By Matthew K. Stiles[1]

BAP to the Future: Multi-Circuit BAPs, Judicial Capacity and Precedent

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Depending on the circuit, appeals from bankruptcy court final judgments, orders and decrees go to either the respective district court[2] or the corresponding circuit's bankruptcy appellate panel (BAP).[3] Of the 12 regional circuits, only five currently have a BAP: the First, Sixth, Eighth, Ninth and Tenth Circuits.

BAP judges are appointed by the court of appeals from among active bankruptcy judges within that circuit to sit in three-judge panels to hear and determine bankruptcy appeals.[4] The bankruptcy appeal statute mandates the BAP's establishment unless the circuit judicial council finds that "there are insufficient judicial resources available in the circuit" or "establishment of such service would result in undue delay or increased cost to parties in cases under title 11."[5] Even if a BAP is established in a circuit, each district court within the circuit must itself authorize appeals from its district to go to the BAP.[6]

Based on the statutory text — "[t]he judicial council of a circuit *shall* establish a bankruptcy appellate panel"[7] — BAPs seemingly *should* be the default.[8] As previously noted, however, more than half of the circuits do not have one. Six have *never* had one.[9]

This last statement is unfair in one way: The D.C. Circuit consists of only the District of the District of Columbia. A BAP panel cannot have a bankruptcy judge hear an appeal originating from that judge's district.[10] Even if it could, the District of the District of Columbia has one authorized bankruptcy judge, which is not enough to fill a panel.[11]

Section 158(b)(4) states: "If authorized by the Judicial Conference of the United States, the judicial councils of [two] or more circuits may establish a joint [BAP] comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section."[12] This subsection appears to have only ever been discussed by a court *once* — and even then only in passing[13] — which makes sense in part because there has never been a multi-circuit BAP.

Multi-circuit BAPs would help reduce the caseloads for district judges (perhaps moreso than just more individual circuit BAPs), which might mitigate the need for some of the 69 new judgeships that the Judicial Conference is currently proposing.[14] Additionally, multi-circuit BAPs could potentially lead to a more coherent body of precedent, leading to more uniformity in bankruptcy law.

Judicial Capacity

Under the U.S. Constitution, "[t]he judicial Power ... shall be vested in one supreme Court, and in such inferior Courts as the Congress may ... ordain and establish."[15] Right now, the Judicial Conference is recommending that Congress use this power to create 69 new district court judgeships, citing "burgeoning caseloads" leading to "significant case delays."[16] Last year, Congress approved a bill to add new judgeships, but it was vetoed by President Joe Biden.[17] Specifically, the Judicial Conference noted that, in 20 of the 25 district courts where it is recommending more judges, weighted case filings were above 500 per judgeship.[18] In other words, many district court judges have too much work.

Congress also has the power to "constitute Tribunals inferior to the supreme Court,"[19] which,

1 The views expressed in this article are the author's alone and not necessarily those of the U.S. Bankruptcy Court for the District of Connecticut.
2 *See* 28 U.S.C. § 158(a).
3 28 U.S.C. § 158(b). Some bankruptcy appeals can also go straight to the court of appeals. 28 U.S.C. § 158(d)(2).
4 28 U.S.C. § 158(b)(1), (3), (5).
5 28 U.S.C. § 158(b)(1). The circumstances under which the circuit judicial council can or must address such circumstances are addressed in § 158(b)(2).
6 28 U.S.C. § 158(b)(6). For example, although there is a Sixth Circuit BAP, the District Courts for the Eastern District of Michigan and Eastern District of Tennessee have not authorized appeals from their bankruptcy courts to go to the BAP. "Participating Districts as of January 1, 2022," www.ca6.uscourts.gov/sites/ca6/files/documents/bap/Participating%20Districts.pdf (unless otherwise specified, all links in this article were last visited on April 22, 2025).
7 28 U.S.C. § 158(b)(1) (emphasis added).
8 *See* 1 Richard Levin & Henry J. Sommer, *Collier on Bankruptcy* ¶ 5.02[3][a] (2025 ed.) ("The congressional policy in favor of establishing an appellate service is so strong that, if a judicial council makes either of these findings and consequently does not establish a bankruptcy appellate panel service, the council is to submit a report to the Judicial Conference of the United States in which the factual basis of the finding is to be set out.").
9 The Second Circuit had a BAP from 1996-2000.
10 28 U.S.C. § 158(b)(5).
11 28 U.S.C. § 152(a)(2).
12 28 U.S.C. § 158(b)(4).
13 *See, e.g., Daly v. Deptula (In re Carrozzella & Richardson)*, 255 B.R. 267, 273 (Bankr. D. Conn. 2000) (discussing precedential value of BAP decisions where, among other things, those decisions might have emanated from multi-circuit BAPs).
14 "Judiciary Seeks 71 Judgeships to Meet Growing Caseloads," U.S. Courts (March 11, 2025), uscourts.gov/data-news/judiciary-news/2025/03/11/judiciary-seeks-71-judgeships-meet-growing-caseloads. The other two judgeships sought are for the courts of appeals. *Id.*
15 U.S. Const. art. III, § 1.
16 "Judiciary Seeks 71 Judgeships to Meet Growing Caseloads," U.S. Courts (March 11, 2025), uscourts.gov/data-news/judiciary-news/2025/03/11/judiciary-seeks-71-judgeships-meet-growing-caseloads.
17 *Id.*
18 *Id.*
19 U.S. Const. art. I, § 8, cl. 9.

