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# A Delicate Balance of Life Tenure and Independence: Conditional Resignations from the Federal Bench

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# A DELICATE BALANCE OF LIFE TENURE AND INDEPENDENCE: CONDITIONAL RESIGNATIONS FROM THE FEDERAL BENCH

## I. INTRODUCTION

[T]he judiciary is beyond comparison the weakest of the three departments of power; . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.

Alexander Hamilton<sup>1</sup>

In a letter dated October 4, 2007, Judge John C. Shabaz of the United States District Court for the Western District of Wisconsin submitted a letter of resignation<sup>2</sup> to President George W. Bush.<sup>3</sup> The letter states:

Please be advised that under the provisions of 28 U.S.C. § 371(b)(1) I shall assume senior status effective when your nominee appointee, my successor, is confirmed by the United States Senate and on the date of your subsequent appointment on or before January 20, 2009. Pending the confirmation process for my successor, I will remain on active status so that the Western District of Wisconsin remains current in the administration of its caseload.<sup>4</sup>

Similarly, Chief Judge Rudolph T. Randa, from the United States District Court for the Eastern District of Wisconsin, submitted a resignation subject to his successor being appointed before the expiration of President George W.

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1. THE FEDERALIST NO. 78, at 472–73 (Alexander Hamilton) (Bantam Classic reissue 2003).

2. For the purposes of this Comment, a “resignation” from a federal judgeship is a notification that the judge plans to either elect full retirement or assume senior status.

3. Posting of Letter from Judge John C. Shabaz, Judge for the United States District Court for the Western District of Wisconsin, to President George W. Bush (Oct. 4, 2007), <http://www.wispolitics.com/1006/071010ShabazLetter.pdf> [hereinafter Shabaz]. Nominated by President Ronald Reagan in 1981, Shabaz served as a judge for the Western District of Wisconsin for twenty-seven years. Federal Judicial Center, Judges for the United States Courts, Shabaz, John C., <http://www.fjc.gov/public/home.nsf/hisj> (click “S,” then click “Shabaz, John C.”). Judge Shabaz served as Chief Judge from 1996 to 2001, and he assumed senior status on January 20, 2009. *Id.*

4. Shabaz, *supra* note 3.

Bush's term.<sup>5</sup>

Judicial selection, including judicial resignations, nominations, and confirmations, is comprised of a patchwork of traditions, rules, and constitutional provisions.<sup>6</sup> The Constitution does not explicitly detail a formalized process at any stage of the appointments process, but checks and balances have organically developed and changed over time as the process has become more politicized. The question becomes, then, whether conditional resignations comport with this system or the Framers' intent. At the Supreme Court level, conditional resignations are rare.<sup>7</sup> Only a handful of conditional resignations have ever been submitted.<sup>8</sup> At the court of appeals and district court levels, it is unclear how widespread this practice is.<sup>9</sup> Neither Congress

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5. John Diedrich, *Federal Judge Randa to Move into Semi-Retirement*, MILWAUKEE J. SENTINEL, June 15, 2007, at 3B; Posting of Press Release Regarding Judge Rudolph T. Randa, Judge for the United States District Court for the Eastern District of Wisconsin to President George W. Bush (June 13, 2007), <http://www.wispolitics.com/1006/070613Randa.pdf>. Nominated by President George H.W. Bush and appointed in 1992, Judge Randa continues to serve in the Eastern District of Wisconsin. Federal Judicial Center, Judges of the United States Courts, Randa, Rudolph Thomas, <http://www.fjc.gov/public/home.nsf/hisj> (click "R," then click "Randa, Rudolph Thomas"). Judge Randa served as Chief Judge from 2002 through August 2009. *Id.*; John Diedrich, *U.S. Judge Not Taking New Criminal Cases: His Actions After Dispute May Cause Bottleneck*, MILWAUKEE J. SENTINEL, Aug. 24, 2009, at 1A. Nominated by President George W. Bush to fill the future vacancies of Judge Shabaz and Judge Randa, respectively, Waukesha County District Court Chief Judge J. Mac Davis and Milwaukee County Circuit Court Judge Timothy G. Dugan never received Senate confirmation and continue to serve on their respective benches. Jack Zemlicka, *Group to Review Shabaz, Biskupic Replacements*, WIS. L.J., Feb. 9, 2009, at 1. Indeed, on January 12, 2009, then-Chief Judge Randa submitted a letter to President George W. Bush, saying:

In June of 2007, I decided to assume senior status upon confirmation of your appointee to this position. This has not occurred, and I have decided to remain on active status and carry out the full duties and obligations of the office.

Letter from Chief Judge Rudolph T. Randa, United States District Court, Eastern District of Wisconsin, to President George W. Bush (Jan. 12, 2009) (on file with the MILWAUKEE J. SENTINEL).

6. *See infra* Part II.

7. Matthew Madden, Note, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1136 (2007).

8. *Id.*

9. *See* James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573, 573 (1995) (finding that "[j]udges are [more] likely to retire when political conditions favor the selection of successors sharing their policy views or when unfavorable political conditions appear unlikely to change"); Gary Zuk, Gerard S. Gryski & Deborah J. Barrow, *Partisan Transformation of the Federal Judiciary: 1869–1992*, 21 AM. POL. RES. 439, 439 (1993) (finding that judges engage in politically motivated departures); Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts: 1900–1987*, 52 J. POL. 457, 457 (1990) (finding that "presidential elections, salary increases, improved retirement benefits, caseload, and major Supreme Court decisions" influence judicial departures from the lower federal courts). *But see* David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. RES. 458, 458 (2000) (concluding that judicial retirements are primarily based on "nonpolitical considerations," however, "presidential elections may factor into a judge's decision").

nor the President has prohibited conditional resignations.<sup>10</sup> Indeed, resignations subject to a date certain have generally been accepted.<sup>11</sup>

This Comment explores the constitutionality of conditional resignations within the context of judicial selection. Part II will detail the appointments process, including judicial resignations, nominations, and confirmations. This Part also includes a discussion of the politicization of judicial selection for the federal bench. Part III explores the constitutional limits of conditional resignations. This Part discusses whether conditional resignations comport with the Framers' concept of a permanent and independent judiciary. While avoiding constitutional and institutional problems thus far, conditional resignations threaten to upset the delicate balance of tension between the Judiciary, Executive, and Legislative branches in the appointments process. Part IV culminates with a discussion of the next natural step for judicial selection—that is, regulation. If the judiciary tips the delicate balance by submitting problematic conditional resignations, attempts to regulate judicial departures may naturally follow. For example, Congress could enact sweeping legislation that regulates judicial departures. By exercising its power through the Necessary and Proper Clause, Congress may attempt to statutorily define “good Behaviour” to prohibit or place restrictions on conditional resignations. Moreover, actions could be brought challenging the validity of conditional resignations under current ethics procedures or in federal court. Finally, Part V concludes that conditional resignations protect judicial permanency in office by providing another check and balance in the patchwork of traditions, rules, and constitutional requirements in the appointments process. As an extension of these changes, the conditional resignation can be interpreted as judges asserting more control over their life tenure and independence.

## II. JUDICIAL SELECTION: A PATCHWORK QUILT OF TRADITIONS, RULES, AND THE CONSTITUTION

Article III of the U.S. Constitution creates the federal judiciary, providing that: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time

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“The only important strategic political consideration” is the president’s party affiliation and “how far off that president’s next election is.” *Id.*

10. See USCourts.gov, Future Vacancies in the Federal Judiciary: 111th Congress, [http://www.uscourts.gov/vacancies/reports/jdarvac1\\_future\\_circuit.html](http://www.uscourts.gov/vacancies/reports/jdarvac1_future_circuit.html) (last visited Dec. 17, 2009) (listing future vacancies and illustrating that many vacancies are not effective upon the date the resignation letter was submitted; that is, many are conditioned upon a future date and have been accepted as creating a vacancy).

