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Why Bankruptcy Judges in North Carolina Still Appoint Trustees

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Abstract:

It is odd for a judge to appoint one of the parties in a case. However, in North Carolina and Alabama, the bankruptcy judge does just that by appointing the trustee. The trustee is a party to the case and has an interest which is separate and often adverse to other parties in the case. A half-century ago, this arrangement was considered not only odd but also problematic and due for reform. However, in 1986, senators, judges, and trustees from North Carolina and Alabama successfully resisted an attempt to remove the judge's appointment power. The goal of this paper is to share research that helps explain the context, persons and arguments related to this resistance. How North Carolina bankruptcy attorneys view the arguments and events of 1986 is likely determined by their perception of the trustee appointment process; whether they believe trustees are treated the same as non-trustee litigants; whether they think the trustee's appointment undermines the perception of fairness; whether they believe that the Bankruptcy Administrator and trustees are entirely independent of the bankruptcy judge and are willing to challenge the bankruptcy judge; and whether they believe trustees have outsized influence and/or status as court insiders.

It is odd for a judge to appoint one of the parties in a case. However, in North Carolina and Alabama, the bankruptcy judge does just that by appointing the trustee. The trustee is a party to the case and has an interest which is separate and often adverse to other parties in the case. A half-century ago, this arrangement was considered not only odd but also problematic and due for reform. However, in 1986, senators, judges, and trustees from North Carolina and Alabama successfully resisted an attempt to remove the judge's appointment power. The goal of this paper is to share research that helps explain the context, persons and arguments related to this resistance. How North Carolina bankruptcy attorneys view the arguments and events of 1986 is likely determined by their perception of the trustee appointment process; whether they believe trustees are treated the same as non-trustee litigants; whether they think the trustee's appointment undermines the perception of fairness; whether they believe that the Bankruptcy Administrator and trustees are entirely independent of the bankruptcy judge and are willing to challenge the bankruptcy judge; and whether they believe trustees have outsized influence and/or status as court insiders.

Under the National Bankruptcy Act of 1898, bankruptcy cases were filed directly with the federal district court. District court judges then delegated many responsibilities to bankruptcy referees. The delegated matters were partially administrative and partially judicial. The bankruptcy referees functioned as assistants to the district court judges. Bankruptcy referees were re-designated as judges in 1973. Until 1984, referees/judges were appointed to six-year terms by the federal district court. Starting in 1984, bankruptcy judges were appointed (or re-appointed) by the federal circuit court to fourteen-year terms. Under the 1898 Act, the bankruptcy referees/judges appointed and supervised trustees. Chapter 7 trustees were and are responsible for, among other things, liquidating assets of the bankruptcy estate and distributing funds to creditors. Chapter 13 trustees were and are responsible for, among other things, being heard on plan confirmation and acting as a disbursing agent on a debtor's repayment plan. Chapter 11 trustees were and are appointed in limited instances of a debtor's misconduct or incompetence, and they must manage the bankruptcy estate and reorganization effort. Chapter 12 trustees are responsible for, among other things, being heard on plan confirmation and acting as a disbursing agent on a debtor's repayment plan.

In 1970, the U.S. Congress (Congress) established the Commission on the Bankruptcy Laws of the United States and published its report in 1973. The 1973 Report was the basis for many of the changes contained in the Bankruptcy Code which was passed in 1978 and went into effect in 1979. One of the key concerns identified in the 1973 Report was the impact of a bankruptcy judge's involvement in administrating a bankruptcy estate on that judge's ability to act judicially in resolving controversies that arose. One issue was that the bankruptcy judge presided at the initial meeting of creditors and was exposed to free-wheeling testimony by the debtor. A bigger issue was the bankruptcy judge appointing the trustee which created problems including:

1. A trustee might be reluctant to take positions contrary to the judge who appointed the trustee.
2. The appointment would result in bias, or at least the appearance of bias, in favor of the trustee where there were disputed matters with parties adverse to the trustee.
3. The appointment put the bankruptcy judge in an awkward position as he or she might be tempted to be protective of the appointee as that appointee's conduct and competence reflect on the judge's own judgment.

"This awkward relationship between trustees and judges created an improper appearance of favoritism, cronyism, and bias, and generated great disrespect for the bankruptcy system."[1] In addition to ordinary litigation, a trustee's adversary might legitimately question a trustee's business judgment, competence, good faith, honesty or right to compensation. Judge Ordin, a bankruptcy judge from Los Angeles, asked rhetorically, "If I have a conflict between my trustee and another party, who do you think I am going to believe?"[2] The solution was to prevent the bankruptcy judge from presiding at the meeting of creditors and to transition away from judges appointing and supervising trustees.

The Pilot Trustee Program

The Bankruptcy Code created the United States Trustee Program (U.S.T.P.), a component of the U.S. Department of Justice, to perform many administrative duties including the appointment and supervision of trustees. In addition to trustee appointment and oversight, the U.S.T.P. received statutory authority to monitor plans, review professional compensation, make criminal referrals and to raise, appear and be heard on any issue in a bankruptcy case or proceeding. The U.S.T.P. was initially commenced as a pilot program in 18 of 96 jurisdictions. The initial plan was for the U.S.T.P. to be nationwide by 1984. This timetable was pushed back for two years. In the 99th Congress (January 1985-January 1987), Republicans controlled the U.S. Senate (Senate), and the Democrats controlled the U.S. House of Representatives (House), and Ronald Reagan was the Republican President. On June 4, 1985, the U.S. Trustee Act of 1985 (HR-2660) was introduced in the House to expand the U.S.T.P. nationwide, and hearings were first held on July 31, 1985. The witnesses were all supportive of the expansion and included the U.S.T.P. Director Thomas J. Stanton.

At the annual conference of the National Association of Chapter 13 Trustees (N.A.C.T.T.) in June 1985 in Lake Tahoe, Nevada, Eastern District of North Carolina (E.D.N.C.) Chapter 13 Trustee Malcolm "Mack" Jones Howard was appointed as chairman of the organization's legal and legislative counsel.[3] In early June 1985, Howard was forty-five years

[1] Summary of legislation filed under H.R. 5316. Ronald Reagan Library.
[2] U.S. Senate Judiciary Committee Subcommittee on Courts hearing held on March 25, 1986. Oral testimony of Mr. Coskey on page 177. Quoting Judge Ordin.
[3] Memorandum from Malcolm Howard to Judge Thomas M. Moore, Judge A. Thomas Small and Clerk of Court Peggy Deans on June 14, 1985. A. Thomas Small Archives. Biddle Law Library National Bankruptcy Archives. University of Pennsylvania School of Law.

old and had served as President of the N.A.C.T.T. from 1982-1983 and served on that organization's legislative counsel from 1978-1988.[4] Howard was first appointed as a chapter 7 trustee by E.D.N.C. Bankruptcy Judge Thomas Milton "Mickey" Moore in 1975 and then was appointed as a chapter 13 trustee in 1976.[5]

Howard practiced in Greenville, North Carolina and had little or no bankruptcy experience before being appointed as trustee. Howard had come to know Jesse Helms during the 1972 election when Howard lost in the Republican primary for North Carolina's First District U.S. House, but Helms won the first of five terms as a senator from North Carolina. Howard's wife Eloise Howard was a North Carolina delegate to the Republican National Convention in Miami in 1972 and worked on at least one of Helms' campaigns.[6] From 1973 through March 1974, Howard served as an Assistant U.S. Attorney in the E.D.N.C. and then from March 1974 through August 1974 worked as Deputy Special Counsel in the White House as part of President Nixon's legal defense team in relation to the Watergate scandal.

Howard himself was a delegate at the contentious 1976 Republican National Convention in Kansas City where the North Carolina delegation, led by Helms, played a high profile but ultimately unsuccessful role supporting Reagan against President Ford for the nomination. Helms and his political organization are generally credited with saving Reagan's 1976 campaign from irrelevancy in his defeat of Ford in the North Carolina presidential primary on March 23, 1976. Because of the boost given to Reagan, this primary is considered by at least one commentator to be the most consequential in North Carolina history.[7]

Howard considered Helms to be his mentor.[8]After first being considered for a federal district court judgeship in 1981,[9] in August 1987 Helms would cause Howard to be appointed as a federal district court judge for the E.D.N.C.[10] At Howard's investiture Helms remarked:[11]

> *This day is scarcely more significant to Judge Howard, and what a ring that has, to Judge Howard and his family and his friends than it is to me. A long time ago I made the judgment that I could not perform a more useful service to the nation or for this system of justice than to play whatever role I could in assuring that Mac Howard would one day be a part of the federal judiciary.*

[4] Malcolm Howard resume attached to cover letter sent to Jesse Helms on September 15, 1992. Courtesy The Jesse Helms Center Archives.
[5] ibid
[6] Email between Carter Wrenn and author. January 12, 2019.
[7] The Paradox of Tarheel Politics. Rob Christenson, 2nd Edition. Page 219.University of North Carolina Press. 2010.
[8] Handwritten letter from Howard to Jesse Helms dated March 11, 2003. "Senator Helms you have always been my mentor, and I am truly appreciative." Courtesy The Jesse Helms Center Archives.
[9] Raleigh News & Observer, June 21, 1981. Page 25. "Two join list of possible judicial picks."
[10] Letter from Howard to Jesse Helms dated September 15, 1992. Courtesy The Jesse Helms Center Archives.
[11] Howard investiture transcript. March 11, 1988. New Bern, North Carolina. Copy available at E.D.N.C. Bankruptcy Court in Raleigh.