along with the Bankruptcy Clause,[20] allowed for the creation the bankruptcy courts.[21] The Judicial Conference is not currently asking for any increase in bankruptcy judges. Instead, this past September, the Committee on the Administration of the Bankruptcy System made its biannual recommendation concerning the elimination of bankruptcy judgeships.[22] Although it recommended "that no existing bankruptcy judgeship be statutorily eliminated," it advised the various circuit judicial councils to consider not filling vacancies in 56 districts as they arise.[23] Caseload statistics from the Administrative Office of the U.S. Courts, coupled with this recommendation to not fill potential vacancies, strongly suggest that bankruptcy judges currently might not have enough work in the aggregate.[24]

This dichotomy between district and bankruptcy court caseloads is likely largely unrelated, given the separation between the majority of district and bankruptcy judges' workloads. There are three areas where district and bankruptcy judges can perform the same judicial functions. The first two — bankruptcy cases that are before district judges because the reference has been withdrawn from the bankruptcy court,[25] and cases before bankruptcy judges because they have been removed from district courts as "related to" matters[26] — are not the focus here. The third are bankruptcy appeals—that is, at least where is there is also a BAP.

The Third Circuit, which consists of the districts in Delaware, New Jersey, Pennsylvania and the Virgin Islands, has no BAP. Among those districts where the Judicial Conference is seeking additional judgeships are Delaware and New Jersey.[27] There are currently four authorized district court seats in Delaware, and the Judicial Conference is seeking two more.[28] As for New Jersey, the Judicial Conference would like to add four seats to the 17 currently there.[29]

In the 12-month period ending Sept. 30, 2024, there were 188 bankruptcy appeals filed in the Third Circuit, with 189 terminated in that period and 153 left pending. Of the 188 filed, 135 came from Delaware and New Jersey.[30] Because the bankruptcy appeals statute would prevent bankruptcy judges in Delaware from hearing appeals emanating from the District of Delaware, bankruptcy judges from Pennsylvania and New Jersey would need to sit on those panels. The Judicial Conference has recommended not filling future bankruptcy judge vacancies in the Eastern and Western Districts of Pennsylvania. This suggests a perception that the bankruptcy judges in those districts may have a shortage of work and thus the capacity to take on appeals. Would that be enough to obviate the need for a new district court judgeship? Perhaps not, in part because bankruptcy appeals in circuits with BAPs go in roughly equal numbers to the BAPs and the district courts.[31]

In the aggregate, enough cases might go to BAPs that fewer new district court judgeships would be needed. In total, there were 1,248 bankruptcy appeals filed in the district courts for the 12-month period ending Sept. 30, 2024, with 1,314 cases terminated and 916 pending.[32] It takes 430 weighted case filings[33] per judgeship to justify an additional judgeship.[34] If there are roughly 1,500 bankruptcy appeals a year,[35] and if half each go to the district courts and the BAPs, this could mean that there are one to two fewer district court judges needed than asked for.[36]

This aggregation of numbers might be hard to accomplish absent a multi-circuit BAP (or perhaps an all-circuit BAP). Under such a system, underutilized bankruptcy judges from across the nation can assist with bankruptcy appeals arising in those districts with higher district court caseloads. Given the progress made post-pandemic with such digital platforms as Zoom and Teams, it should not be difficult or costly to arrange an oral argument with the panel and attorneys in five different states.

