ACCEPTANCE REMARKS OF THE HONORABLE W. HOMER DRAKE, JR.

My good friend, Judge David Kennedy, is entirely too generous in his remarks, but David, I am deeply appreciative of those warm and sincere words. All of you here tonight should know, if you do not already, that there is no more outstanding or well-respected Bankruptcy Judge in the country than Judge Kennedy. I could stand here a long time relating to you the reasons why this is true, as he has rendered so much valuable service to our profession in so many areas, and to the betterment of the Bankruptcy system, in particular. However, I know that our gathering here tonight is not designed to be a mutual admiration society, so I'll save that for another time.

What an honor it is for me to be selected by Emory University *Bankruptcy Developments Journal* to be this year's recipient of the Journal's Lifetime Achievement Award for Distinguished Service! When I think of those outstanding honorees who have been chosen previously, it makes me feel most humble, if not inadequate. These previous honorees are truly outstanding leaders in our profession, such as my friend and former colleague, Judge Bill Norton, whose commitment to academic endeavors is recognized as having contributed greatly to improving Bankruptcy law practice through his annual seminars, as well as being the moving force in the creation of such organizations of the American Bankruptcy Institute and the American College of Bankruptcy, in addition to his many publications; such as the NORTON BANKRUPTCY LAW ADVISER and the multi-volume NORTON BANKRUPTCY LAW AND PRACTICE published by Thomas-West; also, Professor Frank Kennedy, who was a true champion of Bankruptcy reform and who, though his teaching skills at the University of Michigan and New York University, motivated many eager and talented young law students to practice Bankruptcy Law; Kenneth Klee, an outstanding law professor in his own right, who was such a valuable resource and influential factor in the passage of the Bankruptcy Reform Act of 1978; Harvey Miller and Gerald Smith, two of the country's leading practitioners and lecturers; Judges David Coar and Conrad Duberstein, two of our finest judges; and last year, the *Journal* acted wisely again in presenting this award to Senator Dennis DeConcini, who was so instrumental in guiding through the Senate meaningful bankruptcy reform. These previous

honorees have all been highly deserving of such recognition, and it makes my inclusion in such a group even more meaningful and special.

Let me tell you that I am particularly pleased that my dear wife, Ruth, is here tonight to enjoy this occasion with me, as well as our sons, Walter and Taylor, and their wives, Tracie and Lori.

I want you to know that I have always had a great deal of admiration for Emory University. It is certainly among the very best institutions of higher learning in our country. Very few people are aware of the fact that I began my study of law at Emory Law School in the Spring of 1953, but I was able to spend only one quarter at Emory, as the ongoing war in Korea and the availability of the ROTC program at Mercer led to my returning to Mercer to complete my legal education. Professors such as Bob Hall, Ben Johnson, and Tom Christopher were all at Emory Law School in the Spring quarter of 1953, and many of you know what outstanding teachers they were.

While at Emory, I recall very vividly living in an upstairs room in a residence on South Oxford Road just across from the campus and within easy walking distance of the law school, which was then located on the quadrangle across from the Candler School of Theology. I don't know if Horton's Drug Store is still there on South Oxford, but I spent a lot of time there, as it was one of the major eating favorites of Emory students.

My contact with Emory continued after I had served on the Bankruptcy Bench for a few years. In the early 1970s, Ray Patterson, who was the Dean of the Emory Law School at that time, called me and asked if I would consider teaching a class in Bankruptcy Law at the school. I knew Ray well, for he had been my classmate at Mercer Law School. I accepted Ray's invitation and taught the Bankruptcy course to students and seminar courses to practicing members of the Bar for about a two-year period. Teaching these classes, which occurred mostly at night and at 8:00 o'clock in the morning, was, of course, in addition to my judicial duties; and this was exacerbated by the fact that Emory was some 45 miles from my home in Newnan, but I enjoyed every minute of the time I spent teaching at Emory Law School.

