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NOTES

BANKRUPTCY'S GRAY AREA: ARE BANKRUPTCY COURTS "COURTS OF THE UNITED STATES"?

*Angelo G. Labate**

INTRODUCTION

To declare bankruptcy throughout much of Anglo-American history was akin to declaring oneself a failure.¹ Bankruptcy, therefore, for much of American history carried a heavy social stigma and was usually reserved for those willing to take on the economic shame that came with debt reorganization.² By the 1960s, however, evolving social norms surrounding the abstract ideas of wealth, effort, and success began to erode the negative stigmatization of debt and bankruptcy.³ Declaring bankruptcy is a common practice today that affects (or will affect) millions of Americans—and the impact of the increased filings are felt strongly in the United States Bankruptcy Courts. As more individuals and corporations turn to the bankruptcy courts to resolve common economic problems, ensuring the system remains effective and efficient is of paramount importance.

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1 See Rafael Efrat, *The Evolution of Bankruptcy Stigma*, 7 THEORETICAL INQUIRIES L. 366, 366–67 (2006).

2 *Id.*

3 See generally Michael D. Sousa, *Bankruptcy Stigma: A Socio-Legal Study*, 87 AM. BANKR. L.J. 435 (2013) (detailing the historical basis for the stigma surrounding bankruptcy, as well as its modern decline); see also generally, Steve Rhode, *Here Is Exactly Why People Who File Bankruptcy Are Smart*, HUFFINGTON POST (June 30, 2015, 5:33 PM), http://www.huffingtonpost.com/steve-rhode/here-is-exactly-why-peopl_b_7695826.html (describing bankruptcy filings in a positive light, not in the historically negative manner).

National scandals, such as the massive failures of Enron and Lehman Brothers,⁴ might paint a picture that bankruptcy is a corporate tool to restructure bad debt and escape what is owed, yet the vast majority of bankruptcy filings are personal.⁵ Financial stressors such as high student-loan debts, mortgages, or credit card bills can lead many American families down the road to insolvency.⁶ The debt accrued by necessary medical procedures has become the leading cause of personal bankruptcies in the United States.⁷ Bankruptcy, therefore, is not only an escape valve for corporations and wealthy individuals, but also a part of the economic reality within our nation for all classes of society.

That is not to say that corporate bankruptcies do not occur regularly, nor does it suggest that they are bad for the economy. In fact, many economists hail the modern bankruptcy system for allowing corporations to restructure soundly, prevent layoffs, and better manage assets to emerge from debt.⁸ Therefore, because corporations and the average American family both rely on this system, its efficiency and effectiveness are vital to our modern national economic reality.

Congress, recognizing the importance of commercial and individual bankruptcy matters to the national economy, created a separate court within the federal system to ensure the efficient adjudication of bankruptcy cases. Initially, Congress intended to grant original jurisdiction over all bankruptcy cases to a specialized court—similar to how the Federal Circuit operates today.⁹ However, the Supreme Court struck down parts of the 1978 Bank-

4 See, e.g., Peter J. Henning, *In Lehman's Demise, Some Shades of Enron*, N.Y. TIMES (Mar. 12, 2010), <http://dealbook.nytimes.com/2010/03/12/in-lehmans-demise-some-shades-of-enron/>.

5 See *March 2015 Bankruptcy Filings Down 12 Percent*, U.S. COURTS (Apr. 27, 2015), <http://www.uscourts.gov/news/2015/04/27/march-2015-bankruptcy-filings-down-12-percent> (showing that of the several million bankruptcy filings since 2011 the overwhelming majority have been for non-business insolvencies).

6 *Top 10 Reasons People Go Bankrupt*, HUFFINGTON POST: BLOG (Mar. 24, 2015, 4:23 PM), http://www.huffingtonpost.com/simple-thrifty-living/top-10-reasons-people-go_b_6887642.html.

7 *Id.* (noting that a significant majority of those filing due to medical expenses also had insurance, “thus debunking the myth that only the uninsured face financial catastrophes”).

8 See generally Thomas H. Jackson & David A. Skeel Jr., *Bankruptcy and Economic Recovery*, FACULTY SCHOLARSHIP SERIES, U. PA. (2013) (explaining the importance of the bankruptcy system to the national economy); see also generally Michelle J. White, *Economic Analysis of Corporate and Personal Bankruptcy Law* 56–69 (Nat'l Bureau of Econ. Research, Working Paper No. 11536, 2005), <http://econweb.ucsd.edu/~miwhite/Handbook-proofs.pdf> (describing the economic motivations and empirical data surrounding bankruptcy decisions, as well as the overall economic impact of those decisions on a macro and personal level).

9 Pub. L. No. 95-598, § 213, 92 Stat. 2549 (1978); see also David S. Kennedy & Tisha L. Federico, *If the United States Bankruptcy Court Is Not a “Court of the United States,” Then What Is It?*, 28 U. MEM. L. REV. 859, 862 (1998) (describing the original language of the United States Code prior to the 1984 amendments).

ruptcy Act in *Northern Pipeline*, making many of the reforms inoperative.¹⁰ Congress responded by passing a new law creating an Article I bankruptcy court as a unit within the United States District Courts that would receive cases by referral.¹¹ The judges of the new bankruptcy court would be deemed “judicial officers” of the district court.¹² Congress, in response to the Supreme Court’s decision in *Northern Pipeline*, did not scrap the bankruptcy court entirely, but instead found a legislative fix—thus showing its commitment to the efficient running of bankruptcy matters within the federal system.

The reforms, in light of the Supreme Court declaring much of the 1978 Bankruptcy Act unconstitutional, created one issue that threatens the efficient running of the system—and therefore the entire purpose of the reforms. The newly created bankruptcy courts were deemed to be a “unit of the district court[s]” of the United States.¹³ Thus, the bankruptcy courts began to operate in a gray area. They were neither a stand-alone court nor fully a district court. The nebulous status of the bankruptcy courts is not just a matter of theoretical interest; it a matter of great practical concern. This concern arises due to Congress’s repeated use of the phrase “courts of the United States” throughout the United States Code, and the inconsistent treatment of the bankruptcy courts with respect to the phrase.¹⁴ Thus, determining whether the bankruptcy courts are “courts of the United States” has practical import, as inconsistent treatment threatens the integrity and efficiency of the federal bankruptcy system.

The Supreme Court has never directly taken up the issue, but the United States Courts of Appeals have attempted to define the status of the bankruptcy courts for the past several decades.¹⁵ In particular, the circuit courts have taken three approaches to this question: (1) explicitly holding that the bankruptcy courts are not “courts of the United States”; (2) implicitly treating the bankruptcy courts as falling within the definition while not explicitly deciding the issue; or (3) explicitly holding that the bankruptcy

10 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).

11 Kennedy & Federico, *supra* note 9, at 863.

12 *Id.* at 882 (internal quotation marks omitted) (quoting Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 336 (codified at 28 U.S.C. § 152(a)(1) (1994))).

13 *Id.* (quoting 28 U.S.C. § 151 (1994)).

14 *See, e.g.*, 18 U.S.C. § 6001(4) (2012) (internal quotation marks omitted); 28 U.S.C. § 451 (2012) (internal quotation marks omitted); 28 U.S.C. § 1927 (2012).

15 *See Sixth Circuit Joins the Split on Whether Bankruptcy Courts Are ‘Courts of the U.S.’*, AM. BANKR. INST., <http://www.abi.org/newsroom/daily-wire/sixth-circuit-joins-the-split-on-whether-bankruptcy-courts-are-%E2%80%98courts-of-the-us> (last visited Jan. 29, 2016) [hereinafter *Sixth Circuit Joins the Split*] (describing the most recent jurisprudence on the on-going circuit split); *see also* Kennedy & Federico, *supra* note 9, at 864–69 (describing the origins of the circuit split dating back to the early 1990s).

courts are “courts of the United States.”¹⁶ The resulting circuit split has created a dual status within the federal system for bankruptcy courts, thus jeopardizing not only the efficiency of the courts but also their legitimacy. A slim majority of circuit courts counts the bankruptcy courts as “courts of the United States,”¹⁷ while the minority does not grant this status.¹⁸ The practical effect is that in some circuits certain statutes are applicable within a bankruptcy proceeding, whereas in other circuits these same statutes would be inapplicable to the same case. Depending on the circuit, statutory procedural tools such as sanctions, fee shifting, and declaratory judgments might not be available to bankruptcy judges, which jeopardizes their ability to effectively manage a growing docket of bankruptcy matters. As the current system was created to efficiently handle the nation’s bankruptcy cases, this status quo is untenable.

