

## The Semi-Retirement of Senior Supreme Court Justices: Examining their Service on the Courts of Appeals

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#### ABSTRACT

A wealth of scholarship examines the reasons Supreme Court Justices retire. While political scientists and legal scholars have analyzed the political and personal factors that play a role in retirements with varying conclusions, little has been written about the judicial careers of senior justices. This study compares the careers of the eleven senior justices who have sat by designation on the federal circuit courts. The senior justices are compared with each other as well as with active justices, with active circuit judges, and with senior circuit judges. The goal of this essay is to increase our understanding of senior service.

This essay hypothesizes that senior justices will be deferred to more often while sitting on a circuit panel and that they will have some extra insight into the Supreme Court's reasoning or cares as a result of their active service. The data, however, does not support these hypotheses. Rather more modest and partial answers seem to explain the results.

Analyzing a variety of factors, including the instances where each justice sat in a majority, wrote the opinion, or was overturned by the Supreme Court, this study finds that senior justices are not unique in their application of the law. Although their prior service on the Supreme Court likely provides these senior justices with additional insight into the Court's dynamics, they seem unable to translate that insight in order to persuade their former colleagues or arrive at the correct decision in the first instance any more often than other circuit judges.

Senior justices are equally as likely as circuit judges to be overturned by the Supreme Court. They produce far fewer opinions, concurrences,

and dissents than active Supreme Court Justices, active circuit judges, and even senior circuit judges, although this latter group has the most parallels with senior justices. The only category in which senior justices surpass their former Supreme Court colleagues and senior circuit judges is the likelihood that they will author an opinion. This essay posits that the results it finds are products of the senior justices' seniority and reduced workload on appellate panels, among other variables. Further research and examination are needed to determine if alternative factors account for this essay's other findings.

#### INTRODUCTION

In 1937 justices became eligible to retire from the Supreme Court and sit by designation on lower courts. Eleven out of the thirty-eight eligible justices have done so.<sup>1</sup> This essay examines and compares their service as senior justices on the United States Courts of Appeals in order to shed light upon the significant judicial work senior justices undertake.

Most scholarship on the retirement of Supreme Court justices examines the timing, politics, and impact of life tenure upon the justices' decisions to leave the bench.<sup>2</sup> Only one study, an article by Minor Myers III, briefly examines the careers of retired Supreme Court justices up and until Justice White.<sup>3</sup> This study updates Myers' work and expands upon it, analyzing and comparing the senior tenures of justices after they leave the Supreme Court to increase our understanding of senior service.

Many differences emerge between the service of active and senior Supreme Court Justices. Similar differences exist between active and senior circuit judges, on one hand, and senior justices, on the other. This essay catalogs these differences, as well as the similarities, and draws conclusions from the data, investigating the unique properties of the senior service of Supreme Court justices. This study offers an opening salvo in a field where almost no research exists, presenting data and analyses to quantify the senior careers of Supreme Court justices.

This essay proceeds in four parts. Part I provides a statutory and judicial history of senior service. Part II offers the hypotheses that drove this study. Part III covers the essay's methodology and presents the data

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<sup>1</sup> See *Members of the Supreme Court of the United States*, SUPREMECOURT.GOV, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (May 9, 2015, 7:44PM). This tally does not include today's active members of the Court.

<sup>2</sup> See, e.g., DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (1999) (studying why and when justices leave the Court); ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* (2003) (examining the political factors influencing retirement from the Court).

<sup>3</sup> Minor Myers III, *The Judicial Service of Retired United States Supreme Court Justices*, 32 J. SUP. CT. HISTORY 46 (2007).

analyses and observations. Part IV explains the findings, while the conclusion presents considered thoughts and queries for the future.

### I. HISTORY OF RETIRED JUSTICES

The year 1937 redefined retirement for Supreme Court justices. Before that year, justices could resign their commission from the bench but not take senior status.<sup>4</sup> The passage of the Retirement Act of 1937 changed this legal landscape, permitting justices to assume senior status for the first time.<sup>5</sup> While senior justices no longer hear cases on the Supreme Court,<sup>6</sup> they are eligible to, and frequently do, sit on Courts of Appeals by designation. This section provides a history of the provisions enabling justices to leave the Court, assume senior status, and sit by designation on lower courts. It also offers a description of the judicial service of these senior justices on the Courts of Appeals.

#### *A. Retiring from the Supreme Court*

Following the failure of President Franklin Roosevelt's Court-packing plan, Congress passed the Retirement Act of 1937.<sup>7</sup> Before the passage of this Act, justices had far fewer options when leaving the Court. After the Act's passage, justices could take senior status and continue to hear and decide cases on lower federal courts. Since this reform, thirty-eight justices have left the Court with eleven assuming senior status and hearing cases on lower federal courts.<sup>8</sup> This practice is commonly, although incorrectly, referred to as retiring from the Supreme Court.

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<sup>4</sup> Lisa T. McElroy & Michael C. Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L. J. 81, 85 note 13 (2011).

<sup>5</sup> Matthew Madden, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1156–57 (2007).

<sup>6</sup> For articles on the justices' decisions to retire, see, e.g., Kelly J. Baker, *Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?*, 16 J.L. & POL. 139 (2000) (examining the political implications of senior status); Saul Brenner, *The Myth that Justices Strategically Retire*, 36 THE SOC. SCI. J. 431 (1999) (concluding that judges do not retire for political reasons); Terri Peretti & Alan Rozzi, *Modern Departures from the United States Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPIAC L. REV. 131 (2011-12) (analyzing why justices in the modern era have left the Court); Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180 (1988) (finding that pension benefits and infirmities are the two strongest predictors of retirement and that activity on the bench, such as opinion writing, portends continued service).

<sup>7</sup> Madden, *supra* note 5, at 1155.

<sup>8</sup> Myers, *supra* note 3, at 46.(describing 35 justices to have left the Court but not counting Justices O'Connor, Souter, or Stevens).

Before 1869, Supreme Court justices could only leave the Court by death or resignation.<sup>9</sup> Indeed, from 1801 to 1868, of the twenty-four justices who left the bench, four resigned and twenty died.<sup>10</sup> Hoping to spur older justices to leave the Court before infirmity struck, Congress passed The Judiciary Act of 1869, enabling justices to retire from the Bench.<sup>11</sup> The Act's "retirement provision had mixed success in enticing justices to relinquish their seats on the Supreme Court."<sup>12</sup>

Fifty years later, Congress created the framework for today's senior justices. First, Congress enabled lower Article III judges to assume senior status,<sup>13</sup> and, in 1937, Congress enacted similar provisions for justices, permitting each to assume senior status while retaining his or her Article III commission.<sup>14</sup> The Retirement Act of 1954 followed, permitting judges aged sixty-five with fifteen years of judicial service to retire.<sup>15</sup> Thirty years later in 1984 Congress adopted the Rule of Eighty, which permits judges to retire on a sliding scale of age and service; those who serve at least ten to fifteen years and are between sixty-five and seventy years old may retire, provided their age and years of service total eighty.<sup>16</sup> Five years later in 1989, Congress required that senior judges certify that they have completed at least a quarter of their regular workloads in order to receive the same salary increases of active Article III judges, and since 1996, Congress permitted extra work from previous years to carry-over to satisfy certification for any single year.<sup>17</sup> Since the 1954 Act, every member of the Supreme Court has retired or resigned with the exception of Chief Justice Rehnquist.<sup>18</sup>

Today, this statutory system, cobbled together over 150 years, offers a variety of choices for justices preparing to leave fulltime Article III service. Upon reaching the Rule of Eighty, a justice may retire from judicial service entirely. This is the "retirement on salary" option.<sup>19</sup> Retired justices receive an annual pension equivalent to their salary during

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<sup>9</sup> Madden, *supra* note 5, at 1156.

<sup>10</sup> Madden, *supra* note 5, at 1155.

<sup>11</sup> Madden, *supra* note 5, at 1156.

<sup>12</sup> Madden, *supra* note 5, at 1156.

<sup>13</sup> Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 862 (2011).

<sup>14</sup> Madden, *supra* note 5, at 1157.

<sup>15</sup> Madden, *supra* note 5, at 1157.

<sup>16</sup> Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 514 (2005); Clark, *supra* note 13, at 863.

<sup>17</sup> Madden, *supra* note 5, at 1157 n.79.

<sup>18</sup> Madden, *supra* note 5, at 1158.

