

Who Are Bankruptcy Judges and How Did They Become Federal Judges?

by Craig A. Gargotta



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Each judicial district in the United States and Puerto Rico has at least one bankruptcy judge. Bankruptcy judges are a “unit” of the district court.¹ Bankruptcy judges are judicial officers of the U.S. district court under Article III of the U.S. Constitution.² Bankruptcy judges serve as adjuncts of the district court in bankruptcy cases.

Bankruptcy judges are Article I judges whose offices are created under U.S. Const. art. 1, § 8, which authorizes Congress to constitute tribunals inferior to the Supreme Court. Bankruptcy courts are referred to as “legislative courts” as opposed to Article III courts that derive their powers from Article III of the Constitution.

Circuit courts appoint bankruptcy judges. The selection process is merit-based and differs from each circuit. For example, the Fifth Circuit generally uses a merit panel consisting of a Fifth Circuit judge, bankruptcy attorney, and district court judge (sometimes the chief judge for the district that is filling a bankruptcy judge position). Applicants fill out a form that requires them to attest to their competency in bankruptcy, notable cases, bar activities, and community service. The attorney member of the panel collects the applications and the panel assesses the merits of each applicant. The list of applicants is reduced to a manageable number of interviews. After the interviews are concluded, the panel ranks the applicants and usually selects the top two candidates.

The circuit judge member of the merit panel then presents the Judicial Council for the Fifth Circuit with the chosen top candidates. The judicial council consists of Fifth Circuit judges and a district court judge from each judicial district in the Fifth Circuit. The merits of the candidates are discussed, the circuit judge member of the merit panel makes a recommendation to the judicial council, and the members of the council vote on which candidate should be appointed.

After the candidate is notified that he or she has been selected, the candidate must then go through a detailed background check and vetting with judges and attorneys who know the candidate. The process can take up to three or four months to complete,

and it is not uncommon for the candidate to provide information dating back to high school days with an emphasis on not only competency, but also whether any past “indiscretions” preclude the candidate from serving and if the candidate has the requisite temperament to serve.

Once selected, bankruptcy judges serve a term of 14 years.³ There are differences between Article III judges and bankruptcy judges and their service on the bench. To begin with, Article III judges have lifetime tenure and their compensation cannot be diminished. More importantly, the president appoints Article III judges and the Senate confirms them. Bankruptcy judges, however, serve for 14 years and can be removed from office for incompetence, misconduct, neglect of duty, or physical or mental disability.⁴ Moreover, a bankruptcy judge’s salary is determined under § 225 of the Federal Salary Act of 1967.⁵ Unlike district court judges, bankruptcy judges do not enjoy lifetime tenure for good behavior or salary protection.⁶

District courts have original jurisdiction over all bankruptcy cases and adversary proceedings. District courts may “refer” bankruptcy cases to bankruptcy judges and generally do so through “orders of reference.” As such, bankruptcy judges are considered an arm of the district court and can only hear cases that a district court refers to them. Stated differently, bankruptcy courts have no independent jurisdiction to consider bankruptcy matters other than what flows from district court. Bankruptcy judges may rely on statutory authority from Title 28 of the United States Code, the Bankruptcy Code (Title 11 of the United States Code), the Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and any local rules the court may adopt in rendering their decisions. Like district court judges, bankruptcy judges may formulate federal common law. Bankruptcy courts are known as courts of equity, although some commentators believe that a bankruptcy judge’s equitable powers are limited to those conferred by a statute.

Bankruptcy judges today enjoy a great deal of responsibility and respect as judicial colleagues. Bankruptcy judges are recognized for their expertise

in bankruptcy and Article III judges look to the bankruptcy courts to apply the Bankruptcy Code competently and with appropriate discretion. That said, bankruptcy judges did not always enjoy their status as a respected colleague and a bankruptcy judge's role as a judicial officer took several versions of the Bankruptcy Code before obtaining the status that bankruptcy judges have today.

The first national bankruptcy act was passed in 1800, repealed in 1803, and did not give any equitable authority to district courts in matters in bankruptcy.⁷ Thereafter, the Bankruptcy Act of 1841, which lasted 18 months, gave the district court the power to exercise its bankruptcy jurisdiction as summary proceedings in equity. At this time, there were no bankruptcy judges. Nonetheless, a bankruptcy practice could be profitable. Abraham Lincoln handled 77 bankruptcy cases under the Bankruptcy Act of 1841, and his firm was one of the largest bankruptcy firms in Illinois at the time.⁸

Thereafter, under the Bankruptcy Act of 1867, district courts were constituted as courts of bankruptcy and had original jurisdiction in all bankruptcy matters.⁹ The district court could appoint "registers in bankruptcy" to assist the district court in its duties. These registers in bankruptcy are the predecessors to bankruptcy referees, which are the predecessors to today's bankruptcy judges.