This Note seeks to evaluate the circuit split regarding the status of bankruptcy courts and propose a solution to the problem through an efficiency-based lens. Part I lays out a brief history of bankruptcy in the United States and the current bankruptcy system. Part II then outlines the circuit split within the courts of appeals as to the proper definition of “courts of the United States.” Part III will analyze the statutory language, the United States Code, and the relevant historical context to determine if the bankruptcy courts qualify as “courts of the United States.” This Part argues that the bankruptcy courts are “courts of the United States.” Part IV will discuss, from an efficiency-based lens, the policy rationale supporting this legal conclusion. The Note concludes by suggesting that Congress or the Supreme Court should intervene and legitimize the bankruptcy courts as “courts of the United States.” This conclusion is reached by analyzing the United States Code in a consistent and uniform manner with common tools of statutory interpretation—with attention paid to history, Congressional purpose, and general principles of efficiency.

16 See *Grossman v. Wehrle (In re Royal Manor Mgmt., Inc.)*, 652 F. App’x 330, 341–42 (6th Cir. 2016).

17 See, e.g., *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 102–05 (3d Cir. 2008) (holding that the bankruptcy court, as a unit of the district court, comes within the meaning of § 451); *Adair v. Sherman*, 230 F.3d 890, 895 n.8 (7th Cir. 2000) (pointing to a bankruptcy court’s authority to sanction under § 1927); *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.)*, 931 F.2d 222, 230–31 (2d Cir. 1991) (analyzing the bankruptcy court’s § 1927 sanction on the merits, rather than holding it lacked power to issue sanction). These cases all hold, implicitly or explicitly, that bankruptcy courts come within the definition of 28 U.S.C. § 451.

18 See, e.g., *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.)*, 40 F.3d 1084, 1086 (10th Cir. 1994); *IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696, 699 (11th Cir. 1991); *Miller v. Cardinale (In re Deville)*, 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002). These cases all hold that the bankruptcy courts do not fall within the meaning of “courts of the United States” found in 28 U.S.C. § 451.

I. A BRIEF HISTORY OF THE US BANKRUPTCY SYSTEM

To better understand how the current bankruptcy court operates within the overall federal system, and just what Congress could have meant by its repeated use of the phrase “courts of the United States,” it is important to look at the evolution of the bankruptcy system. By tracing the changes to the bankruptcy system over time, through an efficiency-based lens, past inadequacies can be gleaned. Analysis of these inadequacies will help illuminate a solution to the disagreement underlying the ongoing circuit split surrounding the status of the bankruptcy courts.

A. *Bankruptcy in the Founding Era*

The framers of the Constitution recognized the importance of bankruptcy when they granted Congress the power to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁹ The inclusion of the Bankruptcy Clause within the powers of Congress was part of a greater attempt to federalize the economy in the wake of the failure of the Articles of Confederation.²⁰ The Federalist Papers also defended a uniform federal bankruptcy power as being necessary for the economic health of the new republic.²¹ The appearance of the bankruptcy power among the more general commerce powers highlights that the Founders saw not only how important the power was to the emerging economy, but also how potentially dangerous discriminatory and differing state laws could be.²² With little debate, and only one vote against, the clause was added to the Constitution—yet Congress chose not to exercise this power immediately.²³

Over a decade after ratification, Congress would pass the first of many federal bankruptcy laws—the Bankruptcy Act of 1800.²⁴ Based heavily on English norms,²⁵ the first act was creditor-friendly and had no provision for individual debtors to file on their own.²⁶ Procedurally the act carried over the English practice of using commissioners to handle the bankruptcy mat-

19 U.S. CONST. art. I, § 8, cl. 4.

20 See Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 340 (2013).

21 THE FEDERALIST NO. 42, at 221 (James Madison) (George W. Carey & James McClellan eds., 1999) (“The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie, or be removed into different States, that the expediency of it seems not likely to be drawn into question.”).

22 Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995).

23 *Id.*

24 David Haynes, *History of Bankruptcy in the United States*, BALANCE (Oct. 31, 2016), <https://www.thebalance.com/history-of-bankruptcy-in-the-united-states-316225>.

25 Tabb, *supra* note 22, at 6–12.

26 Haynes, *supra* note 24; see also Lubben, *supra* note 20, at 340 (describing the merchant class’s desire for a federal bankruptcy scheme in the wake of the Articles of Confederation).

ters, who would then report to the district courts.²⁷ By 1803, however, the shortcomings of the law led to its total repeal, leaving bankruptcy law to the regulation of the various state legislatures.²⁸

B. *From the New Republic to Civil War*

From the repeal of the Bankruptcy Act of 1800 until 1841, Congress did not attempt to involve itself in the administration of bankruptcy law. The Supreme Court, however, throughout this four-decade interlude routinely hindered the powers of the states effectively to administer bankruptcy proceedings.²⁹ In the ensuing years the nation experienced periods of severe economic hardship, and the states alone, in the absence of federal bankruptcy law, could not adequately handle the economic crises.³⁰ Thus, in the early republic, bankruptcy law was neither effective nor uniform, betraying the Founders' earlier intentions.

In the next several decades, Congress began to exercise its bankruptcy power, but only intermittently in times of economic hardship for the nation. In 1841, in a late response to the Panics of 1837 and 1839, Congress passed a short-lived federal bankruptcy law, which finally allowed for debtors to petition voluntarily for debt relief.³¹ Commissioners would again play a role in the system under this law, but their use was not mandatory.³² After little more than a year, Congress repealed the 1841 Act, and once again state law filled the void created by a lack of federal bankruptcy law.³³ During the subsequent years of economic prosperity Congress felt little pressure to attempt another go at bankruptcy reform.³⁴

The economic crises brought about by the end of the Civil War once again put focus on bankruptcy reform at the federal level. This next federal attempt, which was a response to the Panic of 1857 and the economic collapse in the wake of the Civil War, would eventually fail as past measures did.³⁵ The Act, however, did attempt to correct some of the issues seen in previous reform attempts, as it placed the district courts in charge of bankruptcy matters (as "courts of bankruptcy" rather than relying upon commissioners), allowed for corporate bankruptcies, and made allowances for both voluntary and involuntary bankruptcies.³⁶ These reforms were the closest to the modern bankruptcy system, and while they eventually failed, their repeal

27 *Id.* at 363.

28 *See* Haynes, *supra* note 24.

29 *See* Tabb, *supra* note 22, at 15.

30 *See id.* at 16.

31 *See* Lubben, *supra* note 20, at 360–63 (discussing Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843)).

32 *Id.* at 363.

33 *Id.* at 365–66.

34 *See* Tabb, *supra* note 22, at 19.

35 *Id.*

36 *Id.* (internal quotation marks omitted) (quoting An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 176, § 1, 14 Stat. 517 (1867)).

in 1878 made them the longest lasting federal law on bankruptcy at the time.³⁷

C. Movement to a Permanent System

The past failures of temporary solutions as short-term responses to economic catastrophe finally led to the creation of the first permanent federal bankruptcy law in 1898.³⁸ Two major goals of the new federal system were to keep fee expenses low and to allow for the quick discharge of debt that individuals were unable to pay.³⁹ For the first time Congress showed that it intended for a federal bankruptcy scheme to remain as the uniform system for the country, as it did not add an expiration date to the Act.⁴⁰ Congress finally broke free of the past laws' outdated English roots, and a system similar to that in use in modern times emerged.⁴¹ The district court appointed referees to handle all bankruptcy matters more efficiently.⁴² Under the 1898 Act, the district courts at first only used the referees for administrative purposes, but soon the courts began to rely upon them for legal matters as their dockets became crowded with a slew of bankruptcy cases.⁴³ While it was heavily amended as part of the New Deal, the Bankruptcy Act of 1898 would remain in force as the basic framework for most insolvency proceedings until 1978. Congress's attitude toward the entire system began to change as bankruptcy became a tool for the debtor rather than the creditor, opening up the process and allowing thousands of Americans to discharge crushing debt and thereby help the overall economy.⁴⁴ A sure sign of the Act's necessity (and relative success compared with past efforts) was the tens of thousands of proceedings that the district court and referees dealt with each year after its passage.⁴⁵

The Bankruptcy Act of 1898 ushered in a "modern era of liberal debtor treatment,"⁴⁶ and while the system remained in place for nearly a century, it was adapted to better respond to the Great Depression.⁴⁷ These reforms—implemented after several careful studies of bankruptcy proceedings—included many procedural changes to the administration of bankruptcy

37 See *id.*

38 An Act to Establish a Uniform System of Bankruptcy Throughout the United States, ch. 541, 30 Stat. 544 (1898), amended by Chandler Act (Bankruptcy Act, Amendments of 1938), ch. 575, 52 Stat. 840, repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

39 See Lubben, *supra* note 20, at 385–86.

40 *Id.* at 386.