<sup>19</sup> Clark, *supra* note 13, at 863; David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460 (2006-07).

their last year of judicial service and may return to law practice or other gainful work.<sup>20</sup> On the other hand, a justice may assume senior status; continue to hear cases; and receive the same salary as if in active service, including regular pay increases.<sup>21</sup> Taking senior status does not allow a senior justice to practice law, but it does create a vacancy, which the president and Senate may fill via nomination and confirmation.<sup>22</sup>

In order to remain eligible for salary increases and serve by designation, the Chief Justice of the United States must designate and assign senior justices, and those senior justices must satisfy a minimum workload requirement.<sup>23</sup> Because the Chief Justice must assign a senior justice to a Circuit Court, he or she has the power to prevent a senior colleague from sitting on a lower panel by not designating the justice to serve on a particular—or any—court of appeals. For example, Chief Justice Earl Warren refused to designate and assign senior Justice Charles Whittaker to hear cases on lower courts, telling a colleague, “Tell [Justice Whittaker] that I never could get him to make up his mind, and I’ll be damned if I will let him do that to me again trying cases. So the answer is no.”<sup>24</sup> Another option to fulfill the senior status obligations with non-judicial work would enable other justices so prevented still to satisfy their statutory obligations and qualify for a pay raise.

To satisfy the workload requirement, senior justices “must annually perform at least the same amount of work that an active judge would perform in three months, or other work for the courts as specified in detail under the statutory scheme.”<sup>25</sup> The other work specified in the statutory scheme permits justices to perform non-judicial duties to satisfy their obligations. Senior judges must work “equal to the full-time work of an employee of the judicial branch,” can do so through non-judicial work, and may combine courtroom and non-courtroom duties to meet the statutory minimums.<sup>26</sup> Thus senior justices enjoy extreme flexibility regarding the work they perform to satisfy their statutory obligations. Recent examples include Justice O’Connor’s service on the Iraq Study Group<sup>27</sup> and Chief Justice Burger’s time as chairman of the commission planning the bicentennial celebration of the United States Constitution.<sup>28</sup> Despite this broad understanding of service during senior status, justices

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<sup>20</sup> Clark, *supra* note 13, at 863.

<sup>21</sup> Clark, *supra* note 13, at 863.

<sup>22</sup> Clark, *supra* note 13, at 863.

<sup>23</sup> Stras & Scott, *supra* note 19, at 461.

<sup>24</sup> Stras & Scott, *supra* note 19, at 483.

<sup>25</sup> McElroy & Dorf, *supra* note 4, at 87 n.25.

<sup>26</sup> Stras & Scott, *supra* note 19, at 462.

<sup>27</sup> McElroy & Dorf, *supra* note 4, at 114.

<sup>28</sup> Stras & Scott, *supra* note 19, at 500 n.332.

may not return to sit on the Supreme Court, as the statute does not permit the designation and assignment of senior justices to the Supreme Court.<sup>29</sup> Senior justices, therefore, do not vote on certiorari petitions, hear oral arguments, or, it seems, eat regularly with the active justices.<sup>30</sup>

Senior justices, as a perk of their status, may maintain offices anywhere in the country. Justice O'Connor has chambers in the Supreme Court—the first senior justice to do so since Justices Brennan and Powell.<sup>31</sup> Others kept chambers in the Thurgood Marshall Federal Judiciary Building near Union Station in Washington, D.C.<sup>32</sup> Justice White remained in this building until 2001, when he moved to Denver and used that courthouse's office of the Circuit Justice.<sup>33</sup> Today, Justice Souter has chambers in New Hampshire.<sup>34</sup> Senior justices therefore can and do leave Washington and the Supreme Court building. Despite being able to maintain chambers wherever they choose, senior justices are permitted only a single clerk for a given year,<sup>35</sup> three fewer than their usual allotment but commensurate with their reduced workloads. Table 1 below summarizes the employment differences between active, senior, and retired judges and justices.

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<sup>29</sup> Stras & Scott, *supra* note 19, at 513. There have been recent calls for senior justices to sit by designation on the Supreme Court to replace a recused Justice. *See, e.g.*, Lisa T. McElroy & Michael C. Dorf, *supra* note 4; Rebekah Saidman-Krauss, *A Second Sitting: Assessing the Constitutionality and Desirability of Allowing Retired Supreme Court Justices to Fill Recusal-based Vacancies on the Bench*, 116 PENN. ST. L. REV. 253 (2011). Despite this statutory disability, Justice Douglas attempted to sit on the Court after his retirement and even drafted and printed an opinion in *Buckley v. Valeo* following Justice Stevens' confirmation as his replacement. Myers, *supra* note 3, at 56.

<sup>30</sup> David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1438 (2006).

<sup>31</sup> David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397, 1465 n.391 (2005).

<sup>32</sup> Stras & Scott, *supra* note 31, at 1465.

<sup>33</sup> Myers, *supra* note 3, at 56.

<sup>34</sup> Tony Mauro, *Souter Returns to the Granite State*, NAT'L L. J. (Aug. 17, 2009), <http://www.law.com/jsp/scm/PubArticleSCM.jsp?id=1202433117459>.

<sup>35</sup> Stras, *supra* note 30, at 1445 n.155.

	Article III Judges		
	Active Status	Senior Status	Retirement
<b>Non-diminishing Compensation</b>	✓	✓	✓
<b>Creation of Judicial Vacancy</b>	✗	✓	✓
<b>Subsequent Increases in Compensation</b>	✓	✓	✗
<b>Exemption from Federal Taxes on Annual Compensation</b>	✗	✓	✓
<b>Freedom to Earn Non-judicial Income</b>	✗	✗	✓
<b>Judicial Chambers, Clerks, &amp; Administrative Support</b>	✓	✓	✗
<b>Discretion Regarding Caseload Number, Type, &amp; Calendar</b>	✗	✓	N/A
<b>Participation in Court Governance, En Banc Decisions</b>	✓	✗	✗

**Table 1: The Differences between Active, Senior, and Retired Article III Judicial Service<sup>36</sup>**

### *B. Sitting By Designation*

Of the thirty-eight justices to retire from the Bench, eleven have served on lower courts by designation. Justice Van Devanter was the first to do so, assuming senior status soon after the Retirement Act's 1937 passage, although he only oversaw two trials on the Southern District of New York while on senior status.<sup>37</sup> Justice Souter is the most recent Justice to assume senior status and sit by designation, hearing cases on the

<sup>36</sup> Yoon, *supra* note 16, at 511.

<sup>37</sup> See *United States v. Graham*, 102 F.2d 436 (2d Cir. 1939); *United States v. Moore*, 101 F.2d 56 (2d Cir. 1939), *cert. denied*, 306 U.S. 664 (1939).



First Circuit exclusively.<sup>38</sup> Justice Stevens, the most recent justice to retire from the Bench, has yet to hear a case on a lower court.<sup>39</sup> This section covers the history of the eleven justices who heard cases by designation, offering a brief portrait of their senior service on the District and Appellate Courts of the United States.

#### 1. Justice Willis Van Devanter

As mentioned, Justice Van Devanter, after assuming senior status, served as a trial judge in New York. He heard two cases, one in January and another in February of 1938.<sup>40</sup> The Second Circuit confirmed his power to preside over the case as a senior justice in *United States v. Moore*.<sup>41</sup> Justice Van Devanter, however, sat on no appellate panels and would die in 1941.<sup>42</sup> Given that he never sat on a panel of the United States Court of Appeals, Justice Van Devanter's brief service as a District Judge will not inform this essay's analysis of retired justices' appellate service.

#### 2. Justice Stanley F. Reed

Justice Reed had a very prolific career as a senior justice, sitting exclusively in Washington, D.C. He sat on panels for the D.C. Circuit and the Court of Claims, the appellate division of which was later folded into the Federal Circuit, and served as a Special Master for the Supreme Court.<sup>43</sup> Justice Reed heard cases for thirteen years, from his assumption of senior status in 1957 until 1970.<sup>44</sup> When he died ten years later,<sup>45</sup> he had heard 191 cases, authored 33 opinions, and composed 10 dissents during his senior service.<sup>46</sup>

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<sup>38</sup> See, e.g., *United States v. Christi*, 682 F.3d 138 (1st Cir. 2012).

<sup>39</sup> Justice Stevens has, however, published two books: (1) JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (1st ed. 2011) and (2) JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (1st ed. 2014).

<sup>40</sup> Myers, *supra* note 3, at 49.

<sup>41</sup> 101 F.2d 56 (2d Cir. 1939).

<sup>42</sup> *Willis Van Devanter*, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/willis-van-devanter-1911-1937/> (last visited Apr. 7, 2013).

<sup>43</sup> Myers, *supra* note 3, at 50.

<sup>44</sup> Myers, *supra* note 3, at 50.

<sup>45</sup> Myers, *supra* note 3, at 50.

<sup>46</sup> See, e.g., *Brandenfels v. Day*, 316 F.2d 375 (D.C. Cir. 1963); *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 156 Ct. Cl. 18, 20 (1962); *Johnson v. Geffen*, 294 F.2d 197 (D.C. Cir. 1960) (Reed, J., dissenting).