From 1988-1992, Howard served on the Bankruptcy Rules Committee. In 1991, Bankruptcy Rule 9035 was adopted along with its extensive Advisory Committee Note. Bankruptcy Rule 9035 provides guidelines for how cases filed in North Carolina and Alabama are to relate to Bankruptcy Rules replete with references to the U.S. Trustee.

Helms was politically conservative, had a national profile, and helped the Republican Party become competitive in the traditionally Democratic Party stronghold of North Carolina in part through his political action committee the Congressional Club aka National Congressional Club. Helms' reputation was as a fighter, and he was sometimes referred to as "Senator No." He was willing to filibuster on occasion, and he was considered skillful at using Senate rules to influence appointments of people to important positions.[12] In 1985-1986, Helms' primary home state office was a floor apart from a secondary location for the E.D.N.C. Bankruptcy Court in the Century Station Building in Raleigh.

In a debriefing memo from the Lake Tahoe conference written to Bankruptcy Judge Moore and Bankruptcy Judge A. Thomas Small, Howard wrote:[13]

> *The central theme throughout the conference after the presentation concerning the U.S. Trustee Act of 1985, centered around what probabilities this Bill had of passage and what additional bills might be introduced and what amendments might be made thereto. This conference became generally of the view that the U.S. Trustee Act of 1985 served to politicize the bankruptcy trusteeship in general and was highly undesirable by most everyone, even including many of those persons presently functioning as/or under a U.S. trustee in the pilot districts. Your reporter had numerous conferences with Tom Stanton and learned that Stanton did not favor the "4-year" term for U.S. trustees. Stanton reported that he had never previously seen HR-2660 prior to its introduction by Chairman Rodino and Mr. Fish and Mr. Edwards. Stanton reported that his office had prepared a bill extending the U.S. trustees nationwide, but his bill called for a 7-year term. Stanton did indicate that it was his understanding, however, that the Justice Department people who had been involved with Chairman Rodino did favor a "4-year term".*
>
> *Another aspect of HR-2660 that met almost unanimous resistance was the provision that a trustee, including a standing Chapter 13 trustee, could be removed by the U.S. trustee for "cause" but without hearing. Stanton would never agree with us to resist this issue by the form of an amendment.*
>
> *It was learned from several sources, including former Administrative Office employee Kent Presson, Judge Ralph Kelly, Tom Stanton and others that the Administrative Office*

[12] Courage of His Convictions, Jesse Helms. YouTube: youtu.be/PET4FZQxRMU. Minute 9. "He was a master at using Senate rules to influence appointments of people in important positions."
[13] Memorandum from Howard to Moore, Small and Peggy Deans dated June 14, 1985. Small Archives.

is presently preparing "their bill," and it is likely to be introduced in the Senate and, thusly, become the Senate's U.S. Trustee Act of 1985. It was the consensus that such a bill would provide for the U.S. trustee system to be expanded but be under the supervision of the Judiciary. It was generally believed that the terms of U.S. trustees in the Administrative Office bill would be seven years and that there would be no provisions for "hearings" before any trustee is attempted to be removed for cause (political affiliation).

Through various sources your reporter, became even more keenly aware of the chaos as relates to "bankruptcy matters" in the Administrative Office. It seems that the Administrative Office is experiencing some degree of chaos in all of its areas. The vacancy as to the Director of the Administrative Office must be passed upon by a majority of the U.S. Supreme Court.

It is understood that Chief Justice Berger has advocated the naming of Ms. Debbie Kirk as Director of the Administrative Office but has been unable to get a majority of the associate justices to so agree. It was learned that Ms. Kirk is a very attractive, approximate 35-year-old female, who has had a meteoric rise in Washington legal circles and is through to be exceedingly close to Chief Justice Berger. Her position is presently Assistant Inspector General of the Administrative Office, but she has daily free access to Chief Justice Berger's office and ear.

In the bankruptcy area, Ms. Kirk is exercising some degree of influence while Mrrs. Trencher, Benedict and Weiller are allegedly in charge.

No one had any feel for how soon this "log jam" might unfold and who, in fact, might emerge as the new Director of the Administrative Office and the Bankruptcy Chief.

……..

Mr. Stanton's advocacy of the expansion of the U.S. trustee system was uniformly rejected by all trustees with the exception of the pilot area trustees. This was accentuated by the recent introduction of HR-2660 which the standing trustees uniformly believe to be politicizing what has heretofore been accomplished in a "non-political" manner.

Howard's memorandum began with "Your undersigned Chapter 13 Trustee" and twice refers to "Your trustees, Stubbs and Howard." This terminology was loaded as Professor Lawrence King explained in his March 25, 1986, Senate testimony:[14]

It was not uncommon, necessarily to hear the attorney for the trustee telling the judge, in the courtroom, what this other party wanted "your trustee to do, Your Honor." It was always "your trustee" the judge's trustee. This is part of what the Bankruptcy Code was

[14] U.S. Senate Judiciary Committee Subcommittee on Courts. March 25, 1986. See transcript page 176.

trying to get away from, and that is why there are the provisions for the appointment of the trustee by the U.S. trustee, someone before whom that trustee is not going to be appearing; a person who is not going to be adjudicating.

With Howard in Lake Tahoe was, Trawick "Buzzy" Stubbs, another chapter 13 trustee in the E.D.N.C. Stubbs lived and practiced in New Bern, North Carolina and had been Chairman of the Craven County, N.C. Republican Party for six years, the 1978 Co-Chairman of Finances for Senator Helms in Craven County, a Congressional Club member since its inception and a fundraiser and supporter of President Nixon, Reagan, Helms, and Senator John East.[15] Stubbs was licensed in 1967 and clerked for E.D.N.C. District Court Judge John D. Larkins. It was during his clerkship for Larkins when Stubbs met Moore. Stubbs was appointed as trustee by Moore in July 1972. In April 1981, Helms and East wrote a letter of recommendation for Stubbs to the Reagan Administration for a position on the Advisory Committee to the Pension Benefit Guaranty Corporation, and below the signatures, East handwrote "This is a must!" and Helms handwrote "He's important to me!"[16]Stubbs also played a role in the resistance to U.S.T.P. expansion but the specifics are unknown.

Also in Kansas City at the 1976 Republican National Convention was John East, then a professor at East Carolina University (E.C.U.) in Greenville, North Carolina.[17] East earned a Ph.D. in political science, had been a professor at E.C.U. since 1964 and had run for office previously. In 1976 East served as a national committeeman and worked on fashioning the Republican platform. Before entering the academic world, East had received a law degree and had practiced law for one year. East was politically conservative, and with the help of Helms and the Congressional Club, was elected to the Senate in 1980. Judge Moore's son worked for the Congressional Club during the 1980 campaign primarily on the North Carolina gubernatorial race.[18] Eloise Howard worked on the East campaign in a leadership capacity.[19] An indication of East's connection with Howard would be that in March 1981, with the approval of E.D.N.C. Chief District Court Judge Frank Dupree Jr., Howard met with East and the Senate Judiciary Committee Chief of Staff "in an effort to sell them on our needs here in Eastern North Carolina."[20] "Needs" equated to facilities, staffing, and judgeships for the E.D.N.C. bankruptcy court. At the time, Howard was just a private practice attorney and chapter 13 trustee.[21] One

[15] Cover letter and resume of Trawick H. Stubbs Jr. sent to Mike Dunn of Congressional Club dated April 1, 1981. East Archives. Joyner Library. East Carolina University.
[16] Letter from John P. East and Jesse Helms to Rosalie Vasilou dated April 29, 1981. East Archives.
[17] One of East's students was the late Randy Doub who would later become a E.D.N.C. trustee and then bankruptcy judge. While Doub was a member of the N.C. Board of Transportation during the 1980s he was responsible for a portion of Highway 264 entering Greenville to be named in honor of East.
[18] Cover letter and resume of Clifford Moore dated November 18, 1980 sent to North Carolina Congressional Club Executive Director Carter Wrenn. East Archives.
[19] Email from Carter Wrenn to author on January 12, 2019.
[20] See Letter from Dupree to Moore dated March 25, 1981. Franklin T. Dupree Jr. Archives. Wilson Library at the University of North Carolina at Chapel Hill.
[21] Memorandum, White House Counsel Arthur B. Culverhouse, Jr. to Reagan with Howard resume attached. OA 19165. Ronald Reagan Library.

result of the campaign for additional resources was that the Judicial Conference approved a second bankruptcy judgeship for the E.D.N.C. in August 1981.[22]

As a result of polio contracted at age 24 during his service at Camp Lejeune, East used a wheelchair and was sometimes referred to as "Helms on Wheels."[23] During his time in the Senate, East focused on social issues including abortion, desegregation and the proper role of the federal judiciary. East was generally opposed to adding judgeships, and he believed the increasing workload of the federal judiciary was the result of judicial activism he sought to curb. During his term in the Senate, East wrote a book titled "The American Conservative Movement: The Philosophical Founders," which was published in 1986. By most accounts, East was a thoughtful and serious politician. In early 1986, East was chairman of the Courts Subcommittee of the Judiciary Committee. East had decided not to seek re-election in 1986 and in June 1986 finalized plans to rejoin the faculty at E.C.U. once his Senate term expired.

