

MEMORANDUM

November 10, 1960

TO: The Chairman and Members of the Advisory Committee
on Bankruptcy Rules

FROM: Frank R. Kennedy, Reporter

SUBJECT: Conforming Rule Making in Bankruptcy to Other Kinds
of Rule Making in Federal Courts

The overriding purpose of the enabling legislation pursuant to which the Advisory Committee on Bankruptcy Rules was appointed is "to create a program for improving the rulemaking process in the Federal courts." H.R.Rep. No. 1670, 85th Cong., 2d Sess. 1 (1958). The purpose is to be accomplished by authorizing the Judicial Conference to engage in a continuous study of the operation and effect of the general rules of practice and procedure in those courts, including the General Orders and Official Forms in Bankruptcy.

In the delegation of authority to the Judicial Conference to recommend changes, there was no change in the responsibility of the Supreme Court for rule making. Accordingly, the Supreme Court retains the power to prescribe "All necessary rules, forms, and orders as to procedure" under the Bankruptcy Act, as provided in section 30 of the Act, 11 U.S.C. § 53. In most areas of its rule-making responsibility, however, the Supreme Court is required by pertinent legislation to report proposed rules to Congress. The rules so reported do not take effect unless and until Congress has had a fair opportunity to scrutinize and object to the proposals made by the Court. It is significant that Congress has never acted in any way to prevent or delay the scheduled

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effectiveness of any rules reported to it by the Supreme Court, though it has made a limited modification of rules of pleading for patent cases (28 U.S.C. § 282). Once rules reported to Congress by the Court have gone into effect at the close of the statutory period, all conflicting laws, including Congressional enactments, are superseded. No such effect attaches to General Orders and Forms in Bankruptcy promulgated pursuant to section 30 of the Bankruptcy Act. See *Meek v. Centre County Banking Co.*, 268 U.S. 426, 434 (1925); 2 Collier, Bankruptcy 1284-85 (14th ed. 1940).

This is the pattern of rule making as originally prescribed for the federal rules of civil procedure for the United States district courts uniting procedures in law and equity. 48 Stat. 1064 (1934). The pattern not only governs the making of changes in the rules of civil procedure (28 U.S.C. § 2072); it has been adapted for use in the making of rules for criminal proceedings in the district courts up to verdict (18 U.S.C. § 3771), the rules for admiralty and maritime cases (28 U.S.C. § 2073), and the rules for the review of decisions of the Tax Court (28 U.S.C. § 2074). Of the rules of practice and procedure to be studied by the Judicial Conference, only the following need not be referred to Congress ~~for prior approval~~: (1) rules, orders, and forms in bankruptcy (11 U.S.C. § 53); (2) rules of practice and procedure in criminal proceedings after verdict and on appeal (18 U.S.C. § 3772); and (3) rules for trial of cases before commissioners and appeals therefrom (18 U.S.C. § 3402).

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Notwithstanding the seeming care to preserve unimpaired the precise variations of pattern in rule making, it is not believed that the legislation which brings the Judicial Conference into the rule-making process embodies the result of any deliberation by Congress, or the sponsors of the legislation, as to the proper relation of the Supreme Court's role to that of Congress. This relation was collateral to the main thrust of the legislation. If the suggestion was made in the course of the legislative history that rule making in all the areas within the scope of the Judicial Conference's new responsibility should conform to a single pattern, it is likely that an awareness of the uncertain implications of the suggestion for bankruptcy and criminal practice was enough to discourage support. It is nonetheless believed that rule making in bankruptcy should conform to the pattern prescribed for rule making in the areas of civil procedure and admiralty. Although no reason for divergence is evident to this Reporter, no opinion is expressed here, of course, as to whether rule making for criminal proceedings ought likewise to conform.

