittees is voluminous in nature, and the fact that we have four or five witnesses on each panel, usually three panels, really does not provide an opportunity for an exchange between Members of Congress and witnesses. I really do think, Mr. Chairman, that this is a format that ought to be followed in the future: two panels, one or two witnesses on each panel.

You alluded to "months." I think it was maybe Mr. Williamson's testimony which indicated that from the time the Commission last issued a report, back in 1978, there was finally legislation that was passed some 5 years after that report. So I don't think we should delude ourselves into thinking that there will be a quick response from this subcommittee, from the full committee, and from Congress to the report.

At the same time, in reading the testimony of each of the witnesses, it was clear that there are a number of recommendations that did achieve unanimous support from the Commission. And it would be my recommendation to the chairman that we determine whether it is feasible to secure quick passage of some of these recommendations that all can agree would make a significant difference in improving the Bankruptcy Code.

And I would just conclude by saying that the one aspect of the report that I found disappointing is the lack of a clear rationale for the explosion in consumer bankruptcy filings. And I don't know whether it's possible at this late date, but I clearly would be supportive of an extension of the Commission to examine that very issue to determine why the number of filings increased so dramatically, because it's my belief that we have to understand the reason for that explosion before we can really address the remedy for it.

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And I know that several witnesses have expressed their disappointment at not having sufficient time, nor, it would appear, resources, to thoroughly explore that issue.

You know, the chairman talked about behavior and individual responsibility, and I concur with that. At the same time I think it was the chairman who talked about it as an addiction—as an addiction—and my friend from Massachusetts, Mr. Meehan, has developed an expertise in that area with regard to the tobacco issue. And I think he would be the first to indicate that tobacco addition is the responsibility, to a large degree, of the tobacco companies themselves.

I for one am really surprised when I go home to get my mail and find that my daughter, who is a full-time student, receives on an every-other-day basis a brochure indicating that she has been pre-approved for credit. So, there's a lot to be looked at in this issue.

I yield back.

Mr. **GEKAS.** We thank the gentleman. It is time to empanel our first witness, who constitutes the entire first panel, Mr. Williamson. We invite him to the witness table.

Brady Williamson is a partner in the Madison, Wisconsin law firm of LaFollette & Sinykin, and he teaches constitutional law and bankruptcy law at the University of Wisconsin Law School. Mr. Williamson is a 1975 graduate of the Georgetown University Law Center, where he was a member of the Law Review.

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He won a unanimous decision from the United States Supreme Court in *Farrey* v. *Sanderfoot*, a case that helped establish the relationship between Federal bankruptcy law and State divorce law. It was his second successful appearance in the Nation's highest court. He has often appeared before the State supreme court, and in the Federal courts arguing cases involving State and Federal constitutional issues.

On March 28, 1996, following the untimely death of former Congressman Mike Synar, the President appointed him to chair the National Bankruptcy Review Commission. Mr. Williamson led the Commission in the filing of the timely report, as required by the Congress, and he is in front of us to give us highlights from that report.

Mr. Williamson.

STATEMENT OF BRADY C. WILLIAMSON, CHAIRMAN, NATIONAL BANKRUPTCY REVIEW COMMISSION

Mr. **WILLIAMSON.** Thank you, Mr. Chairman, for the opportunity to present the report and the recommendations of the National Bankruptcy Review Commission to this subcommittee and, through it, to the U.S. House of Representatives and the Committee on the Judiciary.

Mr. **GEKAS.** Mr. Williamson, we will referee the match by having you summarize in any way you want to for 10 minutes and then submit yourself to questions, if you don't mind—10 minutes.

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Mr. **WILLIAMSON.** Thank you, Mr. Chairman. This subcommittee already has focused its attention on bankruptcy law and the work of the Commission through several hearings earlier this year, and now that the Commission has completed its work, the legislative process becomes preeminent—today, next year, and beyond that.

Twenty years ago, the House Judiciary Committee had just approved legislation that would become the Bankruptcy Reform Act of 1978. That bill was jointly sponsored by Congressman Don Edwards and Congressman M. Caldwell Butler, and it was based in part on the work of the first Bankruptcy Commission, which as Congressman Delahunt mentioned, had submitted its report almost 5 years earlier.

That legislation, developed by the predecessor to this subcommittee and the full Judiciary Committee, was comprehensive. It, in essence, replaced the Bankruptcy Act of 1898 as modified by the Chandler Act of 1938, and that has given us the Bankruptcy Code and system this country have today.

Now, Congress made significant changes in the law—in 1984, 1986, and 1994—but the code's principles and its principal provisions have remained essentially unchanged for 20 years. Nor does the Commission, in its 172 recommendations and 1,300-page report, suggest that those principles need to be changed dramatically to serve this country well into the next century.

The work of this subcommittee and the full committee 20 years ago warrants a brief note this afternoon for two reasons. First, that landmark legislation in 1978 was bipartisan. It was the result of a relatively small number of dedicated Members of Congress, from both parties, working with a skilled and specialized staff to develop a law that balanced the interests of creditors, the interests of debtors, and not, incidentally, the interests of the public.

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Second, and no doubt this was related to the first, the legislation was adopted by the House Judiciary Committee and by both Houses of Congress with overwhelming bipartisan majorities. The development of the 1978 code, from Commission report to law, was in many ways a model of the American legislative process.

Now, as the members of this subcommittee know better than most, the last two decades have seen not only significant changes in the bankruptcy system, but in the legislative process. The system itself, as Chairman Gekas noted, now confronts a record number of consumer bankruptcy filings. When the House Judicary Committee last addressed consumer bankruptcy in a comprehensive fashion, in 1977, there were about 212,000 consumer cases. Today, that number has increased seven-fold.

But there have been changes in the legislative process, as well. The entire Congress, and particularly the House Judicary Committee, faces more issues with more controversy than ever before. I think it was the ranking member of the full committee, speaking in Philadelphia about a month ago, who observed that almost 40 percent of the legislation that comes to the floor of the House of Representatives comes through the House Judiciary Committee. So this subcommittee and the committee have a full plate.

Twenty years ago, this subcommittee's predecessor held 35 days of hearings and 22 days in markup session working on bankruptcy legislation, and it's difficult to imagine today the congressional schedule permitting any legislation to have that much attention.

The Commission's recommendations and report, accordingly, should prove particularly valuable to this subcommittee and the Congress. We had the public hearings you may not be able to have: 21 regional and national hearings, from New York City to Des Moines—to Akron, Ohio, Congressman Chabot—to San Diego. We invited and analyzed the submissions that you may not have time to invite and analyze—2,300 submissions in all, at least one from every State and on every conceivable subject. And we spent the last 18 months reviewing all of the testimony and all of the ideas, great and small, to develop 172 recommendations for improving the system. And I think I can say with confidence that each member of the Commission was committed to submitting recommendations that would not disrupt the inherent balance that has been a hallmark of a century of American bankruptcy law.

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Mr. Chairman, in your opening statement at this subcommitte's hearing on April 16, you said that you hoped that the work of the Commission would be "robust," and I think we can say it is that. The Commission's recommendations and report are controversial—they were meant to be controversial. With its public outreach, the Commission has tried to be the eyes and the ears of this subcommittee and the Congress, and I think that's what you intended us to be.

With respect to the controversy over bankruptcy law, however, the Commission's hearings and its deliberative process do not shield the Congress. To the contrary, they provide only a preview of the controversy that Congress already has begun to encounter over bankruptcy issues. Consider the reaction we've seen in just the 3 weeks since the Commission submitted this slim, little report to Congress, the President, and the Supreme Court on October 20th.

The National Association of Consumer Bankruptcy Attorneys, which is an organization that quite well represents the interests of debtors, issued a news release contending that some of the Commission's proposals, quote, "treat debtors like criminals." And the proposals to tighten the bankruptcy laws, they said, "would prevent many consumers from saving their homes."

The comments from the credit industry were no less restrained. The news releases from that side of the debate characterized the consumer proposals as "disappointing" or "seriously flawed," and those were among the more generous assessments. In short, the Commission's recommendations have been criticized by creditor advocates as being too pro-debtor, and by debtor advocates as being too pro-creditor.

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The November 3rd edition of Business Week magazine spent a full page on the report, reviewing it, and I think the headline from that article commends itself to this subcommittee. This is what Business Week's headline said: "Bankruptcy Reform, Everybody's mad—and that's fine."

The Los Angeles Times conveyed the same sentiment: "The commission's recommendations," it said, "though some are controversial, provide a foundation for reform efforts which already have begun in Congress. Neither consumer groups nor lenders and credit card companies are happy with all of them, which suggests a good balance."

Over the last 18 months, we found, everyone agrees on the need for a bankruptcy system that provides relief for the legitimate debtor. Several of your statements referred to that, but nobody agrees on who that legitimate debtor is. We

learned over 18 months that everyone agrees on the need for balance, but no one agrees on the definition of balance.

How can Congress reach that goal of balance, which is both so elusive and so indispensable? I think that the lessons that this subcommittee's predecessor and the full committee developed 20 years ago resonate still today. And this subcommittee and the Congress can succeed as its predecessors did by moving carefully and by treating with healthy skepticism the proposals offered by either side in what is an inherently contentious and adversarial relationship between the interests of debtors and the interests of creditors. One thing is certain. If any proposal that advances through the legislative process has the endorsement of any single interest, it is almost certainly the wrong proposal.

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The case for radical, architectural change in the bankruptcy system has, in my personal view, not yet been made. The case for incremental change, by contrast, has been made, and we think the report makes it. In my prepared statement, Mr. Chairman, which I'll simply summarize at this point—we have 172 recommendations; the vast majority of those were adopted with little or no dissent—in my prepared statement, I simply note three that I think warrant prompt attention. One is direct appeals, the other is transnational insolvency, and the third is the system—or better stated—the non-system of exemptions, which I think brings discredit to the bankruptcy system today.

With that, Mr. Chairman, I see my time is expired. I'll simply submit my formal statement, and I would be delighted to answer any questions that the members of the subcommittee may have.

[The prepared statement of Mr. Williamson follows:]

PREPARED STATEMENT OF BRADY C. WILLIAMSON, CHAIRMAN, NATIONAL BANKRUPTCY REVIEW COMMISSION

Thank you, Mr. Chairman, for the opportunity to present the report and recommendations of the National Bankruptcy Review Commission to this Subcommittee and, through it, to the U.S. House of Representatives and the Committee on the Judiciary. This Subcommittee already has focused its attention on bankruptcy law and the work of the Commission through several hearings earlier this year and, now that the Commission has concluded its work, the legislative process becomes preeminent—today, into 1998 and beyond.

Twenty years ago, the House Judiciary Committee had just approved the legislation that would become the Bankruptcy Reform Act of 1978. The bill was jointly sponsored by Congressman Don Edwards (D.-Calif.) and Congressman M. Caldwell Butler (R.-Va.), and it was based in part on the work of the first bankruptcy commission, which had submitted its report to the Congress five years earlier. That legislation developed by the House Judiciary Committee was comprehensive, replacing the Bankruptcy Act of 1898 and the Chandler Act of 1938 with the Bankruptcy Code and system this country has today. While the Congress has made significant changes in the law—in 1984, 1986 and 1994—the Code's principles and its principal provisions have remained essentially unchanged. Nor does the National Bankruptcy Review Commission, in its 172 recommendations and 1300-page report, suggest that those principles need to be changed dramatically to serve this country well into the next century.

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The work of the House Judiciary Committee two decades ago and this Subcommittee's predecessor, the Subcommittee on Civil and Constitutional Rights, warrants a brief note this afternoon for several reasons. First, the legislation was bipartisan. It was the result of a relatively small number of dedicated members of Congress from both political parties, working with a skilled staff, to develop a law that balanced the interests of creditors and the interests of debtors and, not incidentally, the interests of the public. Second, and no doubt not coincidentally, the legislation was adopted by the House Judiciary Committee and by both houses of Congress with overwhelming bipartisan majorities. Indeed, the House of Representatives adopted the legislation by voice vote. The development of the 1978 Bankruptcy Code—from commission report to law in about five years—was in many ways a model for the American legislative process.

The last two decades have seen significant changes in the bankruptcy system and in the legislative process. The system itself now confronts a record number of consumer bankruptcy filings, and that quite properly has brought unprecedented attention to the bankruptcy system. When the Judiciary Committee last addressed consumer bankruptcy in a comprehensive fashion, in 1977, there were about 212,000 consumer cases. Today, that number has increased six-fold to 1.3 million consumer bankruptcy filings. From 895 cases for each bankruptcy judge in 1977, the number has now grown to 4,200 cases for each judge. The legislative process itself has changed as well with Congress—and, particularly, the House Judiciary Committee—facing more issues with more controversy than ever before. This Subcommittee's predecessor held 35 days of hearings and spent 22 days in session marking-up the 1978 bankruptcy legislation, for example, and it is difficult to imagine the Congressional calendar today permitting that much attention for any legislation.

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The Commission's recommendations and its report, accordingly, should prove particularly valuable to this Subcommittee and the Congress. We had the public hearings that you may not be able to have: 21 regional and national hearings, from New York City to Des Moines to San Diego. We invited and analyzed the substantive submissions that you may not have the time to invite and analyze: more than 2,300 altogether, at least one from every state, on every conceivable subject involving bankruptcy, insolvency or financial distress. And we spent the last 18 months reviewing all of the testimony, the submissions and the ideas—great and small—to develop 172 recommendations for improving the bankruptcy system without disrupting the inherent balance that has been a hallmark of a century of American bankruptcy law.

Mr. Chairman, in your opening remarks at this Subcommittee's April 16, 1997 hearing on the bankruptcy system and the work of the Commission, you said you hoped the report would be "robust." It is that and more. The Commission's recommendations and its report are controversial. They are meant to be controversial. With its public outreach, the Commission has been, in effect, the eyes and ears of this Subcommittee and the Congress. And that is what you intended us to be. With respect to the controversy over bankruptcy law, however, the Commission's hearings and its deliberative process do not shield the Congress. To the contrary, they provide only a preview of the controversy that Congress already has begun to encounter. Consider just some of the reaction in the three weeks since the Commission filed its report on October 20, 1997.

The National Association of Consumer Bankruptcy Attorneys, an organization that represents debtors' interests, issued a news release contending that some of the Commission's proposals "treat debtors like criminals without any clear evidence of abuse." The proposals to tighten consumer bankruptcy law, the release continued, "would prevent many consumers from saving their homes. Many people will no longer qualify for Chapter 13. . . ." The comments from the credit industry were no less restrained. The news releases from its lobbyists and advocates characterized the consumer bankruptcy proposals as "disappointing" or "seriously flawed," and those were among the more generous assessments. In short, the Commission's recommendations and report have been criticized by creditor advocates as being too pro-debtor and by debtor advocates as being too pro- creditor.

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The November 3, 1997 edition of *Business Week* reviewed the report and the reaction to it and came to a conclusion that commends itself to this Subcommittee. "Bankruptcy Reform," it said in a headline, "Everybody's mad—and that's fine." And the magazine article provided this assessment:

Given the heated emotions swirling around the bankruptcy debate, howls of protest were inevitable. Still, the panel's suggestions would fix a system that is clearly broken. . . . The commission found a reasonable middle ground that cracks down on abuses by the wealthy while protecting financially distressed borrowers from the clutches of lenders who have tried unfairly to portray all delinquents as the new welfare queens.

The commission is trying to encourage greater responsibility by borrowers so they can't simply walk away from their

debts. But lenders have to be responsible, too. . . . The commission's proposals would help foster accountability on both sides, which is what's necessary to cure the bankruptcy epidemic.

The editorial page of the *Los Angeles Times* on October 27, 1997 conveyed the same sentiment: "The commission's recommendations—though some proposals are highly controversial—do provide a foundation for reform efforts, which already have begun in Congress. Neither consumer groups nor lenders and credit card companies are happy with all of them, which suggests a good balance." And *The Dallas Morning News:* "If [the] commissioners didn't solve the creditor-debtor debate, bankruptcy specialists say, at least they illuminated it."

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Over the last 18 months, we found everyone agrees on the need for a bankruptcy system that treats creditors fairly and that provides relief for the "legitimate debtor," but no one agrees on the definition of the "legitimate debtor." Everyone agrees on the need for balance in the bankruptcy system, but no one agrees on the definition of balance. It is for this Subcommittee, in the first instance, and Congress as a whole to maintain—and, in some respects, to restore—balance in the American bankruptcy system. That is important not just to provide protection for creditors and for debtors but for the public as well. It is the public, of course, that pays for the system and either benefits when it works or suffers when it does not.

How can Congress reach that goal of balance, both elusive and indispensable?