### 3. Justice Harold H. Burton

Justice Burton, like Justice Reed, remained in Washington, D.C. for his entire senior career. He sat exclusively on the D.C. Circuit Court of Appeals, and in the three and a half years he served on that court,<sup>47</sup> he heard sixty-three cases, wrote eight opinions, concurred once, and dissented three times.<sup>48</sup> Two years after his last sitting, Justice Burton died in October 1964.<sup>49</sup>

### 4. Justice Tom C. Clark

Justice Clark served as a senior justice for ten years,<sup>50</sup> and in that time heard 397 cases. He heard three cases as a district judge and was twice reversed by the Ninth Circuit.<sup>51</sup> As a panel member for the Eighth Circuit, however, he later wrote an opinion disagreeing with the Ninth Circuit's opinion that reversed his district court decision, thereby creating a Circuit split.<sup>52</sup> In resolving the circuit split, the Supreme Court reversed the Ninth Circuit and adopted the rationales Justice Clark's used in his Eighth Circuit opinion, vindicating his decisions at the trial and appellate level.<sup>53</sup> In all, he would sit on each Court of Appeals that existed at that time, including the United State Court of Customs and Patent Appeals, the Federal Circuit's forerunner, and write 72 opinions and two dissents as a senior justice.<sup>54</sup>

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<sup>47</sup> Myers, *supra* note 3, at 51.

<sup>48</sup> See, e.g., *Stevan v. Union Trust Co. of D.C.*, 316 F.2d 687, 694 (D.C. Cir. 1963) (Burton, J., concurring); *Campbell v. United States*, 289 F.2d 775 (D.C. Cir. 1961); *Lord v. Leneshire House, Ltd.*, 272 F.2d 557, 561 (D.C. Cir. 1959) (Burton, J., dissenting).

<sup>49</sup> *Harold H. Burton*, THE SUPREME COURT HISTORICAL SOCIETY, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/willis-van-devanter-1911-1937/> (last visited Apr. 7, 2013).

<sup>50</sup> Myers, *supra* note 3, at 48.

<sup>51</sup> Myers, *supra* note 3, at 53.

<sup>52</sup> Myers, *supra* note 3, at 54.

<sup>53</sup> Myers, *supra* note 3, at 54.

<sup>54</sup> See, e.g., *Bank of Am. Nat. Trust & Sav. Ass'n v. U. S.*, 552 F.2d 302, 303 (9th Cir. 1977); *Kadar Corp. v. Milbury*, 549 F.2d 230, 232 (1st Cir. 1977); *Am. Intern. Trading Co. v. Bagley*, 536 F.2d 1196 (7th Cir. 1976); *Kirby v. Blackledge*, 530 F.2d 583, 584 (4th Cir. 1976); *Newark Morning Ledger Co. v. United States*, 539 F.2d 929, 930 (3d Cir. 1976); *United States v. Martinez*, 538 F.2d 921, 922 (2d Cir. 1976); *Heber Val. Milk Co. v. Butz*, 503 F.2d 96, 97 (10th Cir. 1974); *Reyes v. Sec'y of Health, Ed. & Welfare*, 476 F.2d 910, 911 (D.C. Cir. 1973); *Driscoll v. Nw. Nat. Bank of St. Paul*, 484 F.2d 173, 174 (8th Cir. 1973); *Alpha Corp. v. Columbia Broad. Sys. Inc.*, 463 F.2d 1098, 1099 (C.C.P.A. 1972); *J. A. Jones Const. Co. v. Englert Eng'g Co.*, 438 F.2d 3, 4 (6th Cir. 1971).

## 5. Justice Potter Stewart

Justice Stewart served as a senior justice for nearly four and a half years, although he only heard cases from 1982 to 1984.<sup>55</sup> In those two years, he sat on the First, Third, Sixth, Seventh, and Ninth Circuits, hearing forty-four cases and writing nine opinions.<sup>56</sup> He also dissented twice in the same case.<sup>57</sup> Later, the Seventh Circuit reheard this case en banc<sup>58</sup>—without Justice Stewart—and ruled along Justice Stewart’s line of reasoning. The Supreme Court, however, granted certiorari and reversed the Seventh Circuit.<sup>59</sup> Justice Stewart’s forceful dissents, thus, came to naught.

## 6. Justice Lewis F. Powell, Jr.

Justice Powell left the Supreme Court in the summer of 1987 and began hearing cases on senior status that fall.<sup>60</sup> He worked exclusively in the South, sitting on the Fourth and Eleventh Circuits and maintaining an office in the Supreme Court until 1996.<sup>61</sup> For four cases, Justice Powell heard oral argument but did not participate in their decisions; the remaining two judges concurred in the outcome, so no additional action was required to render an opinion.<sup>62</sup> In total, Justice Powell participated in 116 published and 157 unpublished cases, writing 32 published opinions, 1 unpublished opinion, and 1 dissent.<sup>63</sup> Interestingly, Justice Powell participated in far more unpublished dispositions than any other senior justice.

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<sup>55</sup> Myers, *supra* note 3, at 48, 55.

<sup>56</sup> See, e.g., Nat. Post Office, Mailhandlers, Watchmen Messengers & Group Leaders Div., Laborers Intern. Union of North Am., AFL-CIO v. United States Postal Serv., 751 F.2d 834 (6th Cir. 1985); Brine v. Paine, Webber, Jackson & Curtis, Inc., 745 F.2d 100 (1st Cir. 1984); ITT Grinnell Corp. v. Donovan, 744 F.2d 344 (3d Cir. 1984); Stewart v. C.I.R., 714 F.2d 977 (9th Cir. 1983); Owen v. Lash, 682 F.2d 648 (7th Cir. 1982).

<sup>57</sup> Marrese v. Am. Acad. of Orthopaedic Surgeons, 706 F.2d 1488 (7th Cir. 1983) (Stewart, J., dissenting).

<sup>58</sup> Marrese v. Am. Acad. of Orthopaedic Surgeons, 726 F.2d 1150 (7th Cir. 1984).

<sup>59</sup> Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373 (1985).

<sup>60</sup> Myers, *supra* note 3, at 55.

<sup>61</sup> *Id.*; see, e.g., Raymond, Colesar, Glapsy & Huss, P.C. v. Allied Capital Corp., 961 F.2d 489 (4th Cir. 1992); Rice v. Branigar Org., Inc., 922 F.2d 788 (11th Cir. 1991).

<sup>62</sup> See, e.g., Sargent v. Waters, 71 F.3d 158 (4th Cir. 1995) (“Justice Powell heard oral arguments but did not participate in the decision of this case. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).”).

<sup>63</sup> See, e.g., Bowman Transp., Inc. v. Heinsohn, 72 F.3d 126 (4th Cir. 1995); Alexander v. Mayor & Council of Town of Cheverly, Md., 953 F.2d 160 (4th Cir. 1992); Anheuser-Busch, Inc. v. L. & L. Wings, Inc., 962 F.2d 316 (4th Cir. 1992) (Powell, J., dissenting).

### 7. Justice William J. Brennan, Jr.

Justice Brennan assumed senior status in the summer of 1990 after suffering a likely stroke.<sup>64</sup> Despite living seven more years, Justice Brennan would only sit for three cases on the D.C. Circuit Court of Appeals. In those cases, Justice Brennan wrote one opinion, joined a unanimous panel in another, and joined a *per curiam*, unpublished opinion.<sup>65</sup>

### 8. Justice Thurgood Marshall

Justice Marshall had a short senior career. He assumed senior status October 1, 1991 and passed away in late January of 1993.<sup>66</sup> In those sixteen months, Justice Marshall sat on the Federal Circuit and his old court, the Second Circuit Court of Appeals.<sup>67</sup> On doctor's orders, Justice Marshall canceled a visit to a Baltimore sitting of the Fourth Circuit, which senior Justice Powell had arranged.<sup>68</sup> In total, Justice Marshall heard eight cases, wrote one opinion, and joined seven majorities.<sup>69</sup> His service on the Federal Circuit resulted in two unpublished dispositions.<sup>70</sup>

### 9. Justice Byron R. White

Assuming senior status in 1993, Justice White would hear cases on Courts of Appeals for the Fifth, Eighth, Ninth, and Tenth Circuits over his senior judicial career.<sup>71</sup> Justice White maintained chambers in the Thurgood Marshall Federal Judiciary Building before moving to Denver in 2001, although he had stopped hearing cases in 1999.<sup>72</sup> In the six years he heard arguments, Justice White participated in fifty-one cases, authored

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<sup>64</sup> Myers, *supra* note 3, at 55; Seth Stern, *Inside Brennan's Post-Retirement Chambers*, THE JUSTICE BRENNAN BLOG, <http://justicebrennan.com/blog/?p=782> (last visited Apr. 8, 2013).