11. See *id.*

ordain and establish.”<sup>12</sup> The federal court system, first established by the Judiciary Act of 1789, has grown from “a six-member Supreme Court, thirteen district courts, and three circuit courts” judiciary<sup>13</sup> to a body of 876 authorized judgeships.<sup>14</sup> There are 9 Supreme Court justices, 179 Courts of Appeals judges, 679 District Court judges, and 9 Court of International Trade judges authorized by Article III.<sup>15</sup>

The Constitution vests the power to fill the judgeships in the Executive and Legislative branches of the government,<sup>16</sup> and the Executive and Legislative branches have responded with their own formal and informal procedures for filling judgeships.<sup>17</sup> Equally important are the means of judicial departures, including retirement. Congress statutorily regulates retirement options,<sup>18</sup> but does not regulate the timing or form of such departures. Over time, each branch of government has asserted more power in the judicial retirement and selection processes by maximizing the use of the tools available to it.<sup>19</sup> The Executive has institutionalized an ideologically

12. U.S. CONST. art. III, § 1.

13. LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 11 (2005).

14. USCourts.gov, Summary of Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm> (last visited Dec. 17, 2009).

15. *Id.* These figures do not include magistrate, bankruptcy, or other statutorily authorized judgeships.

16. *See generally* U.S. CONST. art II, § 2, cl. 2.

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

*Id.*

17. *See id.*; 155 CONG. REC. S2550–51 (daily ed. Feb. 26, 2009) (“Committee on the Judiciary, Rules of Procedure”), available at <http://judiciary.senate.gov/about/committee-rules.cfm>; E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 352 (2006).

18. *See* 28 U.S.C. §§ 371–377 (2006).

19. *See generally* Charles W. Pickering, Sr. & Bradley S. Clanton, *A Proposal: Codification by Statute of the Judicial Confirmation Process*, 14 WM. & MARY BILL RTS. J. 807, 811 (2006). Judicial nominations are “one of the principal ideological battlegrounds of American politics.” *Id.* (quoting G. CALVIN MACKENZIE, TWENTIETH CENTURY FUND/CENTURY FOUND., *STARTING OVER: THE PRESIDENTIAL APPOINTMENT PROCESS IN 1997*, at 20 (1998)). *See generally* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 218–19 (2003) (discussing the politicization in the appointments process for federal judges).

based selection process, and the Senate has more frequently employed delay tactics, resulting in a longer confirmation process and fewer appointments.<sup>20</sup> Judicial nominations and confirmations have, without question, become more politicized.<sup>21</sup> In addition to the means used by the Executive and Legislative branches to assert their power, each branch of government has developed safeguards to protect its institutional power in the decision-making process. Conditional resignations from the federal bench are another natural result of this tension.

*A. Voluntary Departures: Judicial Retirement*

Article III, Section 1 of the U.S. Constitution provides:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.<sup>22</sup>

The federal judge, through the life tenure and good behavior provisions, is the “master of his tenure.”<sup>23</sup> He can depart at his will, and historically, departures from the bench occurred when a judge passed away while in office or when a judge was criminally convicted.<sup>24</sup> Departures from the federal judiciary now take several forms, including retirement, elevation, death, resignation, and impeachment.<sup>25</sup> The life tenure and good behavior provisions are the constitutional foundation for creating vacancies in the federal judiciary.<sup>26</sup>

Voluntary departures from the bench are currently the primary source of vacancies.<sup>27</sup> The motivations behind these departures are typically personal. These reasons include: “age, health, family concerns, workload, and

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20. Pickering & Clanton, *supra* note 19, at 811; Geyh, *supra* note 18, at 218–19.

21. Pickering & Clanton, *supra* note 19, at 811; Geyh, *supra* note 18, at 218–19.

22. U.S. CONST. art. III, § 1.

23. Madden, *supra* note 7, at 1155; see also David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for A “Golden Parachute,”* 83 WASH. U. L.Q. 1397 (2005) (discussing life tenure and the argument that life tenure should be retained).

24. Madden, *supra* note 7, at 1155.

25. *Id.* at 1154–55.

26. U.S. CONST. art. III, § 1.

27. EPSTEIN & SEGAL, *supra* note 13, at 33.

economics.”<sup>28</sup> Politics, though, can also be a motivation.<sup>29</sup> Judges sometimes engage in strategic departures, choosing to depart at a time when the judge has the same ideology or is of the same political party as the President, Senate, or both.<sup>30</sup> Moving up the hierarchy of the federal judiciary, the evidence that political motivations underlie the timing of judicial departures is more certain.<sup>31</sup>

Congress regulates judicial retirement options through a variety of statutes, the first of which Congress created through the Judiciary Act of 1869.<sup>32</sup> The Judiciary Act of 1869 permitted a judge to resign from office and receive a salary for the rest of his life, as long as he had served as an Article III judge for “at least ten years and reached seventy years of age.”<sup>33</sup>

In 1937, Congress passed the Retirement Act, creating the “senior status” option for Supreme Court Justices who met the Judiciary Act of 1869 qualifications.<sup>34</sup> Senior status allowed the Justice to “retire,” instead of “resign,” and to maintain “Article III power and status.”<sup>35</sup> The Retirement Act of 1954 is also significant because it allows judges who are sixty-five years of age and who have served for fifteen years to elect a retirement option.<sup>36</sup> Finally, Congress created the “Rule of Eighty” in 1984.<sup>37</sup> This rule allows a judge to elect a retirement option when he is any age between sixty-five and seventy years old, and when his age combined with any amount of

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28. *Id.* at 33–34.

29. *Id.* at 36–40. *But see* Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, available at <http://ssrn.com/abstract=1307845>. Peretti and Rozzi assert that empirical evidence does not support the conclusion that strategic departures are motivated by politics and that strategic departures from the Supreme Court, in fact, impose significant costs on those who choose to do so; that is, the Justice loses institutional “position and influence.” *Id.* at 1.

30. EPSTEIN & SEGAL, *supra* note 13, at 37–40. Epstein and Segal note that there is conflicting authority over whether political motivations underlie judicial departures, specifically citing Professor Albert Yoon for this argument as applied to the trial courts. *Id.* at 37. At the appellate court level, however, political scientists have established that judges strategically time departures from the appellate courts for political reasons. *Id.* Furthermore, political motivations are unequivocally a reason for strategic timing of departures from the Supreme Court. *Id.* at 38.

31. *Id.* at 36–40.

32. Judiciary Act of 1869, ch. 22, 16 Stat. 44; Madden, *supra* note 7, at 1156. Before 1869, the only voluntary departures occurred through resignation. Madden, *supra* note 7, at 1155. Congress has the power to regulate judicial retirement because the Necessary and Proper Clause vests the legislature with the power to regulate offices of which it has the authority to create. *See* U.S. CONST. art. I, § 8, cl. 18. In this case, the offices are Article III judgeships.

33. Madden, *supra* note 7, at 1156; Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45.

34. Madden, *supra* note 7, at 1156; Retirement Act of 1937, ch. 21, 50 Stat. 24.

35. Madden, *supra* note 7, at 1156–57.

36. Retirement Act of 1954, Publ. L. No. 83-294, § 4, 68 Stat. 8, 12; Madden, *supra* note 7, at 1157.

37. Madden, *supra* note 7, at 1157.

years of service totals eighty years.<sup>38</sup>

Judicial retirement is governed by various statutes in Title 28 of the United States Code, primarily in Chapter 17.<sup>39</sup> 28 U.S.C. § 371 is the most important statute, as it sets out the options of retirement with salary and senior status.<sup>40</sup> Retiring with a salary under 28 U.S.C. § 371(a) means that the judge can retire from office and earn an “annuity equal to the salary he was receiving at the time he retired.”<sup>41</sup> Under 28 U.S.C. § 371(b), a judge eligible for senior status under the age and service requirements of the Rule of Eighty may “retain the office but retire from regular active service.”<sup>42</sup> This means that the judge receives the salary of an active judge and any increases in pay. Each year, a senior status judge must be certified by the “chief judge of the circuit in which the judge sits.”<sup>43</sup>

Certification under § 371(b) requires fulfilling one of the following options within the calendar year. The first option is for a judge to carry “a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months.”<sup>44</sup> Second, the judge can perform:

[S]ubstantial judicial duties not involving courtroom participation . . . including settlement efforts, motion decisions, writing opinions in cases that have not been orally argued, and administrative duties for the court to which the justice or judge is assigned. . . . equal to or greater than the work described [herein] which an average judge in active service would perform in three months.<sup>45</sup>

Third, the judge can perform a combination of work under the first two options that, “in the aggregate equals at least 3 months work.”<sup>46</sup> The fourth option is that the judge can perform “substantial administrative duties directly related to the operation of the courts, or has performed substantial duties for a

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38. *Id.*; 28 U.S.C. § 371(c) (2006). For example, a judge who is sixty-six years old and has fourteen years of service on the federal bench would qualify for senior status. *See* 28 U.S.C. § 371(c).

39. 28 U.S.C. §§ 371–377.

40. *Id.* § 371.

41. *Id.* § 371(a).