This Congress and its successors will face all of the challenges that faced the 95th Congress 20 years ago, when it adopted the Bankruptcy Code, but the difficulty of drafting and passing technically-precise, balanced legislation has increased. This Subcommittee and the Congress can succeed, as its predecessors succeeded, by moving carefully and by treating with healthy skepticism the proposals offered by either side in the inherently contentious and adversarial relationship between the interests of creditors and the interests of debtors. One thing is certain: if any proposal that advances through the legislative process has the endorsement of any single interest, it is almost certainly the wrong proposal.

The case for radical, architectural change in the bankruptcy system, whether in consumer bankruptcy or in corporate bankruptcy, remains unpersuasive and unproved. The case for incremental change, by contrast, is well supported. In this regard, the controversy that some of the Commission's proposals have attracted should only highlight the far larger number and wide variety of changes that the Commission has recommended with little or no disagreement. Three of those recommendations hold the promise of improving the system, significantly and almost immediately, and they can be addressed by the Congress with care before it adjourns next year.

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Direct appeals. Every party in every bankruptcy case filed today faces a burden not imposed in any other federal judicial proceeding: two levels of appeal. A litigant in any bankruptcy proceeding first must appeal an adverse decision to the federal district court or bankruptcy appellate panel and only then, if time and resources permit, in turn, to the U.S. Court of Appeals. That requires an additional round of appellate briefs and argument, additional time—measured in months if not years—and additional cost to the parties and the judicial system. Of no less significance, the "intermediate" decision by the district court has no precedential value beyond the case itself. Instead of resolving issues of bankruptcy law and practice on appeal, thereby reducing subsequent litigation, this requirement encourages additional litigation because fewer appellate issues are resolved with binding decisions by the U.S. Courts of Appeals.

The Commission has recommended, unanimously, that a bankruptcy judge's decision be directly appealable to the U.S. Court of Appeals. This single change in the law will save time and literally millions of dollars for the taxpayer and the parties involved in bankruptcy litigation without raising any constitutional issues involving due process or court structure. It is not a new idea. The bankruptcy legislation adopted by the House of Representatives in 1978 provided for this direct appeal. The legislation sent to the President did not.

Transnational insolvency. It cannot be said too often that the American economy can continue to grow only as part of a growing global economy. Today, transnational and multinational corporations are becoming commonplace. The incidence of transnational insolvency has increased as well, and American businesses today can find themselves discriminated against, if not literally cheated, by the insolvency laws in other countries that favor domestic corporations. Even 20 years ago, Congress recognized the potential impact of transnational insolvency by adopting section 304 of the Bankruptcy Code, which permits ancillary proceedings for foreign insolvencies. There is a need now, however, to take the next step.

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The Commission has recommended, again without dissent, that the Congress adopt the model law recently approved by the United Nations Commission on International Trade Law. The delegates from this country played a critical role in the development of the model law, and the adoption of its substantive provisions in the Bankruptcy Code would protect American businesses and advance international trade. A decision by Congress next year to approve the essential elements of this model law would maintain this country's leadership on the issue and encourage other countries to adopt, with the model law, some of the critical procedural and substantive protections for creditors that characterize American bankruptcy law today.

Exemptions. The constitution gives the Congress the authority to adopt "uniform" laws on bankruptcy. In at least one respect, however, the bankruptcy law of this country is anything but uniform. The "system" of state exemptions, intended to recognize differences from state to state as well as the states' interests in personal financial matters, has become a patchwork of provisions that invite debtor abuse. When some states have no homestead exemption and others have an unlimited homestead exemption, when well-counseled debtors can avoid repaying any of their obligations to creditors through state exemption statutes, the system has lost its way. Indeed, the inconsistency in state exemptions is the single greatest threat to the integrity of the bankruptcy system because it threatens public confidence in the fairness and balance of the bankruptcy laws.

The Commission has recommended that Congress stop these abuses by adopting uniform personal property exemptions that apply to every debtor in every state. Where there is room for state-by-state differences, in homestead exemptions, Congress should adopt a range—with a floor and a ceiling—that gives the states some flexibility, but not unlimited flexibility, to establish the amount of equity that a debtor can protect. Reasonable exemptions should be part of the "fresh start," recognizing as well the inherent value of home ownership, but they should not be an open invitation to abuse. The Commission's exemption proposal was controversial, with Commissioners differing on the appropriate exemption levels, but there was virtually no dissent on the need for uniformity. Like the transnational and direct appeal recommendations, this proposal warrants attention by the 105th Congress.

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The House of Representatives has just approved a technical amendments bill that makes important changes in the Bankruptcy Code. The U.S. Senate has just approved legislation to eliminate the sunset provision that now threatens Chapter 12 and to make subtle but significant changes in the priority payment provisions of the bankruptcy law. The question then is not whether Congress will address the Bankruptcy Code in 1998 but how it will address the Code.

The Commission's report and recommendations offer a systematic analysis of the issues, some technical and some comprehensive, that confront this critical aspect of the American economy. No one expects this Subcommittee, let alone the Congress, to take up every recommendation. Through its work, and the work of thousands of volunteers across the country who selflessly contributed their time and their ideas, however, the Commission has tried to reaffirm the principle of balance in the bankruptcy law. We can offer no clearer recommendation and no better legacy to the Congress than that.

Thank you.

Mr. **GEKAS.** Yes; we thank you for your testimony. Each member will have 10 minutes of questions. Do you agree

with me, Mr. Williamson, that the impetus for the establishment of your Commission in the first place, even before you joined it, was the alarm that went off in the halls of Congress about the burgeoning number of filings in bankruptcy? Do you agree that that was the key propellant for the establishment of the Commission?

Mr. **WILLIAMSON.** Mr. Chairman, I don't think so, for this reason. The Commission was established by the bankruptcy legislation adopted in October of 1994, just before that Congress adjourned, and the dramatic increase in consumer bankruptcies that we've seen over the last 18 months really at that point.

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And I recall, Mr. Chairman, a colloquy that you and I had in April when I complimented the Congress on being prescient, foreseeing the need for a commission. I think that the data made clear that the dramatic increase had not yet started at the time the Congress had adopted the Commission. The Congress was either awfully lucky or awfully farsighted, because it has a Commission and a Commission Report—today—at precisely the time it needs the Commission report.

Mr. **GEKAS.** What about the point at which the Commission had its first hearing or first meeting? At that time, was there news to you that the filings were increasing at an unwarranted rate?

Mr. **WILLIAMSON.** Mr. Chairman, I would agree with that. In October of 1995, 2 years ago, that's about when the country began to see these dramatic increases in consumer filings, and among the exhibits I submitted to the subcommittee in April are several charts that——

Mr. **GEKAS.** Charts, yes; we've seen them, yes. Then the point is, that at least in part, if not totally, some of the features that you would eventually be considering as a Commission would be how to stem the tide of these inordinate number of filings. Isn't that the case?

Mr. **WILLIAMSON.** That is correct.

Mr. **GEKAS.** In that regard, do you consider the very good feature that you recommend, about shrinking the number of appeals, as going to the core of the number of filings that have been seen across the scene? Or is that another phase of it—namely, the expeditious handling of the cases that are at hand?

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Mr. **WILLIAMSON.** Mr. Chairman, eliminating this intermediate and unnecessary level of appeal would help, because we would get more clarity and more binding precedent in the law. But the virtue of eliminating the intermediate appeal requirement will be felt, I think, in reduced cost to the litigants and reduced costs to the system. If, for example, a creditor felt that a debtor's filing were in bad faith, or a debtor felt that a creditor's tactics in a bankruptcy proceeding were overbearing, rather than have to wait months and months to go through two appeals to get a binding precedent, there would be a binding precedent more quickly from the U.S. court of appeals.

Let me also add that I cannot think of a single recommendation that had more unanimous and more enthusiastic support from all nine commissioners than the recommendation to eliminate the intermediate level of appeal. Let me further add, Mr. Chairman, that when this House sent the 1978 Bankruptcy Code to the other body, there was no provision for intermediate appeal.

Mr. **GEKAS.** But there was no unanimity, was there, among the commissioners, that this would add to the drive towards reducing the number of filings?

Mr. **WILLIAMSON.** No, sir. I don't think I can fairly say that there was a cause and effect relationship on that point.

Mr. **GEKAS.** And in that regard on some of the other proposals, do you feel that you liberalized or tightened up the rules governing exemptions?

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Mr. **WILLIAMSON.** I think we tightened the rules governing exemptions, and let me give you an example from the State of Pennsylvania. Pennsylvania does not have a State homestead exemption. It uses, as it's perfectly appropriate to use, the Federal exemptions. Under the Commission proposal for exemptions, the exemption would be reduced for homesteads in the State of Pennsylvania, and that varies from State to State.

Mr. **GEKAS.** And in other States it would expand the——

Mr. **WILLIAMSON.** It would be increased.

Mr. **GEKAS.** Yes.

Mr. **WILLIAMSON.** But the point on exemptions, Mr. Chairman—and, again, I think every member of the Commission shares this view, every member but perhaps one—is that in a uniform system this is a glaring example of a patchwork quilt of provisions that bring discredit to the system. When someone can move from Harrisburg to Tampa, and go from having no homestead exemption under State law in Pennsylvania to having an unlimited homestead exemption in Florida, thereby preventing the creditors from getting any money, I think that's unacceptable in our system.

Mr. **GEKAS.** Do you believe that, as I do, the decision as to whether or not to file for bankruptcy takes into full consideration the ability to amass exemptions?

Mr. **WILLIAMSON.** I think that well-counseled debtors are well aware of exemptions and can fashion a strategy that takes advantage of them. In Congressman Nadler's State, for example, you can have an unlimited exemption for a wedding ring, and as we all know, there are wedding rings—and there are wedding rings. [Laughter.]

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So, in response to the chairman's question, I think some debtors, those with good counsel, are well aware of the exemption laws and strive to take advantage of them, which is their right under State and Federal law. But I think a great many—and we don't know the number—of people that file for bankruptcy do so without a great deal of thought and without a lot of planning.

Mr. **GEKAS.** Do you believe that the recommendations of the Commission, as propounded with respect to exemptions, will go a long or short way towards stemming the flow of filings—I mean the growth of the number of filings?

Mr. **WILLIAMSON.** I think the exemption proposals will help, but there are other proposals that we have suggested, and also those suggested by the minority commissioners, that will help directly stem the tide of growing bankruptcies.

Mr. **GEKAS.** How, in the example——

Mr. **WILLIAMSON.** For example——

Mr. **GEKAS.** Sure; go ahead.

Mr. **WILLIAMSON.** For example, random audits.

Mr. **GEKAS.** Random what?

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Mr. **WILLIAMSON.** Random audits.

Mr. **GEKAS.** Yes.

Mr. **WILLIAMSON.** As Ms. Jones quite properly observes—in her prepared testimony, anyone whether judge or lawyer who picks up a debtor's petition today does not necessarily have a great deal of confidence that the material on it is accurate. Some people make mistakes; some people are not precise; a few people—maybe more than a few—are bent on cheating the system. Random audits would at least inject a deterrent into that process.

The limitations we've proposed on repeat filings—again, a clear area of abuse—are also designed to limit the number of bankruptcy filings, certainly those that are not warranted.

Mr. **GEKAS.** Of course, the best substitute for random audits would be 100 percent audits, and perhaps that's impossible and we may all agree, but is there anything wrong with a 100 percent requirement for everyone to submit a tax form or a copy of the last year's tax return as part of the application for discharge in bankruptcy?

Mr. **WILLIAMSON.** Mr. Chairman, I don't believe that we ever considered that proposal as such. My immediate reaction would be to observe that we might have an inherent conflict between the public nature of bankruptcy and any other Federal judicial proceeding and the sanctity, the privacy of individual income tax returns.

Mr. **GEKAS.** Assuming that that can be overcome by the waiver that would be involved, in my judgment, by the individual seeking bankruptcy and being able to prove the distress in which they find themselves, you never considered that kind of 100 percent coverage like the tax return or like something that would be more than a random audit, or forms that would more fully disclose assets, et cetera?

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Mr. **WILLIAMSON.** Some of the Commission recommendations do address the need for broader disclosure on the forms and, in addition, Mr. Chairman, we recommend a national filing registry so that a person who files for bankruptcy in Seattle and then 6 months later moves to Milwaukee and files again, there would be a check on that. Right now, there is no national registry, no way to determine whether there has been a multiple and, perhaps, improper filing.

Mr. **GEKAS.** The number of filings that we're talking about for 1997—reaching 1.3 million—can you give me a quick division between chapter 7 and 13 on the individual filings?

Mr. **WILLIAMSON.** It is somewhere between 3 to 1 and 4 to 1; I note that we have with us in the audience today Frank Szszebak, from the Administrative Office of U.S. Courts, and he certainly can provide you with the most current data, but between 3 and 4 to 1 is a good approximation. Of course, there are regional variations with which Congressman Bryant is familiar.

Mr. **GEKAS.** The time of the Chair has expired on this first round.

We acknowledge now the attendance of the gentleman from Tennessee, Mr. Bryant, and we will turn to the gentleman from New York, Mr. Nadler, for a period of 10 minutes of questions.

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Mr. **NADLER.** Thank you very much, Mr. Chairman.

I suppose I should address you, sir, also as Mr. Chairman. Could you tell us, first of all, the make-up of the Commission in terms of whether any members of the Commission ever represented individual consumers as part of their law practice? And, on the other hand, banks or financial institutions, and how many?

Mr. **WILLIAMSON.** Only one member of the Commission, to my knowledge, was involved or has been involved as an attorney in consumer bankruptcy cases. One of the members of the Commission was not an attorney. And, of course, the exceptions are the two Federal judges: one, Judge Jones, from the U.S. Court of Appeals for the Fifth Circuit, and Judge Ginsberg, a bankruptcy judge in Chicago, who in their judicial roles were involved—are involved—in consumer bankruptcy cases.

Speaking for myself, Congressman, my experience was only, and has been only, in corporate bankruptcy. I think I've tried to be a good student over the last 18 months and learned a great deal, as have all of the commissioners, about consumer bankruptcy.

Now with respect to your first question about the make-up of the nine-member Commission: three—appointed by the President; two—appointed by the Chief Justice of the United States, and one each by the majority and minority leaders of each House, late in 1994.

Mr. **NADLER.** Thank you. Let me ask you a separate question. Do you believe that in terms of cost to the system there are diminishing returns in requiring 100 percent audits, such as some have suggested? And how would you believe we should strike a balance on that?

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Mr. **WILLIAMSON.** One hundred percent audits of bankruptcy returns? Sure. I think the obvious analogue is to the Internal Revenue Service process, which is not in great favor these days for obvious reasons. One hundred percent audits would always be desirable, but I think there is a point at which the returns—no pun intended—diminish, and part of the goal is deterrence, to encourage filers to be more precise, more forthcoming, and more honest. And I think random audits, at least initially, would help do that.

One possibility, Congressman, that this Congress has used, in a variety of legislative settings, of course, is pilot programs. It may well be that a number of the proposals offered by the Commission—again, either majority proposals or minority proposals—warrant a test through a pilot program. Obviously in the bankruptcy field that's been used in the past, and it's been used in other fields as well.

Mr. **NADLER.** Thank you. Let me ask you a different question. A criticism of the credit card industry is that by pushing people into chapter 13 they will make the Federal Government into a collection agency at a cost to the system and, ultimately, the estates, decreasing the risk and overhead borne by the credit card companies, increasing their profits, but on average increasing the cost to the Government. Could you comment on that?

Mr. **WILLIAMSON.** Without fear of contradiction, I think I can state that every member of the Commission felt that we should do everything possible to encourage people to use chapter 13 rather than chapter 7. By the same token, we all understood that chapter 13 has a "failure rate"—and I put that term in quotations—that causes concern. Statistics vary, but for every two chapter 13's filed, one or more of the two don't complete—don't result in a completed plan. And much of the difference within the Commission itself was on how to accomplish the goal of getting more people into chapter 13 so they could pay more of their debt to more of their creditors. The differences are in how best to do that. Should you mandate it in some way, as the proposal embodied in H.R. 2500 does? Or should you provide greater incentives—some positive, some negative—to encourage more people to use chapter 13? That is a very serious question; it's a very difficult question that divided the Commission, and I think it is one this Congress will have to struggle with because it is a tough question.

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Mr. **NADLER.** Thank you. Let me ask you the following. We've heard reference—in fact the entire discussion is suffused with reference—to the explosion in bankruptcy filings, the explosion in the number of bankruptcy filings, and that's why, allegedly, we have to do certain things, perhaps including restricting access to chapter 7. We also know there's been an explosion in consumer credit, an explosion in the number of credit cards out there. We've all had the experience, or know people who have had the experience, of getting once a month or once every two months an unsolicited, pre-approved application for a credit card.