<sup>65</sup> See *Tenngasco Exch. Corp. v. F.E.R.C.*, 952 F.2d 535 (D.C. Cir. 1992); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991); *United States v. Fenty*, 950 F.2d 797 (D.C. Cir. 1991) (per curiam).

<sup>66</sup> Myers, *supra* note 3, at 48.

<sup>67</sup> See, e.g., *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992); *Doko Farms v. United States*, 956 F.2d 1136 (Fed. Cir. 1992).

<sup>68</sup> Myers, *supra* note 3, at 55.

<sup>69</sup> See, e.g., *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384 (Fed. Cir. 1992); *Morgan v. United States*, 968 F.2d 200 (2d Cir. 1992).

<sup>70</sup> *Krause v. Dep't of Air Force*, 1991 U.S. App. LEXIS 27973 (Fed. Cir. Nov. 26, 1991) (per curiam); *Schwarman v. Office of Pers. Mgmt.*, 1991 U.S. App. LEXIS 27973 (Fed. Cir. Nov. 26, 1991) (per curiam).

<sup>71</sup> See, e.g., *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840 (9th Cir. 1997); *Habiger v. City of Fargo*, 80 F.3d 289 (8th Cir. 1996); *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448 (5th Cir. 1995); *Beard v. City of Northglenn, Colo.*, 24 F.3d 110 (10th Cir. 1994).

<sup>72</sup> Myers, *supra* note 3, at 55–56.

eighteen opinions, concurred twice, and dissented once.<sup>73</sup> He also participated in twenty-three cases that resulted in unpublished opinions.<sup>74</sup>

#### 10. Justice Sandra Day O'Connor

Since assuming senior status upon the confirmation of her successor in 2006, Justice O'Connor has maintained chambers in the Supreme Court.<sup>75</sup> She has launched a civics education drive<sup>76</sup> and sat by designation across the nation. With the exception of the two circuit courts based in Washington, D.C.<sup>77</sup> Justice O'Connor has served on every Circuit Court of Appeals.<sup>78</sup> As of December 31, 2014, Justice O'Connor has written twenty-two opinions and dissented once out of the eighty-three cases she heard that resulted in published opinions. In addition, Justice O'Connor wrote eight unpublished opinions out of a total ninety-three cases she heard that were similarly unpublished.<sup>79</sup>

#### 11. Justice David H. Souter

Justice Souter's retirement has been far more localized than Justice O'Connor's. Since assuming senior status in 2009, Justice Souter has continued to "render substantial judicial service as an Associate Justice," per the terms of his retirement letter, which cited the statutory provisions

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<sup>73</sup> See, e.g., *Lewis v. United States*, 144 F.3d 1220 (9th Cir. 1998) (White, J., dissenting); *Pulia v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995); *TBG, Inc. v. Bendis*, 36 F.3d 916 (10th Cir. 1994) (White, J., concurring).

<sup>74</sup> See, e.g., *Allen v. Int'l Tel. & Tel. Corp.*, 1997 U.S. App. LEXIS 6693 (9th Cir. Apr. 8, 1997).

<sup>75</sup> Myers, *supra* note 3, at 48.

<sup>76</sup> See *What is iCivics?*, iCIVICS, <http://www.icivics.org/About> (last visited Apr. 8, 2013).

<sup>77</sup> The D.C. Circuit Court of Appeals may dissuade visiting judges and even senior justices. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1664 (2003) ("[A]bsent a grave emergency, the [D.C. Circuit] court will not use visiting judges to decide cases on [its] docket.").

<sup>78</sup> See, e.g., *Cole v. United States Atty. Gen.*, 712 F.3d 517 (11th Cir. Mar. 14, 2013); *In re New Jersey Title Ins. Litig.*, 683 F.3d 451 (3d Cir. 2012); *Lin Xing Jiang v. Holder*, 639 F.3d 751 (7th Cir. 2011); *Mingus v. Butler*, 591 F.3d 474 (6th Cir. 2010); *United States v. Cameron*, 573 F.3d 179 (4th Cir. 2009); *United States v. Douglas*, 569 F.3d 523 (5th Cir. 2009); *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008); *McGill v. Minn. Mut. Life Ins. Co.*, 285 F. App'x 765 (1st Cir. 2008); *Adelphia Business Solutions, Inc. v. Abnos*, 482 F.3d 602 (2d Cir. 2007); *United States v. Rosas*, 486 F.3d 374 (8th Cir. 2007); *J & G Sales Ltd. v. Truscott*, 473 F.3d 1043 (9th Cir. 2007).

<sup>79</sup> See, e.g., *United States v. Fields*, 354 Fed. Appx. 254 (6th Cir. 2009). One case involved a certified Question the Supreme Court of Virginia. It is included in this tally. *Dunlap v. Cottman Transmissions Sys., LLC*, 539 F. App'x 69, 70 (4th Cir. 2013) *certified question answered sub nom. Dunlap v. Cottman Transmission Sys., LLC*, 131318, 2014 WL 782853 (Va. Feb. 27, 2014).

permitting senior service.<sup>80</sup> Since 2009, Justice Souter has maintained chambers in New Hampshire<sup>81</sup> and sat exclusively on the First Circuit Court of Appeals, his first federal appointment. He has heard 193 cases with published opinions and 46 more with unpublished opinions. In these few years, he has authored forty published and thirty-five unpublished opinions for the Boston-based court.<sup>82</sup>

### C. Conclusion

Senior justices work where they will and serve as long as they would like or their health permits. They choose to remain in Washington, D.C. or return to the regions where they lived before joining the Supreme Court. Their service depends on their health and longevity. In sum, their senior careers are varied.

Having briefly examined the senior service of the eleven justices to assume senior status from the Supreme Court and sit by designation on lower courts from an historical perspective, this essay now turns to a focused analysis of the judicial work of each.

## II. THEORIES OF SENIOR JUSTICES' INFLUENCE

Judging and judges are viewed through many lenses. To some, judging can be a lonely process.<sup>83</sup> To others, it can be a collaborative process.<sup>84</sup> Still others rest decision-making on an informed "hunch."<sup>85</sup> A court can have politically-charged epochs as well as less political eras.<sup>86</sup> Judging can be viewed "attitudinally" or "strategically,"<sup>87</sup> and decisions can seem blatantly political or technocratically divorced from everyday effects. Whatever matrices ought to be used when studying the judiciary to determine what factors influences judges and how judges influence one another and the law, are questions scholars have, are, and continue to wrestle with and explain. This essay puts much of that scholarship<sup>88</sup> aside

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<sup>80</sup> Letter from David H. Souter to Barack H. Obama, May 1, 2009, *available at*: <http://www.supremecourt.gov/publicinfo/press/DHSLetter.pdf> (last visited Apr. 8, 2013).

<sup>81</sup> Mauro, *supra* note 34.

<sup>82</sup> *See, e.g.,* Feliz v. MacNeill, 493 F. App'x 128 (1st Cir. 2012); EMC Corp. v. Arturi, 655 F.3d 75 (1st Cir. 2011).

<sup>83</sup> Patricia Wald, *Comment: Some Real-Life Observations About Judging*, 26 IND. L. REV. 173 (1992).

<sup>84</sup> Edwards, *supra* note 77, at 1646.

<sup>85</sup> J.C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L. Q. 274, 282 (1929).

<sup>86</sup> Edwards, *supra* note 77, at 1648.

<sup>87</sup> Edwards, *supra* note 77, at 1652.

<sup>88</sup> Such scholarship includes judicial introspection like the citations above and Judge Frank Coffin's *ON APPEAL: COURTS, LAWYERING, AND JUDGING* (1994) and *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* (1980), as well as political

in examining how senior justices perform when sitting by designation on circuit courts.

Instead, this essay looks at the careers of these senior justices and asks what distinguishes a senior justice? Are they essentially “super” circuit court judges? In other words, do they outperform active and senior court judges? Do any senior justices stand out amongst their peers? What anomalies appear in analyzing their careers versus those of active judges? Versus senior judges? Versus active Supreme Court justices? And Versus other senior justices? The section below posits the most readily apparent hypotheses to be expected when undertaking such an examination. The essay then proceeds to present the collected data before analyzing it.

#### A. *Conventional Wisdoms*

A number of theories and proposals come to mind when studying the careers of senior justices. Are senior justices freed from the weight of the Supreme Court and thus more likely to express themselves in a panel decision? Is the necessity to get only one panel member vote for a majority produce the justice’s true voice, perhaps as seen in a dissent, compared with more compromised majority opinions resulting from the necessity to garner four justices to join on the Supreme Court? Are senior justices asked to write more important or mundane opinions as panel members? Does the reduction to a single clerk from four lead to fewer opinions?

