

**Statement of Honorable Frank J. Bailey  
United States Bankruptcy Judge District of Massachusetts  
to the Committee on the Judiciary of the United States House of Representatives,  
Subcommittee on Courts, Intellectual Property, and the Internet.**

**March 25, 2021**

**The Importance of Diversity on the Federal Bench**

**Chair Johnson, Ranking Member Issa and members of the subcommittee, thank you for inviting me to testify this afternoon.**

I am honored to be here today with my judicial colleagues, Judges Reeves, Chen, Donald, and Ho.

I will begin with a story from early in my career on the bench that demonstrates the critical need for a diverse federal bench. The details of that experience are set forth in an article that I wrote for publication in the Judges Journal, which is linked to this report. See F. J. Bailey, [\*Does the Federal Article I Bench Reflect the Ethnicity of the Populations that They Serve? What if the Answer is No?\*](#), The Judges Journal, ABA Judicial Division, Vol. 55, No 2, p. 21 (2016).

By far the largest number of cases filed in federal court each year are those filed in the United States Bankruptcy Court; thus, most Americans have their federal court experience before a bankruptcy judge. While bankruptcy filings have been below normal levels in recent years, during the last recession in Fiscal Year 2013, 1,107,699 cases were filed in the bankruptcy court, compared to the 401,104 cases filed in the district court. Bankruptcy Judges handle a wide variety of cases. They range from cases involving individuals who have fallen on hard times through illness, job loss, eviction or foreclosure to the country's largest corporations needing restructuring to survive. It is therefore essential that the bankruptcy bench reflect the populations that we serve.

Access to debt protection and a fresh start through bankruptcy is preserved in Art I, Section 8, clause 4 of the Constitution. That right is ensured to all Americans. My fear is that unless there are judges on the bankruptcy bench that reflect the populations in our districts, certain communities may not feel welcome in our courts. This could deny them a right ensured by the Constitution and laws of the United States – namely, a fresh start for themselves and their families.

That is what is at stake in this hearing.

I am the only Article I judge to testify today. As I will point out today, diversity on the Article I bench is critical. Of course, diversity on the Article I bench starts with diversity on the Article III bench. Bankruptcy Judges are appointed by Circuit Judges. Magistrate Judges are appointed by District Judges. When there are diverse Article III judges on the merit selection panels it changes the dynamic of that process. In my experience, diverse lawyers are more likely to apply. Lawyers from affinity bar associations, such as the Hispanic National Bar Association, are more likely familiar with the diverse Article III judges on the panels. They feel more welcome to join in the process.

Today, I will be talking about the relative lack of diversity on the bankruptcy court bench and its influence on the administration of justice. I do want to mention, however, one area in which the bench is at least *beginning* to reflect the U.S. population: about one-third of bankruptcy judges are women. Don't get me wrong, there is more work to do on gender diversity on our bench, but recent years have shown progress.

Gender diversity, like all diversity on the bench, matters. I can tell you from personal experience that in the District of Massachusetts, where 40% of the bench is comprised of women, gender diversity affects the administration of justice every day. Although we sit as single trial judges, we formulate local rules, standing orders, and local court policy as a group. More important, I also serve on the First Circuit Bankruptcy Appellate Panel (the "BAP"). In that role, I participate on appellate panels of three judges. While the panels, of course, always follow the law, discussions concerning how to get to a particular result often differs depending on the experiences of the judges on the panel, including gender. For example, when considering a person's request for relief from a student loan, and the student happens to be a single mother with a handicapped child, the observations of a female judge, using her personal life experience, is enormously useful to our discussions.

I can only imagine that the presence of an African American judge on a panel in the First Circuit BAP might also change the discussion, if something about that judge's life experience helped inform how we look at a case. Unfortunately, that is not currently possible. There are no African American bankruptcy judges serving in the First Circuit, and there has never been one.

As president of the National Conference of Bankruptcy Judges, I am here to tell you that the NCBJ believes that systemic change in our society must include racial and ethnic diversity among bankruptcy judges and lawyers. The NCBJ is committed to this goal. In order to achieve a diverse bankruptcy bench, it is critical that we identify and engage with a diverse pool of individuals interested in appointment to our bench. This means increasing the "pipeline" of individuals from diverse backgrounds that apply for appointment. Indeed, circuit judges cannot appoint individuals to our bench unless they apply. Bankruptcy judges know that they are in the best position to encourage diverse lawyers to apply.