Did the Commission compare the increase in consumer bankruptcy filings with the increase in the numbers of credit cards outstanding, or the amount of aggregate debt availability on the credit cards? And did you compare them to see whether the credit card explosion does or does not explain the increase in consumer bankruptcy? Some people are telling us that bankruptcy filings are increasing because there's no stigma attached anymore, because society has changed; and others are saying that it's really because these credit card companies and banks have been irresponsible in flooding people with credit cards, and people haven't been able to handle it properly. Do you have any statistical information that would shed light on this question of causation?

Mr. **WILLIAMSON.** Congressman Nadler, the Commission certainly heard testimony from several witnesses in that vein. It also heard testimony from representatives of the credit card industry. The issue of what causes these dramatic increases in bankruptcy is very difficult—there are a number of factors, in the view of the witnesses, that contribute to this dramatic increase. We heard more theories than I thought existed.

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This leads to a point I think that Congressman Delahunt touched upon, and I think this is a good juncture at which to mention it. I think every commissioner was frustrated by the absence of reliable data dealing with the bankruptcy process, and we have an entire subchapter in the report dealing with recommendations to improve data collection and data dissemination.

Congressman Delahunt, my heart stopped briefly when you suggested an extension for the Commission.

Mr. **DELAHUNT.** Just another year.

Mr. **WILLIAMSON.** Please. [Laughter.]

Mr. **NADLER.** We could add hardship pay.

Mr. **WILLIAMSON.** There are two Government agencies today that either are looking or can look further at this issue. The first is the General Accounting Office, which is reviewing some of the data in the bankruptcy field at the request of Senator Grassley and Senator Durbin.

The Congressional Budget Office also has done some preliminary analyses at the Commission's request, but without meaning to put too fine a point on it, a request from a Commission is not treated quite the same way that a request from a subcommitte chairman or a Member is treated.

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There are data out there, but we didn't have the time or resources to bring it all together, to subject it to an independent analysis, and to come up with some firm conclusions. The next 3 months—the period between now and when the subcommittee will turn its attention seriously to this issue again, when Congress returns, is a wonderful time to obtain a follow-up analysis from CBO and to see where GAO is with its analysis. When you come back in January or February, you'll have something concrete.

Mr. **NADLER.** So you can't tell us at this point even such relatively rudimentary information as, bankruptcy filings

have increased "X" percent as compared to credit card availability of "Y" percent?

Mr. **WILLIAMSON.** Yes, we can, Congressman, and I believe you'll find that both in the preface to the report and in the preface to the consumer bankruptcy section.

Mr. **NADLER.** And without having that before us at the moment, do you know those two figures?

Mr. **WILLIAMSON.** There seems to be—speaking only for myself—a pretty fair correlation between the increase in debt and the increase in bankruptcies. I'm also persuaded that the increase in legalized gambling in certain parts of this country has had a direct effect on the rise in consumer bankruptcy.

Mr. **NADLER.** You know, I'm glad you mentioned that. I must say that 25 years ago I did a research paper on whether we should have off-track betting in New York, and found that in, I think, Louisiana, which had instituted off-track betting, repealed it, and then re-instituted it—when they instituted it, the bankruptcy filings went up; when they repealed it, the bankruptcy filings went down, and when they re-instituted it, the bankruptcy filings went up again. And you just reminded me of that. Thank you, sir.

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Mr. **GEKAS.** We thank the gentleman. We yield to the gentleman from Tennessee, Mr. Bryant, for a period of 10 minutes of questioning.

Mr. **BRYANT.** Thank you, Mr. Chairman. Thank you, Mr. Williamson, for your testimony thus far.

Did you have a comment on Mr. Nadler's statement? Did you have a comment you wanted to make when you were talking about legalized gambling?

Mr. **WILLIAMSON.** I simply wanted to elaborate on the fact that we received at least one study that suggested that legalized gambling was the single biggest contributing factor to the rise in consumer bankruptcies. This study, which is referred to in the report, looked at counties where legalized gambling can now take place in this country and drew some dramatic conclusions about its effect on the rise in consumer bankruptcy.

Let me also note that in some areas of this country, I think lawyer advertising contributes to the rise in consumer bankruptcies. Garnishment laws, varying from State to State, also contribute to the rise in consumer bankruptcy—in some States, but not others.

Congressman, in your general area of the country, there's a suggestion that the presence of a river and a State line, which divides two States that have totally different approaches to garnishment, has a dramatic impact on consumer bankruptcies.

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Mr. **BRYANT.** I don't disagree that there are a number of factors out there that work in combination or separately and cause this, but let me get to a couple of questions that I have. I have two questions that are fairly specific questions, and then I'd like to come back to maybe some broader issues.

But I do have an interest in her statement, that Ms. Jones points out that the majority of the commissioners advocate making school loans fully dischargeable, even if the debtor files bankruptcy one day after receiving a degree. I'm wondering if you can provide me with some insight as to why this should be allowed, knowing in some instances that there are colleges that won't let you graduate if you owe them $1.00 on a library fee or an overdue book, or a traffic ticket. I would generally come down in opposition to that, and I'm just wondering why the majority would feel that way.

Mr. **WILLIAMSON.** That proposal and the general area of dischargeability, Congressman, are discussed in the report. It's important to note that the proposal was advanced by former Congressman Butler of Virginia, and I certainly don't want to purport to speak for him, but I think he was concerned about equity, and the fact that in our bankruptcy system we permit a whole range of obligations to be discharged, but not student loans. I think he was concerned as well about student loans—not to attend Vanderbilt or Memphis State, but student loans to attend a trade school, or a school which offers or purports to offer educational services that it does not deliver. I think he was concerned about students who have gone to some of those institutions and not received value for the money they borrowed.

Again—now I'll speak not for Congressman Butler, but for myself—I was concerned about going down a path that suggested that a loan to attend Vanderbilt was somehow better than or different than a loan to attend a responsible, reputable electronics school; I think that had a sense of elitism to it that I wasn't interested in. So the question of student loans is very difficult, and while the recommendation does say that they should not be automatically non-dischargeable, obviously any attempt to discharge a student loan is subject to all of the other provisions of the Bankruptcy Code—including, of course, the substantial abuse provisions of section 707.

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Mr. **BRYANT.** Thank you. Let me ask you another question. This is one—I'm not sure I can support this, but it's an interesting idea. One of my colleagues, Congresswoman Helen Chenoweth of Idaho, has come forward with a bill, and I guess in response to some bankruptcy courts having allowed a trustee to disgorge a bankrupt parishioner's ties to churches to settle the parishioner's bankruptcy estate. And the Eighth Circuit Court of Appeals has found that the tithe does not have a value and therefore was a fraudulent transfer or conveyance, under the U.S. Code, section 548, and she has introduced a bill called the Religious Fairness and Bankruptcy Act of 1997 which would provide that, for the purposes of that section, the transfer of a donation to a religious group or entity made by a debtor from a sense of religious obligation, such as tithes, should be considered to have been made in exchange for a reasonably equivalent value.

Have you expressed an opinion on that in your report, or if you have not, do you have an opinion on that?

Mr. **WILLIAMSON.** The Commission did consider a proposal in that area. Ms. Jones offered the proposal, and it's an area in which she has a particular interest. There's also legislation pending in the other body that addresses the problem. Again—let me speak personally—I don't think anybody wants to have a situation where a member of a church or a synagogue has had a regular practice of giving, and finds him or herself in trouble, and all of a sudden someone is suggesting that it's a fraudulent conveyance under section 547 to make a regular donation.

Once again, as we see so often in bankruptcy, we have a definitional problem, however, because it's not the tithing that's done to the synagogue or the church or the tabernacle—that would be easy if that's all we were talking about. There are, however, other charitable institutions, defined as such under the Internal Revenue Code, that may not be quite so reputable as your church or Congressman Gekas' church; and, once again we have to develop a law that covers everyone. To try to make distinctions between a good charity and a not-so-good charity, especially since we're dealing with the First Amendment freedom of religion issue, is a very tough thing to do.

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Mr. **BRYANT.** Thank you. Let me follow up in terms of the recommendation of the Commission, in terms of the direct appeal process of skipping the district court judge and going directly to the Court of Appeals. Having practiced law, I'm just wondering if we don't have the potential to create a monster here. Perhaps it would discourage a lot of appeals; that might be one of the reasons behind this. But what is left of the adjunct relationship between the bankruptcy courts and the district courts if we were to do that?

And, also, recently we've had this ongoing battle of the United States Trustees and the private trustees, and they're trying to sort through how they can negotiate their disputes; and as I recall, the private trustees want to go to the bankruptcy judges and the U.S. Trustees want to go to the district courts. The latter provision—how would that be

affected in this? And again, the other relationship that would remain if we went to this single-tier appeal?

Mr. **WILLIAMSON.** The Commission was persuaded without much difficulty that the elimination of the district court as a mandatory appellate stop would not create problems under *Marathon Pipeline*, and the simplest reason is that you're appealing from a bankruptcy court decision to an Article III court; it just happens to be the U.S. court of appeals instead of the Federal district court. The adjunct relationship between the district court and the bankruptcy court is undisturbed by that.

I would point out that the House had no provision at all in the 1978 legislation for an appeal to the district court; it was inserted in conference that there be a mandatory stop at the district court.

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Since then, Congressman Bryant, as you know, the district courts have been overwhelmed with caseloads—sadly, much of it devoted to drug cases—and I don't think there are many district judges who relish having to be bankruptcy appellate judges. We would discourage some appeals with this proposal, and we would save the taxpayer and litigants a lot of money by eliminating this intermediate step; and this is a recommendation that all of the commissioners agree on. We think it's something you can do quickly, without a constitutional fight.

Mr. **BRYANT.** But I can't envision the circuit judges—I can't envision them standing there with their hands open welcoming more files, either.

Mr. **WILLIAMSON.** Perhaps not at the U.S. court of appeals; we felt our plate was full without having to decide which judges were working harder.

Mr. **BRYANT.** And did you see any effect, again, on this trustee thing in terms of—that's pretty far out in terms of ——

Mr. **WILLIAMSON.** That was about the only other area, Congressman, we decided——

Mr. **BRYANT.** To stay away from?

Mr. **WILLIAMSON** [continuing]. You didn't need our assistance on. That legislative debate had advanced pretty far down the line.

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Mr. **BRYANT.** Good. I'll tell you, I was just going to say, in the interest of time, I was going to yield back my time because I know we have lots of questions here. And, again, thank you, Mr. Williamson.

Mr. **GEKAS.** The gentleman from Massachusetts. We recognize the attendance of the senior member of the minority and the ranking member of the Judiciary Committee, Mr. Conyers, of Michigan. Now we yield to the gentleman from Massachusetts, Mr. Meehan.

Mr. **MEEHAN.** Thank you, Mr. Chairman. Mr. Williamson, the Commission's recommendations in the area of bankruptcy—consumer bankruptcy—seem to reflect concern about the disadvantaged legal posture of many consumer debtors. For example, the Commission would prohibit the reaffirmation of unsecured debt, in part because it believes that consumer bankruptcy attorneys often fail even to consider whether reaffirmation agreements would cause undue hardship to their clients.

Similarly, the Commission's recommendations regarding credit card debt make specific reference to the fact that a creditor's allegations of fraud often lead to quick settlements even where there is no fraud present, for many consumer debtors can't afford to contest these allegations in court. Can you elaborate on the precarious legal posture of many

consumers, particularly low-income consumers, who find themselves in bankruptcy court?

Mr. **WILLIAMSON.** Congressman, the concerns that you just described, I think, are real, and they emanate in part—or they certainly were illuminated in part—over the last year in the bankruptcy courts of Massachusetts, particularly in Boston, with litigation involving one particular retailer and, of course, had national ramifications.

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There is a general concern about the adequacy of representation that consumer debtors receive. Well-counseled debtors generally fair well in the system, but the number of well-counseled debtors is quite small. So we find ourselves asking, and I think this Congress will find itself asking, in light of the last 20 years of experience under the Bankruptcy Code, did the consumer provisions work as well as your predecessors intended them to work? Reaffirmation is a good example of that.

Mr. **MEEHAN.** Mr. Williamson, we've talked a little bit about credit card debt and the ramifications of the explosion of credit being given out by credit card companies, by giving out credit cards in the mail—to the best of your knowledge, how often is it the case that households with substantial credit card debt incurred the bulk of that debt only after they were already in financial distress?

Mr. **WILLIAMSON.** The most prevalent testimony the Commission heard over 18 months, Congressman Meehan, was what we came to regard affectionately as anecdotal testimony, and there was an anecdote for everything. Every side of every argument had an anecdote that supported its position—often colorfully, often effectively—and this leads to this frustration that I expressed to both you and your colleague from Massachusetts about the data problems in bankruptcy. We have limited surveys, some done by academics, some done by the credit card industry itself, that suggest at the time of bankruptcy the average debtor had "X" number of credit cards or was delinquent "X" months.

But, again, I think this is an area that needs prompt congressional attention. I don't see, quite frankly, how you can legislate in some of these areas without having better data that describe what is happening economically in this country.

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Mr. **MEEHAN.** Well, the point obviously is, if the Commission is impeded by the lack of data, imagine the Congress trying to determine policy in this area, really in the dark in many respects. That's going to be something, I think, that will be extremely difficult for us to get passed.

I'm struck by the substantial regional variation in the sort of bankruptcy cases that are filed in United States bankruptcy courts. In certain circuits, in districts, the number of chapter 7 cases dwarfs the number of chapter 13 cases. In other areas of the country, these numbers are almost identical. How would you explain this regional variation? Is it a function of the differences in controlling case law, or is it in judicial or administrative practices? Can you give an accounting for why there's this wide disparity or variation around the country?

Mr. **WILLIAMSON.** Congressman, we came to no conclusion on the cause, but we did attempt to highlight the significant regional disparities. Congressman Bryant, both as a former practicing lawyer that did some work in this area and now as a Congressman in a State where the proportion of 7's to 13's are about precisely opposite of what they are in Massachusetts, has some first-hand experience in this area.

We heard lots of explanations, but nothing that persuaded me that cause "A" was or cause "B" was the "real" cause. We're suffering from a lack of good, hard data.

Mr. **MEEHAN.** A re-occurring theme in the Commission's report is the need to minimize the complexity of the bankruptcy system. To what extent is this concern related to complexity's impact on the already strained judicial and administrative resources of the bankruptcy system?

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Mr. **WILLIAMSON.** Prospectively, when this Congress legislates in the bankruptcy area, I think it has to be very aware of the burdens being placed on bankruptcy judges. In my prepared statement, I suggest that in 1977 the number of consumer bankruptcy cases for each bankruptcy judge was something on the order of 800 consumer cases for each judge, and it's now more than 4,000 cases.

As this subcommittee develops its own legislation, which the chairman spoke of in his statement, and as it reviews the legislation that's been introduced, it has to ask the question: How does the theory work in practice? Who's going to make the decisions about who qualifies for chapter 7? Who qualifies for chapter 13? How can we accommodate the due process rights of debtors and creditors in a system where bankruptcy judges are, by all accounts, already overworked?

Now this House has passed legislation to increase the number of bankruptcy judges. The fate of that legislation is not clear into next year, but as you develop responses to the explosion in consumer bankruptcy, the mechanical impact, the logistical impact on the bankruptcy system has to be foremost in your thinking.

Mr. **MEEHAN.** I guess the challenge for this committee is going to be to develop legislation with the gap in data that's available and to avoid being tempted to legislate on the basis of compelling and often misleading anecdotes that the Commission has to deal with. And therein lies the difficult task that is ahead of us.

I yield back, Mr. Chairman, the remainder of my time. Thank you.

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Mr. **GEKAS.** The gentleman from Ohio, Mr. Chabot, is recognized for 10 minutes of questioning.

Mr. **CHABOT.** I thank the chairman. Mr. Williamson, you said something before, that you think that perhaps one of the reasons for the high number or bankruptcies is, for example, the advertising by bankruptcy lawyers so often on television now. And I just last night coincidentally happened to be grazing, which I have a tendency to do late at night—we didn't get off the floor until about what--was it 12:30 a.m. last night, or something like that?

But I'm kind of grazing along, and sure enough, you know, there's a bankruptcy lawyer talking about how easy it is to file bankruptcy nowadays. I mean in every other commercial you have a couple of guys yelling at you—"Just call 1-800-YES-CREDIT." And I think it does lead to a little less stigma on bankruptcy than there once was; I think that's one of the reasons; I think, perhaps, the ease of the credit cards that were being sent out for a while there—there are probably a lot of other factors as well.

We've heard that consumer bankruptcy is being used as a first option rather than as a last resort, as it was intended to be. A lot of people do believe that; I tend to believe that, as well. And this is evidenced by creditors who are seeing up to half of their total bankruptcy filings originating from customers who are not seriously delinquent. This leads up to the belief that there are sociologic and societal, rather than economic factors, causing the rise in consumer bankruptcy filings.