41 *Id.* at 387.

42 *Id.*

43 *Id.*

44 See Tabb, *supra* note 22, at 24.

45 See Lubben, *supra* note 20, at 390.

46 Tabb, *supra* note 22, at 24.

47 Lubben, *supra* note 20, at 392 (discussing the New Deal's Chandler Act as heavily amending the 1898 scheme).

cases.⁴⁸ Eventually, in the 1960s, changes to procedure resulted in the promulgation of bankruptcy procedural rules by the Supreme Court.⁴⁹ Congress conducted another series of studies in the 1970s, which resulted in the controversial bankruptcy reforms of 1978 (the source of the current circuit split).⁵⁰ Congress's focus on procedure and its careful study of the issue (at the taxpayers' expense) suggests that it cared deeply about the efficient running of the bankruptcy system in the nation, in order to fully realize the Founders' goals in exercising the Bankruptcy Clause to ensure that uniform federal laws effectively governed the national economy.

D. *The Modern Era Framework and Reforms*

The Bankruptcy Reform Act of 1978⁵¹ was the first major federal bankruptcy act not to stem from a major economic panic in the nation,⁵² and was the product of nearly a decade of intensive study by the congressionally formed Commission on the Bankruptcy Laws of the United States, bipartisan negotiations, and several draft bills.⁵³ Legal scholars have described the pre-1978 field as a patchwork of bankruptcy amendments and court opinions interpreting the laws—leading at times to an ineffective administration of justice.⁵⁴ Thus, Congress acted as dissatisfaction mounted in the 1960s and not as a reactionary measure to any negative economic distress.⁵⁵

The 1973 Commission created to investigate how best to reform the bankruptcy process focused upon inefficiencies within the system.⁵⁶ Focus points included: administrative waste, the rapid increases in the number of consumer bankruptcies over the years, lack of uniformity in treatment of debtors, and abusive or negligent behavior by those involved in the bankruptcy process (including lawyers and judges).⁵⁷ By 1977 a House Report used commission findings to hone in on the impaired process by looking at the low status and lack of independence of bankruptcy judges, as well as the vagueness in the Bankruptcy Code.⁵⁸ The House sought to transfer more judicial power to the bankruptcy judges, while the Senate resisted expansive

48 Tabb, *supra* note 22, at 29–31.

49 *Id.* at 31.

50 *Id.* at 32.

51 Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.).

52 See Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 942 (1979); see also Tabb, *supra* note 22, at 32.

53 See Klee, *supra* note 52, at 942–57.

54 See Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47, 61 (1997).

55 See *id.* at 61–67 (describing the criticisms of the 1898 Act and subsequent amendments as an impetus for change rather than an economic disaster).

56 *Id.* at 67–69; see also Tabb, *supra* note 22, at 35 (“A strong effort was made in the 1978 Act to improve the administration of bankruptcy cases.”).

57 Posner, *supra* note 54, at 68 (describing the major complaints that the bankruptcy commission noted about the system as it was in 1973).

58 *Id.* at 70.

jurisdiction.⁵⁹ A compromise between the House and the Senate gave the bankruptcy judges some independence, but blocked their Article III status.⁶⁰ From the legislative history it would seem that Congress wanted bankruptcy judges to have sizeable judicial powers and to be able to operate as independent judicial officers in order to increase efficiency.

The 1978 Bankruptcy Reform Act, while still the major framework today, was nonetheless challenged very soon after its enactment. This legal challenge led to a major crippling of the system's overall structure, as a plurality of the Supreme Court held that the grant of original jurisdiction over all bankruptcy matters to an Article I bankruptcy court was an unconstitutional usurpation of Article III judicial power.⁶¹ In 1984, Congress reformed the act so that it fell in line with the Supreme Court's ruling in *Northern Pipeline*.⁶² The decision did not allow Congress merely to sever the unconstitutional parts of the court system that the 1978 Act had set up—Congress had to scratch the entire bankruptcy court and begin again.⁶³ The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA) sought to remedy this issue by creating new bankruptcy judgeships as “units of the district court” which heard bankruptcy matters only by reference from the district courts.⁶⁴ These new bankruptcy judges would have the power to enter judgment on “core” bankruptcy matters, while deferring to the district court for final judgment on non-core matters.⁶⁵ Since instituting this law, Congress from time to time has added to the number of existing judgeships as a reaction to the increasing number of bankruptcy cases that make it onto the docket.⁶⁶ The BAFJA is the source of the issue described in this Note, as it repealed and replaced much of the 1978 Act without addressing whether these new units of the district court would in fact be “courts of the United States.”

In the ensuing years after BAFJA, Congress made several more substantive reforms and funded another commission to study the bankruptcy system. The newest Commission Report in 1997 found that there was not enough done to deter abuses within the system.⁶⁷ The report went even further to

59 *Id.*

60 *Id.* at 73 (describing the final bill as partly being a compromise between House and Senate desires on the status of the bankruptcy judge).

61 Tabb, *supra* note 22, at 34–35.

62 See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion); see also Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, 87 TEMP. L. REV. 875, 878 (2015).

63 See *Northern Pipeline*, 458 U.S. at 87 (plurality opinion); see also Tabb, *supra* note 22, at 38–39 (describing the relationship between the *Northern Pipeline* decision and the congressional response).

64 Tabb, *supra* note 22, at 39.

65 *Id.* (internal quotation marks omitted) (quoting Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 157(b)(2), 98 Stat. 333, 336)).

66 *Id.* at 43.

67 Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 487–88 (2005).

recommend Article III status for the bankruptcy judges—a recommendation that Congress rejected.⁶⁸ The last major overhaul of the bankruptcy system, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), still focused on the national well-being of the economy and efficiency in its reform goals.⁶⁹ These reforms, however, did not address the status of bankruptcy courts, leaving them stuck in the gray area of the current circuit split.

Going forward, the number of bankruptcy filings show no sign of slowing down, and in fact studies have shown that nearly “fifteen times as many American households could benefit from bankruptcy” but do not file.⁷⁰ As more and more Americans turn to bankruptcy as a solution to economic hardship, it is important that the bankruptcy system is run efficiently and smoothly. While Congress has routinely re-tooled the Bankruptcy Code as inefficiencies present themselves, it has also routinely ignored the circuit split on the bankruptcy courts’ status in the federal system. This inaction makes one wonder if Congress believes that it has run out of options other than creating an Article III court and is hesitant to create such a court. Or Congress might feel that any action would bring further confusion and ambiguity to the bankruptcy system already in place. It is also entirely feasible that given the difficulty in adding items to Congress’s agenda, members of Congress would rather resolve the issue judicially. The rest of this Note will, in light of the above historical background, attempt to work through the quagmire that is the status of bankruptcy courts in order to find a realistic solution to the problem.

II. THE SPLIT ON “COURTS OF THE UNITED STATES”

In June of 2016, the Sixth Circuit reinvigorated the debate regarding the status of bankruptcy judges within the federal system by ruling that the bankruptcy courts are indeed “courts of the United States.”⁷¹ The case, like many before it, involved the power to issue sanctions for multiplying the proceedings unjustly under 28 U.S.C. § 1927.⁷² The Second, Third, and Seventh Circuits had previously held that the bankruptcy courts enjoy status (or at least powers) under the U.S. Code as “courts of the United States,” while the Ninth, Tenth, and Eleventh Circuits have disagreed.⁷³

68 *Id.*

69 See Zachary Price, *The Bankruptcy Abuse Prevention and Consumer Protection Act*, 39 HARV. J. LEGIS. 237, 237 (2002) (noting that bipartisan efforts were motivated by the growing numbers of bankruptcy cases courts were handling).

70 *Id.* at 245.