Moore was born on July 10, 1928, and finished tenth in his class of eighty from the University of North Carolina Law School. He practiced law with his father in Wilson, North Carolina. Moore entered the U.S. Army in 1952 and upon a release from active duty in 1954, eventually rose to the rank of major general in the U.S. Army Reserve. E.D.N.C. District Court Judge Algernon Butler, Sr. appointed Moore as a part-time bankruptcy referee on November 1, 1960. Moore and Butler, Sr. were Republicans at a time where Democrats controlled most elected positions in North Carolina. Moore had sought a federal district court judgeship position in 1959 but the state Republican Party, which controlled the pick on account of the Eisenhower presidency, chose the more experienced Butler, Sr. [24] Moore attended the Butler, Sr. investiture in Clinton, North Carolina.[25] Moore reported directly to Butler, Sr. from 1960-1975. In 1969, with Nixon in the White House but no Republican senator from North Carolina, the state Republican Party had another opportunity to select an E.D.N.C. district court judge nominee[26] and Moore was again in the running but was not chosen.[27] The bankruptcy judgeship became a full-time position in 1976. Moore was the sole referee/judge in the E.D.N.C. from 1960 until 1982 when A. Thomas Small joined the court as a second judge.

Judge Moore's Significant Influence

[22] Letter from Samuel W. Phillips to Berkeley Wright dated August 20, 1981. Dupree Archives.
[23] People Magazine. March 2, 1981. It's Still an Uphill Struggle but Senator East Persisted to Become 'Helms on Wheels'.
[24] Letter from Moore to William E. Cobb Chairman of the North Carolina Republican Executive Committee dated April 8, 1959. Letter from W.T. Outland to William E. Cobb dated March 4, 1959. Judge Algernon Butler Archives. Wilson Library at UNC-CH. The Wilson Daily Times. February 9, 1959. Front page "Strong Candidate: Moore is Nominated for U.S. Judgeship."
[25] Undated letter from Moore to Algernon Butler Sr. in September 1959. Judge Algernon Butler Archives. Wilson Library at the University of North Carolina at Chapel Hill.
[26] Letter from Dupree to James E. Holshouser, Jr. Chairman of Republican Party dated July 25, 1969. Judge Algernon Butler Archives.
[27] Raleigh News & Observer. September 3, 1969. Page 1. Under the Dome. "Wilson's 'Mickey' Moore eyes new judgeship."

Moore's influence was and is significant. He appointed the E.D.N.C. Clerk of Court Peggy Deans who served from 1979-2008. Deans had begun her association with Moore in 1970 working as a legal assistant in his law office. His first law clerk, Richard Stearns, was hired in 1979 and was appointed as a chapter 13 trustee in 1980 and served in that capacity for over 30 years in addition to serving as a chapter 12 trustee. Another law clerk, David M. Warren, served Moore as his law clerk from 1984-1986 and then was appointed as a chapter 7 trustee in 1988 and remained as one until he was appointed as an E.D.N.C. bankruptcy judge in 2014. A former law partner of Moore, Stephen Beaman, was appointed as a chapter 7 trustee in 1977 and has served as a chapter 7 trustee for over forty years. In addition to various appointments in the E.D.N.C., Moore sought to train trustees and their staff as well as the general bar. Moore was mostly responsible for the E.D.N.C. bankruptcy court obtaining a new facility in Wilson, North Carolina in 1988 and he played a significant role in the drafting and enactment of the E.D.N.C. Local Bankruptcy Rules.[28] From a national perspective, he and Small helped to draft Chapter 12 of the Bankruptcy Code—family farmer reorganization. Chapter 12 was passed into law along with the U.S.T.P. expansion.

Also, Moore provided informal advice to E.D.N.C. District Court Judge Dupree who served on the Bankruptcy Rules Committee from 1984-1988. When appointed to the Bankruptcy Rules Committee by Chief Justice Warren Burger,[29] Dupree explained to Moore, Small and the then E.D.N.C. District Court clerk Rich Leonard that:[30]

> *As you probably are already aware, my present knowledge of the bankruptcy rules could be set forth in detail on the head of a pin and still leave room for several angels to dance. Accordingly, I am inviting the addressees of this memorandum in whose heads I carry a super-abundance of additional knowledge of the rules to let me have your suggestions as to any new rules needed and any changes, revisions or modifications needed in the rules presently in effect."*

Moore assured Dupree that he would be happy to be of assistance.[31] In Moore's capacity as informal advisor to Dupree he made recommendations about, among other things, whether the bankruptcy court should maintain a separate judgment index,[32] a proposed Uniform District Court Rule of Reference to Bankruptcy Judges,[33] Official Bankruptcy Forms, Bankruptcy Rule 5004(a),[34]and Bankruptcy Rule 5003.[35] He also recommended that Bankruptcy Rule 5002(b) be

[28] Letter from E.D.N.C. Bankruptcy Clerk of Court to Moore dated August 26, 1988. On file with the U.S. Bankruptcy Court Clerk of Court for the Eastern District of North Carolina and Order issued September 1, 1988 signed by Moore and Small under "In re Local Bankruptcy Rules".
[29] Letter from US Supreme Court Chief Justice Warren Burger to Dupree dated November 1, 1984. Dupree Archives.
[30] Memorandum from Dupree to Moore, Small and Leonard dated November 26, 1984. Dupree Archives.
[31] Letter from Moore to Dupree dated November 29, 1984. Dupree Archives.
[32] Letter from Moore to Dupree dated March 19, 1985. Also, memorandum sent from Moore to Dupree dated March 15, 1985. Dupree Archives.
[33] Memorandum from Small and Moore to Dupree dated February 25, 1985. Dupree Archives.
[34] Letter from Moore to Dupree dated January 8, 1985. Dupree Archives.

amended along with the Committee Comment to give judges more discretion in appointing trustees and examiners that were connected to the judge other than blood relatives such as former law clerks.[36]

An interview of Small by the late Randy Doub provides a personal perspective:[37]

> Judge Small: *Judge Moore was a wonderful person. He was a great judge. He had a wealth of practice, good, common sense. He was a very wise judge and he taught me a lot. I worked with him for about ten years on the bench. We talked almost daily. He just really sort of taught me how to become a judge. He was a smoker. When he held court, he would frequently take a smoking break, which meant he would go back into his chambers, and the lawyers who were appearing before him would also go into chambers. Inevitably, they would resolve the case by the end of the smoking break.*
>
> Judge Doub: *Yeah, I fondly remember exactly what you're talking about, there in the old Wilson Courthouse there on Nash Street, because I was a young attorney back there in the early to mid '80s. I recall Judge Moore taking recesses, and joining him in his chambers would be Mr. Trawick Stubbs, who is now a Chapter 13 Trustee and one of our preeminent Chapter 11 practitioners, and Malcolm Howard who was a Chapter 11 practitioner. I think they would all go back in those chambers and light up their filter-less cigarettes, and you could tell something was going when you could see the smoke coming out from under the door, kind of like a smoke signal.*

Moore met Howard when Howard was an Assistant U.S. Attorney (1973-March 1974) assigned to defend Moore in his official capacity as a Colonel in the United States Army Reserve because Moore had denied an enlisted man his pay when the soldier wore a wig on duty that he refused to remove.[38] Moore gave extensive remarks at Howard's investiture ceremony in March 1988.

Moore died in 1991. The Wilson, North Carolina bankruptcy court location was named in his honor. The inscription on the dedication plaque read:[39]

Esteemed By His Colleagues For Uncommonly Good Sense, Caring, Concern And Dedication To Justice During Thirty Years Of Distinguished Service. Superb Administrator. Teacher. Friend.

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[35] "Our two bankruptcy judges have expressed agreement with our district clerk's suggestion that Rule 5003(c)….". Letter from Dupree to Judge Morey L. Sear dated April 9, 1986. Dupree Archives.
[36] "It seems to me that the present Rule 5002 is entirely too broad and should be amended…." Letter from Moore to Dupree dated January 8, 1985. Dupree Archives.
[37] National Bankruptcy Archives. Oral History Project. July 24, 2009. A. Thomas Small. Interviewed by Randy Doub and Stephanie Edmondson. Pages 6-7.
[38] Howard investiture transcript. March 11, 1988. New Bern, North Carolina. Copy available at E.D.N.C. Bankruptcy Court.
[39] Letter from Peggy B. Deans to Dupree dated April 20, 1992 and received by Dupree on April 22, 1992. Dupree Archives.