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How does the proposed framework address these factors—the fact that perhaps there is more societal rather than just economic factors causing this increase in bankruptcies?

Mr. **WILLIAMSON.** Well, Congressman, we heard a lot of testimony about that, and we certainly have noted it in the report. But, again, all of us on the Commission were frustrated by the lack of a reliable and expansive body of statistical data that would have helped explain this. The stigma of bankruptcy probably has lessened somewhat, but why is that? That's a very difficult question to answer.

It surely can't be the laws passed by this Congress. The reason I say that is this: Congress passed the 1978 code and then legislated substantially again in 1984 and 1986 and 1994. There have been several studies that suggest there is no correlation between increases in bankruptcy filings and legislation, whether it's legislation that could be characterized as pro-creditor or as pro-debtor.

Mr. **CHABOT.** So, basically, then, you didn't really take into consideration, because of the lack of data, the societal pressures, the increases perhaps due to less stigma? I mean, that really isn't a factor in your recommendations.

Mr. **WILLIAMSON.** Perhaps I misunderstood your question, and I apologize if I did. It certainly was a factor in this regard. We think repeat filings are a serious abuse, and both the majority and minority proposals address the need to restrict repeat filings.

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Mr. **CHABOT.** How much of an effort was made to fashion a consensus?

Mr. **WILLIAMSON.** Congressman, an extraordinary effort was made to fashion a consensus, both by the several commissioners who ultimately dissented and by a number of commissioners who ultimately were in the majority. The really laboring oar in that effort was by a former colleague of Congressman Gekas, Congressman Caldwell Butler of Virginia, who, not surprisingly, is the only former member on the panel and who, I think, both had the skills and the inclination to try to fashion a compromise. It was Congressman Butler's set of consumer bankruptcy proposals that the Commission ultimately adopted.

Mr. **CHABOT.** I'm not one who generally believes that we should legislate by polls, but I do think sometimes it's important to take into consideration what the American people think about an issue. And, according to a recent survey conducted by the National Consumer's League, 71 percent of Americans believe that it's too easy to file for personal bankruptcy, and 76 percent believe that filers able to repay a portion of their debts should be required to do so; it shouldn't be an option but that they should be required to do so. Do you think that debtors who are able to pay back some or all of their debt should be required to do so?

Mr. **WILLIAMSON.** Yes. The difficulty is how to establish a set of laws and procedures that accurately identify those who can but don't want to, and distinguish those people from those who want to but can't. That's the real challenge that faces the subcommittee in the first instance.

As I said, Congressman, we all agree on the need to help the legitimate debtor, and we all want to provide support for the creditor who deals responsibly with debtors. But trying to identify under a hard set of statutory rules who that legitimate debtor is, is very difficult.

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Mr. **CHABOT.** Over the last 3 years, this Congress has been working very hard to return power to the States and, for example, in our block granting back to the States giving them more options, letting them set their own welfare reform these types of things. It appears that the Commission, with respect to the exemptions, went in just the opposite direction and are looking for one standard nationally. I'd like to hear you, perhaps, expound a little bit on this.

Mr. **WILLIAMSON.** That's correct, Congressman, I think for at least three reasons. First, Constitution that in Article I says that Congress has the power to establish uniform laws of bankruptcy. Second, I think that the system of exemptions that has evolved around this country, State by State, is not uniform and is ineffective as part of the bankruptcy system. We have these incredible disparities—Pennsylvania to Ohio, Ohio to Indiana, Tennessee to Florida. At a time when this country has become more homogenous, when the differences between and among us as citizens of the State of Ohio or citizens of the State of Wisconsin have become less pronounced, the patchwork quilt of exemptions, both in the homestead area and in personal property, is just very difficult to justify.

Mr. **CHABOT.** With respect to exemptions, you know, one thing I would like to know is how the Commission justifies a proposal that would exempt personal property exceeding the net worth of three-fourths of American households' from inclusion in assets be liquidated.

Mr. **WILLIAMSON.** First Congressman, I quarrel with that statistic. I've heard it before, but I think a careful examination of the exemption proposal would show that we're establishing for the States a range within which they would legislate on the homestead exemption. With respect to the personal property exemptions, the numbers adopted with great difficulty by the Commission would obviously increase exemptions in some States, but decrease them in others—Pennsylvania being a good example. More importantly, the Commission's recommended exemptions in many respects are tighter, less generous than the Federal exemptions today—the exemptions that are in Federal law today.

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Mr. **CHABOT.** In you testimony you acknowledge the concern with the problem of multiple or serial filings.

Mr. **WILLIAMSON.** Absolutely.

Mr. **CHABOT.** Under the NBRC framework, a debtor would be allowed to file one chapter 7, and 11 chapter 13 bankruptcies every 6 years. Do you believe that this will truly solve the filing problem?

Mr. **WILLIAMSON.** The serial filing, or the repeat filing problem, Congressman, is one that we concluded is serious but is not nationwide. It seems to have particular vigor in certain parts of the country. We looked at a number of remedies for repeat filings. On one hand, we looked at a flat ban—no filings more often than a certain period of time. The proposal that was put forward by Congressman Butler was less rigorous than some would have liked and more rigorous than others would have liked. I think what's important is that Congress address the repeat filing problem. There are a variety of ways in which to do that.

Mr. **CHABOT.** If a person is injured and recovers damages, that recovery is often meant, at least in part, to pay for medical bills. And it's my understanding that under the NBRC framework there would not be a requirement to pay those back.

Mr. Chairman, I request 1 additional minute to complete the question.

Mr. **GEKAS.** Without objection.

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Mr. **CHABOT.** However, in recommendation 1.2.6, you suggest that personal injuries and recoveries should be exempt. If part of the money that they recovered as a result of this injury was to cover medical bills, why should a debtor be able to declare bankruptcy and keep the money, particularly if it's often earmarked to cover just those expenses?

Mr. **WILLIAMSON.** Congressman, I'd ask to respond to that question in writing. I understand your point.

Mr. **CHABOT.** That's fine. Thank you.

Mr. **GEKAS.** We thank the gentleman. We yield to the gentleman from Massachusetts, for 10 minutes for the purpose of questions.

Mr. **DELAHUNT.** Yes, thank you, Mr. Chairman.

We continue to hear about the $40 billion figure. And yet, I've just been handed a piece of paper that indicates that

there was a study done by a Dr. Michael Staten who suggests the annual cost of bankruptcy to be between $4 and $5 billion. Could you comment about the disparity?

Mr. **WILLIAMSON.** Only, Congressman Delahunt, to the extent that we know that there has been a great deal of statistical fencing, jousting, in this area.

Mr. **DELAHUNT.** I do respect your opinion, and I mean that genuinely, Mr. Williamson. That is a huge disparity. In terms of your expertise and your background, do you have any idea what the real figure might be?

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Mr. **WILLIAMSON.** No; but let me modify that——

Mr. **DELAHUNT.** That's very disturbing, I might add.

Mr. **WILLIAMSON.** But let me add to that one-word answer. It's important to make a distinction between losses on credit, whether it's credit cards or any other kind of loan, business or consumer, and losses in bankruptcy. And I think there may be a tendency to attribute the former to the latter. And they are two different dimensions.

Mr. **DELAHUNT.** But that's a very significant distinction. Because what we're discussing, what is before us, is a significant proposal put forth to reform the bankruptcy code. So maybe, if you could further pursue that for us. I mean, if there are credit losses of $40 billion, but only $4 or $5 billion in terms of losses in bankruptcy, I mean, we're talking about a different animal, if you will, a different issue, a different concern. Now, maybe I have it wrong. And let me be very clear, my knowledge of the bankruptcy code is negligible at best. So please be very patient and simple with me.

Mr. **WILLIAMSON.** I understand, Congressman, and again, you've put your finger on the frustrations that we face in dealing with an issue that is so important and so complex with relatively little hard data.

Mr. **DELAHUNT.** But that's pretty basic stuff. I mean, we pick up the paper and we read about a $40 billion problem or a $4 or $5 billion problem and you're the chairman of a commission, someone who has impeccable credentials, and you're having difficulty giving me an estimate.

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Mr. **WILLIAMSON.** Yes.

Mr. **DELAHUNT.** Boy, that really concerns me, because, we're operating here without hard data. In terms of the dimensions of the problem, there is a hell of a difference between 4 billion and 40 billion. I mean, that's a difference of $36 billion. That's a lot of money, $36 billion.

Well, let me ask you this: do you see any reason why this subcommittee and the full committee would not be able to address, in the form of legislation, those specific recommendations which achieve unanimous support——

Mr. **WILLIAMSON.** No.

Mr. **DELAHUNT** [continuing]. And act on those in an expeditious fashion? Are there any implications or consequences that I'm not aware of that would prevent us from acting in a forthright and expeditious fashion?

Mr. **WILLIAMSON.** No. To the extent that the Commission agreed on an issue, any issue, unanimously, or virtually so, that doesn't mean there wasn't opposition.

Mr. **DELAHUNT.** Right.

Mr. **WILLIAMSON.** But what we have done, I think, in the report, is to identify the opposition, to identify the contrary view, even when the Commission as a whole was unanimous. But as I pointed out in my testimony and both Commissioner Ceccotti and Judge Jones point out in theirs, there are a number of these critical issues: transnational insolvency, direct appeals, and the like, that this Congress should be able to act on with thorough consideration before next fall when this Congress finishes it's work.

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Mr. **DELAHUNT.** How would you prioritize those unanimous recommendations in terms of what action this Congress ought to take on those unanimous recommendations?

Mr. **WILLIAMSON.** I think that the two most obvious are direct appeals and transnational insolvency.

Mr. **DELAHUNT.** In terms of the explosion in the number of filings, presume, for a moment, that we would accept all of them, and in addition thereto, in factor in the legislative proposals put forward by Representative McCollum and Senator Grassley. Has anyone estimated the cost of implementing the McCollum bill, the Senate bill, and the proposals put forth by the Commission, in terms of the additional resources that would be necessary?

Mr. **WILLIAMSON.** Not that I'm aware of.

Mr. **DELAHUNT.** OK, so we don't know that either.

Can you tell me, has any study been done of those individuals who are seeking bankruptcy relief? I mean, are there any studies of their income category, demographics, what have you?

Mr. **WILLIAMSON.** Yes, there have been some studies done. The financial industry has completed several. The studies that have been undertaken by Dr. Staten to whom you referred tried to address some of those issues.

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Mr. **DELAHUNT.** I presume there is no typical individual. But you could give us just 30 seconds worth on what we know about the individual debtor in——

Mr. **WILLIAMSON.** I think we do know this, Congressman Delahunt, that the average——

Mr. **DELAHUNT.** Bankruptcy.

Mr. **WILLIAMSON** [continuing]. Normal debtor today doesn't look all that different than the average debtor of 20 years ago, in terms of the amount of debt compared to the amount of income; in terms whether the debtor was a homeowner or a renter. Obviously——

Mr. **DELAHUNT.** So that profile has not really changed?

Mr. **WILLIAMSON.** Apparently not substantially; again, based on the data that we do have available to us. And, if it's out there, it's referred to in the Commission report.

Mr. **DELAHUNT.** I think we all want to see a reduction in the number of filings, without, at the same time, crafting legislation that really would deter people who legitimately need relief from seeking relief.

Much has been said about the proclivity, if you will, of people abusing the system. I think it was my colleague from Ohio who talked about a poll. And maybe there is this popular sense that there are too many bankruptcies being filed. But that doesn't really go to the issue of why people are filing. Do you have any ideas that you can give us? Well, I guess that's really an unfair question because you said there is no empirical data to account for the reasons that people

are seeking bankruptcy relief; none at all.

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Mr. **WILLIAMSON.** Congressman, I can give you my own personal conclusions.

Mr. **DELAHUNT.** Could you do that?

Mr. **WILLIAMSON** [continuing]. Which are that: compared, for example, to 20 years ago, the family that finds itself with the choice of filing for bankruptcy or not has thinner margins. Put another way, the same kind of catastrophic events that might cause the family to chose bankruptcy, whether it's a medical emergency, a divorce, a car accident, a lay-off, a down-sizing——

Mr. **DELAHUNT.** For example, fewer and fewer Americans have health insurance today.

Mr. **WILLIAMSON** [continuing]. All of those problems were present to one degree or another 20 years ago.

Mr. **DELAHUNT.** But they're exacerbated today?

Mr. **WILLIAMSON.** But what's different now is that the margin for error—the comfort zone, the cushion—is not what it was.

Mr. **DELAHUNT.** My time has expired. Let me just conclude by saying to the chairman that it would be my intention to draft a letter to the CBO and the GAO and signed by as many members of the committee as possible encouraging them to pursue with alacrity the kind of study that you indicated, Mr. Williamson, that they are presently conducting. We have to have that because, otherwise, we're just out there crafting public policy based on nothing more than anecdotal information.

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Mr. **WILLIAMSON.** Congressman, let me just add a sentence addressed to the Chairman, if I might. The Commission and its staff have 6 days left in their existence, because we go out of business next Wednesday at 5:00, by law. But, between now and then, we will contact you through the subcommittee staff and make sure that you have the names and addresses of those people who have given us studies and those at CBO and GAO that we know are looking at this.

Mr. **DELAHUNT.** I would really appreciate that. And if the chairman will just indulge me for another 10 seconds? What I would like to see, if those studies are concluded in an expeditious manner, is that they would be presented to the Commission and that you would reconvene as a—just simply as a good citizen, which you certainly are, Mr. Williamson. Reconvene the Commission and have the Commission review that data to see whether there would be any additional recommendations or a different perspective that ought to be presented to this subcommittee.

Mr. **GEKAS.** I hope you're prepared to issue a subpoena. [Laughter.]

Mr. **DELAHUNT.** I've got a batch of them.

Thank you, Mr. Chairman.

Mr. **WILLIAMSON.** And we'll advise counsel to resist the subpoena.

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Mr. **DELAHUNT.** And thank you, Mr. Williamson.

Mr. **GEKAS.** We thank the gentleman.

The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. **CONYERS.** Thank you, Mr. Chairman.

Good to see you again, Chairman Williamson. We had a great time in Philadelphia. We met a lot of very dedicated men and women and I was very impressed about the things that were going on and the nature of the organization.

We here on this side don't want you to get out before we do. I mean, it's nothing personal, but we've been getting out for a long time. So, I hope you wouldn't feel offended if we—and we're under what is called martial law, which means that you can bring anything up at any time. And the chairman of Rules Committee is very good at doing that—no hearings, no nothing. I mean, we have to even take his word that there's a bill in existence for what he's getting passed.

Mr. **GEKAS.** I accept his word.

Mr. **CONYERS.** Well, there's always one or two that give everybody the benefit of the doubt, like our good chairman. But we could get a one sentence addition attached to anything coming to the Floor, that would give you life after death with funding to ensure that under no circumstances do you go out of business before we go out of business. Now, that wouldn't—I mean, your chances are at least 50–50.

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I also want to commend Chairman Gekas before we get started, who has, along with Jerrold Nadler, done some very good work. The detailed kind of work coming out of Judiciary Committee on bankruptcy matters, I think, is as fine as any that I've ever seen. And I think they are doing a good job.

Both of them are moving rather slowly, and I'm happy about this, on the trustee bill that is also before the committee. There is an idea of grandfathering in every bankruptcy trustee. I doubt if anybody here knows more than, I would say two or three, maybe for some, one. These are very powerful people and we need to really look at very carefully who it is we're about to do all of this for.

Mr. Chabot is not here, but I guess he'll have to take his lumps in absentia here. But he was talking about polling majorities—and I'll get this to him so we don't have to worry about him not hearing about it. Polling majorities, I guess, is great information, but the majority of people in America feel that Newt Gingrich should resign; that's in the 70th percentile. So, you know, I don't know whether or how well versed they are about Newt Gingrich or what he's done or not done, and I don't know how many people in America are bankruptcy knowledgeable to the extent that they can answer a poll about bankruptcy doing anything more than giving their subjective view, to which each of us is, of course, fully entitled.

So we come to this subject and the committee's work with a great deal of excitement. I've never seen this much excitement around a subject that's usually considered so arcane that it's sort of a, not even—there are many lawyers who immediately refer a bankruptcy matter out, which is what they should do if they're not versed in it. But your committee has somehow stirred the passions of everybody on the spectrum. And we've had a swell of activity among the lobbyists in Washington who are now being employed in record numbers about a new proposal about bankruptcy which is bringing stellar figures into play. My good friend Lloyd Bentsen, for example, former Secretary of Treasury, senior member on committee after committee, has now weighed in on this matter. And it's providing a fair amount of employment to ex-Members of Congress, which is a good thing. I mean, there isn't a lot of work out here for ex-Congressmen, so I want them all to be gainfully employed, and it looks like that's about what's happening. There's a big rush on.