These are just a few of the questions that come to mind when beginning to investigate the careers of senior justices. But questions specifically about senior justices’ influence on appellate panels and on the Supreme Court leap to the forefront. This essay focuses on two hypotheses.

First, it seems that senior justices would command respect among circuit judges. This respect should mean that senior justices wield more persuasive power amongst panel members. Indicators to illustrate this hypothesis should include: fewer dissents by senior justices than a typical circuit court judge or perhaps a higher percentage of authored panel opinions as compared to other circuit judges. This hypothesis presumes collegiality on any given panel,<sup>89</sup> and the importance of deliberation.<sup>90</sup>

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science examinations of the courts too numerous to be cited and hybrids like Frank B. Cross & Emerson H. Tiller’s, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L. J.* 2155 (1998).

<sup>89</sup> For a primer on collegiality and the appellate courts, see Edwards, *supra* note 77.

<sup>90</sup> Judge Edwards agrees. Edwards, *supra* note 77 at 1646 (arguing for collegiality and describing the deliberative process on a collegial court as “until a final judgment is reached, judges participate as equals in the deliberative process – each judicial voice carries weight, because each judge is willing to hear and respond to differing positions. The mutual aim

Second, with their unique experience on the High Court, senior justices should be better able to anticipate what future courts, most importantly the Supreme Court, will do. These justices, therefore, should be reversed less often than typical circuit court judges and be able to signal the Court to take notice and follow their lead. This hypothesis assumes that senior justices understand the shifts in the law that may result from their departure from active service on the Court and can predict, account for, and neutralize those changes<sup>91</sup> in their appellate opinions.

### III. OBSERVATIONS: SERVICE ON THE LOWER COURTS

When retired justices sit on circuit courts, they serve on regular three-member panels. It is possible to compare the justices against each other as well as active and senior circuit judges by analyzing the outcomes of the decisions and the justices' respective positions in each case. Part III proceeds in two sections. First, it presents this essay's methodology. Second, it examines the data of the senior justices' service, comparing their service against one another as well as representative active and senior court of appeals judges by measuring the instances when justices were in the majority, authored the opinion, concurred, dissented, were appealed and granted certiorari, and were reversed or affirmed by the Supreme Court. It also compares and analyzes the data presented and explores trends, outliers, and curiosities.

This section finds that senior justices have unique service records and stand apart from their former peers and those judges who share panels with them. It also demonstrates that senior justices possess no additional or unique insight, as compared with their fellow appellate court judges, into the future actions of the Supreme Court, a result contrary to the natural assumption that they would possess this insight.

#### *A. Methodology*

Comprehensive database searches produced the dataset used in this research. Every case a senior justice participated in was catalogued, as were the cases' procedural postures and the justice's position on each panel. This procedure produced a complete dataset from which to base observations, analyses, and comparisons.

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of the judges is to apply the law and find the right answer.”). Judge Posner disagrees. See RICHARD POSNER, *HOW JUDGES THINK* (2008) (“Judicial deliberation is overrated.”).

<sup>91</sup> Judge Posner described the dangers of those changes when accounting for the Supreme Court's shift following the departure of Justice O'Connor and the arrival of Justice Alito. He wrote, “if changing judges changes law, it is not even clear what law is.” Posner, *supra* note 90, at 1.



With the few exceptions noted below, this essay does not include unpublished opinions. Because unpublished opinions do not have precedential weight except with regard to the doctrine of law of the case and claim and issue preclusion,<sup>92</sup> their citation is frowned upon.<sup>93</sup> For the purposes of this essay, they are tallied and analyzed only to demonstrate the overall productivity of senior justices. For example, Justice Powell heard 273 cases while on senior status, however, fully 157 (57.5%) of those were unpublished. Comparing Justice Powell's overall work rate without this data against Justice Clark, who heard 404 cases (1.7% of which were unpublished), would have been unfair to Justice Powell's service and resulted in incomplete comparative analysis.

In addition cases vacated en banc<sup>94</sup> and panel decisions certifying questions to state supreme courts<sup>95</sup> were not counted. Vacated opinions are legally void, while certified questions ask state supreme courts to clarify the law for a federal court. However, cases that the Supreme Court heard and vacated were counted, as they illustrate the frequency with which the justice incorrectly identified and applied the law.<sup>96</sup> In essence, panel decisions that the Supreme Court vacated are counted as reversals. Relatedly, cases superseded by statute<sup>97</sup> or overturned or reversed at a much later date<sup>98</sup> are not counted against a senior justice. Only direct reversals are included. Court of Claims cases, where the court notes that the other panel judges concur, are counted as if the sitting senior justice was in the majority, not concurring. This is because the Court of Claims, as an institution, has treated authored opinions in this manner and because no separate concurrence appears.<sup>99</sup>

The database of cases involving Justices O'Connor and Souter contains cases from the time each justice assumed senior status until December 31, 2014. The data on each justice must be accepted with some

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<sup>92</sup> See, e.g., 9TH CIR. R. 36-3(a).

<sup>93</sup> See, e.g., 4TH CIR. R. 32.1.

<sup>94</sup> See, e.g., *Chapman v. United States*, 541 F.2d 641 (7th Cir. 1976) *vacated en banc*, 575 F.2d 147, 151 (7th Cir. 1978) ("We note that the panel decision no longer stands as a precedent on the duty issue, because the effect of granting the rehearing in banc was to vacate the panel opinions.").

<sup>95</sup> See, e.g., *Osterweil v. Bartlett*, 706 F.3d 139, 140 (2d Cir. 2013) *certified question accepted*, 20 N.Y. 3d 1058 (2013).

<sup>96</sup> See, e.g., *Sanders v. John Nuveen & Co., Inc.*, 524 F.2d 1064 (7th Cir. 1975) *cert. granted, judgment vacated*, 425 U.S. 929(1976).

<sup>97</sup> *United States v. Ellis*, 951 F.2d 580 (4th Cir. 1991), *superseded by statute as stated in United States v. Kinter*, 235 F.3d 192 (4th Cir. 2000).

<sup>98</sup> See, e.g., *Lowe v. Aarco-Am., Inc.*, 536 F.2d 1160 (7th Cir. 1976) *overruled by N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) *and overruled by Autry v. Nw. Premium Services, Inc.*, 144 F.3d 1037 (7th Cir. 1998).

<sup>99</sup> See, e.g., *Heinz v. United States*, 312 F.2d 759, 764 (Ct. Cl. 1963).

skepticism, as petitions for certiorari and rehearing may be pending. Overall, however, the nine and five years of service each justice has provided the Circuit Courts, respectively, contain enough cases to form the basis for useful analyses and comparisons with each other, with active justices of the Supreme Court, with prior senior justices of the Supreme Court, with active circuit judges, and with senior circuit judges.

With few exceptions, the author personally identified and collected the data presented. To better compare senior justices with active and senior circuit judges, an average or composite active and senior circuit court judge was generated. To do so, the author selected a single active and senior judge from each circuit and tallied the cases he or she heard, as well as the opinions, dissent, and concurrences he or she authored, mirroring the process used to generate the data of the senior justices' service on the appellate courts.<sup>100</sup> The selection includes circuit judges picked from across the ideological spectrum, as determined by their appointing president. Care was taken to pick judges with varying lengths of tenure and to ensure that those senior judges chosen were still hearing cases. The cases tallied covered the period from October 1, 2011 to September 30, 2012, the same timeframe the Administrative Office of United States Courts (AOUSC) uses to organize its data pools. In addition, this essay's data pool includes unpublished and published opinions, in order to present a complete picture of a senior judge's work, given the high percentage of cases that go unpublished today. In addition, the author gathered and tallied senior circuit judges' total caseloads for this period, noting the judges' position on each panel (i.e. opinion author, majority voter, dissenter, etc.)—the same procedure used for senior justices. This procedure was not repeated for active judges, however, because each active judge's dataset over the year in question was too large for a timely quantification and analysis. Finally, where noted, the essays relied on the AOUSC's overall data on the courts.

### *B. Data Analyses and Findings*

This section presents the accumulated research data. It analyses the number of cases each justice heard, how many opinions, concurrences, and

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<sup>100</sup> The then-active judges selected are Boudin, Pooler, Chagares, Wilkinson, Clement, Cole, Wood, Colloton, Tallman, Kelly, Tjoflat, Garland, and O'Malley on the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits respectively. The senior judges are Stahl, Leval, Barry, Hamilton, Wiener, Merritt, Ripple, Beam, Hug, Seymour, Cox, Silberman, Clevenger on the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits respectively. Senior Judges Leval, Ripple, Seymour, and Clevenger all sat by designation on other circuits. These cases were included in the dataset.