At the portrait unveiling ceremony of Moore on May 1, 1992, Butler Jr. presented the portrait and Howard gave the benediction.[40]

Moore appreciated some aspects of the Bankruptcy Code. As he explained in his Senate testimony, "In 1978, when you (Congress) enacted the code, you gave us resources, personnel, and funding, to implement the new system that we have, in a much better manner than we had in the past."[41] He was less enthusiastic about other changes. On January 27, 1981, the Administrative Office of the U.S. Courts (A.O.C.) issued a memorandum[42] to all non-U.S.T.P. pilot Bankruptcy Clerks of Court authorizing the hiring of a "Deputy Clerk-Estate Administrator." This position required a master's degree or law degree. The duties associated with this position were to, among other things, assess the trustee panel size and structure, recruit trustees, assist with trustee case assignments, supervise trustees and investigate trustee misconduct. Moore wrote to Dupree:[43]

> *The Administrative Office has just authorized a Deputy Clerk for Estate Administration with a proposed grade from JSP 9-13. The purpose of this position is supposedly to permit the non-U.S. Trustee Districts to have an employee comparable to the U.S. Trustee. Frankly, I am not "competing" with the Districts which have a U.S. Trustee, and I do not think we should hire a "super grade" when we don't need one. What we need is authorization to hire permanent or temporary clerks in grades 3 through 5.*
>
> *I am thoroughly disgusted with the Bankruptcy Division of the Administrative Office, and I am sure it shows. Any help or assistance you can provide us will help keep the office functioning.*

On April 10, 1981, he wrote Dupree again:[44]

> *I have received the new staffing formula. Enclosed is a copy of my letter to Mr. Foley regarding the new formula. If the new formula were applied, the Clerk's office would be entitled to about 16 personnel. They now have 13 and are authorized to hire one "super" deputy clerk for estate administration with "super" qualifications. Enclosed is the memo on this position. We can get along without this "chief" if we could get the "indians". The AO will not let us have a lesser grade employee in lieu of the "chief". The bureaucracy is driving me crazy. At any rate, if we can just get two "indians", we can get by.*

Perhaps to prove the point, the E.D.N.C. Clerk of Court, Peggy Deans, elected to not fill the "Estate Administrator" position from April 1, 1981, to March 1, 1982, at a cost savings of

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[40] Ibid
[41] Testimony before Courts Subcommittee of Senate Judiciary Committee on March 25, 1986. Page 180.
[42] Memorandum from Berkeley Write, Chief Division of Bankruptcy for Administrative Office of the United States Courts to Clerks of the Bankruptcy Court in non-United States Trustee Pilot Districts dated January 27, 1981. Dupree Archives.
[43] Letter from Moore to Dupree dated March 20, 1981. Dupree Archives.
[44] Letter from Moore to Dupree dated April 10, 1981.Dupree Archives.

$15,000.00.[45] June Farmer aka June Lucas eventually filled the position and Moore became a proponent of the estate administrator position either because he saw the inherent value in it or because it was a lesser evil to the U.S.T.P. Farmer was not an attorney. In 1988, Farmer became the first Bankruptcy Administrator for the E.D.N.C.

Congressional Proposals for Nationwide Expansion of Trustee Program

On October 25, 1985, the Department of Justice transmitted to the Senate and House the Department's legislative proposal for the nationwide expansion of the U.S.T.P.[46] Congressman Hamilton Fish submitted the bill, H.R. 3664, on October 31, 1985.

On November 12, 1985, East chaired a joint hearing of the Subcommittee on Courts and Subcommittee on Administrative Practice and Procedure to discuss the family farmer bankruptcy reform that would ultimately result in Chapter 12 of the Bankruptcy Code. At the end of his prepared remarks, he noted that the first witnesses would be Moore and Small and that "...it is a source of great pride to me that the North Carolina bankruptcy system is considered by many to be a model for the nation…".[47]

On November 18, 1985, Howard wrote the following memorandum to the Executive Committee of N.A.C.T.T.: [48]

> *I have just obtained the "attached" copy of what is now HR 3664, having been introduced in the U.S. House as HR 3664 by ranking Judiciary Committee member Fish and co-sponsored by Congressmen Morehead, Hyde, Kindness, Sensenbrenner, Dannemeyer and Shaw, who are all members of the Monopolies and Commercial Law Subcommittee.*
>
> *This is the Department of Justice/Administration's proposed bill for U.S. Trustee Expansion.*
>
> *It is my belief that this bill was "largely drafted" by Tom Stanton, Executive Office for United States Trustees, and obviously sent to the Congress by the U.S. Department of Justice.*
>
> *Please note that copies of the transmittal letters, the bill and a "section by section" analysis which accompanied the proposed legislation are enclosed. Additionally and apparently at the request of several Congressional staff members, the Department of Justice prepared a comparison of this new legislation (HR 3664) with the legislation*

[45] Letter from Moore to William E. Foley, director of the Administrative Office of the Courts dated February 10, 1982. Dupree Archives.
[46] Letter from Philip D. Brady of the U.S. Department of Justice to The Vice President of the United States and the Speaker of the House of the United States dated October 25, 1985. Small Archives.
[47] Letter from David Anderson to East dated November 8, 1986. East Archives.
[48] Memorandum from Howard to Executive Committee of NACTT dated November 18, 1985. Small Archives.

introduced by Chairman Rodino last June (HR 2660). Please note that much of the original HR 2660 is also incorporated in the new Department of Justice bill.

I would appreciate each of you causing these materials to be personally reviewed and, in lieu of telephoning me with your "concerns and complaints", please drop me a letter specifically setting out any "deficiencies and arguments" you deem appropriate. I will attempt to consolidate these "contentions" and thusly have a "working paper" for any defense we later deem appropriate.

On December 16, 1985, Moore wrote to the A.O.C.: [49]

I am very much opposed to the U.S. Trustee program being extended to this district. The shortcomings in the bankruptcy system are relatively insignificant when compared with the overall volume of work and the total funds being administered by the trustees. If problems do exist in some districts, they are "people" problems and not system problems. Even the U.S. Trustee Program provides no guarantee that "people" problems will not exist. Furthermore, the cost of the U.S. Trustee Program cannot, in my opinion, be justified as a legitimate expense for the general public, and the increase in filing fees to make the program self-supporting discourages the use of bankruptcy as a means of financial relief.

Frankly, I find very little criticism of the estate administration concept. However, I believe the estate administrator should be a part of the clerk's office. The clerk's office is the operational arm of the bankruptcy court. There is nothing unique about the clerk's office being responsible for administrative and quasi-administrative matters. Furthermore, no matter how hard you try, you simply cannot <u>completely</u> separate bankruptcy judges from the administrative area of bankruptcy law and procedure. I do not understand why there has been such turmoil over the issue of "supervising" Chapter 11 cases and the "trustees panel." This responsibility should be the clerk's. The clerk is on the scene and can handle these matters on the spot. Neither the AO nor the Attorney General's office can get into the trenches where the real problems are without building its own staff.

It is my belief that if Congress will provide the clerk with an estate administrator and staff sufficient to manage the Chapter 11 case load in each district and clearly authorize the clerk to act as a party in interest for the purpose of enforcing the rules and orders of the court, then we will have the most effective, efficient and least expensive solution to this problem. Accordingly, I would suggest that the "estate administrator" concept be left as it is and that Congress simply clarify that the clerk is the proper party to raise questions relating to administration of the estate or enforcing the orders of the court.

[49] Letter from the Moore to A.O.C. Deputy Legislative Affairs Officer Daniel R. Craven dated December 16, 1985. Small Archives.

Senate Version of Trustee Legislation Introduced

On December 17, 1985, Senate Judiciary Chairman Strom Thurmond, ranking minority member Dennis DeConcini, Senator Mark Andrews, Senator Quentin Burdick, Senator Al D'Amato, Senator Alan Dixon, Senator Paul Simon, and Senator John Warner introduced S-1961 which was the Senate's version of the U.S.T.P. expansion bill.

On January 13, 1986, Howard wrote to the N.A.C.T.T. Executive Committee:[50]

It appears that this latest bill has "heavy and broad" support in the Senate. That is, the Chairman of the Judiciary, as well as the ranking Democrat, along with several other senators, have introduced this bill. I am further told that Senator Thurmond has met with Attorney General Meese, and I am told they are both "in support" of this bill, S-1961.

Please note the following general specifics of this bill:

1. *Thirty U.S. Trustee regions.*
2. *Four-year term for U.S. Trustee.*
3. *Increases filing fees, etc.—attempt to make self-funding.*
4. *The U.S. Trustee can only dismiss standing trustees "for cause" with right of hearing.*

Personally, I still feel that this bill establishes a "political bureaucracy." The four-year term equates to the same situation we presently have with U.S. attorneys. The bill further reduces and limits the authority of U.S. Bankruptcy Judges and places "general administration" of U.S. Bankruptcy matters in the U.S. Department of Justice.

I expect to see "hearings" scheduled for this bill in March or April with "floor" considerations shortly after.

N. C. Bar Association Opposes Expanding Program to North Carolina

On January 17, 1986, the Board of Governors of the North Carolina Bar Association (N.C.B.A.) passed the following unanimous certified resolution:[51]

BE IT RESOLVED: That the North Carolina Bar Association by and through its Board of Governors on its behalf and in recognition and support of the position of its Bankruptcy Section and Council does hereby acknowledge and express its general opposition to and discouragement of all proposed federal legislation that would extend or expand the U.S. Trustee Pilot Program into the federal judicial districts of the State of North Carolina.