42. *See id.* § 371(b)(1).

43. *Id.* § 371(e)(1).

44. *Id.* § 371(e)(1)(A).

45. *Id.* § 371(e)(1)(B).

46. *Id.* § 371(e)(1)(C).



Federal or State governmental entity.”<sup>47</sup>

### B. *The Appointments Clause*

Article II, Section 2 of the U.S. Constitution vests the power of nominating and confirming federal judges with the Executive and Legislative branches, providing that “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.”<sup>48</sup> While the delegates to the Constitutional Convention in Philadelphia engaged in a short and agreeable debate over the tenure of federal judges, it took more than three months, “virtually the duration of the entire convention,” for the delegates to the Convention to reach an agreement on how to select federal judges.<sup>49</sup> Among the proposals were those vesting the appointment power solely with the Executive or the Senate.<sup>50</sup> Article II, Section 2, Clause 2, in its final, enacted text, represents what has been called a “considerable compromise.”<sup>51</sup> Commentators have suggested that the intense, diverse, and controversial debate over the rules governing judicial appointments stems from the belief that “how we choose our judges plays a part in determining which types of men and women will serve as judges and, in turn, the choices that they will make in their post.”<sup>52</sup> Commentators diverge as to the proper balance between two central concepts in the judiciary—*independence and accountability*.<sup>53</sup>

The constitutional framework and distinct functions of each branch are the foundations for the appointments process.<sup>54</sup> The Supreme Court detailed the structure for the appointments process in *Marbury v. Madison*, when it held that the Constitution contemplates that the President has the “sole” and “voluntary” power to nominate and the Senate has the power of appointment through its “advice and consent.”<sup>55</sup>

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47. *Id.* § 371(e)(1)(D); see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007) (arguing that senior status, as provided in 28 U.S.C. § 371, is unconstitutional and proposing ways to restructure the statute to comport with the Constitution). *But see* Betty Binns Fletcher, *A Response to Stras & Scott’s Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 523 (2007) (responding to the argument that senior status is unconstitutional and providing policy reasons to justify senior status).

48. U.S. CONST. art. II, § 2. All federal judges are officers of the United States. USCourts.gov, Federal Judges, <http://www.uscourts.gov/faq.html> (last visited Dec. 22, 2009).

49. EPSTEIN & SEGAL, *supra* note 13, at 8.

50. Madden, *supra* note 7, at 1140.

51. *Id.* at 1141.

52. EPSTEIN & SEGAL, *supra* note 13, at 8.

53. *Id.*

54. Madden, *supra* note 7, at 1143.

55. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803)).

The meaning of advice and consent is at the center of continued debate.<sup>56</sup> Epstein and Segal note “two issues in serious contention” with regard to interpreting the Framers’ intent for the extent of the Senate’s power in the advice and consent provision.<sup>57</sup> The first issue is the balance of power between the President and the Senate.<sup>58</sup> Tension remains between the views that: (1) the President is the major source of appointment power where the Senate is a “minor check” on this power<sup>59</sup> and (2) the Senate has the “right” and “responsibility” to “reject a president’s nominees.”<sup>60</sup> The second issue in the “debate over the framers’ intent” is the “role of politics, partisanship, and ideology in judicial appointments.”<sup>61</sup>

The judicial selection process is such that the Senate can and does play a significant role in checking the President; politics, partisanship, and ideology are integral to the appointments process.<sup>62</sup>

### C. *The Process and Politics of Judicial Selection*

Formal and informal traditions, rules, and constitutional provisions govern the process of judicial selection.<sup>63</sup> Epstein and Segal provide a broad sketch of the overall process.<sup>64</sup> The first step is the creation of a vacancy (by retirement, death, or the creation of a new seat).<sup>65</sup> The first step can be more generally viewed in terms of the Article III judge notifying the President of his resignation, instead of in terms of “vacancies.”<sup>66</sup> Second, the President’s advisors “compile an initial list of candidates” for the position, and may conduct background checks of the candidates.<sup>67</sup> Third, the President announces the nominees and submits their names to the Senate.<sup>68</sup> Fourth, the Senate Judiciary Committee holds hearings, debates, and votes on the candidates.<sup>69</sup> Simultaneously, the media, the public, interest groups, and party elites are involved in the process, adding a layer of national attention and

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56. EPSTEIN & SEGAL, *supra* note 13, at 18.

57. *Id.*

58. *Id.*

59. *Id.* (citing THE FEDERALIST NO. 76 (Alexander Hamilton), *supra* note 1, at 463).

60. *Id.* at 19.

61. *Id.*

62. *See id.* at 20–27.

63. Moritz, *supra* note 17, at 352.

64. EPSTEIN & SEGAL, *supra* note 13, at 23 fig.1.6.

65. *Id.*; *see* Madden, *supra* note 7, at 1146–50 (arguing that the president’s power to nominate requires an actual vacancy and that conditional resignations, as future vacancies, do not trigger the power to nominate).

66. *See infra* Part III.B.

67. EPSTEIN & SEGAL, *supra* note 13, at 23 fig.1.6.

68. *Id.*

69. *Id.*

exposure to the process.<sup>70</sup> American Bar Association (ABA) ratings have been used since 2001 at the Senate Judiciary Committee stage.<sup>71</sup> Finally, the Senate votes on whether to confirm the President's nominee.<sup>72</sup>

While the process of judicial selection is "remarkably complex," Professor Linz Audain asserts that three categories of "major players" are consistently involved in judicial selection: (1) "the initiators" (the Executive); (2) "the screeners" (Congress, the media, the public, and the agencies who conduct background checks); and (3) "the affirmers" (the Senate).<sup>73</sup> The significance of the roles changes with the type of judgeship being filled.<sup>74</sup> For example, the use of "senatorial courtesy" and "blue slipping" are more prominent in the confirmation of a district court judge.<sup>75</sup> Senatorial courtesy allows a senator from the state where the vacancy arises to select candidates from his own state first.<sup>76</sup> Blue slipping is a process by which blue slips are sent by objecting senators to the Judiciary Committee, which theoretically is supposed to withdraw a candidate from the pool of applicants.<sup>77</sup>

Historically, ideology has played a role in judicial nominations, but President Ronald Reagan institutionalized the selection of "the most ideologically compatible judicial candidates for nomination" by creating a formal screening process.<sup>78</sup> President Nixon initiated the first "systematic

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70. *Id.*; see generally Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 JUDICATURE 58, 58–59 (2000) ("Once a judicial nominee has been forced, under oath, to voice an opinion regarding the correctness of a Supreme Court precedent on national television, both the appearance and reality of judicial independence has been compromised."). See also Michael Comiskey, *Not Guilty: The News Media in the Supreme Court Confirmation Process*, 15 J.L. & POL. 1 (1999) (discussing the media's role in judicial confirmations).

71. EPSTEIN & SEGAL, *supra* note 13, at 22–23. Until 2001, the ABA ratings were a part of the background check stage of the process. *Id.* at 22.

72. *Id.* at 23 fig.1.6.

73. Linz Audain, *The Economics of Law-Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function*, 42 AM. U. L. REV. 115, 124–25 (1992) (citing HOWARD BALL, *COURTS AND POLITICS: THE FEDERAL JUDICIAL SYSTEM* 193–206 (2d ed. 1987) (discussing the classes and roles of participants in the federal judicial selection process).

74. *Id.* at 125.

75. *Id.* at 125–26.

76. *Id.* at 125. The constitutionality of senatorial courtesy is questionable, as it may violate separation of powers by the senators encroaching on the President's nomination power under Article II, Section 2. See Sandra E. Strippoli, Note, *Senatorial Courtesy: Not in the Public Interest, Justiciable and Unconstitutional*, 15 RUTGERS L.J. 957 (1984).