It may well be queried whether it lies within our province to be making proposals going to the statutory allocation of rule-making responsibility among the Supreme Court and Congress. It may indeed be pointed out that the original designation of this Committee as the Advisory Committee on General Orders in Bankruptcy signifies its exclusive concern with the needed revisions of the orders, and perhaps the forms, promulgated by the Supreme Court pursuant to section 30 ~~of the~~

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of the Bankruptcy Act. While your reporter is not eager to enlarge the scope of the Committee's and his own responsibilities, it does not appear necessary or wise to view our assignment so narrowly. Judge Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, early suggested to the Chairman and the Reporter of this Committee that we might properly consider the advisability of recommending legislation that would conform rule making in bankruptcy to the more commonly prevailing pattern which requires submission of the Supreme Court's proposals to Congress. (He also suggested that it would be consistent with the spirit of the enabling legislation itself to conform the designation of our Committee to the simpler and shorter names of the other five Advisory Committees. This suggestion has met with favor on the part of the Chairman, the Executive Secretary, and the Advisor as well as the Reporter of the Committee. In any event, the four of us have found it convenient to refer to the Advisory Committee on Bankruptcy rules, whatever the legitimacy of the shortened appellation.) It is understood that the Chairman, the Executive Secretary, and the Advisor of this Committee concur with the Reporter in thinking that the proposal under consideration lies within the legitimate scope of the Committee. Reflection on the merits of the proposal has served to strengthen the original opinion of the Reporter that it is sound.

The grant of rule-making authority to the Supreme Court by section 30 of the Bankruptcy Act could hardly be phrased in terms more broad

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and general. Nevertheless, the scope of the Court's actual authority is restricted by the numerous procedural provisions of the Bankruptcy Act itself which constitute paramount law. The Court's bankruptcy rules and forms merely implement the Act or operate interstitially. It is not to be expected that Congress will enlarge the scope of the Supreme Court's rule-making authority in bankruptcy unless coupled with the kind of safeguard included in sections 2072, 2073, and 2074 of the Judicial Code, viz., the requirement that rules proposed by the Supreme Court shall be reported to Congress, there to await the lapse of a statutory period before going into effect. Pending the enactment of such a measure, changes in bankruptcy practice and procedure of any consequence must be effected by the laborious and expensive process of amendment of the Bankruptcy Act by Congress.

Reference to the bankruptcy legislation enacted by the last Congress is illustrative and illuminating. Public Law 86-49 repealed section 39a(9) of the Bankruptcy Act so as to eliminate a pointless ~~and~~ requirement respecting the transmission of papers by the referee to the clerk of the district court. Public Law 86-64 amended ^{ed} sections 22a, 331, and 631 of the Act to authorize automatic reference of bankruptcy, Chapter XI, and Chapter XIII cases by the clerk to the referee. Public Law 86-519 amended section 57 of the Act to eliminate the necessity for an oath to accompany a proof of claim. Public Law 86-662 amended section 39c of the Act to clarify the time allowable for seeking review of referees' orders. Public Law 86-631 amended sections 58e and 678 of the Act to reduce the notification requirements theretofore provided

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in the Act for the benefit of the Secretary of the Treasury. Comparable changes elsewhere within the domain of federal civil procedure would be initially proposed by the Supreme Court and would become effective after a lapse of the statutory period following their being reported to Congress.

It seems important, if not imperative, for an early conclusion to be reached as to the statutory disposition of the rule-making authority in bankruptcy cases. If conformity is to be sought and obtained, the scope of changes to be proposed thereafter will be materially affected, inasmuch as existing provisions in the Bankruptcy Act will no longer be a limiting factor. On the assumption that such conformity is at least a promising possibility, the National Bankruptcy Conference has deleted proposed revisions of sections 18, 68a, 133, and 136 from its Omnibus (Noncontroversial) Bill which is being readied for introduction in the next Congress. The Conference has instead submitted its proposed revisions of these sections to this Committee for consideration.