[50] Memorandum from Howard to NACTT Legislative Counsel dated January 13, 1986. Small Archives.
[51] See letter from Robert C. Vaughn, President of North Carolina Bar Association to Senator East dated January 17, 1986. Page 233 of March 25, 1986 Senate materials. "….I enclose a Resolution, unanimously adopted by its Board of Governors for itself and in support of the Bankruptcy Section and Section Council…"

The N.C.B.A. is a voluntary organization for lawyers and should not to be confused with the North Carolina State Bar, which is a government agency responsible for the regulation of the legal profession in North Carolina. The chairman of the Bankruptcy Section of the N.C.B.A. at the time was Butler Jr. who was a chapter 7 trustee appointed by Moore. Butler Jr.'s father had appointed Moore to be bankruptcy referee in 1960. Of the nine other members of the Bankruptcy Section Council, two were also E.D.N.C. trustees,[52] one was a W.D.N.C. trustee,[53] one was an associate of a chapter 13 trustee,[54] and one was a former chapter 13 trustee.[55] In his March 25, 1986, Senate testimony, Butler Jr. stated:

> *On behalf of the North Carolina Bankruptcy Section of the North Carolina Bar Association and its 504 members and on behalf of the Board of Governors of the North Carolina Bar Association I respectfully urge that any legislation seeking to perpetuate or expand the experiment that was the United States Trustee System be rejected.*

The N.C.B.A. does not function as a democratic institution nor does its Bankruptcy Section. It is not clear what the positions of its 504 members were. The "U.S.T.P. Resolution" is not nuanced. It is understandable that existing trustees would like to preserve their positions and judges might prefer to protect their appointment power. It is not apparent why attorneys typically representing the trustee's adversaries would wish to continue to litigate matters against the judge's appointee. On January 13, 1986, Butler Jr. sent a letter to a bankruptcy attorney in South Carolina urging organization and passage of a similar resolution from its bar in an attempt to influence Senator Thurmond who was the state's senior senator and the chairman of the Judiciary Committee.[56] It was unsuccessful. No other bar organizations followed the N.C.B.A.

To put the unanimous "U.S.T.P. Resolution" into perspective, on December 4, 1982, while E.D.N.C. attorney J. Larkin Pahl was chairman of the Bankruptcy Section of the N.C.B.A., the following resolution was passed:

> *BE IT RESOLVED that the Bankruptcy Section of the North Carolina Bar Association acting through its counsel unanimously recommends against elimination of Wilson North Carolina as the location of headquarters and offices of the United States Bankruptcy Court for the Eastern District of North Carolina and supports the report of the Director of the Administrative Office of the United States Court in its recommendation that the number of bankruptcy judges for the Eastern District of North Carolina be increased to three.*

[52] Gregory B. Crampton and Ocie F. Murray.
[53] Albert F. Durham.
[54] Secretary of the Council Sally A. Conti was then an associate of Richard M. Hutson.
[55] Bonnie Kay Johns.
[56] Letter from Butler Jr. to Attorney Billy Robinson dated January 13, 1986 with subject heading "Extension of U.S. Trustee System into Non-Pilot Districts. Small Archives.

As part of forwarding the "Wilson Resolution" to Moore, Pahl closed by asking Moore to let him or the Bankruptcy Council know if further assistance was needed.[57] Moore then included the "Wilson Resolution" into a letter sent to the Fourth Circuit Court of Appeals.[58] It is highly unlikely that more than a handful of members of the Bankruptcy Section cared at all about whether one of the three judicial districts in the state maintained its location in Wilson as opposed to Raleigh (as the Judicial Conference Committee on Bankruptcy Administration had recommended). It is likely that many members of the Bankruptcy Section wished for the headquarters to be moved to the more populated city of Raleigh. Moore cared a great deal about retaining the Wilson location.[59] Similarly, the "U.S.T.P. Resolution" cannot, without additional corroborating evidence, be construed as broad-based opposition to U.S.T.P. expansion within the North Carolina bankruptcy bar.

On January 29, 1986, Howard wrote to the N.A.C.T.T. Executive Committee about the family farmer legislation and also the U.S.T.P. expansion:

> *Focusing now on "U.S. Trustee Expansion," as was reported to you at the seminar in Lake Tahoe, Chairman Rodino has introduced H.R. 2660 providing for the expansion of the present "pilot program" nationwide by the creation of twelve (12) regions with a U.S. trustee in each region. These regions basically follow the eleven (11) circuits with one of the circuits being divided. This bill also provides for a four-year term for the U.S. Trustee appointed by the Attorney General, the right for the U.S. Trustee to discharge a panel or standing trustee without cause, and self-funding provisions……On December 17, 1985, Senate Judiciary Chairman Thurmond and ranking minority member DeConcini introduced S-1961 which is the Senate's version of the "U.S. Trustee Expansion". This bill allegedly is the Administration/Department of Justice's bill (Attorney General Meese), and has the "general" support of Senators Thurmond and DeConcini. This bill provides, among other things, for the establishment of U.S. Trustees in twenty-four (24) regions, breaking down the judicial districts in the United States into twenty-four (24) "regions", provides that any "panel trustee or standing trustee" must be discharged for "cause" and that such person being discharged would have the right for a hearing on his dismissal, increases the filing fees for Chapter 7 and 13 to $100.00 and Chapter 11 to $500.00 with a monthly service fee of a minimum of $100.00 per month in Chapter 11s. These increased fees are intended to offset the estimated $40-$60 million per annum cost of the U.S. trustee system nationwide so that it would be at least claimed as "self-funding".*

[57] Letter from J. Larkin Pahl to Moore dated January 11, 1983. Dupree Archives.
[58] Letter from Moore to Mr. Samuel W. Phillips, Circuit Executive dated January 13, 1983. Dupree Archives. The Wilson NC Resolution is also referenced in an undated letter (likely late October or early November 1985) from Chief Judge Britt to the A.O.C. about the Wilson versus Raleigh issue. The memo line is "Survey of Bankruptcy Judges' Official Duty Stations and Places of Holding Court…" Dupree Archives.
[59] Letter from Moore to Samuel W. Phillips dated May 19, 1982. Letter from Moore to Samuel W. Phillips dated January 13, 1983. Letter from Moore to Samuel W. Phillips dated December 11, 1984. Dupree Archives.

Both bills provide for the U.S. Department of Justice (Attorney General) to appoint and control trustee systems.

The prognosis for passage of one or the other or some combination of these two (2) bills for U.S. trustee expansion is complicated. That is, the potential "cost" of expansion, coupled with the national financial crises, causes some concern among our national lawmakers.

Further, it is anticipated that the Administrative Office of U.S. Courts will ultimately prepare its own "trustee bill" and have it introduced in the U.S. Congress. Whether or not such new bill obtains the support of such persons as Chief Justice Berger and instrumental legislators remain to be seen. The A.O.' bill will probably retain the Trustee system under the supervision of the Judiciary (not the Department of Justice).

The "sunset" of existing legislation providing for the "pilot" U.S. trustee systems is September 30, 1986. Accordingly, it is the opinion of your Legislative Counsel that it will probably be late Summer 1986 before either of these bills or any future "trustee expansion" bill receives the height of their consideration. Regrettably, whatever is done will, no doubt, take place in a "hurry/rush" with compromises agreed at 11:00 o'clock p.m. on September 30, 1986 at a conference between Senate and U.S. House representatives with final passage in both houses the next morning.

There is some "resistance" to the U.S. Trustee Expansion program; and at least one state (North Carolina) has, through its State Bar Association unanimously passed a resolution resisting U.S. Trustee Expansion in any form in the Federal Judicial Districts of its state. Copies of this resolution have been circulated to all North Carolina U.S. legislators.[60]

The Legislative Reports from Senator East for the week of January 27-31, 1986 reflect that the Subcommittee on Courts made preparations for future hearings on the question of the U.S.T.P.[61] The Legislative Reports from East for the week of February 3-7, 1986 reflect that the Subcommittee on Courts continued its work on the U.S.T.P. and family farmer bankruptcy bills.[62]

On March 20, 1986, the House continued hearings that commenced in July 1985. The primary issue addressed was whether the national entity should be placed in the executive branch or the judicial branch. Witnesses in favor of the executive branch included Ronald J. Trust (National Bankruptcy Conference), Professor Lawrence King (National Bankruptcy Conference), Cornelius Blackshear (bankruptcy judge from S.D.N.Y.), Joseph Matz (Commercial Law League) and Richard J. Leighton (U.S. Chamber of Commerce). The witness in favor of a

[60] See Memorandum written from Howard to NACTT Executive Committee on January 29, 1986. Small Archives.
[61] East Archives.
[62] ibid

national entity housed within the judicial branch was Judge Robert E. DeMascio, representing the Judicial Conference (the entity that supervises the A.O.C.).

On March 25, 1986, East convened a three-hour hearing of the Subcommittee on Courts of the Judiciary Committee as it related to the U.S.T.P. expansion. Present that day for at least part of the session were Senators Strom Thurmond (R. South Carolina), Dennis DeConcini (D. Arizona) and Howell Heflin (D. Alabama). The witnesses for U.S.T.P. expansion under the U.S. Department of Justice were Associate Attorney General Arnold I. Burns, Thomas J. Stanton (Director of U.S.T.P.), Lawrence P. King for the National Bankruptcy Conference, Richard K. Kaufman for the National Association of Credit Managers, Benjamin Zion and Hal Coskey for the Commercial Law League of America and Bankruptcy Judge Robert Ginsburg of Illinois. Robert Anderson testified on behalf of the National Association of Bankruptcy Trustees, a trade organization for chapter 7 trustees, and expressed specific concerns but his testimony cannot be characterized as for or against the U.S.T.P. expansion under the U.S. Department of Justice. Opposing the U.S.T.P. expansion controlled by the executive branch were Judge Robert DeMascio for the Judicial Conference, U.S. District Court Judge from the Northern District of Alabama James Hancock, Bankruptcy Judge William Brown from Kentucky, Bankruptcy Judge T. Glover Roberts from the Southern District of Mississippi, Judge Moore, Attorney Robert Sawdey of Michigan, and Butler Jr. for the N.C.B.A.