71 See *Grossman v. Wehrle (In re Royal Manor Mgmt., Inc.)*, 652 F. App’x 330, 341 (6th Cir. 2016).

72 See *Sixth Circuit Joins the Split*, *supra* note 15; see also 28 U.S.C. § 1927 (2012).

73 See *Sixth Circuit Joins the Split*, *supra* note 15.

A. *Closer Look: The Second, Third, Sixth, and Seventh Circuits*

The Sixth Circuit's ruling in favor of bankruptcy courts qualifying as "courts of the United States" looked to the reasoning of its sister circuits heavily.⁷⁴ The Second, Third, and Seventh Circuits all have held that bankruptcy courts operate as "courts of the United States" for purposes of Title 28⁷⁵—with only the Third Circuit giving specific reasoning.⁷⁶

An early decision finding that a bankruptcy court can act under a statute limiting action to "courts of the United States" is *In re Cohoes Industrial Terminal, Inc.*⁷⁷ The Second Circuit in that matter held that a bankruptcy court can issue sanctions under 28 U.S.C. § 1927, which is a power reserved only to the "courts of the United States."⁷⁸ The court overturned the sanction, but not because of any lack of power on the part of the bankruptcy court. It found that the bankruptcy court abused its discretion under § 1927, not that it was using a power it never had in the first place.⁷⁹ The court did not offer any defense of its actions; it merely asserted that the bankruptcy court had the statutory authority under § 1927 to sanction vexatious litigation.⁸⁰ In fact, the Second Circuit simply applied the same standard it usually applied to § 1927 inquiries.⁸¹

In a similar fashion, the Seventh Circuit, in passing, declared that bankruptcy courts enjoy authority to sanction under § 1927. In a footnote in *Adair v. Sherman*, the Seventh Circuit asserted that bankruptcy courts have authority to sanction under that statute.⁸² The court did not discuss "courts of the United States" explicitly, mentioning only that a bankruptcy court can sanction attorney behavior that comes within § 1927's prohibition on vexatious litigation.⁸³

The most recent decision prior to *Royal Manor* was in the Third Circuit, which oddly enough found that the bankruptcy courts actually are not "courts of the United States" but enjoy the same powers because they are a unit of the district courts which are expressly given that status by statute.⁸⁴ The Third Circuit's holding brings bankruptcy courts within the definition of "courts of the United States"—defined in 28 U.S.C. § 451—through their association with the district courts.⁸⁵ In practice, the Third Circuit's decision

74 *In re Royal Manor*, 652 F. App'x at 341.

75 *Id.*

76 *See In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 105 (3d Cir. 2008).

77 *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal, Inc.)*, 931 F.2d 222 (2d Cir. 1991).

78 *Id.* at 230; *see also* 28 U.S.C. § 1927 (2012) (granting power to "courts of the United States" to sanction vexatious litigation).

79 *See In re Cohoes*, 931 F.2d at 231.

80 *See id.* at 230.

81 *Id.* (citing *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986)).

82 *Adair v. Sherman*, 230 F.3d 890, 895 n.8 (7th Cir. 2000).

83 *Id.* (asserting that bankruptcy judges have the authority under § 1927 to sanction attorneys if they have engaged in vexatious or unreasonable conduct).

84 *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 105 (3d Cir. 2008).

85 *See id.*; *see also* 28 U.S.C. § 451 (2012).

to bring bankruptcy courts within the reach of the definition of “courts of the United States” allows the bankruptcy courts to administer bankruptcy matters efficiently by making full use of the Judicial Code.

The Sixth Circuit looked upon its sister circuits as well as its own unpublished opinions related to the matter of attorney sanctions to hold that the bankruptcy courts did have authority to act under § 1927.⁸⁶ In the past, a Sixth Circuit court upheld a bankruptcy court’s sanctions without ever explicitly addressing whether it was a “court of the United States.”⁸⁷ The court then looked to a recent order of the Sixth Circuit to remand for reconsideration of the appropriateness of sanctions, without ever questioning whether the bankruptcy court had the power to issue these sanctions in the first place.⁸⁸ These past holdings, along with the persuasive reasoning of its sister circuits, led the Sixth Circuit to the conclusion that bankruptcy courts are “courts of the United States.”

B. Closer Look: The Ninth, Tenth, and Eleventh Circuits

While a majority of circuits have found that the bankruptcy courts have power to act as “courts of the United States,” that majority is a slim one. The Ninth, Tenth, and Eleventh Circuits have each found that the bankruptcy courts do not qualify under the definition of “courts of the United States” found in 28 U.S.C. § 451.

Since 1992, the Ninth Circuit has consistently held that bankruptcy courts lack authority to act statutorily under grants of power to “courts of the United States.” By looking at the history surrounding the definition of “courts of the United States,” the Ninth Circuit noted that the bankruptcy courts were deleted from § 451.⁸⁹ Thus, with no express grant of power in § 451, and the implied restriction through deletion, the Ninth Circuit prohibited a bankruptcy court from exercising power under 28 U.S.C. § 1915(a), which would allow the court to waive fees.⁹⁰ Following that reasoning, when it came time to review a bankruptcy court’s authority to act under § 1927 the Ninth Circuit once again held that the court had no such authority.⁹¹ The Ninth Circuit Bankruptcy Appellate Panel did not even entertain § 1927 as a possible way to uphold sanctions. The panel dismissed the appeal because “the Ninth Circuit does not regard a bankruptcy court as a ‘court of the

86 *Grossman v. Wehrle* (*In re Royal Manor Mgmt., Inc.*), 652 F. App’x 330, 341 (6th Cir. 2016).

87 *Id.* (citing *Maloof v. Level Propane Gasses, Inc.*, 316 F. App’x 373, 376 (6th Cir. 2008) (per curiam) (noting the court’s inherent and statutory authority to issue sanctions)).

88 *Id.* (citing *Followell v. Mills*, 317 F. App’x 501, 513–14 (6th Cir. 2009)).

89 *See Perroton v. Gray* (*In re Perroton*), 958 F.2d 889, 896 (9th Cir. 1992).

90 *See id.*

91 *See Miller v. Cardinale* (*In re Deville*), 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002).

United States.’”⁹² The reasoning was then upheld on appeal by the Ninth Circuit.⁹³

Similarly, the Tenth Circuit expanded upon the reasoning of the Ninth Circuit to bring the two sister circuits into accord with one another. The Tenth Circuit found that the legislative history was very persuasive and supported a holding that the bankruptcy courts are not “courts of the United States” for the purposes of § 451.⁹⁴ Pointing to the Bankruptcy Reform Act of 1978, the court noted that originally § 451 did include the bankruptcy courts, and that the 1984 amendments removed any language referencing the bankruptcy courts.⁹⁵ Senate commentary provided some insight as to why, which the court believed related to the holding in *Northern Pipeline*.⁹⁶ Alternative arguments have been entertained by the court, such as the Bankruptcy Clause contemplating the creation of federal courts, § 1927 being able to stand apart from § 451 as they do not make explicit references to one another, and § 451 referencing “courts in which judges hold office during good behavior.”⁹⁷ However, without going into why these arguments ultimately failed (or at least fail in the eyes of the Tenth Circuit), the legislative history persuaded the court to hold that § 1927 (and by implication § 451) does not contemplate the federal bankruptcy courts.⁹⁸

The Eleventh Circuit, when confronted with a bankruptcy court’s ability to award fees, also held that a bankruptcy court was not a “court of the United States”; however, its reasoning was slightly different. Instead of relying upon the legislative history of § 451, as the Ninth and Tenth Circuits did, the Eleventh Circuit found that as non-Article III courts the bankruptcy courts could not be “courts of the United States.”⁹⁹ To bolster this finding the court relied upon the fact that the statute in question, 26 U.S.C. § 7430, included references to the Tax Court and the Claims Court.¹⁰⁰ The Eleventh Circuit held that the explicit inclusion of these non-Article III courts indicated a lack of authority as “courts of the United States” without Congress’s express inclusion.¹⁰¹ The court further explained that as a non-core proceeding, the bankruptcy court had no jurisdiction to award fees.¹⁰²

92 *Id.*

93 *See* *Miller v. Cardinale (In re Deville)*, 361 F.3d 539 (9th Cir. 2004).

94 *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.)*, 40 F.3d 1084, 1086 (10th Cir. 1994).

95 *Id.*

96 *See id.*

97 *Id.*

98 *See id.*

99 *See IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696, 699–701 (11th Cir. 1991).

100 *Id.* at 701.

101 *Id.*

102 *Id.* (citing *Gower v. Farmers Home Admin. (In re Davis)*, 899 F.2d 1136, 1139 n.7 (11th Cir. 1990)).