This does not account for the fact that those bankruptcy appeals numbers are spread across all districts, whereas two fewer district court judges would likely only be felt in one or two districts. Congress, however, could target those districts in need where a large number of bankruptcy appeals also happen to go. If nothing else, BAPs would likely ease the burdens felt in those districts where caseloads for district judges are elevated, but are not enough yet to justify an additional seat (*i.e.*, district judges can focus more on their civil and criminal caseloads).[37] If the multi-circuit approach is used, it could help alleviate the issue that the various circuits without a BAP have found: the lack of sufficient resources to establish one.[38] It is a win–win: Bankruptcy judges get more work, and district judges get fewer bankruptcy cases.[39]

Precedent

Multi-jurisdictional bankruptcy jurisprudence has created disparate, and often conflicting, precedent. Typically, only

20 *Id.* at cl. 4.
21 *Yellow Sign Inc. v. Freeway Foods Inc. (In re Freeway Foods of Greensboro Inc.)*, 466 B.R. 750, 760 and n.2 (Bankr. M.D.N.C. 2012).
22 Report of the Proceedings of the Judicial Conference of the United States (Sept. 17, 2024), uscourts.gov/sites/default/files/2024-12/jcus-sep-2024-proceedings_cj-approved_final-for-posting.pdf.
23 *Id.* These do not include any single-judge districts.
24 In 2023 and 2024, many bankruptcy judges took part in a case weight study, the results of which have yet to be released (but may bear out this perceived lack of cases). Recent statistics, however, show an uptick in chapter 11 cases.
25 *See* 28 U.S.C. § 157(d).
26 28 U.S.C. §§ 157(a), 1452(a).
27 Additional Judgeships Recommended by the Judicial Conference: 2025, uscourts.gov/sites/default/files/2025-03/2025_judicial_conference_recommendations.pdf.
28 *Id.*
29 *Id.*
30 Table C-7: U.S. District Courts—Intellectual Property Cases, Securities/Commodities/Exchange Cases, and Bankruptcy Appeals Filed, Terminated, and Pending During the 12-Month Period Ending September 30, 2024, uscourts.gov/sites/default/files/2025-01/jb_c7_0930.2024.pdf.
31 *Compare, e.g., id.* (showing district courts in First Circuit having 42 bankruptcy appeals filed, 52 terminated and 24 pending), *with, e.g.*, Table BAP-1: U.S. Bankruptcy Appellate Panels—Cases Commenced, Terminated, and Pending During the 12-Month Period Ending September 30, 2023, and 2024, uscourts.gov/sites/default/files/2025-01/jb_bap1_0930.2024.pdf (showing First Circuit BAP having 37 bankruptcy appeals commenced, 30 terminated and 21 pending). The other circuits with BAPs show a similar balance (especially when accounting for the two districts that do not participate in the Sixth Circuit BAP).
32 Table C-7, *supra* n.29.
33 I admittedly am not trying to grapple with the difference between gross filings and weighted case filings.
34 "Judiciary Seeks 71 Judgeships to Meet Growing Caseloads," *supra* n.15.
35 This was rounded down after adding the 1,248 from the district courts with the 315 from the BAPs, Table BAP-1, *supra* n. 30.
36 Or more, if any of the districts are teetering on the edge of the need for another judgeship.
37 *See In re Carrozzella & Richardson*, 255 B.R. at 273 ("BAPs were conceived primarily as a tool for relieving district court judges of an ofttimes undesirable and burdensome aspect of their workload.").
38 *See* Donald A. Brittenham Jr., "Note, The Pros and Cons Behind the First Circuit's Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last," 32 *New Eng. L. Rev.* 215, 228 (1997). The one sentence dedicated to this proposition in this 28-year-old student note is the sole discussion of multi-circuit BAPs that could be found in scholarly literature.
39 A multi-circuit BAP could also solve the problem of preventing appeals from the District of the District of Columbia from going to a BAP. In those circuits where certain larger districts do not allow their districts to participate in a BAP (thus contributing to a lack of judicial resources), it could allow other districts within the circuit to be part of a BAP.

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decisions by the Supreme Court and the relevant courts of appeals are binding on bankruptcy courts.[40] The problem is not new,[41] but it is paradoxical partly due to the constitutional requirement that bankruptcy laws be uniform.[42] Although this requirement gives Congress the "flexibility to craft legislation that responds to different regional circumstances that arise in the bankruptcy system," it is also not "toothless."[43] Critics have argued that the bankruptcy appellate system itself is not uniform.[44] BAPs are only an available option in five circuits, and in one of those — the Sixth Circuit — not every district participates.