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So, I hope that the ranking member and the chairman will proceed with some caution about some of these matters. And my question to you is, to what extent was the matter that has now been reduced to a legislative proposal which deals with—is based on the premise—there are people being discharged in bankruptcy that could really pay their bills, a little bit, or a lot more than a total discharge. And my question is, to what extent was that subject matter and related issues covered by your Commission.

Mr. **WILLIAMSON.** Congressman Conyers, the concept of means-based or needs-based bankruptcy was discussed by a number of witnesses who appeared before the Commission. We were aware of the general proposals, but the legislation that is now H.R. 2500, I believe, was not introduced until after the Commission had its final meeting. The answer to your question is: the Commission did not consider that legislation. It did consider the general concept of means-based bankruptcy and the next two witnesses will have more to say about that because they are both familiar with the ideas and hold differing views.

Let me add one point, though. The American consumer—or American families—have had a choice between chapter 7 and chapter 13 since 1938. When this Congress established the Commission, it said, quite forthrightly in the legislative history, that it found itself generally satisfied—that's almost a quote from the committee reports—with the workings of the bankruptcy system. Congress did not encourage the Commission to undertake any proposals for, what I call architectural change. Whether it's a good idea or not the proposal that is embodied in this means-testing legislation would be architectural change, because it would limit a choice that has been part of American bankruptcy law for 60 years. That is one reason that the Commission did not embrace it enthusiastically, or for that matter, did not embrace it at all. The concept did have some support on the Commission, and again, I think Judge Jones and Commissioner Ceccotti will address that in more detail.

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Mr. **CONYERS.** Yes, I too look forward to the ladies that served with you as our next witnesses.

Now, do you have any knowledge about the number of failed chapter 13 repayment situation?

Mr. **WILLIAMSON.** Yes, Congressman. The report addresses statistics that we do have in that area. It is clear that for all of the virtues of chapter 13 as a procedural structure, a large number—somewhere between half and two-thirds—of chapter 13 plans, are not completed. Now, we use the term sometimes that they are "failed." Well, if they fail one month before they were scheduled to be completed, well that's not a great failure. But the emphasis here is directed not just at ensuring that we have more chapter 13's, which we all agree is a good goal, but that we have more successful chapter 13's. Because the mere election of chapter 13, or in the absence of an election under some of the more recent proposals, the direction into chapter 13 does no one any good if the chapter 13 does not, in fact, result in greater repayment of more debt to more creditors.

Mr. **CONYERS.** Well, I thank you very much.

Thank you, Mr. Chairman.

Mr. **GEKAS.** Mr. Williamson, the gratitude of the subcommittee should be automatic, and is, for all the work you have done and for the testimony that you have proffered today. We thank you very much.

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Mr. **WILLIAMSON.** Thank you, Mr. Chairman.

Mr. **GEKAS.** We invite the second panel to join us, now, at the witness table.

We have with us for the second panel Judge Edith Hollan Jones, a member of the United States Court of Appeals

for the Fifth Circuit since 1985. She was born in Philadelphia in the Commonwealth of Pennsylvania, and received her B.A. from Cornell University, in what Mr. Nadler would doubtless recognize as the great State of New York. She received her J.D. with honors from the University of Texas Law School. Prior to going on the bench, she was a partner in the law firm of Andrews and Kurth in Houston. She has served in the National Bankruptcy Review Commission since its establishment.

Babette Ceccotti is a partner in the New York law firm of Cohen, Weiss, and Simon, where she has represented labor organizations and employee benefit plans in chapter 11 proceedings in the airline, trucking, steel, entertainment, and shipping industries. She received her B.A., cum laude, from Clark University, and her J.D. from New York Law School. She has edited and served as co-author of several publications in the field of labor law. She has served on the National Bankruptcy Review Commission since its formation in 1995.

The Chair seizes its prerogative to now restrict the testimony to 5 minutes in oral presentation, in hopes that the summary can be presented during that time. Your written statements will be accepted as part of the record. And we will similarly restrict the questions to 5 minutes. They can be posed simultaneously to both witnesses. And we will proceed from that.

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We will ask Ms. Jones to begin.

STATEMENT OF HON. EDITH H. JONES, JUDGE, UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT AND MEMBER, NATIONAL BANKRUPTCY REVIEW COMMISSION

Ms. **JONES.** Well, in my court nobody can say much of anything in 5 minutes, so I hope I can improve on the presentation slightly.

I know you've received a very large report. It's been my honor to serve on this Commission. And I will deem it important to use a bit of my time to thank our staff members who are here today, Ms. Susan Jensen Conklin, Ms. Judy Benderson, and Ms. Melissa Jacoby. Others have already left our employ. Their contributions were very important to the work that the Commission did.

I have a simple recommendation in regard to the report that the Commission has issued: you needn't pay attention to the 1,000 page report; do pay attention to the bold faced proposals that are at the beginning of the report and at the beginning of each of the chapters. The report was written under very hurried circumstances and is largely the product of staff, and I and several other Commissioners take no responsibility for most of it which we never had a chance to read.

On the other hand, I commend to your attention the dissents. And those are 250 pages at the end and I wrote a great deal of them under very harried circumstances, I'll admit, but I know what's in those.

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I'm going to use my time to say to you that I agree with Chairman Williamson that Congress ought to devote its initial and serious consideration to the problems of consumer bankruptcy. The increase in filings has been dramatic; it is unexplained; it is, perhaps, inexplicable. All the authorities disagreed on it, but that does not mean that it does not admit a solution. My city of Houston suffers from recurring flooding, and no scientist can tell us the precise cause of the flooding but everyone can agree that you have to build more storm drains.

Similarly, in the United States today, we face what amounts to a flood of bankruptcy in supposedly the best economic times in our history. And one can only ask, what is going to happen when the economy turns downward; and what is going to happen to the availability of credit and the sudden tightening of credit that will occur when we face economic reversals. I fear there will be dramatic and adverse consequences for everyone in this room, particularly

for the poor and the marginally credit worthy.

It is time to consider means testing. Our Commission did not seriously consider means testing. But I can say this, I agree with Chairman Williamson that it may seem difficult to work out a formula, but on the other hand, for many years now we have means-tested benefits for every other Government program from Social Security, to Welfare, to free school lunches. I don't see why bankruptcy defies a solution. And particularly because most bankruptcy is availed, nowadays, by the middle class. And most—many—bankruptcies, now, are filed by people who are income earning when they file. The increase in medical expenses, divorce, and losses of jobs simply cannot explain the increase that we face today. I think gambling is involved. I think there is a decreased social stigma. In my grocery store last night—two nights ago—I saw a handbook that you can buy for $16.99 to file your own bankruptcy; and certainly people do it that way.

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The five-member majority proposals of our Commission address means testing not at all. The four-member proposals which deal with modest rerforms to prevent patent abuses of the system also don't do anything significant to reduce the number of filings. The only thing that will do that is means testing which gives income-earning debtors an alternative if they want the benefit of the automatic stay. If they want a fresh start, and if they are able to pay some modest amount to their unsecured non-priority creditors, they will have to do so. That is the cost of bankruptcy relief for people in those circumstances.

The majority proposals, I think, probably will go nowhere because they shouldn't. They are debtor-friendly, they are not, however, what I would call, consumer-friendly. They may allow debtors to escape certain obligations like credit card debt or student loans, and to that extent they'll encourage people to file bankruptcies. But the costs that they will impose on the rest of American society, those of us who do pay our bills, are going to be enormous. I just don't think the times justify, or the circumstances that we see ourselves in today, justify any such draconian increase in bankruptcy filings as the five-member proposals would suggest.

I want to conclude by—I'd love to have questions, but I want to conclude by pointing out, I also support the direct appeals which I can explain to you. I support several other parts of our report that have to do with small-business bankruptcy, the tax proposals in bankruptcy, modifications of the preference laws. I support the proposals to relieve churches and charitable institutions of the burden of unfair bankruptcy litigation.

[The prepared statement of Ms. Jones follows:]

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PREPARED STATEMENT OF HON. EDITH H. JONES, JUDGE, UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT, AND MEMBER, NATIONAL BANKRUPTCY REVIEW COMMISSION

It is an honor to appear before members of this subcommittee to testify on the report of the National Bankruptcy Review Commission. Even as a dissenter to many of the Commission's more significant proposals, I was privileged to have served for two years and been allowed to address the serious problems that beset the American bankruptcy system.

Congress has copies of the Commission's voluminous report and the dissents authored by myself and other Commissioners. Helpfully for Congress's purposes, the specific recommendations are contained in boldface at the beginning of the report, and the dissents I wrote specifically identify the recommendations with which I and other Commissioners disagree.(see footnote 1) Because the time allotted to us today is short, and because I realize that Congress will ponder these recommendations and dissents for some time to come, I wish to highlight those portions of the report that I think most important to the reform of bankruptcy law and procedure, and those recommendations with which I, and often other dissenters, most strongly disagree.

I. CONSUMER BANKRUPTCY

The Commission's recommendations which have achieved the most immediate notoriety are those dealing with consumer bankruptcy. As bills have already been introduced in the House and Senate to consider reforming consumer bankruptcy law, I believe Congress will consider this area among its first priorities. Congress should be concerned about the alarming increase in consumer bankruptcies under the 1978 Bankruptcy Code and particularly in the last four years. One research group estimated that given the million-plus level of consumer bankruptcy filings, and the correspondent level of losses imposed on creditors, every American household paid $300–400 in higher credit charges in 1996 to make up those losses.(see footnote 2) Congress should also be concerned that when consumer bankruptcy filings reach the current extraordinary rate during prosperous economic times, the results might be truly catastrophic when the credit-driven economy turns down and many more people begin losing their jobs.

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Between the Commission's five-member majority proposals on consumer bankruptcy and the recommendations of the four-Commissioner dissent, there are represented two distinct philosophical and practical approaches to consumer bankruptcy. As I hope to demonstrate, the five-member majority proposals are agnostic or worse concerning the high level of consumer bankruptcy filings. The five-member dissent proposes measures that would go much further to penalize debtor abuse and deter the widespread "gaming" of the system that now occurs. In a separate dissent, Commissioner Shepard and I furnish additional criticisms of the five-member proposals and advocate that Congress consider means-testing of bankruptcy relief. Our separate dissent identifies five different varieties of means-testing, two of which have already been introduced as legislation.

Lacking time to compare the majority and dissenting proposals item by item, I shall instead describe the problems that they were intended to combat. I will summarize the inadequacy of the five-member proposals to deal with these problems, and identify the stronger and more effective proposals advocated by the four-member dissent.

In four areas, the Commission seems almost united in agreeing that there are opportunities and significant instances of consumer debtor abuse:

1. Debtors' statements of their assets, contained in schedules and statements of affairs, are often widely inaccurate and untrustworthy.

2. Too many debtors file multiple bankruptcy petitions, either to gain the temporary advantage of the automatic stay or repeated protection from indebtedness.

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3. Not enough debtors otherwise able to do so choose to pay some of their debts in Chapter 13.

4. Not enough debtors complete payments under Chapter 13 plans, especially to unsecured creditors.

1. Inaccurate/Untrustworthy Statement of Assets

The five-member majority propose to remedy this widespread problem by requiring attorneys to verify the essential accuracy of the debtors' schedules under Bankruptcy Rule 9011, Comm'n. Rec. §1.1.4, and by initiating random audits of debtors. Comm'n. Rec. §1.1.2. Random audits have some value, especially in the 1% of cases they may involve. Enhancing attorneys' responsibility for the trustworthiness of their clients' schedules is also useful. (Note that the final Commission Report has come around to the view on Rule 9011 expressed by the four dissenters in earlier papers. See Four Commissioner Dissent §1.1.4, pp. 19–20.)

Unfortunately, these measures do not significantly penalize debtors who in individual cases are caught secreting or misstating their assets and liabilities. Present law that appears to sanction such debtor conduct is simply ineffective.

The four dissenting Commissioners therefore recommended that if a debtor materially falsifies his schedules as initially filed with the court, discharge should be denied. This is no different from the level of veracity required of individuals who file tax returns, applications for gun licenses, loan applications or other important documents. The penalties for inaccuracy must be beefed up. We also recommended, *inter alia*, filing tax returns and pay stubs, and making discharge contingent on a trustee certification that the debtor cooperated. See generally §1.1.A of the Four-Commissioner Dissent to Consumer Bankruptcy Proposals, pages 19–21.

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2. Serial Bankruptcy Filings

The five-member majority proposals call for a national bankruptcy filing registry, Comm'n. Rec. §1.1.1; *in rem* orders, Comm'n. Rec. §1.5.6; and a modified, "three-strikes" limit on repeat bankruptcy filings. Comm'n. Rec. §1.5.5. We all agree on the advisability of a national filing registry and on allowing courts to issue *in rem* orders that would prevent individuals from playing tag-team fraud with bankruptcy filings to prevent foreclosures. See Four-Commissioner Dissent, §1.1.1 at p. 14, and §1.5.6 at 57–59.

The Commission is split, however, on the amount and type of deterrents needed to limit access to bankruptcy. Currently, a debtor may secure a Chapter 7 discharge once every six years, but the debtor may repeatedly seek Chapter 13 relief. The five-member majority proposal would allow a minimum of two bankruptcy petitions, either Chapter 7 or 13, within a six-year time frame, and would only limit (by making the stay non-automatic) a debtor who, within six months of dismissal or conversion of the second filing, attempted a third filing. It is difficult to see how any enforceable limit on refiling exists under this proposal. It is absurd to say that the majority proposal imposes any kind of limitation as compared with present law; it does nothing to curtail abusive "Chapter 20" filings.

The four dissenting Commissioners proposed two alternative measures to limit refilings. One of them would limit debtors to seeking bankruptcy relief, whether under Chapter 7 or Chapter 13, no more than once every six years. The other alternative would eliminate the possibility of an "automatic" stay for those who refile within 180 days or who are spouses, co-owners or co-lessees of a person who filed in the previous 180 days. See Four Commissioner Dissent, §1.5.B at 51–57. Neither of these measures is much more stringent than current law. Either of them would be far preferable to the utterly ineffectual majority proposals.

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3. Not Enough Chapter 13 Filings

The five-member majority proposals seek to encourage Chapter 13 filings only by enhancing the credit report of debtors who complete their Chapter 13 payments and verbally encouraging incentive loan programs for them. Comm'n. Rec's. §1.5.8 and 1.5.9. While these are laudable measures, with which the dissenters agree, they will not alone significantly increase the number of Chapter 13 filings. Nearly every other major consumer bankruptcy proposal of the five-member majority seriously undercuts the incentives of debtors to engage in Chapter 13 repayment plans. The majority proposals dramatically increase the average level of personal exemptions around the country, and in so doing promote straight discharge of debt in Chapter 7 over Chapter 13.(see footnote 3) See Comm'n. Rec's. §1.2.1—1.2.6. By modifying reaffirmations, they give debtors the same ability to reduce their secured obligations in Chapter 7 as now exists in Chapter 13 "cramdowns" of secured debt. Comm'n. Rec's. §1.3.1 and 1.3.2. Further, there are "consumer-protection" measures proposed for Chapter 7, such as those concerning rent-to-own contracts, Comm'n. Rec. §1.3.5; voiding liens on "household" goods less than $500 "value," Comm'n. Rec. §1.3.4; and a "free ride" discharge for credit card debt incurred (within card limits) more than 30 days before bankruptcy. Comm'n. Rec's. §1.4.1 and 1.4.2. The majority advocate making school loans fully dischargeable even if the debtor files bankruptcy one day after receiving a degree. Comm'n. Rec. §1.4.4. All six of these proposals create disincentives to Chapter 13 payment plans.

Unfortunately, the four-member dissenting proposals do not adequately encourage Chapter 13 filings either. There would, however, be a greater incentive to file Chapter 13 if, consistent with the dissenters' recommendations, Congress

passed uniform federal exemptions with far lower limits than those advocated by the majority. See Four-Member Dissent, pp. 25–27. In such cases, debtors would have more non-exempt property exposed to the claims of creditors, and they might be more willing to file Chapter 13 payment plans.

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Ultimately, the *only* way really to encourage Chapter 13 is to means-test bankruptcy relief, requiring those who are able to repay some portion of their unsecured, non-priority debts to do so. The Grassley-Durbin bill offers one such possibility, by modifying §707(b); the McCollum-Boucher bill proposes a means test for access to Chapter 7 relief. In the Jones-Shepard Additional Dissent to the Consumer Bankruptcy Recommendations, pp. 5–17, these and other means-testing proposals are identified and discussed.

4. Too Few Completions of Chapter 13 Plans

Nationwide, nearly two-thirds of Chapter 13 repayment plans are never completed. Precisely what this means to debtors is unclear. Apparently, many of them get the benefits they sought by curing defaults in home mortgages, auto loans and taxes; if they never complete payments on unsecured debts, they are not worried enough about being pursued by creditors to risk the lack of a discharge. The lack of completions disadvantages unsecured creditors, although they prefer Chapter 13 to 7.