Intense interest in Bankruptcy Law began to take hold at about this time at Emory in the early 1970s, leading a few years later to the creation of this very *Journal*, the *Bankruptcy Developments Journal*. Bankruptcy law was in the process of undergoing considerable change at that time, as was the status of Bankruptcy Courts, so a number of students, professors, judges, and

practitioners here in Atlanta wanted to make Emory a real focal point of academic interest in Bankruptcy Law. This interest eventually led to the creation of this outstanding *Journal*, edited by Emory law students, which was designed to feature in every issue, articles and thoughts from some of the country's leading thinkers in this area of law. I am proud of the fact that the Southeastern Bankruptcy Law Institute played a major role in helping to establish the *Developments Journal* by co-sponsoring it with the Law School and in contributing large sums of money in the early years to assist in publication costs; and I sincerely believe that the time has now arrived for the SBLI, the DEVELOPMENTS JOURNAL, and Emory Law School to renew and strengthen the ties that bound us together during those years. Today, this *Journal* is as well-thought of by Bankruptcy Law experts as any in the country. I am extremely proud of you students who have evidenced such an interest in Bankruptcy Law and who have, year after year, since 1984, published such an outstanding *Journal*.

To some degree, all of the previous recipients of this award have mentioned in their remarks the struggles that took place in the 1970s—focusing on the negotiations, the compromises, the debates, the testimonies before Congressional committees—that finally resulted in the passage of the Bankruptcy Reform Act of 1978. Since that time, we have had several modifying statutes passed—the last being the BAPCPA in 2005—but for the most part, most of the provisions of the 1978 Reform Act, are still in place. Significantly, among those provisions, is the elevation of the Bankruptcy Court itself from a minor, not very effective tribunal, to what is today—a very important court in the Federal Judiciary. There is still room for improvement, but on balance, the Court is much strengthened and is now in a much better posture to perform the function for which it was established.

Looking back briefly to the 1970s, each person who played a role or had some part in the efforts to secure passage and enactment of meaningful and balanced legislation, designed to improve the practice of Bankruptcy Law and to upgrade the status of Bankruptcy Courts, looks at those years from one's own perspective. Your previous honorees have described, from their individual points of view, the long process and the lengthy negotiations culminating finally in the signing by President Carter of the Bankruptcy Reform Act of 1978. My own participation in that reform effort was governed and controlled by my interest in making the Court itself an integral part of the Federal Judiciary, with enough authority being vested in that Court to accomplish its mission.

Earlier, in 1970, a Bankruptcy Commission had been appointed to study all the aspects of upgrading the system, and to propose and write a new Bankruptcy Act. Inexplicably, no Bankruptcy Judges were appointed to the Commission, principally because of the determined opposition of the Judicial Conference of the United States and its Committee on the Administration of the Bankruptcy System. Even so, and notwithstanding our exclusion from the Commission, many of us who were on the Bankruptcy Bench then and who were active in our Conference, began to work harder than ever to put forward what we considered to be the improvements that were so badly needed in the Bankruptcy System. Many Bankruptcy Judges testified time and again at various hearings, and in the process of doing so, quickly learned that the Commission was going to propose a structure which would change drastically the role of the judge and place almost all authority in the hands of what they called an "Administrator," who would be appointed by the President. This Administrator would not only be responsible for administrative matters, but would also perform almost all judicial functions that heretofore had been the exclusive province of the Bankruptcy Courts. As you might imagine, many of us became extremely alarmed and concerned by such a proposal, which would have created yet another new federal bureaucracy that would have undermined the availability of debtors and creditors to a fair and impartial judicial forum.

Consequently, the National Conference of Bankruptcy Judges created a Study Committee to review the recommendations of the Bankruptcy Commission and to make our own recommendations regarding what the Commission was proposing. This Study Committee, while agreeing in many respects with the general contents of the Commission Bill, differed with the Commission regarding several important provisions of their legislation, with the major disagreements coming over Court structure and Court control. So, in view of the number of important differences, the Conference decided to draft our own Bill.