77. Audain, *supra* note 73, at 126.

78. See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 878–80 (2005). During George H.W. Bush's presidency, the overt politicization of the nomination process was illustrated by various judicial candidates sending their "conservative credentials to Bush Administration officials." *Id.* at 888. Goldman provides an example of a candidate for a Second Circuit judgeship who detailed his conservative record and ideology in a letter to Bush Administration officials. *Id.*

emphasis on policy considerations” in the judicial selection process.<sup>79</sup> Subsequently, President Reagan centrally institutionalized the ideas contained in a memorandum to President Nixon from a young White House aide, Thomas Charles Huston.<sup>80</sup> Huston suggested:

Perhaps the least considered aspect of Presidential power is the authority to make appointments to the federal bench—not merely to the Supreme Court, but to the Circuit and District benches as well. Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office.<sup>81</sup>

Huston additionally concluded that if a President “establishes *his* criteria and establishes *his* machinery for ensuring that the criteria are met, the appointments that he makes will be *his*, in fact, as in theory.”<sup>82</sup> Subsequently, President Nixon, in a handwritten notation, wrote, “RN *agrees*—Have this analysis in mind in making judicial nominations.”<sup>83</sup>

Now, both the Department of Justice’s Office of Legal Policy and the White House Counsel have formal processes through which applicants are screened.<sup>84</sup> The President can actually “track potential judicial nominees for years,” and ensure that the “Administration can effectively fill the lower courts with judges committed to its basic views.”<sup>85</sup> With the institutionalization of the process comes the potential cost to applicants and nominees. These costs include: the difficulty of maintaining a client base because of clients’ concerns that, if all goes as planned, a confirmed nominee would no longer be able to represent them; job loss from being nominated, but never getting confirmed; the significant amount of paperwork required for the separate White House, Senate, Federal Bureau of Investigation, and ABA

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79. Elliot E. Slotnick, *Appellate Judicial Selection During the Bush Administration: Business as Usual or a Nuclear Winter?*, 48 ARIZ. L. REV. 225, 228 (2006).

80. *Id.* at 228–29.

81. *Id.* at 228 (citing SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 205–06 (1997) (quoting Memorandum from Thomas Charles Huston to the President 1 (Mar. 25, 1969))).

82. *Id.* (citing GOLDMAN, *supra* note 81, at 206 (quoting Memorandum from Thomas Charles Huston to the President 7 (Mar. 25, 1969) (emphasis in original))).

83. *Id.* (citing GOLDMAN, *supra* note 81, at 206 (quoting Memorandum from John Ehrlichman to the Staff Secretary (Mar. 27, 1969) (emphasis in original))).

84. Goldman, *supra* note 78, at 880.

85. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1508 (1992). “[M]any Presidents, including most of those who appointed the last eleven Justices, more or less overtly considered a candidate’s likely voting patterns in choosing a nominee.” *Id.* at 1513.

background checks; and “intrusive financial disclosure requirements.”<sup>86</sup>

Once the President has selected a nominee, the Senate engages in its advice and consent role.<sup>87</sup> Both the Senate and the Judiciary Committee have formal rules guiding the confirmation process;<sup>88</sup> however, the informal practices are “[f]ar more important.”<sup>89</sup> Judge Pickering states that the process is primarily “a hodgepodge of traditions and precedents that empower a small group of senators, or even an individual senator, to delay interminably the confirmation of judicial nominees.”<sup>90</sup> The Senate uses several veto gates to block a nomination, including: (1) denying approval from the Judiciary Committee; (2) “blue-slipping”;<sup>91</sup> (3) a senator’s requesting a “hold” on having the confirmation come before the Senate or the Judiciary Committee; (4) the Majority Leader choosing to not hold a full vote in the Senate; (5) by filibustering or threatening to filibuster; and (6) not holding any vote before the end of a Congressional session.<sup>92</sup> Another relevant obstruction to confirming nominees when considering the conditional resignations issue is the “Thurmond Rule.”<sup>93</sup> The Thurmond Rule is a Senate tradition invoked at the end of a presidential term whereby nominations are simply delayed until

86. Edith H. Jones, *Observations on the Status and Impact of the Judicial Confirmation Process*, 39 U. RICH. L. REV. 833, 835–36 (2005).

87. See *supra* Part II.B.

88. 155 CONG. REC. S2550–51 (daily ed. Feb. 26, 2009) (“Committee on the Judiciary, Rules of Procedure”), available at <http://judiciary.senate.gov/about/committee-rules>. cfm.

89. Moritz, *supra* note 17, at 352.

90. Pickering & Clanton, *supra* note 19, at 812.

91. Moritz, *supra* note 17, at 355.

92. *Id.* at 354–57. See Arthur L. Rizer III, *The Filibuster of Judicial Nominations: Constitutional Crisis or Politics as Usual?*, 32 PEPP. L. REV. 847, 859 (2005) (discussing the constitutionality of the Senate’s filibustering of judicial nominees); Pickering & Clanton, *supra* note 19, at 815:

For over two hundred years of American history, the filibuster was not used to block confirmation of judicial nominees with majority support. . . . [T]his historical practice changed dramatically during the 108th Congress in 2003 and 2004, when Democrats filibustered ten of President Bush’s nominees to the U.S. Courts of Appeals and threatened filibusters of six more.

*Id.* (internal citations omitted). The resultant nuclear option to ban the use of the filibuster of judicial nominees and the emergence of the Gang of Fourteen senators, comprised of seven Democrats and seven Republicans who agreed not to vote against filibustering in the future unless there are “extraordinary circumstances,” illustrates the unpredictable and often unworkable procedure of judicial confirmations in the Senate. *Id.* at 816 (quoting Charles Babington & Shailagh Murray, *A Last-Minute Deal on Judicial Nominees*, WASH. POST, May 24, 2005, at A1); see also Sheldon Goldman, Elliot Slotnick, Gerard Gryski & Sara Schiavoni, *Picking Judges in a Time of Turnmoil: W. Bush’s Judiciary During the 109th Congress*, 90 JUDICATURE 252, 264–65 (2007). Commentators have argued that statutorily codifying the process would help to repair the “badly broken” process. Pickering & Clanton, *supra* note 19, at 816. However, Pickering and Clanton note that such statutes have been proposed and rejected in the past. *Id.* at 817–18.

93. Slotnick, *supra* note 79, at 235–36.

the next President takes office.<sup>94</sup>

Judge Charles Pickering and Bradley Clanton note that “[f]or much of our nation’s history, ‘judges nominated by the President were confirmed based on their experience, qualifications, and integrity, rather than on their political stance and ideology.’”<sup>95</sup> However, over time the process has become increasingly politicized, and it is generally accepted that the 1987 nomination and subsequent controversial confirmation battles over Judge Robert Bork’s nomination to the Supreme Court of the United States marked a turning point in the increased politicization of the process.<sup>96</sup> President Ronald Reagan declared that he would appoint judges based on ideology, causing the media and public opinion to influence some senators’ votes; ultimately, the Senate rejected Bork for political reasons.<sup>97</sup> The legacy of the Bork hearings lives on, and “bork” has since become an entry in *Black’s Law Dictionary*:

BORK (bork), *vb. Slang*. 1. (Of the U.S. Senate) to reject a nominee, esp. for the U.S. Supreme Court, on grounds of the nominee’s unorthodox political and legal philosophy. • The term derives from the name of Robert Bork, President Ronald Reagan’s unsuccessful nominee for the Supreme Court in 1987. 2. (Of political and legal activists) to embark on a media campaign to pressure U.S. Senators into rejecting a President’s nominee. 3. Generally, to smear a political opponent.<sup>98</sup>

Subsequently, the “fallout from the Bork rejection ‘quickly seeped down to the lower courts.’”<sup>99</sup> Senate scrutiny of lower court nominees has become openly politicized.<sup>100</sup> Nominees have been rejected “on policy and judicial philosophical grounds.”<sup>101</sup> Delay tactics and veto gates used by the Senate to avoid confirming nominees based on ideology are not unique to President George W. Bush’s administration, during which Senate Democrats “delayed or killed” nominees by holding up, filibustering, or simply not acting on

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94. *Id.*

95. Pickering & Clanton, *supra* note 19, at 809 (quoting Gerald Walpin, *Take Obstructionism Out of the Judicial Nominations Confirmation Process*, 8 TEX. REV. L. & POL. 89, 90 (2003)).

96. *Id.* at 811; Jones, *supra* note 86, at 838.