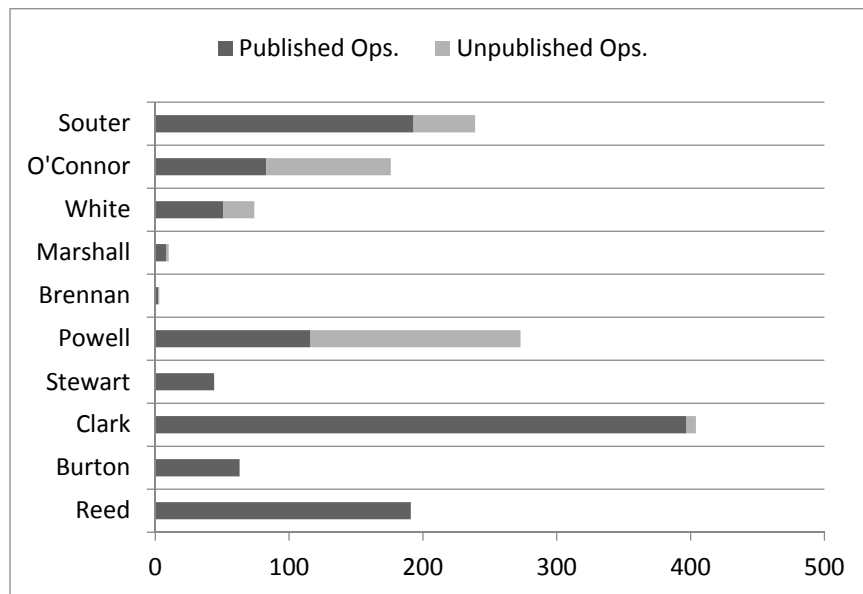
dissents each authored, as well as the *per curiam* opinions produced by panels that included a senior justice. Similar tallies for select active and senior judges generated an average active and senior judge for easy comparison. Using the data gathered, this section compares the judicial service of senior justices with each other, with active Supreme Court justices, with active circuit judges, and with senior circuit judges.

i. Cases Heard

Justice Clark was the hardest working senior justice in terms of number of cases heard. In his thirteen years, he heard 404 cases. Justice Brennan's three cases, on the other hand, represent the fewest number of cases heard by any senior justice who sat by designation on a Circuit Court. Table 2 and Chart 1 illustrate the disparate number of cases senior justices took on during their senior tenures on Circuit Courts. The table and chart include published and unpublished cases to show how each justice measures against his or her peers.

<b>Justice</b>	<b>Published Opinions</b>	<b>Unpublished Opinions</b>	<b>Totals</b>
<b>Clark</b>	<b>397</b>	<b>7</b>	<b>404</b>
<b>Powell</b>	<b>116</b>	<b>157</b>	<b>273</b>
<b>Souter</b>	<b>193</b>	<b>46</b>	<b>239</b>
<b>Reed</b>	<b>191</b>	<b>0</b>	<b>191</b>
<b>O'Connor</b>	<b>83</b>	<b>93</b>	<b>176</b>
<b>White</b>	<b>51</b>	<b>23</b>	<b>74</b>
<b>Burton</b>	<b>63</b>	<b>0</b>	<b>63</b>
<b>Stewart</b>	<b>44</b>	<b>0</b>	<b>44</b>
<b>Marshall</b>	<b>8</b>	<b>2</b>	<b>10</b>
<b>Brennan</b>	<b>2</b>	<b>1</b>	<b>3</b>
<b>Totals</b>	<b>1148</b>	<b>329</b>	<b>1477</b>

**Table 2: Cases Heard by Senior Justices on Courts of Appeals**

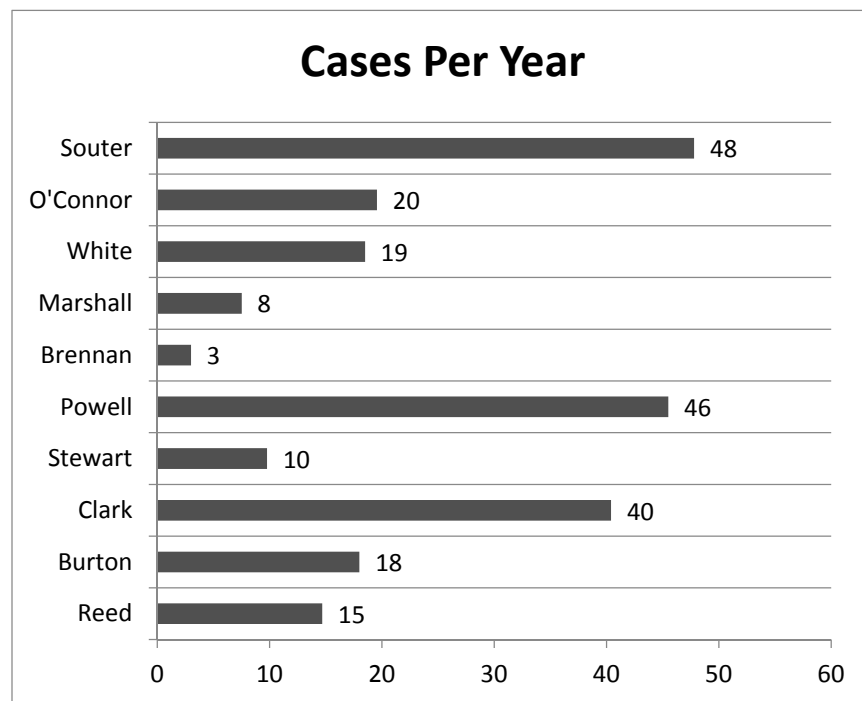


**Chart 1: Published and Unpublished Opinions by Senior Justices on Courts of Appeals by Percentage of Their Total Opinions Written**

The numbers show first that many justices hear a considerable number of cases on senior status. While Justice Clark's 404 exceeds the others, and amounts to 27.4% of all senior justices' cases, Justice Powell heard a hefty 273 cases, or 18.5% of all senior justices' cases. Justice Souter has now heard 239 cases, while Justices Reed and O'Connor round out the top five, having heard 191 and 176 cases, respectively. The data also show the recent rise in unpublished opinions, with the first four senior justices together producing seven unpublished opinions in total—all from Justice Clark—while justices retiring since 1987 took part in 322 unpublished opinions. Indeed, unpublished opinions accounted for 1.7% of Justice Clark's cases, 57.5% of Justice Powell's, 33.3% of Justice Brennan's, 20.0% of Justice Marshall's docket, 31.1% of Justice White's, 52.8% of Justice O'Connor's, and 19.2% of Justice Souter's cases. The dramatic rise in unpublished opinions across the judicial system likely accounts for its concomitant rise in the number of unpublished opinions

senior justices joined and wrote. Indeed unpublished opinions accounted for 81.4% of circuit opinions in 2012.<sup>101</sup>

When compared to the number of years each justice heard opinions while on senior status, the data show some particularly hard working justices. For example, Justices Clark, Powell, and Souter all averaged over forty cases in a year, over half of the 2012 Supreme Court caseload.<sup>102</sup> The average across the senior justice dataset per year was a manageable twenty-two cases, while the median was eighteen cases in a year. Chart 2 presents this data.



**Chart 2: Cases Senior Justices Hear Per Year**

When compared to the seventy-seven argued cases in the Supreme Court’s October 2012 Term,<sup>103</sup> both the mean (twenty-two) and median (eighteen) are around a quarter of the Supreme Court’s current caseload,

<sup>101</sup> Thomas Hogan, *Annual Report of the Director 2012: Administrative Office of the United States Courts, Table S-3*, available at: <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/tables/S03sep12.pdf> (last visited Mar. 13, 2015).

<sup>102</sup> Chief Justice John Roberts, *2013 Year End Report, Appendix: Workload of the Courts* (2014) (“During the 2012 Term, 77 cases were argued and 76 were disposed of in 73 signed opinions . . .”).

<sup>103</sup> *Id.*

as the statute authorizing senior status requires a senior justice reach to be eligible for salary increases.<sup>104</sup> The data also show that Justices Marshall, Stewart, and Reed heard relatively few cases a year, while Justice Brennan's three cases in his single year of service were the likely result of his ill-health.