Judge Hancock was warmly greeted by his fellow Alabamian Heflin. Hancock characterized the U.S.T.P. pilot in the Northern District of Alabama as a dismal failure. Hancock quoted N.D. Alabama Chief Bankruptcy Judge George Wright who opined that "…five of the six bankruptcy judges for the Northern District of Alabama all feel that the U.S. trustee system is not beneficial, slows and hinders, rather than helping the system become more efficient." Hancock's position was that the U.S.T.P. was needed but that it should not be housed within the Department of Justice. Hancock suggested that the circuit courts appoint trustees. It is noteworthy that the spokesperson for the Northern District of Alabama did not seek to preserve the bankruptcy judge's power to appoint the trustee.

Judge DeMascio argued that housing the U.S.T.P. under the Department of Justice was a problem because the department also represents other governmental entities in bankruptcy, including but not limited to the Internal Revenue Service. Also, the placement within the executive branch violated the separation of powers because the system purports "…to make judges dependent on another branch of the government for the processing of matters before the courts."

Judge Ginsburg criticized the estate administrator system by pointing out the conflict of both perception and fact in that the estate administrator is an arm of the court and is referred to by lawyers as "my" estate administrator meaning the judge's estate administrator. The estate administrator system, Ginsburg argued, necessarily gave rise to an appearance of conflict and

that as a judge he would prefer the conflict involve the parties, the U.S. trustee, and the U.S. attorney, rather than involving the court itself.

Professor King's written statement pointed out that a benefit of the central agency being housed in the executive branch was also to keep a check on judges. He explained:

> *The reason for the establishment of a bankruptcy administrator is to create, as much as possible, a true separation of the administrative from the judicial functions. An independent bankruptcy administrator is to be a watchdog to prevent not only abuses by debtors, trustees, debtors-in-possession and attorneys, but also to prevent errors or abuses by bankruptcy judges themselves. A system which would not grant the bankruptcy administrator the power to complain of administrative actions of the bankruptcy court would leave a gaping hole in the true separation of administrative and judicial functions. And to have the power to complain means the right to enter an appearance, plead, offer evidence and be heard in the bankruptcy court, even in opposition to the bankruptcy judge.*

Later King noted:

> *Placing the U.S. Trustee program in the Judiciary would be rendering that office a mere extension of the bankruptcy court itself. The resulting U.S. Trustee or estate administrator, whatever title is used, would be part and parcel of the court system, subordinate and beholden to the bankruptcy judges of the district in derogation of all that Congress and this Committee in particular intended when it considered and passed the 1978 bankruptcy reform legislation. While the instances of actual impropriety were documented in the hearings, equally important were the perceived appearances of impropriety.*

The last panel of the day included Moore and Butler, Jr. representing the N.C.B.A. East remarked "I am particularly grateful, of course, being from North Carolina, to have Mr. Algernon Butler and Judge Thomas Moore. We are delighted to have you with us, and I can report personally you are both doing outstanding jobs in North Carolina."

Judge Moore Defends Existing Bankruptcy Trustee System in N.C.

In Moore's oral testimony, he defended the non-U.S.T.P. system:

> *I have heard about the trustee panel not being independent under our system, but it will be independent under the U.S. trustee system? Not so, sir. It simply shifts the dependency from the court to the U.S. trustee. For example, the panel trustee will be an officer of the court and he is subject to discipline by the court, but he also serves the U.S. trustee. So you are not making the trustee panel any more independent. You are shifting their dependence from the court to the Attorney General.*

This is not an altogether satisfying argument. The trustee's duty is to the bankruptcy estate regardless of which entity appoints him or her. The reason for the U.S.T.P. was not to make the trustee unaccountable and independent generally, but rather to make the trustee independent from the bankruptcy judge. To be fair, the trustee being dependent on the Attorney General would be a problem if that undermined the trustee's duty to the bankruptcy estate.

In his written submission Moore posited:

> *It is frequently argued by supporters of the United States Trustee System that the persons responsible for supervising the administration of the cases are not independent from the judges that they serve, and as a result, the court's decisions will not be challenged by the trustees, debtors' attorneys or judicial branch administration. This is nonsense. Appeals from the judge's actions are taken by the debtor's attorney, creditors committee or individual creditors. There is no hesitation to appeal the judge's decision. In district courts, for example, the judges set pre-trial conferences, discovery conferences, status conferences and adopt rules for case management and case administration. If the requirements imposed on parties and counsel are not met, then sanctions are imposed, including dismissal of the case. I assure you that counsel does not hesitate to appeal decisions simply because they may have to appear before the judge on another occasion. Attorneys and trustees are officers of the court. They are not so easily intimidated as the supporters of the United States Trustee System would have you believe.*

Moore dismissed the argument that the trustee's appointment had the effect of reducing the independence of the trustee. It is not clear how this independence manifested itself in the E.D.N.C. in 1986. The E.D.N.C. District Court and LEXIS databases do not reflect trustees as engaged in appellant activity during the 1980s, and in fact, a close reading of Moore's statement omits reference to trustees in the list of entities who filed appeals. Moore did not address the issue of bias or appearance of bias or the awkwardness of the bankruptcy judge adjudicating matters between the judge's appointee and adverse parties.

Butler Jr. Testifies for Preservation of Existing System

Butler Jr.'s testimony began with him acknowledging "I probably owe quite a bit of my perception as to the present system, and my opposition to the U.S. trustee system, from the able administration of bankruptcy cases in my State." The N.C.B.A.'s decision to send Butler Jr. to testify could have backfired. Butler Jr. was the son of the judge who had appointed Moore initially back in 1960, and under whom Moore had worked under until Butler, Sr. went on senior status in 1975. Butler Jr. was appointed as a trustee in 1977. A U.S.T.P. proponent might well have argued that this was an example of why the judicial appointment of trustees was a problem. That said, this was a low-profile hearing on a low-profile issue chaired by a friendly senator. It is probable that East was the only senator present during Butler Jr.'s testimony. Butler Jr.'s four points were that the U.S.T.P. system was not needed, the U.S.T.P. system would politicize the

process, the U.S.T.P. system would create conflicts of interest because the U.S. Attorney also represents governmental agencies in bankruptcy cases and the high cost there would be to operate the U.S.T.P. system. Butler Jr. contended that the public's perception of the bankruptcy system in the non-pilot districts was one of "…. non-political impartiality, fairness and evenhandedness," and he stated that "It is my sincere belief that the United States Trustee System, if expanded, would destroy the public confidence and faith that exists in the present bankruptcy system."

Butler Jr.'s written statement did little to address the problem of the conflict caused by the judicial appointment. He seemed to contend that the issue was solved by the removal of the bankruptcy judge from the meeting of creditors. In his verbal exchange with East, Butler, Jr. stated that "I think that the judges in North Carolina are extremely cognizant of the perception of impropriety that exists between judge and trustee, and I think that they avoid the perception." It may have been accurate, but it would have been a more compelling statement if made by an attorney who typically represented the trustee's adversary.

Butler, Jr.'s testimony (oral and written) focused heavily on the preservation of the existing system. He observed that in the judicial districts of North Carolina trustee panels were filled by "…mature, experienced and dedicated attorneys…". The importance of "…position permanence, continuity and security…" for trustees was also emphasized.

On March 28, 1986, the A.O.C. submitted its draft legislation to the House and Senate.[63] It provided for a Bankruptcy Administrator system controlled by the judiciary. It also stipulated that the Bankruptcy Administrator, not bankruptcy judges, would appoint and supervise all trustees. The A.O.C. proposal was never introduced in Congress but did have some influence on the ultimate legislation. However, that influence did not extend to the Bankruptcy Administrator appointing trustees. It is noteworthy that the most vocal and influential institution opposing the U.S.T.P. housed within the executive branch sought to have the Bankruptcy Administrator appoint the trustees rather than the judge.

On May 1, 1986, E.D.N.C. Chief District Court Judge Earl Britt, a Carter appointee, wrote identical letters to Helms and East opposing the U.S.T.P. expansion:[64]

> *Feeling that the administration of bankruptcy estates should be retained in the Judiciary and not in the Department of Justice, Chief Bankruptcy Judge Thomas M. Moore and I have previously expressed our opposition to the proposed trustee program. Statistics prove that the proposed trustee program would be exceedingly more expensive than the current method of operation. At a time of fiscal restraint it would seem imprudent to*

[63] Letter from L. Ralph Mecham to President of United States Senate dated March 28, 1986. Page 247-248 of March 25, 1986 Senate materials.
[64] Letter from Britt to Helms dated May 1, 1986. Small Archives.

adopt such a new, untested program. I urgently seek your support in defeating any such proposed amendment.

The Britt letter was copied to the bankruptcy judges and other district court judges in the E.D.N.C. On May 7, 1986, Moore wrote E.D.N.C. District Court Judge James C. Fox:[65]

Enclosed is a copy of my prepared statement before the Senate Judiciary Committee on Courts in opposition to S. 1961. Also enclosed is a copy of S.1961.

It is my understanding that the Subcommittee is seriously considering adding an "opt out" provision to the Bill which would permit any district to opt out of the United States Trustee System if the bankruptcy judges and chief district court judge, by a majority vote, choose to do so. Personally, I believe the opt out provision provides a satisfactory solution to the problem. I believe if the Bill is passed with the opt out provision that eighty percent or more of the judicial districts will probably elect to opt out of the United States Trustee System.