It might interest you to know that this Bankruptcy Commission during the three years of its deliberations had access to substantial public funds and had a paid staff of 27. Records indicate that the Commission held 21 working meetings lasting some 44 days. By way of contrast, the Study Committee of the National Conference of Bankruptcy Judges held 13 working meetings lasting some 40 days over about a three-year period, resulting in a carefully drafted Bill of our own, generally referred to as the Judges' Bill, written in final form by one of our finest and brightest members, Judge Joe Lee of Kentucky. I want you to understand that the Conference's meager treasury

was the sole source of financial support, with almost all efforts of the judges being of a voluntary nature at our own individual expense. Truly this was a monumental, unprecedented undertaking, but it resulted in a workmanlike, carefully considered proposal for the modernization and improvement of the Bankruptcy System. And I might say at this point that were it not for the herculean efforts of the National Conference of Bankruptcy Judges, the statute proposed by the Commission, and that would have been passed by Congress, would have emasculated the public's access to the judicial process and, in effect, turned the Bankruptcy System into an administrative agency housed in the Executive Branch.

We could be here for a long time discussing these two Bills and the events that preceded the final passage of the Bankruptcy Reform Act of 1978. Suffice it to say that the Congress eventually rejected the Administrator concept, which, as I have said, was an Administrative Agency approach to handling bankruptcy cases, and the system remained housed, rightly so, in the Judicial branch of government. It all came down to a question of public access to the judicial process. The subsequent creation of the U.S. Trustee system is viewed by some as a resurrection of the Administrator concept, but the U.S. Trustee is responsible today for administrative matters only; and that jurisdiction does not extend to judicial matters, which are left firmly in control of the Bankruptcy Judge, as they should be.

Now, in conclusion, a few words as to what I consider to be lacking still in our Bankruptcy system—even after the enactment of several additional pieces of legislation after the passage of the Bankruptcy Reform Act of 1978.

The over-riding disappointment, in my view, of the much-needed upgrading of the Bankruptcy system is the continued failure of Congress to create an Article III Bankruptcy Court. That failure has spawned a convoluted, piecemeal judicial apparatus that unnecessarily involves two federal trial courts in order to resolve the many disputes that arise in the course of administering a bankruptcy case. As you know, the Reform Act of 1978 did create a separate court, but it gave it Article I status. This caused a constitutional problem, culminating in the Supreme Court's Marathon Pipe Line decision, which stated, in effect, that the authority vested by Congress in this new Court could only be exercised by a constitutional court, an Article III Court.

Congress tried again, in the early 1980s after the Supreme Court's Marathon decision, and even though a major effort had been mounted by judges, professors, and practitioners to at last give Article III status to the

Court in order to meet the Supreme Court's concerns, Congress for the second time failed to pass legislation creating Article III Bankruptcy Courts, finally settling on our current bifurcated system that continues to cause confusion today.

For example, it continues to involve two courts at the trial level; we have core vs. non-core; we have a far from clear guide as to what extent sanctions can be imposed by the Bankruptcy Court, to say nothing of one trial court hearing an appeal from another trial Court. Bankruptcy appellate panels are in place in some circuits, not in others, and without a BAP, a sub-circuit body of law simply cannot be developed.

Many outstanding, well-known experts in our Bankruptcy field—Judge Bill Norton, Judge Conrad Cyr, and Judge Joe Lee, to name a few—have written and lectured extensively over the years about this vexing problem. They point out in clear fashion that the extent of the Bankruptcy Court's jurisdiction to administer property in a bankruptcy case and to adjudicate the rights of persons appearing before the Court has been a complex and confusing matter for judges and attorneys for a very long time, and they remind us that our current system still retains many of these unnecessary roadblocks.

We could discuss at some length tonight these and other deficiencies, but suffice it to say that in leaving Bankruptcy Judges without Article III authority, the efficient administration of the estate continues to be hindered and is contrary to the interests of our people. One day, Congress may once again address this problem, and it is my hope that when this next opportunity comes, our Senators and Representatives will at last give us a "Constitutional" Court that can deal with all the issues which may arise in or be related to a bankruptcy case.

Please know that it is a pleasure for me to be with you tonight, and it is indeed a high honor to receive the *Journal's* Annual Distinguished Service Award.