97. Comiskey, *supra* note 70, at 9.

98. Jones, *supra* note 86, at 838 n.20 (quoting BLACK’S LAW DICTIONARY 196 (8th ed. 2004)).

99. Geyh, *supra* note 19, at 219 (quoting MACKENZIE, *supra* note 19, at 20).

100. *Id.*

101. Goldman, *supra* note 78, at 889; see also Orrin G. Hatch, *At Last a Look at the Facts: The Truth About the Judicial Selection Process: Each Is Entitled to His Own Opinion, But Not to His Own Facts*, 11 GEO. MASON L. REV. 467, 467 (2003).

nominees.<sup>102</sup> Republicans engaged in the same delay tactics during the Clinton Administration.<sup>103</sup> The delay tactics are “especially severe” when the government is divided, that is, when control of the White House differs from that of the Senate.<sup>104</sup>

Commentators have offered various reasons for the trend toward “ideological warfare” and “confirmation wars.”<sup>105</sup> Judge Edith Jones asserts that “[t]he problems of judicial selection . . . are not so much a cause as a symptom of the deeper division in views as to what constitutes the rule of law.”<sup>106</sup> Professor Sheldon Goldman argues that there are three main reasons for the increased politicization of the process: (1) judgeships, while once patronage jobs, are now “policy positions”; (2) “party elites” have become polarized, in part because of the media’s dramatization of current issues; and (3) there has been a rise of advocacy groups in both judicial selection and confirmation.<sup>107</sup>

The Congressional Research Service Report for Congress on Judicial Nomination Statistics for the U.S. District and Circuit Courts between 1977

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102. Goldman, *supra* note 78, at 889–90; Geyh, *supra* note 19, at 219; Press Release, White House, President Bush Discusses Judicial Accomplishments and Philosophy (Oct. 6, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html>. For example, Senate Democrats “threatened either to place holds on or filibuster” President George W. Bush’s judicial nominees “unless they were assured that Democrats in states whose delegations were split would have the opportunity to blue-slip judicial nominees to whom they objected.” Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218, 218–19 (2002).

103. Goldman, *supra* note 78, at 889–90. *But see* Posting of Carl Tobias, Why the Federal Courts Should Give Thanks This Thanksgiving: A Set of Positive Developments, with the Hope of More to Come (Nov. 26, 2008), [http://writ.news.findlaw.com/commentary/20081126\\_tobias.html](http://writ.news.findlaw.com/commentary/20081126_tobias.html) (discussing recent positive developments in the federal judiciary). For example, the number of days between the nomination and confirmation of a lower court nominee averaged 25.4 days during the Nixon administration and increased to an average of 73 days by 1997. Geyh, *supra* note 19, at 220. The Senate questioned one of President Clinton’s district court nominees “as to how she had voted, as a private citizen, on all of the 160 initiatives on the California ballot in the preceding decade.” *Id.* at 219. Senator Orrin Hatch and other senators engaged in extensive background checks, “to weed out ‘liberal activists.’” *Id.* (quoting David G. Savage, *Rehnquist Chides GOP for Judicial Stalling*, L.A. TIMES, Jan. 1, 1998, at A1).

104. Goldman, *supra* note 78, at 892–93. This occurred during both the Clinton and current Bush Administrations, and as a result, nominees were obstructed by delays, filibuster, or inability to make it out of the Judiciary Committee. *Id.*; *see also* Slotnick, *supra* note 79, at 232–37. Senator Feingold once addressed the delay tactics used by Republicans during President Clinton’s term: “A nomination delayed is justice delayed. As we know, justice delayed is justice denied. A vacancy unfulfilled is justice unfulfilled.” Rizer, *supra* note 92, at 871 (internal citation and quotation marks omitted). Senator Feingold’s philosophy was fleeting. In 2003, he became a lead senator engaged in filibustering President George W. Bush’s judicial nominees. *Id.*

105. *See, e.g.*, Goldman, *supra* note 78; BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES 9–12 (2006).

106. Jones, *supra* note 86, at 846 (quoting Edith H. Jones, *Foreword to Symposium: The Ethics of Judicial Selection*, 43 S. TEX. L. REV. 1, 6 (2001)).

107. Goldman, *supra* note 78, at 875–76.

and 2003 indicates various relevant trends in judicial selection,<sup>108</sup> including:

The great majority of each President's district and circuit court nominations have been confirmed, except for the circuit court nominations of Presidents William J. Clinton and George W. Bush.

The confirmation percentage for district and circuit court nominations combined was greater than 60% for every congressional session from 1977 through 1990, whereas the district and circuit combined confirmation rate has been less than 60% for nine of the last 13 congressional sessions.

The average number of days elapsing between nomination date and confirmation has been higher for most Congresses in the post-1990 period than for prior Congresses.

Starting with the 100th Congress (1987–1988), and in five of the eight Congresses since, an average of more than 100 days has elapsed between nomination dates and committee votes on either district or circuit court nominations, or on both.

. . . .

The average number of days between nomination date and final action increased in Congresses ending in presidential election years.

The vast majority of judicial nominations submitted during the 1977–2003 period received committee hearings and votes, as well as full Senate votes.<sup>109</sup>

There are several practical concerns with the prevalence of delay tactics and ideology in judicial confirmations. One commentator notes that the current system hinders judicial independence by either locking the nominee into a commitment on how he would rule on issues or by having the appearance of partiality.<sup>110</sup> Others have asserted that “[i]ntellectual [h]omogeneity on the Court” is dangerous because different views are an asset

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108. Denis Steven Rutkus & Mitchel A. Sollenberger, CRS Report for Congress, *Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977–2003*, at i (Feb. 23, 2004), <http://www.senate.gov/reference/resources/pdf/RL31635.pdf>.

109. *Id.*

110. Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 974 (2007); see generally Fein & Neuborne, *supra* note 70, at 62–63 (“[C]ase-specific questioning of would-be or actual nominees is tantamount to political arm twisting to dictate the outcome of constitutional questions by the judicial branch. . . . Questions about judicial philosophy, unlike case-specific litmus tests, have a legitimate place in presidential or senatorial inquiries.”).



to the courts, instead of a threat.<sup>111</sup> Additionally, independence in judicial selection and diversity on the bench will enable future Congresses, Presidents, and judges to effectively respond to judicial opinions and identify and solve problems.<sup>112</sup>

The power, process, and politics of judicial selection provide a context within which to place conditional resignations from the federal bench. These findings lay the groundwork for discussing the tension between the competing interests of the Judicial, Executive, and Legislative branches and the Framers' intent for the institutional roles in judicial selection. Conditional resignations are another piece of this politicized process.

### III. THE CONSTITUTIONAL LIMITS OF CONDITIONAL RESIGNATIONS

Conditional resignations from the federal bench epitomize how checks and balances in judicial selection create tension among the three branches of government. The constitutional limits of conditional resignations are unclear. They test the limits of the vested power of the Executive and Legislative branches in the appointments and confirmation processes, coming close to violating separation of powers principles. Some conditional resignations could be seen as encouraging judges to be political actors in a system not designed for judges to engage in politics. However, conditional resignations such as Judge Shabaz's signal transparency in the judiciary and illustrate the judiciary's concern for its caseload.<sup>113</sup> Since 1960, the federal judiciary's caseload has increased substantially.<sup>114</sup> The reality is that judicial vacancies can and have remained vacant for several years.<sup>115</sup> Conditional resignations do not per se exceed the judiciary's powers; rather, they are a tool that the Framers intended the judiciary to use to protect its permanence and independence.

#### *A. Life Tenure and Independence: The Framers' Intent*

In *The Federalist No. 78*, Alexander Hamilton explains that,

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111. Strauss & Sunstein, *supra* note 85, at 1510–12.

112. *Id.*

113. *See* Shabaz, *supra* note 3.

114. Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CON. L. 377, 388 (2003) (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 65 (1985)); Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 761–62 (1983).

115. USCourts.gov, Current Judicial Vacancies, <http://www.uscourts.gov/judicialvac.cfm> (click "Current Judicial Vacancies") (last visited Dec. 29, 2009). Of the ninety-eight vacancies, eight vacancies are at least three years old and have no nominee pending. *Id.* For example, one vacancy in the Fourth Circuit has been vacant since July 31, 1994, although a nominee for the position was finally named in November 2009. *Id.*

[I]n a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>116</sup>

The Framers committed judicial selection to a system of checks and balances through the text of the Constitution.<sup>117</sup> The fundamental separation of powers principles embodied in the Appointments Clause function as a guard against “encroachments” and “majoritarian impulses”<sup>118</sup> on “individual rights and liberties” anticipated by the Framers.<sup>119</sup> The President has the duty and power to nominate as he chooses, and he is checked by the Senate’s “advice and consent.”<sup>120</sup> Life tenure ensures that the judiciary maintains its power and ability to operate without undue influence from the other branches.<sup>121</sup> Indeed, a hallmark of the judiciary is its “independent spirit.”<sup>122</sup> In a system of checks and balances, the conditional resignation is a check and balance the Framers made available to the judiciary that can protect the judiciary’s independence.

James Madison explained that each branch must be afforded “the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack.”<sup>123</sup> The judiciary’s place within government illustrates that it “is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and as that nothing can

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116. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 472.

117. Madden, *supra* note 7, at 1144.

118. *Id.* (quoting Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1058–59 (1987) (quoting THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961))).