In comparison, 162 active and 88 senior circuit judges disposed of 35,095 cases on the merits from October 1, 2011 to September 30, 2012.<sup>105</sup> Circuit judges heard 7115 oral arguments in this same time sitting on an average of 56 panels each.<sup>106</sup> The composite active judge on average sat on forty-eight cases where he wrote an opinion, concurrence, or dissent.<sup>107</sup> Although not a perfect match, because these data do not include all cases they heard because the universe of data proved unmanageable, the data demonstrate that active judges write in more than double the cases an average senior justice hears. Senior judges, on the other hand, heard, on average 145 cases from October 1, 2011 to September 30, 2012.<sup>108</sup> This dataset, however, is possibly skewed because senior Judge Hamilton heard 661 cases in this span, although he only wrote in seven of them.<sup>109</sup> Removing him from the dataset, the average senior judge heard 102 cases, with Judge Silberman on the D.C. Circuit hearing the fewest at 22.<sup>110</sup> This shows that senior judges hear far more cases than senior justices, fully 6.5 and 4.6 times more cases, with and without Judge Hamilton's total number. The data also demonstrate that senior justices hear far fewer cases than active circuit judges. Chart 3 illustrates the differences.

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<sup>104</sup> See Madden, *supra* note 5, at 1157 n.79; McElroy & Dorf, *supra* note 4, at 87 n.25

<sup>105</sup> Thomas Hogan, *Annual Report of the Director 2012: Administrative Office of the United States Courts, Statistical Tables – U.S. Courts of Appeals*, available at: <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B01Sep12.pdf> (last visited Apr. 29, 2013); Federal Court Management Statistics: September 2012, *Administrative Office of the United States Courts*, available at: <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2012/appeals-fcms-profiles-september-2012.pdf&page=1> (last visited Mar. 3, 2014). I spent a significant amount of time trying to break down this data further to determine the cases heard by senior judges, as well. As first glance it seems like simple mathematical analysis to determine this figure from the data tables. However, these attempts were futile, as more specific data is needed to break down the percentages of cases heard by senior judges, including what the Administrative Office of the United States Courts means when it says 75.7% of all merits cases were decided by active judges. *Id.* This is why the essay uses a composite active and senior circuit judge.

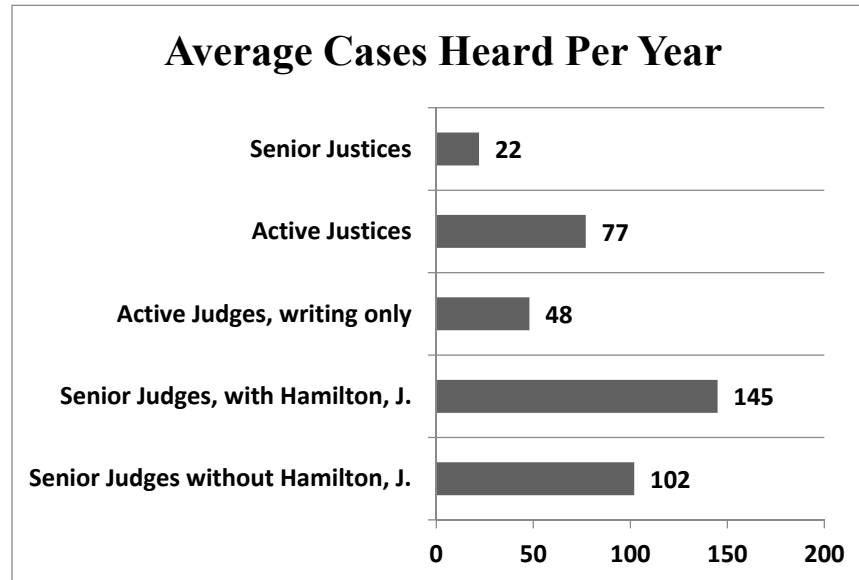
<sup>106</sup> Hogan *supra* note 105; Federal Court Management Statistics, *supra* note 105.

<sup>107</sup> See, e.g., *United States v. Kennedy*, 682 F.3d 244 (3d Cir. 2012).

<sup>108</sup> See, e.g., *Alpine Glass, Inc., v. Country Mut. Ins. Co.*, 686 F.3d 874 (8th Cir. 2012).

<sup>109</sup> See, e.g., *United States v. Dimache*, 665 F.3d 603 (4th Cir. 2011).

<sup>110</sup> See, e.g., *Gunderson Lutheran Med. Center, Inc., v. Sebelius*, 666 F.3d 1335 (D.C. Cir. 2011).



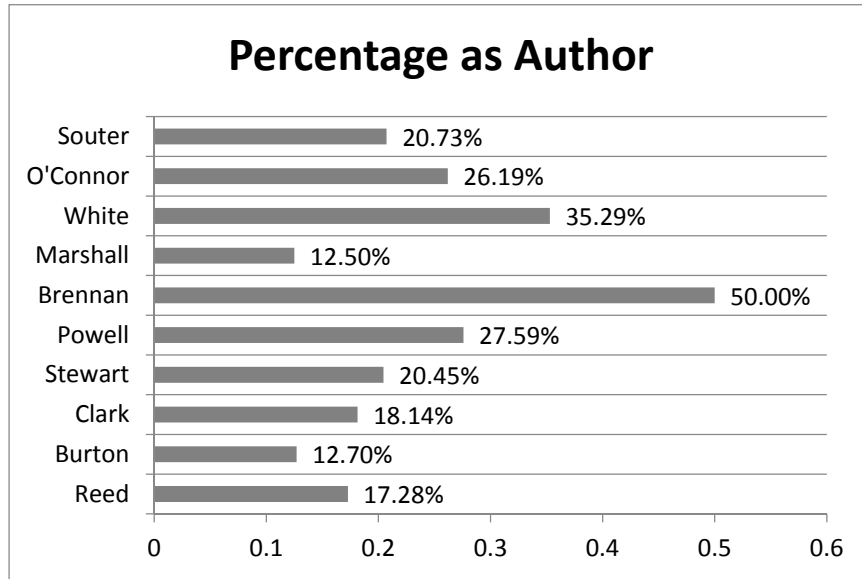
**Chart 3: Average Cases Heard per Year Compared**

ii. Position on Judicial Panels

The remainder of the analyses of senior justices' service does not include unpublished opinions. The remaining portions of this essay focus on the impact of the opinions and votes of each justice in senior status. Since unpublished opinions do not have precedential weight in the circuits, their impact is negligible. Thus, they are excluded. The essay includes unpublished opinions for the active and senior judges studied for the reasons offered earlier and presents the data below in four categories: number of opinions authored, times in a panel's majority, *per curiam* and concurrences, and dissents. These four categories provide a complete picture of each justices' service and allow for easy comparison.

*a. As Opinion Author*

Although each of the eleven senior justices studied wrote opinions for panels, the frequency with which they wrote the opinion for that panel varies considerably. Chart 4 below presents the percentage of cases on which the justices authored panel opinions.



**Chart 4: Percentage Opinions Authored of Cases Heard**

The data show that the senior justices authored between 12 and 36 percent of cases they heard, with Justice Brennan's 50 percent an outlier likely because he heard so few cases. Justice White was most likely to author an opinion as a senior justice, while Justices Marshall and Burton were least likely to do so. On average, senior justices authored opinions for 24.1 percent of the cases they heard, while the median was 20.6 percent. These data show that Justices Powell and White were most likely to write opinions, while both Justices Clark and Reed, despite taking part in the most appellate cases, were each less likely than the average senior justice to author a panel decision. By comparison, active Supreme Court Justices wrote the majority opinion eight times in the 2012 term, equating to 10.26 percent of the time.<sup>111</sup> The average senior circuit judge authored the panel opinion in 10 percent of the cases he heard, while the median was 14 percent.<sup>112</sup>

<sup>111</sup> *Stat Pack for October Term 2012*, SCOTUSBLOG (June 27, 2013), <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblogStatPackOT121.pdf>. The average includes *per curiam* opinions to take into account the entire term's docket.

<sup>112</sup> *See, e.g., Gonzalez v. Holder*, 673 F.3d 35 (1st Cir. 2012). As noted earlier, the dataset for active judges was too large to make similar comparisons across their year of service.



Thus, senior justices on average, wrote the panel decision more than twice as often as active justices and senior judges, and 1.5 times as often as the median senior judge. Although it is beyond this essay's scope, perhaps the presence of a senior justice on a panel leads to more authored opinions, as other judges defer to them. Their reduced workload may also enable senior justices to take on a higher proportion of writing assignments for a panel vis-à-vis the number of cases they hear. Presumably, active circuit judges author opinions in one-third of the cases they hear. If this assumption holds, then senior justices are writing fully 9 percent of the time less than an active circuit judge.