The desirability of vesting at least the initiative and primary responsibility for rule making in the judiciary is generally conceded today and is the premise of the legislation pursuant to which this Advisory Committee functions. See Moore, Address, 21 F.R.D. 125 (1958); Section of Judicial Administration of A.B.A., The Improvement of the Administration of Justice 10-11 (3d ed. 1952). The arguments against statutory regulation of practice and in favor of conferring broad judicial authority to make rules have been summarized recently by

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Joiner and Miller in Rules of Practice and Procedure: A Study of Judicial Rule Making, 55 Mich.L.Rev. 623 at 642-43 (1957). See also Clark, The Challenge of a New Federal Civil Procedure, 20 Corn.L.Q. 443, 457 (1935); Pound, The Rule-Making Power of the Courts, 12 A.B.A.J. 599, 602-03 (1926); Section of Judicial Administration of A.B.A., supra, at 11-12; Wright, Rule 56(e): A Case Study on the Need for Amending the Federal Rules, 69 Harv.L.Rev. 839, 857-62 (1958).

It is arguable that exclusive rule-making authority should be vested in the Supreme Court, i.e., free of any power in Congress to object or override by contradictory legislation. Cf. Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), cert.denied, 340 U.S. 877 (1950). It seems peculiarly inappropriate to argue for so drastic a change in the authority of the Court in the realm of bankruptcy practice and procedure. Doubts as to the wisdom of the absolutist position in the realm of state court rule making have been exposed by Kaplan and Greene in The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury, 65 Harv.L.Rev. 234 (1951); and by Levin and Amsterdam¹⁷ Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. of Pa.L.Rev. 1 (1958). The ultimate power of Congress over the practice and procedure of the federal courts has often been recognized and seldom, perhaps never seriously, challenged. Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1941). The question posed here is more political than legal, since it contemplates asking Congress to give the Court a carte blanche in an area where the role of Congress has been dominant. Although Judge Clark

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questioned features of the reporting requirement as formulated and applied to the effectuation of the Federal Rules of Civil Procedure and their amendments prior to 1950, (see his Code Pleading 44-45 (2d ed. 1947); The Influence of Federal Procedural Reform, 13 L.& Contemp.Prob. 144, 151-52 (1948)), he seems to have acquiesced in the version of the requirement as it has read since the amendment of 28 U.S.C. § 2072 in 1950. See Two Decades of the Federal Civil Rules, 58 Col.L.Rev. 435, 443 (1958). He applauds the Congressional indisposition to tinker with procedure notwithstanding its acknowledged power to do so and the opportunity afforded by the reporting requirement and the provision for postponement of the effectiveness of the rules, and he concurs in the consensus as to the admirable results that have been achieved under the existing arrangement for effectuating the federal civil rules. The model provided by sections 2072, 2073, and 2074 seems worthy of emulation in the making of rules for bankruptcy.

Conformity could be achieved pursuant to a new section 2074 of the Judicial Code reading as follows:

Rules for bankruptcy courts

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the courts of bankruptcy.

Such rules shall not abridge, enlarge, or modify any substantive right.

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Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

This language, it will be noted, follows closely that of 28 U.S.C. § 2072, substituting "courts of bankruptcy" in the first paragraph for "district courts of the United States in civil actions," and omitting the guaranty of the right of trial by jury in the second paragraph.

It may be wondered why the Reporter has not suggested the possibility of achieving the purpose of the proposed new section 2075 of the Judicial Code by the simpler technique of tacking on ~~appropriate~~ appropriate words to present section 2072 or, perhaps even more to the point, to present section 2073. There is considerable duplication of language in sections 2072, 2073, and 2074, and some of the discrepancies, where they occur, seem more likely to have been inadvertent than deliberate. (For instance, only section 2074 explicitly confers power on the Supreme Court to "amend," as well as to "prescribe," rules; only section 2073

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omits the word "enlarge" in the second paragraph in the passage putting "substantive right" beyond the scope of the rules.) It may well be that the Standing Committee on Rules of Practice and Procedure will wish to consider this Committee's recommendation as part and parcel of a larger proposal affecting areas within the cognizance of other advisory committees. Judge Clark on that Committee has previously pointed out the anomaly that exists with respect to the Rules of Criminal Procedure, some of which need not be reported to Congress and some of which do have to be so reported before they become effective. See his Code Pleading 45 n. 130 (2d ed. 1947). It has seemed unnecessary and premature at ^{for this Committee} this stage to entertain further thoughts about the possibility of tacking its proposal on or merging it into some other statute.