On May 8, 1986, Senator Thurmond introduced Amendment 1844 that included Senator Heflin's modification that individual districts be given the opportunity to "opt out" of the U.S.T.P. This passed the Senate on May 8, 1986, along with the bill for additional bankruptcy judgeships and family farmer reorganization. Senate floor statements and written submissions reflect the A.O.C.'s continued opposition to the U.S.T.P. expansion and its desire for additional bankruptcy judgeships and the following from Heflin:

Mr. President, I share the concern of the distinguished Senator from Mississippi, Senator Cochran concerning the structure of this U.S. trustee system and I was opposed to it until we worked out his provision dealing with allowing the districts to opt out. It is a compromise.

My judges in the northern district of Alabama do not like it. The bankruptcy judges, with the exception of one in that district do not like the trustee system.

The northern district of Alabama was one of the 10 pilot programs that were conducted.

Later he noted:

It has been expressed that conflicts arose under the pilot program with the trustee.

Now, it is my understanding that there is a great deal of support for the trustee system in some of the other areas where the pilot program operated successfully and without conflicts there. But I think it is going to be incumbent upon the Attorney General to see that the U.S. trustee in these districts cooperate with the bankruptcy judges and the judges of the court. If he takes the attitude that they cannot in effect supervise or give him

[65] Letter from Moore to Fox dated May 7, 1986. Small Archives.

orders, we may be faced with a rash of contempt proceedings against the trustees that are appointed.

Heflin and the bankruptcy judges in the Northern District of Alabama may have missed the point that the U.S.T.P. was intended to be independent and was not to be supervised by the bankruptcy judge.

On May 9, 1986, Thurmond wrote East:[66]

I want to express my sincere appreciation for your contribution to the passage of S.1923 and especially for the relevant hearings you held before your subcommittee. This bill, as amended, will help to alleviate the heavy burden being placed on the bankruptcy courts across the Nation and will provide significant relief from the dire economic problems faced by our Nation's farmers.

Your support was vital to achieving passage of this legislation in a manner reflective of the fine tradition of the Congress.

Clearly a compromise had occurred in the Senate in relation to the three pending bankruptcy bills and Thurmond, East and Heflin had played a part in the negotiations.

On June 26, 1986, Helms responded to Britt's letter of May 1, 1986:[67]

Thank you for your correspondence arguing against expansion of the U.S. Trustee System in the administration of bankruptcy laws. I agree with you, but as you may know the Senate decided otherwise in its recently passed bankruptcy legislation. Fortunately the legislation did allow for jurisdictions to opt out of the expanded U.S. Trustee System.

In my opinion, the last thing we need is new and growing federal bureaucracy within the Justice Department to administer estates in bankruptcy. The traditional approach of local, nongovernmental trustees, subject to bankruptcy court supervision, has worked well and does not need to be changed. In the long run, I believe this approach, in which individual estates are taxed to pay for individual trustees, will place less financial burden on both estates in bankruptcy and federal taxpayers.

After the House of Representatives acts on this legislation, the Senate may have another opportunity to consider it. Under those circumstances, I will again oppose expansion of the U.S. Trustee System.

In the early morning hours of Sunday, June 29, 1986, East committed suicide at this home in Greenville.[68] On July 22, 1986, about 50 senators eulogized East including Heflin,

[66] East Archives.
[67] Letter from Helms to Britt dated June 26, 1986. Small Archives.
[68] For more information about East suicide, see East v. United States, 745 F. Supp. 1142 (D. Md. 1990).

Thurmond, Grassley, Hatch, and DeConcini. These five senators would serve as the Senate conferees on the U.S.T.P. expansion legislation two months later.

Opting Out Becomes Transition Extension

On August 1, 1986, Congressman Rodino introduced HR 5316 as the "Bankruptcy Judges and United States Trustee Act of 1986." This bill implemented the U.S.T.P. expansion and also created 52 additional bankruptcy judgeships. The bill passed the House on August 12, 1986. A different version, allowing for districts to opt out of the U.S.T.P., passed the Senate on August 16, 1986. The opt-out election contained in the Senate version was to be made by a majority vote of the chief district court judge and each of the bankruptcy judges in the district. Each district would have 60 days from the date of the law's enactment to decide.

The House voted down the Senate amendments on September 9, 1986, and agreed to a request for a conference committee. The House conferees were Peter Rodino, Don Edwards, William Hughes, Mike Synar, Dan Glickman, Edward F. Feighan, Hamilton Fish Jr., E. Clay Shaw Jr., Carlos Moorhead, and Henry J. Hyde. The Senate conferees were Strom Thurmond, Orrin Hatch, Chuck Grassley, Dennis DeConcini, and Howell Heflin. On September 11, 1986, Assistant Attorney General John R. Bolton wrote to Senate Judiciary Chairman Strom Thurmond and, among other items, communicated that the Justice Department would recommend that Reagan veto the Senate version. He wrote:[69]

> *Finally, the Senate bill provides that districts may "opt-out" of the Trustee system. This provision also is entirely unacceptable, because it fatally undermines the concept of a uniform system of bankruptcy administration removed from the court. Additionally, the constitutionality of such a provision is highly doubtful. The Constitution provides that bankruptcy laws enacted by the Congress are to be "uniform" (Article I, section 8).*

The U.S. Attorney General in 1986 was Edwin Meese. Meese and Reagan had a close relationship. U.S.T.P. expansion would increase power and resources to the executive branch. The House, controlled by the Democrats, was opposed to permitting jurisdictions to opt-out. There was no apparent reason why the White House would not accept the Department of Justice recommendation as it related to the U.S.T.P. expansion issue.

On September 30, 1986, Reagan signed S.2888 extending the U.S.T.P. through November 10, 1986. On October 2, 1986, a conference report was filed and agreed upon by the House, and it was agreed to in the Senate on October 3, 1986. The bill did not permit any jurisdiction to opt-out. It did allow Alabama and North Carolina to remain outside the U.S.T.P. until 1992 unless those jurisdictions decided to opt-in before that time. On October 2, 1986, the following floor statements were made.

[69] Letter from Bolton to Thurmond dated September 11, 1986. Executive Clerk, White House Office of the Records. Box 078. Ronald Reagan Library.

House Member Hamilton Fish, Jr. (R. New York)

The conferees did agree to an extended transition period for the States of Alabama and North Carolina as part of a compromise to drop the dual system of supervision of bankruptcy administration in the version passed by the other body. A possible delay in extending the U.S. Trustee Program to these two States is far preferable to a permanent, confusing dual system.

Senator Dennis DeConcini (D. Arizona)

I have been a strong supporter of the U.S. Trustees, and am pleased that the provisions of this bill as they apply to the Trustees came out as they did. I regret, however, that the concept of "opt-out" as contained in the bill as it passed the Senate was not continued in a greater form. The bill provides that 88 of the judicial districts of the country will permanently go into the Trustee Program and that six districts, all located in Alabama and North Carolina, will be in a separate program much as exists presently, for 6 years. I believe that the theories of bankruptcy administration would have been served had there been an opportunity for more districts to "opt-out" of the Trustee system and to participate in a program where a Bankruptcy Administrator within the judicial branch would have been responsible for bankruptcy case administration. As the bill stands, I don't believe the concepts of bankruptcy estate administration as advanced by the judicial conference will have a full and fair opportunity to present themselves.

The bill was presented to Reagan on October 15, 1986, along with the family farmer reorganization bill. Within the administration, the Office of Management and Budget approved and submitted a proposed signing statement. The Office of Personnel Management and the Department of Agriculture did not object. The Department of Treasury deferred.[70] The Department of Justice approved and submitted a proposed signing statement. Writing for the Department of Justice, Bolton wrote to the White House:[71]

The conferees also deleted the "opt-out" provisions that the Senate had passed and provided instead that certain districts will be the last to be phased in to the new national system for bankruptcy administration."

Although the A.O.C. is part of the judicial branch, the White House still sought its recommendation. Writing for the A.O.C. to the White House, Mecham repeated the previous arguments about the U.S.T.P. put forth by the Judicial Conference and observed:[72]

[70] Letter from Robert M. Kimmitt General Counsel to the Office of Management and Budget dated October 10, 1986. Executive Clerk, White House Office of the Records. Box 078. Ronald Reagan Library.
[71] Letter from John R. Bolton to the Honorable James C. Miller, III Director of Office of Management and Budget dated October 17, 1986. Executive Clerk, White House Office of the Records. Box 078. Ronald Reagan Library.
[72] Letter from Mecham to Mr. James M. Frey dated October 17, 1986. Ronald Reagan Library.

The transition provisions defer implementation of the United States trustee program in the States of Alabama and North Carolina for six years. During that time, bankruptcy estates in these judicial districts will be administered by an individual in the Judiciary. We are very disappointed that this option was not made more broadly available as the Senate version of the bill would have provided.

In summary, the Judicial Conference of the United States strongly opposes the United States trustee provisions in this legislation. Were they presented in a separate bill, we would strongly recommend that such a bill not be approved. The bankruptcy judgeships included in this bill are urgently needed, and we cannot recommend that they be disapproved.

Reagan signed the bill into law on October 27, 1986, without a signing statement. At the same time, the additional bankruptcy judgeships and family farmer reorganization (Chapter 12) was signed into law. Here are some perspectives on what transpired.