C. *Closer Look: The Eighth Circuit*

The Eighth Circuit avoided the question altogether in *In re Clark*.¹⁰³ The Eighth Circuit reasoned that the question of whether a court could sanction did not turn on whether a court fit the definition of “courts of the United States,” but rather on the broad sanctioning powers found throughout the Judicial Code.¹⁰⁴ The Eighth Circuit approach, however, does not really provide a useful tool for solving the issue with other code sections that also use the term “courts of the United States.” This line of reasoning transforms the question into a statute-by-statute inquiry of which powers are captured via the inherent powers of the bankruptcy court and which are not. Approaching the problem in this manner inefficiently allocates judicial resources and energy towards answering the same question repeatedly. A brightline approach is much more useful to ensure the efficient and uniform running of the bankruptcy system. Therefore, in light of this reasoning’s running contrary to efficiency, and thus the purpose of the bankruptcy system, it will not be discussed in later portions of this Note.

III. BANKRUPTCY COURTS ARE “COURTS OF THE UNITED STATES”

This Part will demonstrate that the bankruptcy courts are “courts of the United States.” While arguments can be made that the courts’ inclusion in that definition is not necessary for the functioning of the courts, or not granted by the plain language of § 451, these arguments ultimately fail. Various traditional indicators of statutory meaning all point towards bankruptcy courts’ inclusion in the meaning of “courts of the United States.” By looking at the statutory relationship between the bankruptcy and district courts, specific mentioning of bankruptcy courts in the Criminal Code, and the overall backdrop of congressional intent, it becomes clear that the bankruptcy courts are part of the definition of “courts of the United States.”

A. *Bankruptcy Courts Are a Unit of the District Courts*

While the words “bankruptcy courts” are not included within the definition of “courts of the United States” found in § 451, the overall court of which the bankruptcy judges are a part is enumerated.¹⁰⁵ The district courts of the United States are explicitly mentioned within the statutory text as being “courts of the United States.” The bankruptcy courts by designation are each a “unit of the district court.”¹⁰⁶ The bankruptcy judges have the ability to hear and decide core bankruptcy matters through the jurisdiction

103 See *Walton v. LaBarge (In re Clark)*, 223 F.3d 859 (8th Cir. 2000).

104 *Id.* at 864.

105 28 U.S.C. § 451 (2012) (listing district courts among the enumerated courts but omitting the bankruptcy courts).

106 28 U.S.C. § 151 (2012) (explaining that “[i]n each judicial district, the bankruptcy judges in regular active service shall constitute *a unit of the district court* to be known as the bankruptcy court for that district.” (emphasis added)).

granted to them via the district court.¹⁰⁷ Employing textualist tools of statutory interpretation leads to the conclusion that bankruptcy courts are “courts of the United States.”

The phrase “unit of the district court,” when given its ordinary meaning, leads to bankruptcy courts being “courts of the United States.”¹⁰⁸ According to the Oxford English Dictionary, “unit” means “[a]n individual thing or person regarded as single and complete but which can also form an individual component of a larger or more complex whole.”¹⁰⁹ The plain-meaning definition of “unit” leads to an understanding that while the bankruptcy courts are an identifiable and distinct entity, they cannot be severable from the “whole,” which is the district court, for their jurisdiction. Therefore, as a part of the whole, the bankruptcy courts are a piece of a “court of the United States.” As a piece of a “court of the United States” it would not make sense to then say that the definition of the phrase does not encompass the bankruptcy courts. Courts should also presume that the legislature did not “waste words when enacting laws”¹¹⁰ and interpret the language of a statute to avoid “linguistic surplusage.”¹¹¹ Reading “unit of the district court” in any way other than meaning “distinct part of a complete whole” would make Congress’s words inactive—other meanings would simply have the two courts as separate entities.

Bankruptcy courts are courts of limited jurisdiction—as they derive the power to hear core bankruptcy matters from the district court—but it should not follow that they all lack similar procedural powers of the district court. As courts, they should possess powers inherent to courts, and as “unit[s] of the district court,” they should have similar powers to that court, except where Congress has explicitly removed such powers. Extending status as a

107 By creating the modern bankruptcy system in this manner, Congress was reacting to the Supreme Court’s decision in *Northern Pipeline*, which held Congress’s initial plan of granting exclusive bankruptcy jurisdiction to a separate bankruptcy court unconstitutional. See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).

108 The method endorsed time and again by the Supreme Court, as the starting point of statutory interpretation, is to give “the words used their ordinary meaning.” See David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1565 (1997) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)); see also Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, CONG. RES. REP. 7 (2011) (noting that dictionaries can serve as tools for ordinary meaning interpretation).

109 *Unit*, ENG. OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/unit>; *accord Unit*, CAMBRIDGE ENG. DICTIONARY, <http://dictionary.cambridge.org/us/dictionary/english/unit> (defining it as “a single thing or a separate part of something larger”); *Unit*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/unit> (defining it as “a single thing, person, or group that is a constituent of a whole”).

110 Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 122 (2010) (quoting Damien M. Schiff, *Purposivism and the Reasonable Legislator: A Review Essay of Justice Stephen Breyer’s Active Liberty*, 22 WM. MITCHELL L. REV. 1081, 1087–88 n.37 (2007)); see also Eig, *supra* note 108, at 13–14.

111 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 98 (2006).

“court of the United States” would not expand jurisdiction of the bankruptcy courts to hear non-bankruptcy matters—nor would it unconstitutionally grant exclusive bankruptcy jurisdiction to an Article I court. All it would do is provide authority for the bankruptcy courts to manage their growing docket efficiently by granting them the ability to use statutorily created procedural tools. Title 11 of the U.S. Code allows for the bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”¹¹² It would seem odd to empower a court in one area of the Code, while simultaneously undercutting that same court in another area of the Code—through an omission. Furthermore, the definitional section of the chapter on procedure of Title 28, empowers “[f]or purposes of this chapter . . . any court which is created by Act of Congress in a territory and is invested with any jurisdiction of a district court.”¹¹³ As bankruptcy courts are units of the district court and are vested with jurisdiction via the district court, it should follow that the bankruptcy courts possess procedural tools that the district courts have.

It is not just the fact that Congress made the bankruptcy courts part of the district court that favors their inclusion within the definition of “courts of the United States.” One way courts determine the meaning of statutory language is by examining how the legislature uses that language in other laws.¹¹⁴ Throughout the U.S. Code, Congress has included bankruptcy courts within its meaning of “courts of the United States” in statutes related to the operation of the federal judiciary. Organs of the federal judiciary treat the bankruptcy courts as “courts of the United States” under their statutory grants of power. For instance, 28 U.S.C. § 620 creates the Federal Judicial Center.¹¹⁵ The Center’s purpose is “to further the development and adoption of improved judicial administration in the courts of the United States.”¹¹⁶ Many of the publications they publish concern the bankruptcy courts.¹¹⁷ The Center must always, by statute, have one bankruptcy judge on its board.¹¹⁸ Similarly, § 462 empowers the Director of the Administrative Office of the United States Courts to decide where sessions of the “courts of the United States” will be accommodated.¹¹⁹ A strict reading of “courts of the United States,” as the Ninth, Tenth, and Eleventh Circuits have held in

112 11 U.S.C. § 105 (2012).

113 28 U.S.C. § 1869(f) (2012).

114 See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 374–75 (2010) (describing the canon of the presumption of consistent usage and its application to phrases used in multiple statutes).

115 28 U.S.C. § 620.

116 *Id.* § 620(a).

117 See FED. JUDICIAL CTR., *Publication and Video Catalogue*, http://www.fjc.gov/library/fjc_catalog.nsf (last visited Jan. 12, 2017).

118 28 U.S.C. § 621; see also FED. JUDICIAL CTR., *General Information about the FJC*, http://www.fjc.gov/public/home.nsf/autoframe?openagent&url_r=pages/102 (last visited Nov. 25, 2016) (listing the current board as including Chief Judge C. Ray Mullins of the U.S. Bankruptcy Court for the Northern District of Georgia).

119 28 U.S.C. § 462(a).

the past, would compel the absurd result of the Center and Administrative Office not having authority over the bankruptcy courts. Further, the definition of “courts” included in the same chapter makes no mention of the bankruptcy courts, once again suggesting that their inclusion within the district courts makes them a “court” for purposes of the Code.¹²⁰ Similarly, 28 U.S.C. § 2104 decrees that when reviewing state court judgments, the Supreme Court decision has “the same effect, as if the [state] judgment or decree reviewed had been rendered in a court of the United States.”¹²¹ Interpreting this statute, then, raises the question: Is there a gray area between federal and state judgments that bankruptcy courts occupy? To avoid confusion, applying the presumption of consistent meaning throughout Title 28 would help clear up the language and avoid unintended consequences¹²²—as it seems that in actual practice bankruptcy courts are awarded “courts of the United States” status in some instances but not others.