119. *Id.* (citing Blumoff, *supra* note 118, at 1058–59).

120. U.S. CONST. art. II, § 2, cl. 2.

121. Diane S. Sykes, *Independence v. Accountability: Finding a Balance Amidst the Changing Politics of State-Court Judicial Selection*, 92 MARQ. L. REV. 341, 344 (2008).

122. Brandon Smith, Note, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televisify the Supreme Court*, 97 GEO. L.J. 1409, 1421 (2009) (quoting THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

123. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 315–16.

contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.”<sup>124</sup> Conditional resignations protect the judiciary’s independence from the encroachment of other branches. As life tenure grants federal judges the power to withdraw their resignation at any time before a nominee is confirmed,<sup>125</sup> a conditional resignation illustrates an extension of this power.

*B. A Delicate Balance: Masters of Their Tenure<sup>126</sup>  
in Violation of Separation of Powers?*

Protection of the judiciary’s independence could come at the expense of its encroaching on the powers of other branches. A conditional resignation from an Article III judge can interfere with the Executive’s and Legislature’s constitutionally vested powers for nomination and confirmation, respectively, by assuming complete control over the timing, form, and substance of the nomination and confirmation process.<sup>127</sup> Additionally, conditional resignations can threaten judicial independence because they can create the appearance of actual partiality in the judiciary and can undermine the balance between independence and accountability.

The Framers constructed government to withstand “a gradual concentration of the several powers in the same department.”<sup>128</sup> The concentration of power in judicial selection could be shifted away from the President and Senate and toward the judiciary if the use of problematic conditional resignations occurs. Conditional resignations can promote power within small interest groups of the judiciary and diffuse the President’s appointment power.

Supreme Court Justice Souter has cautioned against such “diffusion.”<sup>129</sup> Indeed, “[t]he Appointments Clause forbids both aggrandizement and abdication.”<sup>130</sup> Arguably, certain conditional resignations could result in the

124. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 473.

125. See U.S. CONST. art. III, § 1; Madden, *supra* note 7, at 1153 (citing *Clark v. United States*, 72 F. Supp. 594, 597 (Ct. Cl. 1947) (“We express no opinion on the power of the judge to withdraw his resignation before acceptance by the President or before the vacancy has been filled, but, for the purposes of this case, we shall assume that he has [the] power.”)).

126. See Madden, *supra* note 7, at 1155 (stating that a federal judge is the “master of his tenure”).

127. *Id.* at 1164.

128. THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 315.

129. Madden, *supra* note 7, at 1169 (citing *Weiss v. United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring)).

130. *Id.* at 1169 n.126 (quoting *Weiss*, 510 U.S. at 189).

abdication of executive appointment power to the judiciary. The President cannot “allow Congress or a lower level Executive Branch official to select a principal officer.”<sup>131</sup> The President could abdicate his discretionary power to nominate by accepting a conditional resignation.<sup>132</sup> Depending on the conditions placed upon a resignation, a conditional resignation could take the form and substance of an appointment from the President and a confirmation by the Senate. On the one hand, a resignation could be unequivocal and for a date certain.<sup>133</sup> On the other hand, a resignation could place equivocal conditions on a date certain, appointment of a successor, or appointment of a *particular* successor on a resignation.<sup>134</sup>

This is problematic because a conditional resignation could compromise the power of current or future presidents and senators. Although the current President and Senate may confirm a successor for the judge who submits a conditional resignation, certain conditions placed thereupon could encroach upon the sole power of the President to nominate whomever, whenever, and however he or she chooses and for the Senate to confirm whomever, whenever, and however it chooses. Any prospective interference could violate separation of powers principles because a conditional resignation could take away the creation of a vacancy for the succeeding President and Senate, if the condition is not fulfilled before the expiration of the current President’s term. A conditional resignation could also roll over to the future President, provided the conditions are not specific to the current President. In that case, the judge submitting the conditional resignation may encroach upon the future President and Senate’s power in a similar fashion. A federal judge who submits a conditional resignation can assume a significant part of the nomination and confirmation power by dictating terms and conditions of his resignation.

Additionally, certain terms and conditions of conditional resignations could undermine the judiciary’s integrity by having the appearance of or showing actual partiality.<sup>135</sup> The distinction between whether the resignation

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131. *Weiss*, 510 U.S. at 188.

132. *See* Madden, *supra* note 7, at 1168.

133. *Id.* at 1150.

134. *See id.* at 1152. The conceivable conditions placed on a resignation are infinite.

135. *Id.* at 1168–69; *see generally* Fein & Neuborne, *supra* note 70, at 63:

Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.

*Id.*

appears to be political or is actually political is of little value; the appearance of partiality can damage the integrity of the system just as well.<sup>136</sup> Justice Ginsburg has said that the U.S. federal judiciary “has been a model for the world” for the principal that “[e]ssential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially.”<sup>137</sup> While the judiciary’s independence is essential, conditional resignations could threaten its impartiality.

Nonetheless, conditional resignations are an extension of a judge’s life tenure and service during good behavior. An increase in their use could signal a response and adaptation to senatorial delay tactics and the increased politicization of the process. Justice Ginsburg has noted that while “casual use of impeachment against federal judges is a remote prospect . . . hazing of federal judicial nominees [has been] unrelenting.”<sup>138</sup> This politicization of the process causes delay, “threatens to erode the quality of justice,” and will “inevitably sap the energy and depress the spirits of the judges left to handle heavy dockets.”<sup>139</sup> As the President and Senate develop uses for tools within their judicial selection powers, so too may the judiciary adapt to this process with an increasing use of conditional resignations.

#### IV. THE PROCESS, FORM, AND TIMING OF JUDICIAL DEPARTURES

If the judiciary tips the delicate balance by submitting problematic conditional resignations, then attempts to regulate judicial departures may naturally follow. Regulation could come in one of two forms. First, claims could be brought under current judicial ethics procedures or in federal court to challenge the validity of conditional resignations. However, current ethics proceedings and federal court causes of action prohibit the removal of federal judges serving during good behavior. As a result, Congress may attempt to define good behavior to prohibit or place limits on conditional resignations, or enact a formalized resignation process as an extension of the retirement statutes. Both forms of regulation would face staunch opposition and would

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136. Maintaining independence in the judiciary is analogous to maintaining the integrity of candidates in the campaign finance context. For example, in *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 136 (2003), and *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1976), the Supreme Court found that the appearance of or actual corruption of legislators stemming from campaign finance undermines public confidence in the legislature. Similar to campaign finance, the judiciary should avoid the appearance of or actual partiality.

137. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2006).

138. *Id.* at 10.

139. *Id.*

not likely succeed.<sup>140</sup> However, as conditional resignations organically develop within the judicial selection process, a framework of regulation could be a natural response if the judiciary increases the tension with problematic conditional resignations.

A. *Challenging the Validity of Conditional Resignations: Judicial Ethics*

The validity of conditional resignations can be challenged by bringing claims under current judicial ethics procedures or in federal court. The current state of the law indicates that a judge can only be disciplined by fellow judges, but not removed.<sup>141</sup> Both the Judicial Conduct and Disability Act of 1980 and the Code of Conduct for United States Judges are instructive on whether conditional resignations comport with the judiciary's constitutionally vested powers.

First, claims can be brought under a citizen suit provision established in the Judicial Conduct and Disability Act of 1980 (the Act) that allows “[a]ny person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . [to] file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.”<sup>142</sup> Under the Act, the judicial council for each circuit may discipline violations by temporarily suspending the judge’s ability to hear cases; publicly or privately censuring or reprimanding the judge; certifying the judge for disability pursuant to 28 U.S.C. § 372; or “requesting that the judge voluntarily retire.”<sup>143</sup> The Act explicitly prohibits the judicial council from “order[ing] removal from office any judge appointed to hold office

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140. “Enforcement of standards of judicial conduct in the federal courts has drawn substantial criticism.” Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. 1105, 1139 (2009).

141. Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 132 & n.223 (2006) (quoting 28 U.S.C. § 354(a)(3)(A) (2006) (“Under no circumstances may the judicial council order removal from office of any [Article III] judge appointed to hold office during good behavior.”)). A complaint can be filed against him for violating the Judicial Conduct and Disability Act of 1980 (the Act), but again, the judge cannot be removed for any violation. *See id.*; 28 U.S.C. §§ 351–364; USCourts.gov, *Judicial Misconduct and Disability*, <http://www.uscourts.gov/library/judicialmisconduct/index.html> (last visited Dec. 29, 2009) [hereinafter *Judicial Misconduct and Disability*]. Complaints brought against judges for misconduct must be filed pursuant to each U.S. Circuit Court’s procedures and requirements; however, most complaints are dismissed for failure to adhere to the law. *Judicial Misconduct and Disability, supra*.