BAPs do not solve the issue of the lack of binding precedent in bankruptcy. Only the Ninth Circuit BAP considers published opinions of the BAP binding in future cases.[45] BAP decisions, however, if not binding, can be "highly persuasive."[46] Indeed, even courts of appeals treat BAP decisions as such.[47]

A multi-circuit BAP might consist of judges entirely outside of the circuit from which an appeal arises. For example, an appeal out of New Jersey might be heard by judges from California, Kentucky and Montana. In this instance, where a further appeal might be heard by the Third Circuit, the panel should apply the law of that circuit where appropriate.[48] Although it would not create binding precedent, a multi-circuit BAP might lead to a coalescing of thorny bankruptcy issues such that there is less need for further appeals to the circuit courts and, owing to potentially fewer circuit splits, to the Supreme Court[49] — another win-win (and one that might lead to less forum-shopping if there was such a coalescing).

"Please Excuse the Crudity of This Model"[50]

This article's proposal is not a panacea. Instead, it focuses on two areas that more BAPs — and multi- or all-circuit BAPs at that — might help with: to (1) assist with the caseloads facing district courts, and (2) aid in establishing more uniformity in bankruptcy law. They might not solve the issues presented, but they could at least push us closer to a solution. Best of all, this proposal can be accomplished without additional legislation and potentially without significant cost.

If you disagree with this proposal, I can only say, "I guess you guys aren't ready for that yet. But your kids are gonna love it."[51] abi

40 Lisa Laukitis & Edward P. Mahaney-Walter, "Precedent in Bankruptcy Cases," XXXVII *ABI Journal* 12, 46-47, 116, December 2018, abi.org/abi-journal/precedent-in-bankruptcy-cases.

41 *See* Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals* 1 (Federal Judicial Center 2000) ("The bankruptcy appellate system is not well structured to produce binding precedent.").

42 *See* U.S. Const. art. I, § 8, cl. 4.

43 *Siegel v. Fitzgerald*, 596 U.S. 464, 467-68 (2022).

44 McKenna & Wiggins, *supra* n.40, at 11.

45 *See* 9th Cir. BAP R. 8024-1(c)(1).

46 *In re Carrozzella & Richardson*, 255 B.R. at 273. The bankruptcy court in that case disagreed with the supposedly persuasive BAP opinion in question. *Id.*

47 *See In re Silverman*, 616 F.3d 1001, 1005 n.1 (9th Cir. 2010) ("[W]e treat the BAP's decisions as persuasive authority given its special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit."); *Mathai v. Warren (In re Warren)*, 512 F.3d 1241, 1248 (10th Cir. 2008) ("[W]e treat the BAP as a subordinate appellate tribunal whose rulings are not entitled to any deference (although they certainly may be persuasive).").

48 The Federal Circuit basically does this every time it encounters an issue not unique to its special jurisdiction. *See Lazare Kaplan Int'l Inc. v. Photoscribe Techs. Inc.*, 628 F.3d 1359, 1366 (Fed. Cir. 2010) ("Because the denial of a motion for judgment as a matter of law or for a new trial is a procedural issue not unique to patent law, this court reviews such denials under the law of the regional circuit where the appeal from the district court would normally lie, in this case, the Second Circuit."). One criticism of BAP decisions as binding precedent — that three Article I judges could potentially bind bankruptcy and district courts of one or more circuits (*see Carrozzella & Richardson*, 255 B.R. at 273) — could potentially be quelled with an understanding that any panel would necessarily follow the law of the circuit where applicable. Moreover, an understanding that BAP decisions are never binding but merely persuasive could likewise suffice to address such a concern.

49 If establishing binding precedent, avoiding uniformity issues and shortening the time to appeal mattered more, then a single appeal as of right to an Article III court of appeals for bankruptcy might work better. *See* McKenna & Wiggins, *supra* n.40, at 67-69. This would potentially lead to more Article III judges being needed rather than less. *See id.* at 68-69 ("Although diverting bankruptcy appeals to this court would save some district judge time, the district-level savings would not completely offset the costs associated with creating a court that sits in panels."). An Article III court of appeals for bankruptcy would potentially run into some of the same criticisms lobbed at the Federal Circuit. *See* Paul R. Gugliuzza, "The Federal Circuit as a Federal Court," 54 *Wm. & Mary L. Rev.* 1791, 1804 (2013) (noting "the Supreme Court's consistent rejection of the Federal Circuit's exceptionalist rules of jurisdiction and procedure"). Frankly, a multi-circuit BAP might not be immune to such criticism, either.

50 *Back to the Future* (Amblin Entertainment 1985).

51 *Id.*