The five-member majority sought to enhance the effectiveness of Chapter 13 in two ways. First, the majority would require payments to be made on secured and unsecured debt throughout the life of the plan. If the debtor did not keep up payments on the secured debt until the end, the debtor would not achieve the desired cures of defaults. All of us agree on this proposal. See Four Commissioner Dissent, §1.5.A, pp. 41–43.

The other majority proposal purports to impose on debtors "template" levels of minimum payments based on income. Comm'n. Rec. §1.5.4. This recommendation is useless for two reasons. First, the court can deviate from it whenever it finds that "circumstances" are appropriate. The standard is thus a non-standard. Second, for higher income-earners, the template payments envisioned by the Commission (without any empirical supporting justification) are far too low. The template would do nothing to increase the payments to unsecured creditors in Chapter 13.

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Because the four dissenting Commissioners had no time or opportunity to develop a counter-proposal, our recommendations do not promise to enhance payments to creditors in Chapter 13. There are only two ways to do this: to decrease available exemptions, thus incentivizing more debtors to seek Chapter 13 relief; or to means-test bankruptcy and require some debtors to enter into repayment plans.

5. Creditor Abuse

The Commission split five-four over the extent of creditor abuse and need for additional legal measures to counter-act it. The five-member majority proposals that address creditor abuse are those dealing with false claims, Comm'n. Rec. §1.1.3; reaffirmations, Comm'n. Rec's. §1.3.1 and 1.3.2; voiding liens on household goods of $500 "value," Comm'n. Rec. §1.3.4; modifying rent-to-own contracts, Comm'n. Rec. §1.3.5; and enhancing the dischargeability of credit card debt. Comm'n. Rec's. §1.4.1 and 1.4.2.

The dissenters see no need for any of these measures, because current law, as explained in the dissent, adequately addresses the problems. See Four-Commissioner Dissent, §1.1.3 at 16–19; and §1.3.1&2, §1.3.4, and 1.3.5, at pp. 28–41. The Commission did not even consider more modest measures to deter creditor abuse, however, because we were required to vote on the five-member majority proposals as an all-or-nothing package.

The five-member majority proposals would in effect force lenders to change their lending practices, particularly to less-well-off borrowers, because these proposals uniformly increase the risk of credit to such individuals. The results

may favor debtors, but they are anti-consumer, as they drive up the risks of lending and the cost and availability of credit to all consumers. They will have particularly harsh effects on the poorer members of society. See the Four-Commissioner Dissent, *supra* and Part III, pp. 64–71, and the Jones-Shepard Dissent to the consumer bankruptcy proposals, pp. 29–31.

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Two other modest remedies proposed by the Four-Member Dissent should be noted here. First, we recommend an expedited affidavit-form practice for granting uncontested motions to lift stay under §362. See §1.5.C, pp. 59–61. We also vigorously support removing residential leases from the automatic stay, because of the widespread abusive practice by tenants of filing bankruptcy solely to delay state-ordered evictions. Four-Member Dissent §1.5.D, pp. 61–64.

In concluding my comments on consumer bankruptcy, I cannot overemphasize that the time has come for Congress to consider whether the bankruptcy discharge and "fresh start" are widely being made available to individuals who could afford to repay some of their unsecured, nonpriority debts. From my experience on the Commission, I believe the discharge is being unjustifiably granted in a significant number of cases. Proportionately, these may not be a large share of overall bankruptcy filings, but taken together, they cast disrespect on the system and impose large losses that ultimately must be borne by non-bankrupt consumers.

II. DIRECT APPEALS TO COURTS OF APPEALS

Moving to other Commission recommendations, I believe the next most important area is direct appeals. Congress should adopt the Commission's unanimous recommendation that appeals from bankruptcy courts should be routed directly to the U.S. Courts of Appeals, rather than through an intermediary such as the district courts or bankruptcy appellate panels. *The importance of this measure cannot be overstated.* The present Bankruptcy Code is vaguely drafted in many instances. There are literally thousands of conflicting precedents for practically every clause in every provision of the Code. A principal reason for the conflicts is that the parties involved in bankruptcy do not have the time or resources to pursue appeals up to the court of appeals level. It is at that level, and that level alone, where binding decisions will be made for all of the bankruptcy courts in a circuit. Further, at that level, the judges are less likely to take a parochial bankruptcy-only view of the law, and they are more likely to interpret the plain language of the law.

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District courts are not useful way-stations for bankruptcy appeals. The discomfort of district courts in addressing bankruptcy cases is well known. The district courts also, though not always, have a tendency to let bankruptcy appeals languish for an extended time and then to rubber-stamp the bankruptcy court's decision without serious consideration.

It is my firm belief that bankruptcy appeals can be heard by the courts of appeals without unduly straining the workload at our level. First, the handling of prisoner habeas corpus appeals has become easier because of Congress's recent revisions to the law. Second, the large majority of the increase in our caseload consists of prisoner filings, now over 40% of all appeals at the Fifth Circuit; these cases simply do not take much judge time to resolve. Third, when our circuit council considered (and ultimately declined) establishing a bankruptcy appellate panel, it appeared that at most 400–500 additional such cases might proceed to the court of appeals. Given our current workload of over 7,500 yearly appeals, that is not a significant addition. Moreover, many bankruptcy appeals would, for various reasons, not pose difficult issues, and I believe that parties would be less likely to appeal, as they now do, simply to cause delay.

III. SMALL BUSINESS REORGANIZATIONS

The Commission voted, by a seven-two margin, to recommend changes in bankruptcy procedure that will increase the efficiency of small business reorganizations. At present, Chapter 11 does not work well for small businesses or their creditors, and an overwhelming majority of smaller businesses that seek reorganization do not succeed in

confirming plans. The Commission's procedural proposals would strengthen the role of the U.S. trustee in its oversight of small business cases; enhance the ability of courts to control the progress of those cases and terminate those which have no hope of reorganizing; and speed up the process for the small businesses that can make it. These proposals were diligently thought out and carefully crafted. Congress should consider them as a package.

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IV. CRITIQUE OF GENERAL CHAPTER 11 PROPOSALS

Unlike the small business proposals, the recommendations geared toward general Chapter 11 practice are not tailored to be either efficient or useful. I filed a separate dissent from a number of controversial proposals, most notably those which would codify the "new value exception" to the absolute priority rule and change the standard for classification of claims.(see footnote 4) Comm'n. Rec's. §2.4.14 and 2.4.15. See Dissent of Edith H. Jones from certain Commission Recommendations on General Issues in Chapter 11. As the dissent points out, nearly every proposal it addresses passed by a bare five-four majority. Unlike the small business proposals, the recommendations from which I dissent would increase the delay, complexity and cost of business reorganization proceedings. They favor debtors and bankruptcy professionals rather than creditors, without explaining why such favoritism is necessary. Finally, to the extent these proposals would modify the law applicable in small business cases, they conflict with the intent of the small business recommendations and would seriously undermine them.

V. OTHER MATTERS

To the Chairman's credit, the Commission ambitiously addressed many other subjects in bankruptcy law, both on a technical and policy level. As time goes on, I hope Congress will be interested in considering the details of other recommendations that I have not had an opportunity to mention here. For future reference, I commend Congress's attention particularly to the recommendations concerning the government as creditor, bankruptcy tax issues, single asset real estate reorganizations, venue of Chapter 11 proceedings, and modification of the preference laws. Reform of the American bankruptcy system would be greatly assisted by adopting any or all of these recommendations.

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Mr. **GEKAS.** That was excellent within the 5 minutes.

Ms. Ceccotti, match that.

STATMENT OF BABETTE A. CECCOTTI, MEMBER, NATIONAL BANKRUPTCY REVIEW COMMISSION

Ms. **CECCOTTI.** Good afternoon, Mr. Chairman, members of the subcommittee. Thank you for the invitation to appear before you today.

My own views about the working of the bankruptcy system have broadened quite a bit over the last 2 years. My background was largely in the business bankruptcy area before I began work on the Commission. As someone who represents benefit plans and labor organizations, I was reluctantly drawn into bankruptcy cases to fend off attempts to eliminate pension and health insurance obligations and change labor contracts.

While I have not changed my opinion regarding those types of activities, it is very clear that bankruptcy cases involve a complex balance of many different and competing interests and very significant outcomes. Successful business bankruptcies save good jobs, they keep customers supplied which saves additional jobs.

Consumer bankruptcy saves people from misfortune, catastrophe, bad judgment, the full range of human adversity. It allows people to overcome their financial problems and resume productive lives, pay their taxes, and avoid recourse to other social safety nets.

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In short, because these systems are already complex and comprised of deliberately balanced interests, significant change should be approached with caution. Reforms, particularly those advertised with sweeping goals, should not be driven by the best lobbyists, or the most attention-getting headlines, or even an alarming statistic.

Certainly, no one wants either system, business or consumer, to become a haven for the cynical disposal of individual and business obligations. But, I think you will find that the best of our recommendations, at least among those that you are interested in here today, are those that attempt to address problems that were credibly described to us and could be approached with tailored solutions that were not over-broad.

Obviously, you have invited the three members of the consumer working group today. It's obvious from your questions to the first panel that that's really the subject that you are interested in. These are clearly the proposals that have generated the most attention and the most controversy, and our work on consumer bankruptcy exposed deeply divided views about that system and whether and to what extent changes are necessary.

As the chairman explained, you know, we tried to forge as much of a consensus as we could on a number of the proposals. I hope you will not discount them simply because some of the votes were divided. We started a debate in consumer bankruptcy between the competing interests that came to express views to us. We got them on a number of occasions to put aside the polemics, to talk about substance, and I would hope that that effort would continue as the Congress takes up the consumer proposals.

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Now, since you've obviously expressed an interest in the causes of filings, you know, I'll depart from my prepared remarks to this extent. I would urge you to resist the temptation to simply act based upon the number of filings. The number of filings was an emerging phenomenon as we undertook our work and we heard many opinions. We heard from distinguished academics, we heard from lots of people who have studied the filing phenomenon; not this particular increase of course, but the filing phenomenon—why people file. There are studies on that as the Chairman alluded to them, but the increase in filing is a phenomenon about which you will not have the answer simply because —simply until—the data is looked at and people analyze it. I would urge you to resist simple answers because there are no simple answers. And anyone who gives you a simple answer, I'm going to suggest to you is just flat wrong.

There are a multitude of factors that go into individual decisions to file and the trends such as the obvious trend that has become apparent over the last 18 months. There are macroeconomic forces at work. We are told that we are in a period of a boom economy. What does the boom economy mean? Does it mean that everyone is earning lots more money now? Not necessarily. That's only been true, really, in real wage terms for inside of a year. We are told that lending practices changed in the last 5 years. They, perhaps they were relaxed; perhaps they were relaxed imprudently.

These types of trends take time to manifest themselves. What you are probably seeing here is the result of large macroeconomic forces converging with, ultimately, the individual circumstances of people's lives. There simply is no one reason for this. And there will simply not be a way for you to get a handle on this in time to address the current filing problem.

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In my view, H.R. 2500 exemplifies exactly the wrong way to do this because it is a quick reaction based on a quick headline based on a statistic which we all agree is alarming, and a statistic which we would like to see reduce itself over time.

But there are things you can do. And I think if you look in the report, you'll see what we tried to do.

I'm sorry, my time is up.

Mr. **GEKAS.** Finish your statement.

Ms. **CECCOTTI.** OK, thank you.

What we tried to do was address discrete problems that people could identify to us that we could get our arms around and propose a tailored solution.

I will give you one example in the report. It has to do with a phenomenon that was discribed to us out in California about the repeated filings of people who had fractional shares in property. It was a phenomenon that we understood existed. We could see it existed. Many people credibly described it to us, and we proposed a solution to it. It will certainly help in terms of the increase in filings and serial filing with that area. It is certainly—it is a good proposal and you should look at it. It deals with the issue of repeated filings; it deals with the issue of increases in filings. But it is a small proposal, and I don't think on the basis of the fact that it is small you should discount it because it won't help you solve the issue of why there are so many filings today in the aggregate sense. Thank you.

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[The prepared statement of Ms. Ceccotti follows:]

PREPARED STATEMENT OF BABETTE A. CECCOTTI, MEMBER, NATIONAL BANKRUPTCY REVIEW COMMISSION

The Commission's broad charge to study the bankruptcy system and recommend changes led us to develop an ambitious agenda covering every aspect of bankruptcy practice from the smallest consumer cases to the largest transnational insolvencies.

We quickly learned that the bankruptcy system is not a subject that suffers from indifference among those who are familiar with it. During our two-year tenure, we heard from bankruptcy practitioners who rescued businesses and saved jobs, from individuals who rescued themselves and their families, from those who administer the system at all levels, and from academics who study the system. We heard from many people who were frustrated by the legal workings of the system and a few who felt they were cheated by it. No one failed to impress upon us, in one way or another, that the bankruptcy law contains powerful tools that directly or indirectly affect commercial relationships in significant ways and carry out important social goals.

My own views about the workings of the bankruptcy system have broadened over the course of the last two years. As someone who represents benefit plans and labor organizations, I have been reluctantly drawn into bankruptcy cases to fend off attempts to eliminate pension and health insurance obligations, change labor contracts, and reduce employee wage claims. I have not changed my opinion regarding these kinds of activities. But it is clear that bankruptcy cases involve a complex balance of many different and competing interests and important outcomes. A successful business bankruptcy case will save good jobs, keep customers supplied, which helps to save more jobs, and so on. Consumer bankruptcy saves people from misfortune, catastrophe, bad judgment—the full range of human adversity. It allows people to overcome their financial problems and resume productive lives, pay their taxes, and avoid recourse to other social safety nets.

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In short, because these systems are already complex and comprised of deliberately balanced interests, significant change should be approached with caution. Reforms—particularly those advertised with sweeping goals—should not be driven by the best lobbyists, or the most attention-getting headlines, or even an alarming statistic. Certainly, no one wants either system, business or consumer, to become a refuge for the cynical disposal of individual and business obligations. But I think you will find that the best of our recommendations—at least among those that have been getting all the press—are those that attempt to address problems that were credibly described to us and that could be approached with tailored solutions that were not overbroad.

I would like to talk more specifically about some of the recommendations that were developed in the three subject matter working groups in which I participated. You have here today the three members of the Consumer Bankruptcy Working Group. These are, of course, the proposals that have generated the most attention, the most discussion and the most controversy, including our own internal debates.

Our work on consumer bankruptcy exposed deeply divided views about that system and whether and to what extent changes were necessary. We heard from hundreds of people, many of whom with seemingly irreconcilable points of view. Ultimately, it became evident that compromise on a number of issues was essential if we were going to present the Congress with anything useful. We considered and debated a number of consumer proposals as a package in the hopes of increasing the chances of adopting a proposal with broader support. The proposals have already been described as shifting the balance to creditors, and, at the same time, too pro-debtor. I suppose that may indicate some measure of success.

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With all that we heard, I did not believe a case had been made that the system suffers from widespread abuse by consumer debtors necessitating broadly applicable and extreme measures, such as those directed at so called "abusive Chapter 7 filings," exemplified by H.R. 2500. Recognizing that perfect answers were not possible, my own view on this issue was that limited measures should be devised to address specifically identified problems. Our proposal to allow courts to issue *in rem* orders barring future applications of the automatic stay to property under certain instances is one such example. Another recommendation aimed at curbing abuse is our proposal to set an upper limit on the amount of the homestead property exemption that would apply nationwide. We have also proposed an audit program to address repeated concerns expressed over a lack of confidence in the documents filed with bankruptcy petitions. Unlike the "needs based bankruptcy" bill introduced by Congressman McCollom, the more incremental recommendations in the Commission's report focus on discrete problems that we could identify and remedy with some confidence that the cure would not be worse than the disease.

All of the consumer bankruptcy issues we faced were considered against the backdrop of the reported increases in consumer filings over the past couple of years, a phenomenon which we could not fully address given our limited term. It is apparent that there are no simple explanations for the filing statistics that dominated the news from time to time over the past 18 months. Why so many people have amassed so much debt, and what caused so many of them to file bankruptcy cases, is a question about which we heard many theories. As I listened to this debate, it became apparent that there is no easy answer: there are macroeconomic forces that work over time, there are regional "legal culture" issues, and, most basically, there are the individual circumstances of people's lives. The question is far too complex for broad legislative remedies. Until there has been more thorough study and a better understanding of these issues, I believe the best legislative approach is to proceed with caution and narrowly drawn measures. For this reason, H.R. 2500, which proposes a cumbersome and methodologically flawed mechanism for limiting Chapter 7 cases in the absence of a problem demonstrably related to such filings, exemplifies exactly the wrong approach.