142. 28 U.S.C. § 351(a).

143. *Id.* § 354(a)(2)(A)–(B). Each circuit has a judicial council that ensures the “effective and expeditious administration of justice within its circuit.” 28 U.S.C. § 332(d)(1). In addition to its administrative function, a judicial council reviews judicial misconduct and disability matters. *Id.* § 332(g). A council is comprised of the circuit’s chief judge, who serves as the chair of the council, “and an equal number of other circuit and district judges.” *Id.* § 332(a)(1).

during good behavior” under any circumstances.<sup>144</sup>

Second, all Article III judges are subject to the Code of Conduct for United States Judges (the Code of Conduct) that has been adopted by the Judicial Conference and is often considered in claims brought under the Act.<sup>145</sup> The Code of Conduct adopted by the Judicial Conference sets forth guidelines to which “United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges” must adhere.<sup>146</sup> Marking the “first substantial Code revision since 1992,” the Judicial Conference adopted a revised Code of Conduct on March 17, 2009.<sup>147</sup> On July 1, 2009, the revised Code of Conduct for United States Judges took effect.<sup>148</sup> Similar to discipline under the Act, and because many determinations under the Act involve a consideration of whether a judge violated the Code, judges found in violation of the Code receive discipline short of removal, including “censure, reprimand, or other sanction.”<sup>149</sup>

Conditional resignations can violate three Canons in the Code, depending on the type of condition, including Canons 1, 2, and 5.<sup>150</sup> Canon 1 of the

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144. *Id.* § 354(a)(3)(A).

145. *In re Charge of Judicial Misconduct*, 62 F.3d 320, 321–22 (9th Cir. Judicial Council 1995). The Judicial Council of the Ninth Circuit has held that the Act “is not, and never was meant to be, coextensive with judicial ethics as embodied in Canons” of the Code of Conduct for United States Judges. *Id.* at 322 (emphasis omitted). However, the Code of Conduct is often consulted when assessing whether a judge violates the Act. *See, e.g., In re Charges of Judicial Misconduct*, 404 F.3d 688, 688 (2d Cir. Judicial Council 2005) (finding that a circuit court judge did not violate the Code of Conduct for speaking at a progressive legal organization event; a circuit judge violates the Code of Conduct when he publicly endorses or opposes a candidate for public office; and general allegations of bias do not state a claim against a circuit judge under the Code of Conduct provision that prohibits engaging in political activity or advocacy).

The Judicial Conference of the United States is summoned by the Chief Justice each year, and it is comprised of “the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit.” 28 U.S.C. § 331. The Judicial Conference’s “fundamental purpose” is “to serve as the principal policy making body concerned with the administration of the U.S. Courts.” USCourts.gov, Judicial Conference of the United States, <http://www.uscourts.gov/judconf.html> (last visited Dec. 31, 2009).

146. USCourts.gov, Code of Conduct for United States Judges 1, [http://www.uscourts.gov/library/codeOfConduct/Code\\_Effective\\_July-01-09.pdf](http://www.uscourts.gov/library/codeOfConduct/Code_Effective_July-01-09.pdf) [hereinafter Code of Conduct].

147. Press Release, U.S. Courts, Judiciary Updates Code of Conduct; Seeks New Judgeships (Mar. 17, 2009), [http://www.uscourts.gov/Press\\_Releases/2009/0309JudicialConf.cfm](http://www.uscourts.gov/Press_Releases/2009/0309JudicialConf.cfm) [hereinafter Judiciary Updates].

148. Code of Conduct, *supra* note 146, at 1. The revised Code of Conduct contains five canons, whereas the former Code of Conduct contained seven. Judiciary Updates, *supra* note 147. Canons 4, 5, and 6 of the former code have been combined to form a revised Canon 4. *Id.* Canon 7 of the former code has become Canon 5. *Id.*

149. *See, e.g., In re Charges of Judicial Misconduct*, 404 F.3d at 696.

150. The new code, in Canon 3, also imposes an affirmative duty on federal judges to “take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct

Code focuses on judicial independence and sets forth general guidelines on how the code is to be used.<sup>151</sup> Canon 1 provides that:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.<sup>152</sup>

Conditional resignations can undermine the judiciary's integrity because their use can exceed the scope of the judiciary's life tenure powers; encroach upon the nomination and appointment powers of the Executive and Legislative branches, respectively; and exude the appearance of or show actual partiality in judicial departures.<sup>153</sup> The Second Circuit offers insight into determining the appropriate discipline for Canon 1 violations:

The Commentary to Canon 1 of the Code of Conduct for United States Judges states that the question of “[w]hether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text [of the Code] and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.”<sup>154</sup>

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contravened this Code . . . .” Code of Conduct, *supra* note 146, at 6.

151. USCourts.gov, Code of Conduct for United States Judges: Current Code Compared to Proposed Revised Code 02/29/08, at 3, [http://www.uscourts.gov/library/Current\\_Code\\_with\\_Markup\\_03-03-08.pdf](http://www.uscourts.gov/library/Current_Code_with_Markup_03-03-08.pdf) [hereinafter Compared Codes]. The Code provides that:

Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution.

*Id.*

152. *Id.*

153. See sources cited *supra* notes 135–36 and accompanying text.

154. See *e.g.*, *In re Charges of Judicial Misconduct*, 404 F.3d at 696.



Therefore, determining the appropriate discipline for a conditional resignation would depend on how the factors balance on a case-by-case basis. A violation of Canon 1 and Canon 5 (the prohibition on political activity), for example, could be seen as especially egregious. As with disciplinary decisions under the Act, however, the decision to discipline a judge for a conditional resignation would rest with a judicial council's discretion.<sup>155</sup>

Conditional resignations can also violate Canon 2 of the Code. Canon 2 provides that, "a judge should avoid impropriety and the appearance of impropriety in all activities."<sup>156</sup> The Commentary to Canon 2 defines "appearance of impropriety," stating: "An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired."<sup>157</sup> Canon 2B of the revised Code specifically added that any political influence on "judicial conduct or judgment" violates Canon 2.<sup>158</sup> Revised Canon 2B, states in part, "[a] judge should not allow family, social, political, financial, or other relationships or interests to influence judicial conduct or judgment."<sup>159</sup> This is distinct from the former Code because "political, financial" and "or interests" are added language.<sup>160</sup> Impropriety and the appearance of impropriety can emanate from conditional resignations because they imply that the judge has made a calculated decision. They could also be seen as political weapons, as when a resignation is conditioned upon a successor being appointed by the end of a President's term. As such, a conditional resignation can create the appearance of or actual impropriety in judicial departures, and the judicial councils would have to balance the same

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155. See 28 U.S.C. § 354(a)(1).

156. Code of Conduct, *supra* note 146, at 2.

157. *Id.* at 3. The Commentary goes on to state that:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

*Id.*

158. Compared Codes, *supra* note 151, at 3.

159. *Id.*

160. *Id.*

factors from Canon 1 in determining the appropriate discipline.<sup>161</sup>

Conditional resignations can violate Canon 5 of the Code when they are politically motivated. Canon 5 of the Code provides that a “judge should refrain from political activity.” Specifically:

A. *General Prohibitions.* A judge should not:

- (1) act as a leader or hold any office in a political organization;
- (2) make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
- (3) solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase tickets for a dinner or other event sponsored by a political organization or candidate.

B. *Resignation upon Candidacy.* A judge should resign the judicial office if the judge becomes a candidate in a primary or general election for any office.

C. *Other Political Activity.* A judge should not engage in any other political activity. This provision does not prevent a judge from engaging in activities described in Canon 4.<sup>162</sup>

Conditional resignations are not always political, but can sometimes exude the appearance of politics. Seemingly, a judge can condition his resignation for a variety of reasons, many of which are not political in nature. However, when considering judicial departures, politics can be and have been motivations behind strategic departures.<sup>163</sup> When a judicial departure is made for political reasons, the judge violates the Code.<sup>164</sup>

The Second Circuit has noted that “[t]here is little in the way of published case law or other guidance concerning when censure, reprimand, or other sanction is warranted.”<sup>165</sup> Certain conditional resignations have the potential to violate judicial ethics guidelines, and it seems as though the only way to circumvent the presumption against removal of federal judges short of impeachment is through congressional action defining good behavior, which

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161. See Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181, 1256–61 (1986) (discussing factors used in determining the appropriate discipline to impose).