"Courts of bankruptcy" by definition in section 1(10) of the Bankruptcy Act includes the United States district courts but it also includes district courts of the Territories and possessions to which the Bankruptcy Act applies. Ascertainment of the courts actually embraced requires reference to a variety of statutes. See 1 Collier, Bankruptcy para. 1.10 (14th ed. rev. 1956).

Note should be taken here of Professor Moore's call for a "welding together of the admiralty and bankruptcy jurisdictions to the already welded law and equity jurisdictions, and one civil procedure for the combined jurisdictions." 5 Moore, Federal Practice 68-69 (2d ed. 1951). This proposal has implications for this Committee as well as the Advisory Committee on Admiralty Rules. The unification ^{of} suits in admiralty with those at law and in equity into one form of civil action was urged by

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Chief Justice Taft nearly forty years ago. Three Needed Steps of Progress, 8 A.B.A.J. 34, 35 (1922). Professor Brainerd Currie, Reporter for the Admiralty Rules Committee, has prepared a ^{persuasive} Memorandum on the Need for and the Desirability of Unification of the Practice in Civil and Admiralty Cases Under a Single Set of Rules of Procedure.

As there are difficulties to be overcome in the unification of admiralty with law and equity, so there are difficulties, entirely different, in undertaking to achieve an integration of bankruptcy practice into general civil practice. The most obvious differentiating factor in the picture is that rules of bankruptcy practice must take into account the fact that most bankruptcy proceedings are before a referee, whose jurisdiction is limited to bankruptcy cases. By definition the word "court," wherever used in the Bankruptcy Act, includes a referee as well as a judge. It does not seem permissible to argue that the term "court of bankruptcy" does not embrace a referee. While it may be entirely possible to draft a single set of rules of civil practice and procedure for federal district courts that ^{are made binding on} ~~bind~~ the referee as much as ~~they do~~ ^{acting as a bankruptcy court,} the judge, it is hardly possible to integrate the bankruptcy court and the district court.

When the court of bankruptcy is a referee, it is necessarily a legislative as distinguished from a constitutional court. That is, it is a court created by Congress pursuant to Article III. Only on this assumption is it possible for Congress to provide for six-year terms for referees, as it does in section 34 of the Bankruptcy Act, rather than the tenure "during good Behaviour" assured to judges of Article III courts.

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Only on that basis was the Referees' Salary Act of 1946 free of constitutional doubt. This classification of the court of bankruptcy when conducted by the referee as a legislative court has additional consequences of conceivable relevance in this Committee's deliberations. For instance, since constitutional courts cannot be invested with administrative (or legislative) functions, it may be argued that any rule or statute that purports to authorize a court of bankruptcy to dispense with the appointment of a trustee and itself to administer an estate in bankruptcy by setting apart exemptions, conducting sales, etc. would transcend constitutional limitations. Moreover, exercises of administrative authority are nonreviewable by constitutional courts, including the district courts and courts of appeals of the United States. Other limitations on constitutional courts--their disability to render advisory opinions and the immunity of their judgments from legislative or executive revision--are probably of no importance to this discussion.

It needs to be acknowledged here that there are courts that are apparently in the convenient category of hybrid courts, i.e., courts that are constitutional for some purposes and legislative for others. See 1 Moore, Federal Practice para. 0.4/47 (2d ed. 1959). It may be anticipated that the Supreme Court will not be hospitable to efforts on the part of its advisers to enlarge this category. Cf. National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 609, 626 (J. Rutledge, concurring), 639-40 (C. J. Vinson, dissenting), 652 (J. Frankfurter, dissenting)(1949). It is not assumed that this Committee is interested in pursuing the

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the possibility of either eliminating referees in bankruptcy from the federal judiciary or establishing for them the statute of judges of constitutional courts.