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I urge you to read the consumer bankruptcy recommendations and the dissent. You will find a number of areas where the dissenters shared, at least in concept, the view of the majority that an issue deserved attention even if there were differences in approach. I hope our recommendations will not be discounted merely because the votes were divided. We produced a nationwide debate on difficult issues in consumer bankruptcy. In addressing these issues, it is important that the interested parties advance to a level of discussion beyond polemics, and on many issues we were able to do that. I hope that the future debate on these issues will be productive and will not be reduced to sound bites and slogans.

I also participated in Working Groups on Chapter 11 issues and Mass Torts and Future Claims. These topics also involved intense work on a wide range of issues. Here again, we endeavored to consult those with varied interests and views for their opinions and insights. We heard from those who differ on a philosophical basis about the benefits of

Chapter 11. Their views gave us thought-provoking alternatives to consider. But the more consistent message we heard from those who have worked in the system was that Chapter 11 should not undergo fundamental change.

Instead, the Commission's recommendations focus on making the system more efficient and more business-like in its approach to business reorganization. One of our principal concerns was to eliminate time-consuming and expensive litigation over issues disputed in the courts, such as whether and under what circumstances non-debtor parties can obtain a release, whether courts can review creditors' committee appointments, and what rules should apply to post-confirmation plan modifications. These are perhaps issues that only practitioners and judges can get excited about. They do not have the press appeal of the consumer cases. But resolving discrete questions such as these does help to make the system function more smoothly. The participants in the system will know what the rules are, and therefore avoid wasteful litigation. Those who are familiar with my background will not be surprised to find one or two proposals crafted to address the interests of employees affected by their employer's bankruptcy: one aimed at protecting employee wage deductions and another to make the Chapter 11 process system more accessible to employees and their representatives.

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The mass torts and future claims recommendation provides a more comprehensive proposal for a limited group of cases—those where a business suffers a product-driven calamity that has given rise to numerous lawsuits by victims seeking recoveries. The mass future claims recommendations attempt to accommodate the elements of a business bankruptcy case to mass, product-based liabilities so that companies can resolve those liabilities and provide meaningful recoveries to both present and future victims.

The business bankruptcy system—particularly in larger cases—accommodates a range of interests and competing policy choices. My own view is that where there are significant, competing policy choices, as there often are, caution is the better course of action. A number of our proposals are not as broad as some wanted: the mass future claims proposal, for example, offers a next step, after Congress took the first step in the asbestos amendments enacted in 1994, but does not try to embrace all possible future contingencies a company may conjure up. A number of the chapter 11 proposals are similarly narrow in scope. I believe these proposals achieved our goals and yet reflect a measured approach to expanding the uses of the system.

While it is obvious the Commission's more controversial proposals will further debate, I hope that you will begin the process of implementing the large number of recommendations that were adopted with a strong consensus, particularly the more limited and technical recommendations for which there was wide support not only among ourselves, but with whom we consulted. I would like to close with a short note of thanks and tribute to our staff.

The ambitious scope of the Commission's review and the pace at which we worked imposed burdens on everyone. Our dedicated staff worked under incredible pressures, both in putting together our meetings over the past two years and, most recently, in preparing the Report. They should be recognized and commended for their extraordinary efforts and their professionalism in making it possible for us to present a Report that is comprehensive in scope and as detailed and thorough as it is.

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Mr. **GEKAS.** We thank both witnesses.

Now we'll ask you to submit to some of the questions that will be offered.

We will yield, preemptory to the gentleman from Michigan, Mr. Conyers, who pleads an emergency situation for which he has to depart early.

Mr. **CONYERS.** Thank you, Chairman Gekas.

Mr. **GEKAS.** Five minutes.

Mr. **CONYERS.** Right.

I welcome you Commissioners going beyond the call of duty to come and submit yourself before the Congress and I think you have all done well.

Ms. Jones I have one, two, three questions. One, is that your dissents were so numerous that it's clear you didn't like the way the Commission was being run, and I'd like you to tell us if that is true or not?

Ms. **JONES.** I think that's a fair statement.

Mr. **CONYERS.** And secondly, with this phone call I have heard about, you were trying to do something about it in terms of overthrowing the committee leadership.

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Ms. **JONES.** No, sir.

Mr. **CONYERS.** That is not a fair statement, or it's inaccurate?

Ms. **JONES.** That is totally inaccurate.

Mr. **CONYERS.** Totally inaccurate. OK.

Ms. **JONES.** Even the New York Times didn't suggest that. [Laughter.]

Mr. **CONYERS.** Oh, even the New York Times. OK.

And then, finally, there seemed not to be much mood for means testing on the Commission. Was that because—well, what do you attribute that to?

Ms. **JONES.** If you read my dissent, I attribute that to several factors. First of all, the creditor community did not present us proposals in the detail of, let us say, the McCollum-Boucher bill which I think has a proposal that has some possibilities to it. The proposal that became the Grassley-Durbin bill was only floated, not by Congressman or creditors, but by letters we received.

Second, our staff and our reporter were totally hostile to and dismissive of the idea.

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Third, we do not have in-depth experience among the commissioners in consumer bankruptcy law. I was, however, a bankruptcy lawyer. I did, however, represent a couple of debtors. They were the rich guys who wouldn't make it under this means-testing system. Commissioner Shepard represented a lot of debtors in his small-town practice when he was in Iowa. And he and I are the ones who advocate means testing.

Mr. **CONYERS.** OK, well, you've been very forthcoming in your responses. I appreciate it. I didn't mean in any way to question your judgement or activities during your tenure. I thank you very much.

Thank you, Mr. Chairman.

Mr. **GEKAS.** Yes, we thank the gentleman.

We'll return to the Chair, where the Chair is yielding himself 5 minutes.

I was concerned from the very start when Mr. Williamson, quite rightly was commenting on the dramatic—and that's his word which I quote—dramatic increase in the number of filings. And then we can use that word with: a dramatic number of problems that have arisen, and a dramatic concern which has emerged about the whole bankruptcy system. And yet, Ms. Ceccotti, and he himself—the chairman—and perhaps others are saying, but don't do anything dramatic, just incrementally apply a little hammer and a chisel here and there. And I'm wondering if that isn't dampening the enthusiasm that many of us might have for doing something dramatic to right a system that has not served well in the eyes of some.

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The incremental approach does not, even as you have said, Ms. Ceccotti, reach the big number of filings. You have toyed around the serial filings, but you yourself say that doesn't really do much to compress the number of filings. You've done something with direct appeals that has a minimal approach to reducing the number of filings. You're saying leave the thing alone. The current system is doing pretty well. We'll just cosmetically do this and that, just leave us alone. Do you want us to subscribe to such a view?

Ms. **CECCOTTI.** Mr. Chairman, I certainly didn't mean to imply that there is nothing to be done here. What I attempted to convey was a sense that you are all very interested in it and keenly focused on this phenomenon of the filing statistics, and I'm going to tell you, if you're going to look for one magic bullet, you're not going to find it.

Mr. **GEKAS.** I agree.

Ms. **CECCOTTI.** You're not going to find it. What you can do is, you can try to look at the whole phenomenon in little parts. And then you can, perhaps, craft something to affect the pieces. You'll whittle it down that way. But there is no one answer for this. Just to take an example—and you're right, it's not going to get you, you know, a lot of headlines——

Mr. **GEKAS.** What do you think about changing or modifying the definition of assets in the first place. How do we put into that definitional vocabulary the earning power of a person whose income is constant but who files for bankruptcy? How do we treat that in a new, innovative, dramatic way so that we can discourage filing in the first place, or at the very least, compel some of that earing power to go towards distribution among proper and legal debts among creditors?

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Ms. **CECCOTTI.** Mr. Chairman, we do have the chapter 13 option——

Mr. **GEKAS.** Yes, I know.

Ms. **CECCOTTI** [continuing]. Which is designed to draw upon peoples' future earning capacity. I think that, you know, Congress long ago rejected the notion of defining for all time in a mandatory way the notion that future earning capacity would be an asset. And I think the chapter 13 option was a good way to approach that. I certainly think you would be talking about something very radical—and quite controversial—if you retreated from the voluntary aspect of chapter 13. And having said that, I think again, you need to focus on how chapter 13 works and how it works well and how it may not work well.

And the statistics that we saw indicated that in all areas of the country, filing repayment plans don't always make it to the three or five—as many judges are now allowing debtors—they don't make it through the 3- or the 5-year repayment plans. And there are probably many reasons for that, including the fact that peoples' future earnings are not always as secure or stable as they——

Mr. **GEKAS.** Well, I wasn't talking about actuarially projecting future earnings as you may think I was trying to say on future earnings.

Ms. **CECCOTTI.** OK.

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Mr. **GEKAS.** I'm talking about applying what everyone will recognize as a fact, the earning power as of the time that the person files. Considering that he continues to have earning power, how do we change our attitudes, make a dramatic change in that so that we have a chance of having some of the debtors pay off a portion of their debt? Ms. Jones, could I have your thoughts on that?

Ms. **JONES.** I discussed means testing in two commissioner dissent. I discussed five different proposals. You are quite right, when an actor—when famous actors—and, in our area, heart surgeons, file bankruptcy, and when you know that they are going to go out and make literally millions of dollars the day after discharging their debts, that's an unjustifiable result.

None of the means-testing proposals that I have seen—I think, including the McCollum-Boucher bill, because I haven't really studied that very carefully—none of the means testing proposals, to flip your question on the other side, consign people to a life of poverty because none of them even kick in unless a person has, by definition, income that could pay off some of these debts; in other words, excess income.

So it's, I think that if you—one way you can tailor it is to say if you earned above a certain amount of income, presumptively you go into chapter 13, and then you decide how much the person is going to have to pay unsecured non-priority creditors based on their earning capacity. In that connection, it's very important to have their tax returns filed with petitions, which is what the four-commissioner dissent recommended.

Mr. **GEKAS.** OK. I thank the witnesses.

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I turn to the gentleman from New York, Mr. Nadler. Five minutes.

Mr. **NADLER.** Thank you. First, let me say that there have been a number of disparaging comments in this hearing about the staff and reporter and I must say that in my dealing with the Bankruptcy Bench and Bar in New York, I've heard nothing but praise for the staff and reporter of this commission, and I want that in the record because I didn't want those other comments to be the only thing in the record in that respect.

Second, let me ask the following: H.R. 2500 requires that unsecured non-priority debtors be paid in the first years of the plan and holds secured and priority debtors until the end of the plan. So, for instance, credit card companies would be paid before child support obligations. If I could ask both Ms. Jones and Ms. Ceccotti whether that strikes either of you as a good idea, and if so, why?

Ms. **JONES.** (A) I don't know that the bill provides that—because I haven't read it. And (B)——

Mr. **NADLER.** Oh. Assuming it does, would it be a good idea?

Ms. **JONES.** All right. Well, I'll take that—it's a long bill, so I'll take your word.

B, all of us on the Commission, recommended that payments be made in tandem to both the secured and the unsecured creditors, and we didn't deal specifically with the priority creditors—attorney's fees is a particular bone of contention there.

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Ms. **CECCOTTI.** It's a bad idea. Ms. Jones is correct. Our recommendations don't—our recommendations go more towards a more equalized payment of different kinds of debt over time, rather than fronting one type of debt and putting others to the back.

Mr. **NADLER.** Thank you. I'd like to ask you, Ms. Ceccotti, you've called the McCollum bill, methodologically flawed, I believe. Could you expand on that comment?

Ms. **CECCOTTI.** Well, I guess in its use of National income data. And again, I also have not had a chance to look at the text of the bill, I'm going off a section-by-section analysis and other summaries that have been provided to us. But, based on my understanding of how it works, the means testing portion would utilize National income data which I question how that would take into account geographic variations.

Mr. **NADLER.** In other words, it wouldn't deal with different regional variations in cost of living?

Ms. **CECCOTTI.** Correct. That's correct. And also it uses, I guess, some tables or data that the Internal Revenue Service, I guess, has available in its dealings with tax payers dealing with their past-due debts. But I'm not so sure that the IRS applies that in as automatic a way as, at least the descriptions that I have read, of H.R. 2500. In other words, I think that the IRS does allow for individual differences to a more routine extent then at least my understanding of the way that the calculations would be done under H.R. 2500.

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Also, there seems to be no way to take into account arrearages. People file for bankruptcy usually because they have arrearages; either they've got arrearages on their mortgage, or their car payments or even tax debt. And it's just unclear to me—unless again it's, you know, in the text and I just haven't seen it yet—but it's unclear to me how one takes that into account when one is looking at a snapshot to determine what someone's ability to pay debts really is.

Mr. **NADLER.** Let me ask, Ms. Ceccotti, one other question. If we were to succeed by some means legislatively, in increasing the payout to nonsecured creditors in bankruptcy to reduce the losses, in other words, that they are experiencing, do you believe, and if so on what evidence one way or the other, that this decrease in losses would result in lower interest rates for consumers?

Ms. **CECCOTTI.** I have no idea. I understand that the credit card business is fairly profitable, so again, I think one really has to look at the statistics; give a hard look to the statistics.

Mr. **NADLER.** Well, let me rephrase the question and then ask you and Ms. Jones to comment on it. We are seeing ads put out by the credit card companies—the banks and so forth—that the losses they are currently experiencing cost every consumer—everybody—$400 a piece in increased credit cost. Is there any basis for this claim to your knowledge? And presumably the implication of that is that if we were to stanch this loss, the cost to consumers would go down by $400. Is there any evidence for any of this; first Ms. Ceccotti and then Ms. Jones?

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Ms. **CECCOTTI.** I've seen the statistic. I, you know, I've seen the statement. I don't know what it's based on. I wouldn't really want to speculate on what it's based on and I'm afraid I can't really help you with it. I do think it's something that you ought to take a very hard look at. I'm sorry I can't be more helpful.

Ms. **JONES.** I think the Administrative Office of the U.S. Courts is the source of the basic statistic because they said that it was estimated that $30 billion of debt were discharged by the filings of bankruptcies in 1996. And that number is a figure which ought to be pretty accurate despite everybody's complaints about data. You divide that by the number of American households, which is 100 million by most accounts—2.6 members per household--you come up with $300.

Mr. **NADLER.** So in other words, they are saying that the cost per household is $300.

Let me just, I see the red light, I just want to make one comment for the record. When I was a member of the New York legislature in, I think it was 1980, and inflation was then at 14 or 15 or 16 percent, we were told that we had to eliminate the usuary laws and the caps on interest rates for credit cards because obviously they need 19 and 20 percent interest rates if inflation was at 16 and 17 percent. And certainly the market would drive them up then. And when the inflation came down, we were assured, you'd never hear of unheard rates of interest like 19 percent or 18 percent, again, because the market would drive them down. And we did. I'm glad I was present enough to vote against deregulation at that time, and the interest rates immediately shot up, and they never came down; though, of course, we don't have 17 percent inflation any more.

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So I wonder, even if that $400 figure is correct, if we were to eliminate the cause, whether it simply wouldn't go into the profits of the credit card companies.

Mr. **GEKAS.** The gentlemen from Massachusetts; take your pick. [Laughter.]

Mr. **MORAN.** Ask them to follow up. We'd like to hear the answer on that.

Mr. **NADLER.** Yes, we'd like to hear the answer on that question actually. It was a good question.

Ms. **JONES.** About whether the interest rates would go down?

Mr. **GEKAS.** Without objection.

Mr. **NADLER.** Whether there is any evidence that they would fall; that that cost would be decreased; that it would be passed along to the consumer, in effect?

Ms. **CECCOTTI.** My answer would be based on, I guess, skepticism, certainly having just heard the story, and I would say no, I would venture, as a guess.

Ms. **JONES.** We're not economists, and I take great issue with the introduction to the consumer part of this report that purports to analyze some of the economic data that were presented to the Commission. I can't tell you for sure that's going to happen, but I do have a B.A. degree in economics, so if you want that reflection, I'll give it to you, which is: eventually, as long as they compete, companies are going to compete on price or on quality of service. So, that's all I can say, but, I think it likely—well, look at the consequence on the other hand if the economy turns down and we end up with 10 or 15 million filings, is there any doubt in anyone's mind what's going to happen at that point.

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Mr. **MEEHAN.** Judge——

Mr. **GEKAS.** The gentleman from Massachusetts?

Mr. **MEEHAN.** Thank you, Mr. Chairman. Judge, there has been a discussion about your feelings about means testing and about your dissenting opinion relative to the failure of the majority to formally consider means-testing eligibility for chapter 7. You proceed to outline five different options for means testing. And while we have this discussion, I'd like to try to pin you down. Do you expressly support means-testing eligibility for chapter 7, and if so, what sort of approach of the five that you outlined do you think the Congress should adopt?