So, what are we doing about it? The NCBJ has, for many years, focused on increasing that pipeline. In 2009, we established the Blackshear Fellowship Program, through which we provide a scholarship for diverse attorneys to attend our annual conference. In non-pandemic years we expect over 1,500 judges, lawyers, and insolvency professionals to attend. In 2018, the NCBJ established a Diversity Committee. The Diversity Committee's mission is to be a resource on the issue of diversity and to promote diversity, equity, and inclusion within the bankruptcy profession. To that end, many bankruptcy judges routinely engage in outreach to diversity organizations and communities to identify potential bankruptcy lawyers and future judges.

Let me offer a prime example. In October 2019, many of our members participated in a nation-wide program called "*Roadways to the Federal Bench: Who, me? A Bankruptcy Judge?*" that was aimed at improving diversity in the bankruptcy bench and bar and the federal bench in general. Circuit Court Judge Catharina Haynes of the Fifth Circuit worked tirelessly to organize and promote that program,

which was broadcast live to 19 judicial districts around the country. There were literally hundreds of attendees.

Since December 2020, the NCBJ has redoubled its emphasis on building a “pipeline” of diverse lawyers in the bankruptcy practice area in the hope that there soon will be an abundance of qualified practitioners to apply for judgeships. We have partnered with *Just the Beginning, A Pipeline Organization*, to offer summer internships to diverse law students. The students will get valuable exposure to our judges and a generous stipend. The students will also receive an invitation to our annual meeting in Indianapolis in October, with financial assistance to help them attend.

In 2020, we adopted a resolution supporting the inclusion of a diverse person or member of an affinity bar association on every Merit Selection Panel used to screen applicants for judgeships. Research shows that diverse people are more likely to apply if there are diverse people on the selection panel. We now coordinate with the Justice Department’s Office of the US Trustee and several insolvency-related bar associations to ensure the effectiveness of our collective diversity outreach efforts.

Our Diversity Committee members regularly attend law school outreach programs. One example is a Zoom program held in the Western District of Virginia organized by Judge Rebecca Connolly in conjunction with the Black Law Students Association at Washington & Lee just two weeks ago. In the District of Massachusetts, we have developed a program for diverse, large firm “summer associates” where we present the benefits of a bankruptcy practice and encourage them to “ask for a bankruptcy assignment this summer.”

I have merely scratched the surface on these efforts to build the pipeline of diverse lawyers and law students interested in becoming bankruptcy judges.

What is the reason for this focus on expanding the pipeline of diverse applicants to the bankruptcy bench? The answer is in the numbers. According to the *Judiciary Fair Employment practices Annual Report for Fiscal Year 2019*, published by the Administrative Office of the United States Courts (the “FEP Report”), active Article III judges (including circuit and district judges), over 12% were African American, nearly 10% were Hispanic, and nearly 3% were Asian American. Native Americans and Pacific Islanders were also represented on the Article III bench.. [ADMIN. OFFICE OF U.S. COURTS, THE JUD. FAIR EMP. PRAC. ANN. REP.](#), 5 (2019). These numbers show that more work needs to be done in appointing Article III judges. By comparison, however, much more work is needed with respect to Bankruptcy Judges. Those numbers are stark by comparison: according to the report only 3.4% were African American, 2.0% were Hispanic, 2.0% were Asian American, and none reported as Native American or Pacific Islander. *Id.* The FEP Report recognized this relative lack of diversity on the bankruptcy bench by stating “bankruptcy judges continued to reflect the least diversity with respect to race and ethnic composition” in the federal court system. *Id.*

While I will not burden this report with more statistics, I have developed data to compare the ethnicity and race of the general population in every judicial district in the country to the ethnicity and race of bankruptcy judges that serve in those locations. In most districts, those serving on the bench do not at

all reflect the people that work, live, and seek bankruptcy relief in those locations. I can provide data for every committee member's district.

In conclusion, I agree that while *every* litigant has a right to a fair and unbiased judge, *no* litigant has a right to a judge that shares their race, ethnicity, gender, etc. But *every* litigant has a right to appear in a court that, on balance, has judges (and staff) that reflect the diversity of the community served by that court.

Federal judges deliver bad news to people every day, and perceptions of fairness matter.

Thank you, Chairman Johnson, Ranking Member Issa, and members of the subcommittee for taking the time to hold hearings on this important subject.