162. Code of Conduct, *supra* note 146, at 15.

163. See sources cited *supra* notes 30–31 and accompanying text.

164. See Code of Conduct, *supra* note 146, at 2–3.

165. *In re Charges of Judicial Misconduct*, 404 F.3d 688, 696 (2d Cir. Judicial Council 2005).

would expand federal judicial discretion in the disciplinary context.<sup>166</sup>

*B. Tipping the Balance: Congressional Response to  
Problematic Conditional Resignations*

If conditional resignations become a threat to Congress's appointment power, Congress may attempt to exercise its power to prohibit or place limitations on conditional resignations through the Necessary and Proper Clause by defining good behavior or by enacting a formalized resignation process as an extension of the retirement statutes. However, Congress has attempted to "police" the good behavior of federal judges before without success, and any regulation or implementation of a formalized resignation process is a dramatic departure from history and the Framers' intent.<sup>167</sup>

In *The Federalist No. 79*, Alexander Hamilton writes, "if [federal judges] behave properly, [they] will be secured in their places for life."<sup>168</sup> Article III, Section 1 of the U.S. Constitution expressly adopts this tenet and provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices

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166. See *supra* note 161. Judicial councils of each circuit court of appeals have authority to hear claims under the Act and discipline judges for violating the Act. 28 U.S.C. §§ 351–364 (2006). For example, the U.S. Judicial Conference's Committee on Judicial Conduct and Disability reviewed and approved an order from the Judicial Council of the Ninth Circuit that publicly reprimanded District Judge Manuel L. Real for "making inaccurate and misleading responses to the Judicial Council and special committee" and "withdrawing [a] bankruptcy reference and staying a judgment in [a] matter based on personal knowledge and information received *ex parte*." Judgment of Comm. on Jud. Conduct and Disability, No. 05-89097, slip op. at 11 (U.S. Jud. Conf. Jan. 14, 2008) (mem.), available at [http://www.ce9.uscourts.gov/misconduct/orders/committee\\_memorandum.pdf](http://www.ce9.uscourts.gov/misconduct/orders/committee_memorandum.pdf).

167. See Ginsburg, *supra* note 137, at 10–12. Congress has attempted to "police" the "good behavior" of federal judges before without success. *Id.* at 10 (internal citation and quotation marks omitted). Congress previously proposed limitation on judges attending out-of-town education events. *Id.* at 11. In January 2006, three senators proposed a one-day limit on judges' trips to attend "legal education seminars underwritten by private organizations, including, along with commercial enterprises, law schools, and bar associations." *Id.* (citing Federal Judiciary Reform Ethics Act, S. 2202, 109th Cong. §§ 2–3 (2006)). Justice Ginsburg also notes that there are several "jurisdiction-curtailing measures" that Congress has attempted enact, and not one of them has succeeded. *Id.* The Streamlined Procedures Act would have narrowed the scope of federal habeas review. *Id.* (citing S. 1088, H.R. 3035, 109th Cong. § 3 (2005)). A bill was introduced that would have precluded federal courts of jurisdiction over cases involving "a governmental unit's or officer's 'acknowledgement of God as the sovereign source of law, liberty, or government.'" *Id.* (quoting Constitution Restoration Act, S. 520, H.R. 1070, 109th Cong. § 101 (2005)). The Safeguarding our Religious Liberties Act would have precluded federal court jurisdiction for controversies involving the "Ten Commandments, the Pledge of Allegiance, or the National Motto." *Id.* (citing H.R. 4576, 109th Cong. § 2 (2005)). The We the People Act would have removed free exercise, establishment clause, privacy, and equal protection claims from federal courts' jurisdiction. *Id.* (citing H.R. 4379, 109th Cong. § 3 (2005)). Finally, the Congressional Accountability for Judicial Activism Act "would [have] allow[ed] Supreme Court judgments declaring a federal law unconstitutional to be overturned by a two-thirds vote of the House and Senate." *Id.* at 12. (citing H.R. 3073, 109th Cong. § 2 (2005)).

168. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 1, at 481.

during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>169</sup> The good behavior clause is not easily defined.<sup>170</sup> Most argue that the Framers intended impeachment to be the only formal means to remove a federal judge, and that subsequent history and interpretations of the Constitution support this assertion.<sup>171</sup> Impeachment of a federal judge can occur through the constitutional standard of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>172</sup> Indeed, Hamilton writes that federal judges

are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified from holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.<sup>173</sup>

However, it has been argued that the Necessary and Proper Clause is the constitutional gateway through which Congress could statutorily define what constitutes good behavior.<sup>174</sup> Congress has the authority to “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>175</sup> Congress may regulate the offices it creates, and here, the offices are Article III judgeships. Congress cannot violate the express salary or term provisions of Article III,<sup>176</sup> yet Congress may attempt to justify regulating judicial resignations by defining good behavior<sup>177</sup> or, alternatively, attempt to institute a formalized resignation process as an extension of the retirement statutes.<sup>178</sup>

The center of this debate rests in the competing values of judicial

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169. U.S. CONST. art III, § 1.

170. Prakash & Smith, *supra* note 141, at 134–35.

171. *Id.* at 132; *see* Ginsburg, *supra* note 137, at 11–12.

172. Jackson, *supra* note 110, at 987 (quoting U.S. CONST. art. II, § 4). Defining the standard for treason, bribery, or other high crimes and misdemeanors is a completely separate issue that is not particularly relevant to conditional resignations because a conditional resignation would clearly not satisfy this standard. *See id.* at 988–90 (discussing what satisfies treason, bribery, or other high crimes and misdemeanors for purposes of impeachment).

173. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 1, at 481–82.

174. *See* Prakash & Smith, *supra* note 141, at 78.

175. U.S. CONST. art I, § 8, cl. 18.

176. Prakash & Smith, *supra* note 141, at 128.

177. *Id.* at 78.

178. *See supra* Part II.A for a discussion of the judicial retirement statutes.

independence and accountability.<sup>179</sup> The Framers sought to ensure that judges were independent through the life tenure provision and qualified this permanence with “during good Behaviour.”<sup>180</sup> This would keep judges from becoming so independent that they were no longer accountable.<sup>181</sup> If one group within government can amass enough power within the organic framework of judicial selection, it may be a call to action for regulation. There could be a response from the Legislative and Executive branches in formalizing the resignation process, if they feel a deprivation of power in the decision making. Challenges to the validity of conditional resignations may be brought under the judicial ethics guidelines, and Congress may assert its power and establish that “tenure [is] terminable upon a judicial finding of misbehavior”<sup>182</sup> or create a formalized resignation process, including a prohibition or limitation on conditional resignations. However, there could be no institutional response to conditional resignations or abuse of conditional resignations; regulation would be a significant departure from history and unlikely to succeed. The theoretical threat of regulation may be enough to provide sufficient tension to keep judges from exercising excessive power.

#### V. CONCLUSION

Conditional resignations are not a significant problem at this point in time. In theory, however, the constitutionality of certain conditional resignations is strikingly suspect. Conditional resignations test the limits of the separation of powers and judicial ethics. On the other hand, the Constitution does not explicitly detail a formalized process of resignation; rather, the judicial selection process has checks and balances that have developed and evolved over time. As an extension of these changes, the conditional resignation can be seen as judges taking more control over their destiny. Conditional

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179. Prakash & Smith, *supra* note 141, at 87.

180. *Id.* at 88. Prakash and Smith offer this summary:

[W]hen the Constitution was written and ratified, the lay of the land was as follows. Good-behavior tenure was understood as tenure terminable upon a judicial finding of misbehavior in the ordinary courts. While in England and in the colonies impeachment clearly was not regarded as a means of judging whether officers with good-behavior tenure had forfeited their offices, in revolutionary America impeachment was occasionally thought an appropriate method of judging misbehavior. Even so, the state constitutions reveal that impeachment was hardly regarded as the sole means of judging misbehavior. . . . Indeed, we know of no constitution, draft or otherwise, that expressly made impeachment the exclusive means of removing all officials with good-behavior tenure.

*Id.* at 117.

181. *Id.* at 88.

182. *Id.*

resignations from the federal bench offer transparency in the judiciary and protect federal judges' permanent tenure by providing another check and balance in the patchwork of traditions, rules, and constitutional requirements in judicial selection.

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