Ms. **JONES.** I would not prescribe to Congress what to adopt because we did not engage in the debate with the level of care that would give me confidence in selecting among alternatives. From what I know, my concerns about

means testing are: feasibility, so that the test is one that lawyers who file their client's in bankruptcy and the creditors and their lawyers can understand; that it's relatively simple for the courts to administer and apply; and then fairness.

I think means testing obviously cannot force blood out of turnip. Every economist and specialist who testified before the Commission agreed that most of the people who file bankruptcy really are turnips, and you just are not going to get payments out of most of the filers. But there is a significant percentage, and in dollar terms, you know, millions to be gotten out of the people who do have that capacity to repay.

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So, something like McCollum-Boucher, for instance, at least has the virtue of certainty because it relies on data and statistics which are known and knowable.

Mr. **MEEHAN.** Well, the difficulty is, you may be right, but if you're concerned about the lack of substantive discussion of the options within the Commission, I can tell you that I'm even more concerned about the substantive discussions that the Congress embarks on in terms of coming to a resolution of this. And therein lies a lot of the difficulty. We talked earlier about the gap in data and information that's available. And if the Commission didn't adequately discuss this, it's of concern to me how the Congress is going to do it.

But, let me move on. Again, in your dissent, you state that the means-testing eligibility of chapter 7 would limit the adverse consequences of the recent consumer filing explosion, particularly lender losses. Now, apart from mitigating lender losses, will means testing have any impact on the sheer number of consumer filings? Specifically, will means testing actually result in a decrease in the number of consumers who file for bankruptcy, and if so what's the basis of that viewpoint?

Ms. **JONES.** I think that it will for a couple of reasons. First of all, it will say, if you also—I appreciate your taking careful attention to my dissent—you will also notice that I listed just a few of the letters we received from credit unions about the phenomenon. And this is not quote "anecdotal." There are dozens of these; of people filing bankruptcy who haven't even missed a payment. And that means that they view as a rational alternative going into chapter 7, as the overwhelming majority do, and just getting rid of all their debts. If they continue to be income earners, as the credit union people normally are, if they are not in arrears on their debts, or at least some of their debts when they are filing, and their only alternative is going to be under a proper means-test proposal to pay something back to creditors, then I think two possibilities arise. A, they might go down the street to consumer credit counseling and say, how can I get out of this without having a bankruptcy on my record; or B, they might actually come up with the wherewithal to pay some of the debts because, as even Judge Ginsberg acknowledged, the schedules and statements we have before us today in bankruptcy are the great American novel. And, see, if they get into this chapter 13, then they'll at least have discharged what I regard as a moral as well a contractual obligation to some of their creditors. So, I think the incentives would be built in to either discourage filings or to have a system that is self-adjusted for fairness.

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Mr. **MEEHAN.** Mr. Chairman, I yield back the balance of my time. I yield it to my colleague from Massachusetts, whatever would give him more time.

Mr. **GEKAS.** It's 5.5 minutes.

Mr. **DELAHUNT.** Five point five? I won't take all that time.

You know I think it was you, Ms. Jones, that indicated that most bankruptcy are filed by middle-class folks.

Ms. **JONES.** Many of them.

Mr. **DELAHUNT.** How do you define middle class?

Ms. **JONES.** I'll take whatever the economist say is the median American income. It's somewhere between $30,000 and $40,000 annually, I believe.

Mr. **DELAHUNT.** OK. So, between $30,000 and $40,000.

Ms. **JONES.** Yes, sir.

Mr. **DELAHUNT.** I'm just reviewing my notes here for a minute.

You indicated that it was the administrative arm of the judicial conference that provided that statistic of $30 billion.

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Ms. **JONES.** That's my understanding.

Mr. **DELAHUNT.** OK. And that contradicts, I think, maybe it doesn't contradict but maybe it sheds light or expands on the testimony that Mr. Williamson——

Ms. **JONES.** I think he was—well, we've had so many figures thrown at us, no one could fault him for that. That's just somehting you either remember or you don't.

Mr. **DELAHUNT.** Right. What concerns me is the hard data and the empirical evidence that we have. You would suggest then that it is a $30 billion problem, as opposed——

Ms. **JONES.** Yes.

Mr. **DELAHUNT** [continuing]. The figure provided according to the Staten study which is $4 billion to $5 billion.

Ms. **JONES.** I don't recall precisely what the Staten study said. I think I have seen a figure here that suggested that the $3 to $4 billion losses would be retailers only. And of course, if that's the case, there are a lot of creditors beyond retailers. So, that could explain the discrepancy.

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Mr. **DELAHUNT.** Let me conclude by saying that I would hope that all of you would make yourselves available to members of this committee so that we can pursue our line of questions.

I feel that it's really important that we have independent agencies—governmental agencies—provide us the real data as to why people are filing. And according to the chairman, that simply is unavailable. Would you agree that we ought to reach out and make that effort?

Ms. **CECCOTTI.** Absolutely.

Mr. **DELAHUNT.** Ms. Jones.

Ms. **JONES.** I don't feel as strongly about that as most members of the Commission do.

Mr. **DELAHUNT.** OK.

Ms. **JONES.** I think the numbers speak for themselves.

Mr. **DELAHUNT.** What numbers are you talking about?

Ms. **JONES.** The fact that you've gone from 800,000 filings in 1994 to what's estimated to be 1.3 million today. This huge barrage and the traditional explanations——

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Mr. **DELAHUNT.** But won't the data help us form the appropriate response?

Ms. **JONES.** Well, I think it's a matter of principle as much as data. In principle, do people who have family wealth that would put them in the top 50 percent, to be conservative, of American families——

Mr. **DELAHUNT.** Over $35,000 let's say.

Ms. **JONES.** Well, I'm talking here about exemptions, for instance. Should people have the right to file a chapter 7, get a discharge from all their debt no matter how imprudently incurred, and still keep hold of, possibly, $100,000 equity in a home, $40,000 per couple and cash sitting around in a tax-deferred retirement account. Is that fair?

Mr. **DELAHUNT.** But, see, I think what some of us—and earlier I was trying to draw the analogy and I probably didn't do it well enough—but what we're doing here is we're focusing strictly on the debtor. And that very well might be the answer. I don't know at this point in time.

Ms. **CECCOTTI.** Focusing on what, I'm sorry, Congressman?

Mr. **DELAHUNT.** On the debtor.

Ms. **CECCOTTI.** The debtor.

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Mr. **DELAHUNT.** We're trying to change the debtor behavior, if you will. I guess what I'm suggesting is that maybe this Congress and this subcommittee should factor into the policy whether there is a concomitant responsibility on the part of creditors, given what other members have inquired about in terms of the explosion of solicitations. It's very comparable, if you will, to where we stand now in terms of the tobacco settlement in restricting advertising of cigarettes and tobacco products as far as the American public is concerned.

Ms. **CECCOTTI.** I think that you're right to take a——

Mr. **DELAHUNT.** A broader look.

Ms. **CECCOTTI.** Yes, absolutely. Absolutely. And I think you're right to look at certainly what the data shows about what types of debt has increased concomitant with the increases in filing, and what types of lending practices may have changed over time. Absolutely, I think you should look at that.

Mr. **DELAHUNT.** If the Chair will indulge me for a moment. Because you know, prevention is a hell of a lot cheaper than attempting to deter in a reactive form.

You know, with all due respect, Judge, you talk about the turnip, and my sense is that most people don't even begin to really understand bankruptcy or consider it. It's an arcane subject. I mean, you are well versed in it, obviously. You know, for many Members in Congress, it is absolutely beyond our ken, except for those who might have experienced it. But, you know, I practiced law all my life. I was one of those who Chairman Gekas indicated refer it out immediately.

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So we're starting from ground zero here. We're starting from ground zero as far as educating ourselves as to the best means to reduce filings. Or are the filings a product—and I think you indicated this in your testimony—of the fact that, yes, it's a robust economy, but the reality is that the average household income in America has either stagnated or declined in the past two decades?

Mr. **GEKAS.** The time of the gentleman has expired.

The time of the committee—yes?

Mr. **MEEHAN.** May I just make one point on the Staten study that Ms. Jones had mentioned?

Mr. **GEKAS.** Without objection.

Mr. **MEEHAN.** The chief analyst of the Congressional Budget Office that reviewed that study, at least according to the report that we have, questioned the reliability of the findings of the study. They characterized it as misleading.

Part of the difficulty of what we're all trying to come to grips with is all this information that is being roundly criticized by groups like CBO, the chief analyst——

Ms. **JONES.** May I say something about that. This is very important. First of all, Mr. Kowalewski did not speak for CBO; he speaks only for himself. His report appears to state otherwise. Second, we had a big debacle about that in the waning days of the Commission about——

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Mr. **NADLER.** Excuse me; I don't understand what you just said. His report says what?

Ms. **JONES.** He is not speaking as a representative——

Mr. **GEKAS.** It's not going to be a free-for-all here. We have yielded now to the gentleman from Massachusetts for the purpose of one question, and we are hearing one answer.

Ms. **JONES.** Second, the reports that he purported to characterize the Commission staff never told Dr. Staten or Visa that their reports were going to be subject to critique. So they did not have a chance to talk with Mr. Kowalewski and to explain the underlying basis for their reports. I will be happy to submit to you all the correspondence that I have that passed between the subjects of these reports and the CBO and the chairman within the last three weeks. That is very——

Ms. **CECCOTTI.** Mr. Chairman?

Mr. **GEKAS.** We have one other Member who has not yet posed any questions, and we will end the committee hearing with his questions. Five minutes to Mr. Chabot of Ohio.

Mr. **CHABOT.** I thank the chairman.

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Ms. Jones, the preface of the report states that these recommendations address the need to maintain, and in some instances, to restore balance. Do you believe that the recent dramatic increase in consumer bankruptcy indicates that current law is unbalanced making it too easy for consumers to discharge their debts?

Ms. **JONES.** Yes.

Mr. **CHABOT.** Would you want to expound upon that a little bit? [Laughter.]

Ms. **JONES.** Well, the current law is entirely self directed so anybody—from famous movie actresses to famed heart surgeons to a former governor of the State of Texas—can walk into—I could walk into bankruptcy court tomorrow with a petition and get out of my debts because the thing is totally self regulated.

It is also the case, unfortunately, that the tools that exist in the present bankruptcy code for weeding out abusive tactics are simply not very effective or effectual. It is also the case that the system lacks real oversight of the basic integrity of the data—of schedules and statements of affairs that the debtors file.

Mr. **CHABOT.** Thank you. Do you feel that the recommendations contained in the Commission's report are good for consumers? Will they improve the bankruptcy system?

Ms. **JONES.** No, sir; I do not. I think they might give some help. They definitely will give some help to debtors and they ensure that there will be a great deal more debtors because they have a generous level of exemptions. They would essentially increase the level of exemptions available in nearly all of the States—it's complex, but I could go into that. They suggest that you can file a chapter 7 and you can buy a new suburban for $30,000, file a chapter 7 30 days later, and reaffirm that debt at not the original price that you paid for the suburban but the stripped down value which would be maybe $20,000 because the cars are at lower value as soon as they go off the showroom floor. They would allow anybody—this is a great one—they would allow anybody to discharge all credit card debt incurred within card limits more than 30 days before bankruptcy. As my secretary said, I have 10 cards, I could go buy a house. And they would of course, they advocate full dischargability of student loans and they put restrictions on rent-to-own, and eliminate, effectively, secured lending on many household items.

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Those kinds of things are very anti-poor people because the people who have to buy on time are going to be denied credit under circumstances where there's no security that that credit can ever be collected.

Mr. **CHABOT.** Would you favor a more need-related type of bankruptcy system than we have now?

Ms. **JONES.** Yes, sir; and I discussed that some already.

Mr. **CHABOT.** Yes. There's been a lot of discussion about the fact that information filed by debtors in bankruptcy often is inaccurate, and I do share that concern. What does the Commission recommend to address this problem, and do you feel that it is adequate, and if not, could you say why?

Ms. **JONES.** I think we all agree on instituting a system of random audits which is sort of like adding more auditors to the IRS because among the lawyers, the trustees, and the judges, and the U.S. trustee, you ought to have auditors in there already. But, that will do something.

The four-member proposal advocates requiring the tax returns and the pay stubs as part of the bankruptcy filing. We also advocate making a discharge contingent on a certificate by a trustee that the debtor has cooperated with the trustee.

Mr. **CHABOT.** You may or may not have touched on this already; if you did, I apologize. Do you believe philosophically that we should return a little more of the stigma to bankruptcy; that it shouldn't be as freely accessible? Should there be more stigma than there is now?

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Ms. **JONES.** I think there ought to be more stigma, but then I think ladies ought to dress like ladies, too. And I'm

sort of a mossback in that kind of thing. [Laughter.]

Once the horse is out of the barn on some cultural developments it's hard to turn back the clock. And that's why I think we're in a system where we require means testing.

Mr. **CHABOT.** I think I better yield back the balance of my time. [Laughter.]

Mr. **DELAHUNT.** Mr. Chairman, I know that the——

Mr. **GEKAS.** For the extra comments, we'll reconvene at 6:00.

Mr. **NADLER.** Well, I was going to make a suggestion.

Mr. **GEKAS.** All right, the gentleman from New York; I'll indulge.

Mr. **NADLER.** Thank you. I simply had to, because some comments were made by one of the witnesses about someone who's not present, I have to say something for the record. The report, Evaluations of Three Studies Submitted to the National Bankruptcy Review Commission, by Kim Kowalewski, of the Congressional Budget Office, says right on the front page, that, "the analysis and conclusions presented in this memo are those of the author and do not necessarily represent the position of the Congressional Budget Office." So that was not misrepresented.

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Then secondly, he states his comments on the three studies were written in—in reply—to a request by Brady Williamson, the chairman of the Commission. And he says in his transmittal letter, "I also had hoped to add more detail to my evaluation of Dr. Staten's study. I called Dr. Staten four times this late September to get additional information, but he did not return my phone calls until this evening after business hours. As best I could this evening, I tried to reflect his comments in my evaluation. They did not change my major points." So I think there was some communication there, and I think it's just important to add that for the record.

Mr. **DELAHUNT.** Mr. Chairman. Mr. Chairman.

Mr. **GEKAS.** Does anybody want to quote from the Bible now?

Mr. **DELAHUNT.** Mr. Chairman, I understand that the meeting has adjourned, but what I would like to do is: if these witnesses are willing to stay on their time, I'd be more than willing to just stay on my time, just to ask one or two additional questions. Thank you.

Mr. **GEKAS.** With one pending piece of business, we acknowledge the cooperation of the witnesses. And we thank them for being here today. Your views will be considered in toto as we proceed along this torturous path towards bankruptcy reform.

We recognize the gentleman from New York, for a unanimous consent request.

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Mr. **NADLER.** Thank you, Mr. Chairman. Mr. Chairman, I ask unanimous consent that all Members shall have five legislative days to revise and extend their remarks, to submit additional questions and extraneous materials for the record.

Mr. **GEKAS.** This hearing is terminated and the subcommittee is adjourned.

[Whereupon, at 3:51 p.m., the subcommittee adjourned subject to the call of the Chair.]

48–966 CC

1997
NATIONAL BANKRUPTCY REVIEW COMMISSION REPORT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

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WITNESSES

Ceccotti, Babette A., Member, National Bankruptcy Review Commission

Jones, Hon. Edith H., Judge, United States Court of Appeals, Fifth Circuit and Member, National Bankruptcy Review Commission

Williamson, Brady C., Chairman, National Bankruptcy Review Commission

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Ceccotti, Babette A., Member, National Bankruptcy Review Commission: Prepared statement

Jones, Hon. Edith H., Judge, United States Court of Appeals, Fifth Circuit and Member, National Bankruptcy Review Commission: Prepared statement

Williamson, Brady C., Chairman, National Bankruptcy Review Commission: Prepared statement

(Footnote 1 return)
When I refer to five-member majority proposals, I will identify them here as "Comm'n. Rec. **XXXX**." Dissenting proposals will be identified and page-referenced to the dissent.

(Footnote 2 return)
Report of SMR Research Corp., "The Personal Bankruptcy Crisis, 1977," p.22.

(Footnote 3 return)
The majority's proposals would afford exemption levels far more generous than those in half the states, and they would, according to a U.S. Treasury Dept. analysis of a slightly different earlier proposal, allow debtors to shelter wealth that maintains them in the 60–70th percentile of American households.

(Footnote 4 return)
The other proposals from which I dissent are those concerning post-confirmation modifications (Comm'n. Rec. §2.4.19); pre-bankruptcy waivers (Comm'n. Rec. §2.4.5); interim protection for parties to executory contracts (Comm'n. Rec. §2.4.3); clarifying conditions for sales free and clear of liens (Comm'n. Rec. §2.4.11); and consensual releases of nondebtor parties through bankruptcy (Comm'n. Rec. §2.4.12).