Small's recollection is included in a July 24, 2009 interview:[73]

There was an effort to have the United States Trustees throughout the United States. Before that, there was a pilot program where some of the districts around the country had a U.S. Trustee system. One of those districts was in the state of Alabama. They had a very unpleasant experience, and the bankruptcy judges conveyed that to Senator Howell Heflin. Senator Heflin was very much opposed to the U.S. Trustee system based on the experience in the pilot district in the state of Alabama. Judge Moore was also against the U.S. Trustee system,but not because we were part of the pilot project, but he just thought that conceptually it was not a good idea; it was expanding the bureaucracy and created a conflict of interest for the U.S. Trustee, which would be housed in the Justice Department, while the Justice Department had representation responsibility for governmental agencies.

Judge Moore was invited by Senator East to testify at the Senate hearings about the U.S. Trustee system, and he told them it was not a good idea. Well, unfortunately, Senator East died before the legislation came before the Senate, but Senator Heflin, knowing of Senator East's opposition to the U.S. Trustee system, excluded both Alabama and North Carolina from the U.S. Trustee system.

On September 15, 1992, Howard wrote to Helms:[74]

As you may recall, my personal law practice, before you caused me to be appointed to the federal bench, was principally in the area of bankruptcy. Approximately one year after I

[73] National Bankruptcy Archives. Oral History Project. July 24, 2009. A. Thomas Small. Interviewed by Randy Doub and Stephanie Edmondson. Page 15 of 19.
[74] Letter from Howard to Helms dated September 15, 1992. Courtesy The Jesse Helms Center Archives.

came on to the bench, Chief Justice Rehnquist appointed me to the Bankruptcy Rules Committee, and my term will expire in October 1992.

Senator Helms, I have an abiding interest in the American bankruptcy laws. I feel that they have become all too liberal, and the creation of the United States Trustee System, approximately eight years ago for the entire nation with the exception of the districts in North Carolina and Alabama (thanks to you and Senators East and Heflin), is an additional layer of bureaucracy that is largely unneeded and continues to grow.

In a speech given to federal judges on October 3, 1988, Bankruptcy Judge Robert E. Ginsburg explained:[75]

In 1986 the bankruptcy judges in North Carolina and Alabama strongly opposed any attempt to introduce the U.S. Trustee program in their districts. Given the position of Senator Heflin and the late Senator East in the legislative process, their objections fell on sympathetic ears.

In 1995, attorney Dan Schulman wrote:[76]

In the Northern District of Alabama, Chief Bankruptcy Judge George S. Wright successfully lobbied Congress to have Alabama exempted from incorporation into the United States Trustee program...Bankruptcy judges in both states successfully lobbied Congress, most particularly Senators Helms and Heflin, to avoid being placed within the United States Trustee program...In short, logic and all evidence provide that the Bankruptcy Administrator program was retained in Alabama and North Carolina for purely political reasons, not on the basis of a justifiable, geographically isolated problem.

Collier on Bankruptcy notes:[77]

In 1986, the program was not however, made effective on a nationwide basis. The judicial districts in Alabama and North Carolina were permitted to opt out of the [U.S.T.P.] *program. Because these provisions are applied in a non-uniform fashion, contrary to constitutional directive, this statutory inapplicability may have rendered the entire United States trustee system unconstitutional.*

A General Accounting Office (G.A.O) report issued in 1992 provided this explanation:[78]

[75] Remarks of Judges Sear and Ginsberg at the Conference of Metropolitan District Chief Judges, October 3, 1988. Small Archives.
[76] The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs. Dan J. Schulman. Volume 74. Issue 1. Article 4. Nebraska Law Review. 1995.
[77] 1 Collier on Bankruptcy P. 20.04.

Our discussions with bankruptcy judges and BA program officials in Alabama and North Carolina indicated that the impetus for having the BA program in the two states was their extreme dissatisfaction with the operation of the UST pilot program in the Northern District of Alabama. For example, according to the BA program Administrator when the BA program took over after the pilot test, BA program staff could not get an accurate list of Chapter 7 trustees or a complete list of Chapter 7 cases that had been assigned to each trustee—basic information needed to carry out case administration responsibilities.

UST program officials admitted that their program had experienced problems. They believed, however, that a major change---as the UST program represents—is bound to cause tension and resistance. Removing the case administration responsibilities from bankruptcy judges and putting them in the executive branch affected all the major players in bankruptcy: judges, trustees, and bankruptcy attorneys.

The U.S.T.P. in the Northern District of Alabama may have been operationally incompetent, but this was not provided as a basis for opposition to its expansion and permanence within the executive branch in 1986. The example of incompetence raised related to when the Bankruptcy Administrator took over from the U.S.T.P. after October 27, 1986.

Permanent Exclusion

Although the opponents of the U.S.T.P. appeared to have only gained a modest delay covering a small number of districts, the resistance against expansion continued. In 1990, a Federal Courts Study Subcommittee recommended that Congress reconstitute the U.S. trustees as independent statutory officers in the judicial branch.

In 1992, Congress extended the extension for North Carolina and Alabama until October 1, 2002, or until a district elected to opt-in to the U.S.T.P.

The 1992 G.A.O. report recommended that the U.S.T.P. be expanded to North Carolina and Alabama earlier than 2002 because there was no justification for continuing two parallel programs. Mecham, writing for the A.O.C., responded to a draft of the report and again pointed out the conflict of interest problems cited in 1986 and recommending that the system in North Carolina and Alabama survive and be expanded into other districts. Mecham also contended that the G.A.O. report had used the flawed methodology, and its conclusion was illogical.

In 1995, the Judicial Conference issued a Long Range Plan for the Federal Courts calling for estate administration to be brought under the control of the judicial branch or alternatively that the alternate system (Bankruptcy Administrator) be expanded to more districts.

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[78] United States General Accounting Office. Report to the Chairman, Permanent Subcommittee on Investigations Committee on Governmental Affairs. U.S. Senate. Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs. September 1992. Page 14-15. GAO/GGD-92-133. Bankruptcy Administration.

The North Carolina and Alabama exclusion was made permanent on November 13, 2000 when Republicans controlled both the Senate and the House and Presidential Clinton's term was coming to an end.[79] House member Howard Coble from North Carolina, then chairman of the Subcommittee on Courts and Intellectual Property introduced the legislation on the House side and it was combined with many other matters which were generally unrelated to bankruptcy.[80] As a result, in North Carolina and Alabama, the court continues to appoint trustees. This will remain the case until the law is changed or until the majority of the bankruptcy judges in a particular district elect to opt-in to the U.S.T.P. As of 2019, no district has opted into the U.S.T.P. Opting in would result in a loss of power and responsibility for bankruptcy judges in North Carolina and Alabama.

Instead of the U.S.T.P., North Carolina and Alabama have a Bankruptcy Administrator who performs many of the same functions. The Bankruptcy Administrator is appointed by the circuit court for a five-year term and is subject to the oversight of the A.O.C. The Bankruptcy Administrator is independent of the bankruptcy court and the district court. The Bankruptcy Administrator is responsible for establishing, maintaining and supervising the panel trustees and supervising the administration of cases and trustees. The court appoints interim trustees for chapter 7 cases off the panel and at the direction of the Bankruptcy Administrator. If the creditors do not elect or designate a trustee, the interim trustee continues to serve as trustee in the case. The bankruptcy judge appoints trustees in chapter 11, 12 and 13. A trustee that has been appointed can be removed from a specific case only for cause. A trustee has no right to future case appointments. The bankruptcy judge approves the budgets of their appointee standing chapter 13 trustees. The bankruptcy judge appoints committees in chapter 9 and chapter 11 cases. Because of the Bankruptcy Administrator's role in the chapter 7 trustee panel and case assignments and the infrequency of chapter 11 trustees, chapter 11 committees, chapter 9 cases, and chapter 12 cases, the most prominent distinctive of a Bankruptcy Administrator jurisdiction is that the bankruptcy judge appoints the chapter 13 trustee.

In 1986, well connected and motivated trustees and judges in the E.D.N.C. convinced North Carolina's senators to resist the U.S.T.P. expansion contained within the executive branch. The successful resistance was based in part on how those judges and trustees characterized how the E.D.N.C. functioned. Regardless of how accurate that assessment was at the time, it would be advisable for non-U.S.T.P. districts such as the E.D.N.C. to periodically evaluate if the system is still functioning in a way that renders the U.S.T.P. unnecessary. The analysis might include a review of how often trustees and the Bankruptcy Administrator appeal adverse rulings from the

[79] Federal Courts Improvements Act of 2000. Section 302(d)(3) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (28 U.S.C. 581) amended. Section 501. Extensions Relating to Bankruptcy Administrator Program.

[80] E.D.N.C. Bankruptcy Judge A. Thomas Small recalled meeting with Coble and M.D.N.C. Bankruptcy Judge William Stocks to lobby in favor of the exclusion for North Carolina and Alabama. Meeting with author in December 2018.

bankruptcy judges, the frequency of rulings unfavorable to trustees, a review of local forms, rules, procedures and practices and feedback from stakeholders.

Aside from a district opting-in to the U.S.T.P., policy makers could remove the power of appointing trustees and committees from bankruptcy judges and reassign that responsibility to the Bankruptcy Administrator. The Bankruptcy Administrator appointment option would continue to allow for localized authority contained within the judicial branch of government while avoiding the problems associated with a judge appointing a party to a case.

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