Although it seems to be an incontestable conclusion that the referee presides over a legislative court when sitting as a court of bankruptcy, a judge of a district court of the United States presides over a constitutional court when sitting as a court of bankruptcy or when reviewing a determination of a referee in bankruptcy. While *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1956), is not susceptible to wholly satisfactory reconciliation, it is fair to say that the district courts of the United States located in the states always sit as constitutional courts and cannot be invested with jurisdiction except pursuant to Article III. 1 Moore, *Federal Practice* 54, 61 (2d ed. 1959). Accordingly it seems necessary to bear in mind that the identity of the court of bankruptcy when conducted by the referee must remain distinct from that of the court of bankruptcy when conducted by the judge: A district court of the United States does not mean or include a referee sitting as a court of bankruptcy, and rules and forms of practice and procedure cannot be drafted which treat the referee's court as a district court.

As has been intimated this conclusion does not necessarily militate against the possibility of unification of the rules of practice and procedure for the courts of bankruptcy with rules applicable in the district courts when proceeding in law, equity, or admiralty. By virtue of General Order 37, the Federal Rules of Civil Procedure already apply in

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bankruptcy proceedings to the extent they are not inconsistent with the Bankruptcy Act or the General Orders and "as nearly as [they] may be" applied. See also General Order 36, making the Rules applicable to appeals in bankruptcy to the extent the Bankruptcy Act permits. It seems clear that the scope of application can be enlarged and achievement of the Congressional objectives spelled out in the 1958 amendment of 28 U.S.C. § 331 facilitated by enactment of the suggested new section 2075 of the Judicial Code.

A problem requiring comment here because of its close relation to what has been said and because it is a source of some confusion involves the bifurcation of bankruptcy jurisdiction and proceedings into those that are summary and those that are plenary. Generally speaking it may be said that a court of bankruptcy has no jurisdiction of plenary proceedings; that is, its jurisdiction is summary when it exists at all.

MacLachlan, *Bankruptcy* 204 (1956).)

Such a statement requires explanation of the references to plenary proceedings in a court of bankruptcy in sections 60b, 67e, and 70e of the Bankruptcy Act. As Professor MacLachlan has pointed out in his treatise (at p. 204), these are "inartistic references." When plenary proceedings are necessary under these and most other sections of the Bankruptcy Act, the federal court having jurisdiction is not the bankruptcy court but the district court of the United States. (Cf. 5 Moore, *Federal Practice* 68 n.27, 222 (2d ed. 1951).) Accordingly, the referee in bankruptcy does not sit in such proceedings, and the Federal Rules of Civil Procedure apply ex proprio vigore, not by reason of anything in General Order 37.

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The General Orders and Forms in Bankruptcy do not apply at all in such plenary proceedings. MacLachlan, Bankruptcy 213, 248 (1956). Some qualification of the statement that a bankruptcy court has no plenary jurisdiction may be required by virtue of the decision in *Austrian v. Williams*, 331 U.S. 642 (1947), where the Court held that "Congress by the elimination of § 23 [In § 102] to establish the jurisdiction of federal courts to hear plenary suits brought by a [Chapter K] reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking." The rationale rested this grant of plenary jurisdiction on section 2a of the Bankruptcy Act, which explicitly confers the jurisdiction it defines on "courts of bankruptcy." Plenary actions instituted by the trustee in bankruptcy in federal courts should nonetheless be governed by the Federal Rules of Civil Procedure, just as actions instituted in federal court under sections 50b, 67e, and 70e are so governed.