Not only does the ambiguity in language present issues for the procedural powers of the courts, but it could potentially cloud the ethics surrounding the bankruptcy courts as well. “[O]fficer[s] or employee[s] of the Administrative Office,” for instance, “shall not engage directly or indirectly in the practice of law in any court of the United States.”¹²³ A strict reading again of the term would seem to compel an absurd result—exempting this ethical rule from application in the bankruptcy courts. When the U.S. government is interested in lost or destroyed records of “courts of the United States,” necessary steps under the “direction of the judges of such court” must be taken.¹²⁴ Again, strict application of the minority circuit reasoning would compel that bankruptcy court records would not fall within the language of the rule.

The U.S. Code should be read consistently so that phrases and words carry the same meaning throughout.¹²⁵ Selectively reading the Code to include bankruptcy courts within “courts of the United States” for administrative duties of the judiciary, but not in some circuits for procedural powers, leads to an inconsistency. Inconsistencies should be avoided, as they lead to

120 *Id.* § 610.

121 *Id.* § 2104.

122 *See* *United States v. Castleman*, 134 S. Ct. 1405, 1417 (2014) (Scalia, J., concurring in part and concurring in the judgment) (noting that while the usual presumption of consistent use is reserved to operation within a single statute, it has broader application in that it can be used for related statutes (citing *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion))); *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (per curiam); *see also* *Eig*, *supra* note 108, at 14–15 (noting that in the past the Supreme Court has endorsed a “broad[] ‘established canon’ that similar language contained with [sic] the same section of a statute be accorded a consistent meaning.” (citing *Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co.*, 522 U.S. 479, 501 (1998))).

123 28 U.S.C. § 607.

124 *Id.* § 1735.

125 *See* *Scott*, *supra* note 114, at 374–75 (2010) (noting the existence of a general canon of “construing statutes *in pari materia*” which stresses the use of related statutes to interpret phrases in a consistent manner).

inefficiencies. A better approach is to view the bankruptcy courts as part of the “courts of the United States” through its inclusion in the district court, and then limit its powers only where Congress has expressly done so. Additionally, by applying the plain-meaning definition of “units of the district court,” the language of “courts of the United States” would not produce an absurd result¹²⁶—in fact, it would do the opposite.

B. Bankruptcy Courts Are Enumerated in Title 18

Whereas in Title 28 Congress—likely in a hasty attempt to respond to *Northern Pipeline*—left out bankruptcy courts, in Title 18 bankruptcy courts are listed as “courts of the United States.”¹²⁷ Title 18 was amended during the 1978 bankruptcy reforms to be more consistent with the new chapter eleven bankruptcy provisions.¹²⁸ Unlike the Judicial Code, the Criminal Code was not amended in the wake of *Northern Pipeline*.¹²⁹ From the unchanged 1978 revisions to the Criminal Code, it is clear that Congress intended for the bankruptcy courts to be “courts of the United States.”

As used earlier to discuss the consistent reading of “courts of the United States” within the Judicial Code, the presumption of consistent meaning should be employed to interpret the phrase used in 18 U.S.C. § 6001 and 28 U.S.C. § 451 in a uniform manner.¹³⁰ Justice Scalia, in *United States v. Castleman*, noted that while the interpretive presumption is normally used within one enactment, it can be used in interpreting two statutes that are related.¹³¹ The two statutes in question are both definitional sections pertaining to the federal judiciary defining the same phrase: “courts of the United States.” As the similarity between the two is so strong, using Justice Scalia’s reasoning in *Castleman* would be appropriate. Congress’s omission of the bankruptcy courts in Title 28 should be viewed in light of the fact that it left its 1978 amendment intact in Title 18. The gap in language—created by the hasty, unexpected, and necessary response to *Northern Pipeline*—should be filled by the language left behind in Title 18.

126 The only exception to the plain-meaning canon of construction is when ordinary meaning would compel an “absurd result.” Here, applying the plain meaning would not compel an absurdity, and would instead give import to Congress’s intent to make the bankruptcy courts part of the district courts. See Eig, *supra* note 108, at 42.

127 Kennedy & Federico, *supra* note 9, at 869–70.

128 *Id.*

129 *Id.* at 870.

130 See Eig, *supra* note 108, at 14–15 (noting existence of broadly established canons in federal jurisprudence).

131 *United States v. Castleman*, 134 S. Ct. 1405, 1416 (2014) (Scalia, J., concurring in part and concurring in the judgment); see also Scott, *supra* note 114, at 374–76 (discussing the use of the presumption of consistent usage in related statutes, and the strong endorsement of the canon by state legislatures).

C. *Legislative Purpose Favors Extending Status to Bankruptcy Courts*

Interpreting the Judicial Code to encompass bankruptcy courts within the meaning of “courts of the United States” would also fall in line with congressional intent. The legislative history highlights that Congress originally intended to grant exclusive bankruptcy jurisdiction to the bankruptcy judges and, in the original 1978 reforms, did not use “unit of the district court” language.¹³² In response to the Supreme Court declaring this grant of exclusive jurisdiction to a non-Article III court unconstitutional, Congress—over a two-year period—sought a legislative fix to keep the bankruptcy courts operable in a constitutional fashion.¹³³ Congress debated between creating an Article III court and cutting back the Article I court’s jurisdiction¹³⁴—ultimately the broad exclusive jurisdiction was cut back and the bankruptcy courts became a “unit of the district court.” Congress, however, did not intend to completely curtail the system it originally crafted, as the 1984 reforms were only meant to conform to the holding of *Northern Pipeline*.¹³⁵

Part of the impetus for the 1978 reforms was to make the bankruptcy system more accessible and efficient; thus, it follows that in amending the reforms Congress intended to keep the same goals. The legislative workaround Congress devised was to embed the bankruptcy court within the federal district court system.¹³⁶ An interpretation of “unit of the district court” as meaning a part of the larger functioning whole would therefore be consistent with the original plan. Further, it would also be consistent with the original 1978 plan to find that the bankruptcy units of the district court are a part of that “court of the United States” and therefore share its status. Congress limited jurisdiction in conformity with *Northern Pipeline* so that the bankruptcy courts derived their jurisdiction from the district courts—it did not completely start from scratch and create a totally new system. Reading the omission of the new bankruptcy courts as explicitly removing the status of being a “court of the United States” from the federal bankruptcy courts does not mesh with the surrounding historical circumstances of the reform’s enactment. A better reading of the history is that it was a messy—albeit necessary—reaction to try to salvage the brand-new bankruptcy system in what Congress felt was the best way possible. Omission may have been a way to tread lightly to appease a Supreme Court that was, in Congress’s view, hostile to the originally intended system.¹³⁷

132 Susan Block-Lieb, *The Costs of a Non-Article III Bankruptcy Court System*, 72 AM. BANKR. L.J. 529, 529–31 (1998) (describing how Congress did not choose an Article III court after *Northern Pipeline* and the negative impacts of that choice).

133 *Id.*

134 *Id.* at 529.

135 Jacoby, *supra* note 62, at 878 n.21.

136 See 28 U.S.C. § 151 (2012).

137 This reading of history is also consistent with 18 U.S.C. § 6001(4) (2012) retaining the language of the 1978 reforms by listing bankruptcy courts as falling within the definition of “courts of the United States.”

D. *Arguments Against Extension Fail*

Several arguments have been leveled against the proposition that bankruptcy courts should be included in the definition of “courts of the United States.” First, it can be argued that, as bankruptcy courts are not Article III courts, they are properly excluded from the list of “courts of the United States.”¹³⁸ However, this argument again ignores that the bankruptcy judges are “judicial officers of the United States district court established under Article III of the Constitution.”¹³⁹ It also ignores that the Criminal Code includes the bankruptcy courts among the “courts of the United States.” Therefore, this argument would afford higher status to the bankruptcy courts when they handle criminal sanctions than when they issue civil orders for attorneys’ fees—an untenable result.

Second, an argument can be made that the 1984 reforms of the 1978 Bankruptcy Reform Act, in response to *Northern Pipeline*, intentionally deleted bankruptcy courts from the list.¹⁴⁰ Again this argument ignores the fact that Title 18 retained the language and was left untouched during the 1984 reforms. It is sensible to believe that if Congress were attempting to completely change the status of the bankruptcy courts it would have done so consistently. This argument also does not solve the apparent inconsistencies within the Judicial Code when Congress does use the phrase “courts of the United States”—as it occasionally affords this status to bankruptcy courts for what seems like administrative purposes and convenience.