Under the Bankruptcy Act of 1898, the designation of "registers in bankruptcy" changed to "referees." Further, the district courts appointed bankruptcy referees to:

consider all bankruptcy petitions and adjudicate persons bankrupt or dismiss petitions, exercise the powers vested in the courts of bankruptcy for administering oaths, examine persons as witnesses and require production of documents in proceedings before them, exercise the district judge's power to take possession and release the bankrupt's property due to the judge's absence, sickness or disability, and to perform the duties: (1) conferred on the district courts by the 1898 act, and (2) prescribed by the rules or orders of the district court, except as otherwise provided in the 1898 act.¹⁰

As such, a bankruptcy referee had all the powers of a district judge under the 1898 act regarding bankruptcy matters except for those powers expressly reserved to the district court. Notwithstanding these "expansive" powers, bankruptcy referees complained that their salaries were low, they had no law clerks or staff to assist them in administering their cases, and a referee's powers were at all times subject to district judge review.¹¹

By the 1970s it became apparent that the 1898 act was unworkable for a modern economy. Congress needed to modernize the 1898 act to reflect the emerging economy of the 20th century. Further, a bankruptcy judge's¹² jurisdiction needed revision to deal with modern insolvency issues. Additionally, a bankruptcy judge's administrative functions hampered the judge in performing his or her judicial duties. Congress in 1970 commissioned a review commission to study the 1898 act, make recommendations for a new Bankruptcy Code, and evaluate what level of jurisdiction Congress could allocate to bankruptcy judges.

The Bankruptcy Reform Act of 1978, which created the Bankruptcy Code, provided that bankruptcy judges no longer had administrative duties over cases because these duties were transferred to panel trustees, which included presiding over § 341 meeting of creditors. The new code allowed bankruptcy judges to hire law clerks

and staff. In addition, the new code elevated both the status and salary of a bankruptcy judge. The timing of the new code was fortuitous because the economic collapse in the late 1970s and early 1980s demonstrated the need to have judges dedicated to dealing with economic fallout. Shortly thereafter, the Supreme Court declared jurisdictional provisions of the Bankruptcy Code unconstitutional¹³ regarding a bankruptcy court's jurisdiction to hear cases.

As a result, Congress passed the Bankruptcy Amendment and Federal Judgeship Act of 1984 to redefine bankruptcy court jurisdiction. Under the 1984 act, which still governs bankruptcy jurisdiction today, original bankruptcy jurisdiction over cases is initially conferred on the district courts.¹⁴ Under 28 U.S.C. § 157(a) each district court may issue an "order of reference" in which the district court may refer "any and all cases" or proceedings to the bankruptcy court. Under 28 U.S.C. §§ 1334 and 157, the bankruptcy court may hear and determine "core" matters, as defined in § 157(b), and render a final order or judgment. "Noncore" matters, as defined under § 157(c)(1), permit the bankruptcy court to hear the matter but require the bankruptcy court to issue findings of fact and conclusions of law and to submit them to the district court for *de novo* review.¹⁵ The district court and bankruptcy courts operate today under this current judicial system. Under this system, the breadth and application of bankruptcy cases and issue has increased significantly, thereby increasing the visibility and prestige of the bankruptcy court. ☉

Endnotes

¹28 U.S.C. § 151.

²28 U.S.C. § 152(a)(1).

³28 U.S.C. § 152(a)(1).

⁴28 U.S.C. § 152(e).

⁵2 U.S.C. §§ 351-64.

⁶*Northern Pipeline Const. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982).

⁷Alan M. Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not A Court of Equity*, 79 AM. BANKR. L.J. 1, 13 (Winter 2005) (citation omitted).

⁸CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY 19-20* (1935).

⁹Ahart, *supra* note 7, at 16 (citation omitted).

¹⁰*Id.* at 20 (internal citations omitted).

¹¹ALFRED W. BAYS, *THE LAW OF BANKRUPTCY* 38-9 (1917).

¹²On Oct. 1, 1973, the Supreme Court renamed "bankruptcy referees" as "U.S. bankruptcy judges" pursuant to the Bankruptcy Rules under the Rules Enabling Act, 28 U.S.C. § 2705.

¹³*Northern Pipeline*, 458 U.S. 50, at 87 (finding that the jurisdictional provisions of the Bankruptcy Code were unconstitutional because a bankruptcy judge could not adjudicate matters reserved for Article III courts).

¹⁴28 U.S.C. § 1334(a).

¹⁵The Supreme Court has determined that a bankruptcy court has the constitutional authority to issue a final order or judgment if the parties expressly or impliedly consent to the court's authority. *Wellness Inter. Network Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015).