A word should be said about the suggested omission of any reservation regarding jury trial in the proposed new statute comparable to the guaranty now appearing in the second paragraph of 28 U.S.C. § 2072. There is no "right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution" in bankruptcy proceedings. 5 Moore, Federal Practice 215 (2d ed. 1951); 2 Collier, Bankruptcy 224-25 (14th ed. 1940). Accordingly it seems unnecessary and inappropriate to include any such reference to jury trial in the proposed new section. There is, of course, a right to jury trial in bankruptcy proceedings as to particular

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issues by express grant of Congress in section 19 of the Bankruptcy Act. It seems unnecessary and unwise to refer to the statutory right to jury trial in bankruptcy proceedings in the proposed 28 U.S.C. § 207⁵. Congress has provided for jury trial in numerous instances where there is no constitutional right. Rule 38(a) of the Federal Rules of Civil Procedure in general preserves pre-existing rights to jury trial granted by federal statute as well as by the Seventh Amendment to the Constitution. The rule-making power granted the Supreme Court by section 2072 of the Judicial Code empowers the Court to modify or even to withdraw a right to jury trial previously given by Congress, subject, of course, to the acknowledged Congressional power to disapprove and override. The provisions of Rule 71A of the Federal Rules of Civil Procedure dealing with jury trial supersede the right to jury trial in condemnation cases previously predicated on Congressional enactments. 5 Moore, Federal Practice 255 (2d ed. 1951).

It is believed that the Court's power with respect to jury trials in bankruptcy proceedings should have the same reach as it now has with respect to jury trials in civil actions generally. It may be noted that reference to jury trial has been similarly omitted in the statute conferring rule-making authority for admiralty cases, even though Congress has provided for jury trial in at least one instance of admiralty jurisdiction. 5 Moore, Federal Practice para. 38.35 (2d ed. 1951).

It is a fair surmise that substantial progress in the direction of the goal of unification of admiralty with law and equity practice in the federal courts will be made as the result of the work of the

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Advisory Committee on Admiralty Rules. Is a parallel development toward the integration of bankruptcy practice also a desideratum? Unification of practice would appear prima facie to serve the statutory purpose of promoting "simplicity of procedure" and perhaps also contribute to "fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." (These are the objectives made explicit in the Congressional enactment authorizing the Judicial Conference to conduct the continuous study of rules of practice and procedure, 72 Stat. 356 (1958), amending 28 U.S.C. § 331.) Whatever the advantages of unification, there will remain a need for rules and forms of practice and procedure that have no place except in bankruptcy. Whether this special need is warrant for a separate set of Bankruptcy Rules and Forms or whether the needs of bankruptcy may be adequately served by supplementing the Federal Rules and Forms by appropriate words, clauses, subdivisions, and particular rules and forms does not appear to require an answer at this stage.

If the proposal here made to conform rule making in bankruptcy to that prescribed for civil and admiralty rules meets approval at all levels and should become duly enacted law, the dimensions of the assignment to this Committee will be considerably enlarged. A number of changes in the Bankruptcy Act will be necessary. Presumably section 30 should be repealed at the same time as the new authority is granted. Likewise, the seventh sentence of section 77(a), which grants rule-making authority to the Supreme Court to aid courts in exercising jurisdiction under that section, should probably be deleted. A careful study of

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These materials will be useful background for a study of the needed changes in the Bankruptcy Act. As earlier noted, the National Bankruptcy Conference has indicated its feeling that sections 18, 68, 133, and 136 are procedural and properly within the scope of the rule-making authority of the Supreme Court if granted in the terms here proposed. A preliminary survey of the Bankruptcy Act suggests that the following additional sections would probably be superseded by rules made by the Court: 19b, 20, 21a-f and 1-k, 22, 25, 26, 28, 31, 117, 119, 120, 141, 142, 143, 144, 313(3), 315, 331, 413(3), 415, 431, 613(2), 615, 631.

the domain embraced by the boundaries of "practice and procedure" in bankruptcy will be required. There is a considerable literature concerned with this subject as it bears on rule making in general, i.e., without particular reference to bankruptcy. See, e.g., Joiner & Miller, Rules of Practice and Procedure: A Study of Judicial Rule-making, 55 Mich. L.Rev. 623, 644-63 (1957); Levin & Amsterdam, Legislative Control over Judicial Rule-making: A Problem in Constitutional Revision, 107 U.of Pa.L.Rev. 1, 14-24 (1959); Millians, The Source of Authority for Rules of Court Affecting Procedure, 22 Wash. U.L.Q. 459, 462-64 (1937).