The more palatable approach is that of the Second, Third, Sixth, and Seventh Circuits—all of which have recognized the status of the bankruptcy courts as “courts of the United States.” No circuit, however, has provided much reasoning as to why it afforded this status upon the bankruptcy courts. Each just simply acted as if the bankruptcy courts are obviously “courts of the United States.” This approach is the more consistent approach in attempting to create an efficient and effective bankruptcy system, and is more consistent with the history surrounding the phrase, other code sections, and the consistent meaning throughout the Judicial Code.

IV. WHY SHOULD THE BANKRUPTCY COURTS BE TREATED AS
“COURTS OF THE UNITED STATES?”

While the circuit courts focus on the statutory language and power of courts, given the nature of the role they must perform it is worth considering in addition why the status of the bankruptcy courts within the federal court system should matter. Part III focused on why legally the bankruptcy courts are “courts of the United States”; this Part will focus on why the courts’ inclusion within the meaning of the phrase is sound and efficient policy. These

138 *IRS v. Brickell Inv. Corp.* (*In re Brickell Inv. Corp.*), 922 F.2d 696, 701 (11th Cir. 1991).

139 28 U.S.C. § 152(a)(1).

140 *See Jones v. Bank of Santa Fe* (*In re Courtesy Inns, Ltd.*), 40 F.3d 1084, 1086 (10th Cir. 1994).

policy considerations support a judicial interpretation of the U.S. Code that affords bankruptcy courts status as “courts of the United States.” As its historical development indicates, the federal bankruptcy system is intended to uniformly and efficiently carry out an important economic and social good. The split over whether bankruptcy courts are “courts of the United States” threatens that uniform application of bankruptcy law. Without uniformity, the overall efficiency, legitimacy, and socio-economic policy goals of the bankruptcy system are also challenged. By affirming the bankruptcy courts’ status as “courts of the United States,” the judicial system can better check against this erosion over time.

The efficient running of the courts and a swift administration of justice are bedrock principles of the federal court system.¹⁴¹ The number of cases being heard in the federal system has continued to grow; yet the number of judges necessary to meet demand has not. Litigation, especially in the bankruptcy sphere, has not slowed much since then.¹⁴² Repeated amendments to the modern federal bankruptcy system could be seen as recognition of the strain the increasing number of bankruptcy cases has placed on the district courts.¹⁴³ Thus, when looking closely at the way in which the bankruptcy courts fit within the overall system, the analysis should occur through an efficiency-based lens.

The bankruptcy system is relied upon by a variety of individuals and corporate entities, from distressed families with mounting unexpected medical expenses to the largest investment banks in the United States.¹⁴⁴ Congress took action in 2005 in an attempt to ensure that access to bankruptcy courts remains an efficient process, as any unnecessary delays have real world financial burdens on insolvent families and businesses.¹⁴⁵ These reforms focused on the substantive law of bankruptcy to prevent abuse of the system.

141 See, e.g., FED. R. BANKR. P. 1001 (explaining that the purpose of the rules is “to secure the just, speedy, and inexpensive determination of every case and proceeding.”); FED. R. CIV. P. 1 (explaining that the purpose of the rules is “to secure the just, speedy, and inexpensive determination of every action and proceeding”); FED. R. CRIM. P. 2 (stating that the rules shall be interpreted for “fairness in administration, and to eliminate unjustifiable expense and delay”); FED. R. EVID. 102 (stating that the rules shall be construed to “eliminate unjustifiable expense and delay . . . and [to secure] a just determination”).

142 See U.S. COURTS, 2012 REPORT SHOWS MORE REPEAT BANKRUPTCY FILERS (Oct. 22, 2013), <http://www.uscourts.gov/news/2013/10/22/2012-report-shows-more-repeat-bankruptcy-filers> (indicating an increase in bankruptcy filings, especially repeat filings, and a total of 1.1 million personal consumer debt driven filings).

143 See Tabb, *supra* note 22, at 37; see also Posner, *supra* note 54, at 68 (describing the commission’s focus on the increasing number of consumer bankruptcies).

144 See generally Arturo Bris et al., *The Costs of Bankruptcy: Chapter 7 Liquidation Versus Chapter 11 Reorganization*, 61 J. FIN. 1253 (2006) (discussing various corporate bankruptcies); David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741 (2009) (discussing personal medical bankruptcy filings); Michelle J. White, *Bankruptcy Reform and Credit Cards*, 21 J. ECON. PERSP. 175 (2007) (discussing consumer credit card debt induced bankruptcy).

145 See generally Jensen, *supra* note 67.

Judges, through several powers, both inherent and statutorily given, have the means to ensure that the courts are managed in an efficient manner and that litigation abuse is discouraged and curbed. Common ways of achieving this goal are issuing sanctions, enhancing damage awards, and shifting attorneys' fees. Courts can look at the behaviors or motivations of litigants and decide that action is needed to send a deterrent message to a particular litigant and subsequent litigants.

By denying bankruptcy courts the status of "courts of the United States" judges lack necessary procedural tools to deter abusive and inefficient behavior in bankruptcy proceedings. Many statutes that allow for shifting of attorneys' fees or sanctions are located in code sections that restrict use to "courts of the United States."¹⁴⁶ Unless bankruptcy courts are included within this definition, bankruptcy judges would lack case management powers granted by these code sections that other courts within the federal system have. Currently the bankruptcy system is split, with some circuits viewing the bankruptcy courts as having status as "courts of the United States" and others denying status—thus, creating an odd situation where procedural management and deterrence tools are available to some bankruptcy judges but not others.

Serial filers are a problem in the bankruptcy system, especially in recent years for mortgagees after the 2008 financial crisis. The 2005 reforms of the BAPCPA intended in large part to tackle this issue by substantively changing much of the law. Ultimately, however, these reforms were ineffective in solving the serial filing and abuse problem.¹⁴⁷ For instance, recently in just one Florida district court eighty-five individuals were declared abusive serial filers, with some filing as many as seven bankruptcy petitions.¹⁴⁸ While continuing to petition the court for relief from high mortgage payments, most people cease payments—further endangering their financial standing.¹⁴⁹ Florida is in the Eleventh Circuit, a court that does not recognize bankruptcy courts as being "courts of the United States," and thus it does not recognize its authority to use statutory tools branded as being reserved for such courts. The serial filer problem illustrates why courts should be given the full arsenal of procedural tools to manage their dockets, as it is not clear that Rule 11 alone can effectively handle the multitude of behaviors that courts will encounter

146 See, e.g., 28 U.S.C. § 1927 (2012).

147 See Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 242 (2015) (criticizing the reforms as failing to crackdown on the repeat filer problem identified by President George W. Bush: "[T]oo many people have abused the bankruptcy laws . . . [T]he new law will also make it more difficult for serial filers to abuse the most generous bankruptcy protections."); see also AM. BANKR. INST., SERIAL BANKRUPTCY A 20-YEAR STUDY OF UTAH FILERS (Feb. 2006), <http://www.abi.org/abi-journal/serial-bankruptcy-a-20-year-study-of-utah-filers>.

148 See Susan Taylor Martin, *Tampa Bay Judges Crack Down on Serial Bankruptcy Filers*, TAMPA BAY TIMES (June 21, 2015), <http://www.tampabay.com/news/business/realestate/tampa-bay-judges-crack-down-on-serial-bankruptcy-filers/2234543>.

149 See *id.*

(after all, why have separate statutes outlining sanctions if Rule 11 is enough for all circumstances?).¹⁵⁰

A concrete example of the real world consequences of inefficiencies within the bankruptcy system is the fact that most small business filings are not done in federal bankruptcy courts.¹⁵¹ Actual and perceived inefficiencies, such as higher costs and longer proceedings, have driven struggling small businesses outside the federal system and toward state insolvency laws.¹⁵² While this shift might be a good thing in the long run, it runs contrary to Congress's exercise of its constitutional power to *uniformly* regulate bankruptcy laws. And any applause for the shift ignores that it is occurring because the system is perceived to be failing. To aid the efficient running of the system and boost the court's legitimacy, the bankruptcy courts should be empowered with all necessary procedural authority to administer their core bankruptcy matters.

As the Judicial Code contains multiple instances of the phrase "courts of the United States," the bankruptcy courts in several circuits would lack more than just a statutory power to issue sanctions for behaviors—the courts would also lack basic procedural tools like the declaratory judgment. "Courts of the United States" can issue declaratory judgments by using the statutory authority of 28 U.S.C. § 2201.¹⁵³ Declaratory judgments provide a way for judges to efficiently manage bankruptcy matters; yet again, from a strict reading of the statute and under the minority circuit view, it is not readily available for use.¹⁵⁴

Bankruptcy is not just an important legal tool for individuals and businesses, it is also vital to the national economy—thus it serves as a socio-economic good that should be protected. The bankruptcy system can react to handle the financial fallout of a national investment bank collapsing—which affects the national economy.¹⁵⁵ Bankruptcy can allow for an insolvent small business to restructure its debt and escape total failure¹⁵⁶—saving jobs,

150 See generally Janet Eve Josselyn, *The Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477 (1990) (describing the distinctness of the § 1927 sanction, as opposed to inherent or other rule-based sanctions).

151 Edward R. Morrison, *Bargaining Around Bankruptcy: Small Business Workouts and State Law*, 38 J. LEGAL STUD. 255, 255–57 (2009) (explaining that small businesses are increasingly turning to less burdensome and costly alternatives offered by state law).

152 *Id.*

153 28 U.S.C. § 2201 (2012) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration.")

154 The practical means to get around this apparent bar on declaratory judgments is to refer judgment to the district court to issue it on the bankruptcy court's behalf. Again, this extra step cuts against the purpose of the modern bankruptcy system, which is to efficiently handle all core bankruptcy matters for the district courts. See Kennedy & Federico, *supra* note 9, at 876.

155 Rosalind Z. Wiggins et al., *The Lehman Brothers Bankruptcy A: Overview*, YALE SCH. MGMT. (Oct. 1, 2014), <http://som.yale.edu/sites/default/files/files/001-2014-3A-V1-LehmanBrothers-A-REVA.pdf>.

156 See Morrison, *supra* note 151.

improving the economies of local communities, and preserving choice for consumers. And it can even help the average American who has fallen on hard times due to predatory loans, mounting credit card bills, or unavoidable medical debts. Thus, it is vitally important to ensure that the bankruptcy scheme not only remains part of the federal court system, but is efficiently run.

CONCLUSION

While it appears that bankruptcy courts are “courts of the United States” for the purposes of Title 28 of the U.S. Code, the courts currently lack that status in several circuits.¹⁵⁷ There are three possible ways of resolving this disharmony in the circuits: Congress can clarify its language, Congress can redesign the bankruptcy system, or the Supreme Court can address and resolve the split. Immediate action would be welcome from either branch¹⁵⁸ to ensure that the already overburdened federal court system has the ability to address the growing bankruptcy needs of the nation through a procedurally strong bankruptcy court system.

The likelihood, realistically, of resolution by congressional re-wording of the definitional section of § 451 to include bankruptcy courts as “courts of the United States” is quite low. The split in the circuits has existed for nearly three decades, and Congress has not seen a need to act. Since the split is so narrow, though, it would be inappropriate to attempt to read any endorsements into this congressional silence.¹⁵⁹ However, given that the bankruptcy laws have been reformed during this time¹⁶⁰ and with no attempt to provide guidance on this particular issue, it is doubtful going forward that Congress will decide to clarify the language in Title 28.

The Supreme Court can also step in and clarify the language of the Code by resolving the circuit split. In doing so, the above reasoning, as well as that of the Second, Third, Sixth, and Seventh Circuits, would lead the Court to include the bankruptcy courts within the meaning of the phrase “courts of the United States.” However, even if the Supreme Court rejects the arguments presented within this Note, there could be a silver lining. It

157 See, e.g., *Jones v. Bank of Santa Fe (In re Courtesy Inns, Ltd.)*, 40 F.3d 1084, 1086 (10th Cir. 1994); *IRS v. Brickell Inv. Corp. (In re Brickell Inv. Corp.)*, 922 F.2d 696, 701 (11th Cir. 1991); *Miller v. Cardinale (In re Deville)*, 280 B.R. 483, 494 (B.A.P. 9th Cir. 2002) (all holding that the bankruptcy courts do not fall within the meaning of “courts of the United States” found in 28 U.S.C. § 451).

158 The Supreme Court could act by granting certiorari to the next properly filed case that raises this issue. Congress, on the other hand, can begin reforming the law on its own without any precondition for action.

159 See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988) (providing an overview of different views of congressional silence and problems that arise in its application).

160 See, e.g., Jensen, *supra* note 67.

took a Supreme Court decision¹⁶¹ to put Congress on notice to reform unconstitutional parts of the 1978 Bankruptcy Reform Act, and it might take another Supreme Court decision denying this status to the bankruptcy courts to act as the motivational spark to make Congress deal with the issue it created back in 1984. During this same time of congressional silence, the Supreme Court has not granted certiorari to confront the issue head on, casting doubt on if it will do so in the foreseeable future.

Recently, however, bankruptcy law (and its supposed abuses by the wealthy) was a major presidential campaign issue,¹⁶² possibly indicating that some change could be on the horizon. History shows that this is likely, as for almost our entire history the American bankruptcy system has been a work in progress.¹⁶³ Congress might take on bankruptcy not just in light of the new Administration's campaign promises but because there is still more to be done on this work in progress. Small businesses still continue to take advantage of state insolvency laws, rather than the federal system, because of perceived inefficiencies that make the federal route look wasteful from a time and cost perspective.¹⁶⁴ Health insurance continues to be an issue in the nation, as millions are uninsured or underinsured, thus likely leading to the trend of medical expense bankruptcies growing in the future—further clogging the strained courts with bankruptcy litigation.¹⁶⁵ Corporations are turning more towards hedge funds and other investment vehicles as a means of restructuring failing businesses—Congress could turn its attention to this shadow bankruptcy system as a means to regulate this non-transparent business trend.¹⁶⁶ Possibly as Congress acts to fix the inadequacies of BAPCPA, it would also take into account that many of these inefficiencies can be remedied by giving the bankruptcy courts more procedural teeth. While unlikely, this might lead them down the road of clarifying the language of what it means to be a “unit of the district court” or a “court of the United States.” Even more radically, Congress might even decide that it is time to seriously

161 *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion).

162 See Siobhan Fenton, *Presidential Debate: Hillary Clinton and Donald Trump's First Clash-Full Transcript*, INDEPENDENT (Sept. 26, 2016), <http://www.independent.co.uk/news/world/americas/first-presidential-debate-full-transcript-read-hillary-clinton-donald-trump-a7332081.html> (President Donald Trump described his use of the bankruptcy laws as “tak[ing] advantage of the laws of the nation because [he] is running a company,” and throughout the debate discussed how he would close loopholes to make the system fairer).

163 See generally Lubben, *supra* note 20; Tabb, *supra* note 22.

164 See Morrison, *supra* note 151, at 256.

165 See, e.g., Aaron E. Carroll, *Underinsurance Remains Big Problem Under Obama Health Law*, N.Y. TIMES (Dec. 1, 2014), <http://www.nytimes.com/2014/12/02/upshot/underinsurance-remains-big-problem-under-obama-health-law.html>; Emily Drooby, *New Survey Finds 30 Million Americans Are 'Underinsured'*, AOL NEWS (Nov. 30, 2016), <http://www.aol.com/article/news/2016/11/30/new-survey-finds-30-million-americans-are-underinsured/21616937/>.

166 See Jonathan C. Lipson, *The Shadow Bankruptcy System*, 89 B.U. L. REV. 1609, 1612–19 (2009) (explaining shadow banking, the creation of a shadow bankruptcy system, and the need for regulation).

consider proposals to make an Article III bankruptcy court—which would rid us of the issue of clarifying the meaning of “unit of the district court” altogether.¹⁶⁷

Any one of these courses of action would help to resolve the circuit split and bring uniformity within the bankruptcy system. While it might just seem like a semantic issue now, having an increasingly burdened bankruptcy court system that partially lacks statutory procedural authority can lead to practical difficulties. Already in circuits that do not grant “courts of the United States” status to bankruptcy courts, judges lack the power to sanction attorneys that multiply and delay proceedings. Coupled with a growing number of bankruptcies due to medical bills and the 2008 housing crisis, courts’ inability to deter such behavior is problematic going forward. Bankruptcies will continue, and unless Congress or the Supreme Court acts to correct the disharmony in the circuits, this problem of words can, over time, evolve into a practical impediment to the health of our bankruptcy system—and thus the economic health of the nation.

167 See, e.g., Block-Lieb, *supra* note 132, at 530 (explaining that the National Bankruptcy Review Commission also recommends an Article III court taking the place of the current regime); Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155 (2015) (reassessing the lack of bankruptcy courts’ Article III powers in light of its sound reasoning).