In addition to the percentage each justice authored an opinion from his or her total service, it is possible to determine how many opinions a senior justice authored yearly. Chart 5 below compares the number of opinions each senior justice authored in a single year. In a given year, senior justices, on average, write 3.5 opinions. As the chart shows, Justice Souter is the most prolific, authoring eight opinions per year, which is more than double the average. Justice Marshall was the least prolific, having written only one opinion in his sixteen months on senior status.<sup>113</sup> As the chart shows, Justice Clark came in a close second to Justice Souter, while Justice Powell, although the third most prolific opinion author, wrote two full opinions fewer per year than Justice Clark and four fewer than Justice Souter. Compared to the 2012 Supreme Court term, where the average justice wrote eight majority opinions, senior justices average just under half that total, while Justice Clark came in just below and Souter outperformed the 2012 Court term.<sup>114</sup>

Compared to circuit judges, however, senior justices authored far fewer majority opinions in a given year. The AOUSC averaged opinions over active circuit judges and found that each wrote 181 opinions last year.<sup>115</sup> This total includes signed, unsigned, and opinions without comment. If only signed opinions are tallied, which is the only comparable data point to this essay's research of senior justices' opinions, the average is fifty-nine opinions, or nearly seventeen times a senior justice.<sup>116</sup> The composite active judge wrote thirty-seven majority opinions in the 2012 term, while the composite senior judge authored fifteen majority opinions, representing 10.6 and four times as many majority opinions in a calendar year than a senior justice, respectively.<sup>117</sup>

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<sup>113</sup> *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 187 (2d Cir. 1992).

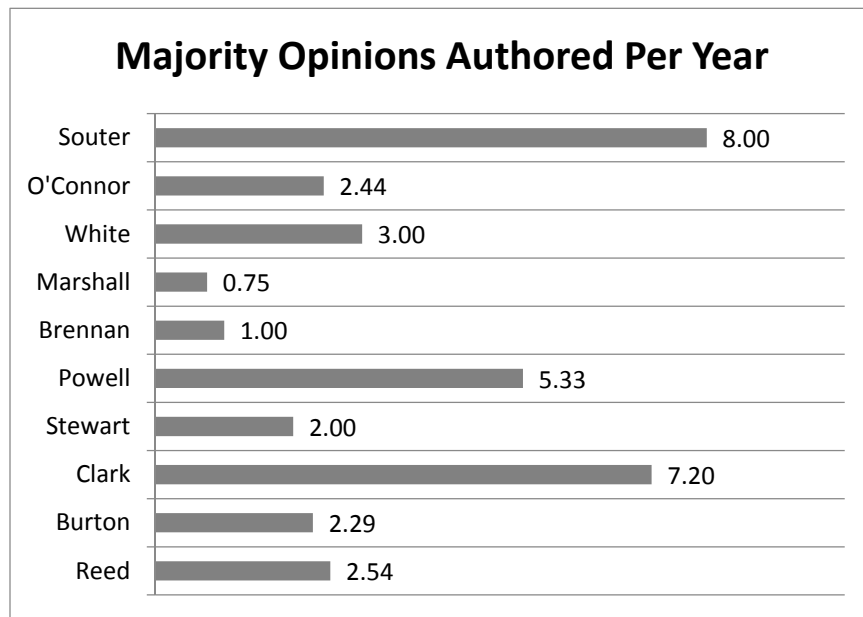
<sup>114</sup> SCOTUSBLOG, *supra* note 111.

<sup>115</sup> Hogan, *supra* note 105.

<sup>116</sup> Hogan, *supra* note 105.

<sup>117</sup> *See, e.g., Bader v. Wrenn*, 675 F.3d 95 (1st Cir. 2012); *SEC v. Goble*, 682 F.3d 934 (11th Cir. 2012).

On the other hand, Justice Souter's average puts him just above half the composite senior judge's output, 21.6 percent of the composite an active judge, and 13.6 percent of all active judges on the Courts of Appeals.



**Chart 5: Majority Opinions Authored By Senior Justice Per Year**

Thus, senior justices—despite writing more often for any particular panel—still produce far fewer opinions in a given year than an active or senior circuit judge. Although their numbers are not far from those of an active Supreme Court Justice, they are significantly lower than that of their appellate colleagues. The discrepancy likely stems from the overall caseload differences between senior justices and active and senior circuit judges. Given that the statutory requirement to remain eligible for regular wage increases is a quarter of one's former caseload, senior justices can much more easily obtain their mandated casework in a given year, likely resulting in the different results observed. The fact that senior justices are likely to write an opinion on a panel may be due to their reduced caseloads vis-à-vis other panel members or deference shown by their fellow panel members. The data do not prove either theory is responsible for the results.

In addition to frequency of opinion writing, it is interesting to show how often the justices' opinions reached the Supreme Court on petitions

for certiorari and the subsequent results. Table 3 shows the number of opinions each senior justice wrote, how many were petitioned for certiorari and denied, as well as those opinions granted certiorari and affirmed or reversed.

Justice	Opinions	Cert. Petitions	Cert. Denied	Cert. Granted	Affirmed	Reversed
Clark	72	23	20	3	1	2
Souter	40	8	8	0	0	0
Reed	33	11	10	1	0	1
Powell	32	7	7	0	0	0
O'Connor	22	5	5	0	0	0
White	18	5	5	0	0	0
Stewart	9	1	1	0	0	0
Burton	8	3	2	1	1	0
Brennan	1	0	N/A	N/A	N/A	N/A
Marshall	1	0	N/A	N/A	N/A	N/A
<b>Totals</b>	<b>236</b>	<b>63</b>	<b>58</b>	<b>5</b>	<b>2</b>	<b>3</b>

**Table 3: Opinions of Senior Justices and the Supreme Court**

The data show that very little of what a senior justice writes reaches the Supreme Court, and almost no opinion is reversed. The Supreme Court never reversed or affirmed Justices Stewart, Powell, Brennan, Marshall, or White.<sup>118</sup> Justices O'Connor and Souter have also yet to face reversal or enjoy affirmation, although the Supreme Court has denied certiorari for five of Justice O'Connor's twenty-two and eight of Souter's forty opinions.<sup>119</sup> Justice Burton saw one of his opinions granted certiorari and affirmed.<sup>120</sup> On the other end of the spectrum, fully a third of the opinions Justice Reed authored resulted in petitions for certiorari, although only one

<sup>118</sup> Justices Brennan and Marshall each only wrote a single opinion, so their sample sizes are too small for meaningful comparison.

<sup>119</sup> See, e.g., *Mendes v. Brady*, 656 F.3d 126 (1st Cir. 2011) (Souter, J.) *cert. denied*, 132 S.Ct. 1551 (2012); *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010) (O'Connor, J.) *cert. denied*, 131 S.Ct. 1540 (2011). Their unpublished opinions were not included in this tally, although one unpublished opinion of Justice Souter's was denied certiorari. *United States v. Ayala-Lopez*, 493 F. App'x 120 (1st Cir. 2012) *cert. denied*, 133 S. Ct 1459 (2013).

<sup>120</sup> *Int'l Ladies' Garment Workers' Union*, 280 F.2d 616 (D.C. Cir. 1960) *aff'd*, 366 U.S. 731(1961).

petition was granted and that opinion vacated.<sup>121</sup> And out of the three petitions for certiorari that the Supreme Court granted from Justice Clark's thirty opinions, the Court reversed Justice Clark twice and affirmed him once.<sup>122</sup>

Overall, the data show that senior justices often get the law right, not requiring Supreme Court review. Of the five cases granted certiorari, however, the Supreme Court reversed three times, demonstrating that the grant of certiorari predicted reversal sixty percent of the time. This percentage corresponds with the Supreme Court's reversal rate from the 2011 October Term, which was sixty-three percent, suggesting that senior justices are no more or less competent as opinion authors than today's circuit court judges.<sup>123</sup> In the 2012 October Term, however, senior justices bested circuit judges who were reversed 72 percent of the time.<sup>124</sup> Nonetheless this demonstrates that senior justices do not have any greater insight into the Court's reasoning nor are they better or worse at predicting a particular result, although the stories of Justices Clark and Stewart earlier discussed show that they can, from time to time, move the Supreme Court or get the law "right" on a particular issue.

*b. In the Majority*

Senior justices can also be compared based on the number of times their panel is affirmed or reversed, when they are in the majority but did not write the opinion. As would be expected, the data presented below show that of the cases appealed to the Supreme Court, few were granted certiorari and even fewer were reversed.

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<sup>121</sup> See, e.g., *Kehaya v. United States*, 355 F.2d 639 (Ct. Cl. 1966); *Pub. Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960) *vacated*, 369 U.S. 111 (1962); *Porter v. United States*, 258 F.2d 685 (D.C. Cir. 1958).

<sup>122</sup> *United States v. Hazelwood Sch. Dist.*, 534 F.2d 805 (8th Cir. 1976) *vacated and remanded*, 433 U.S. 299 (1977); *Gautreaux v. Chicago Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974) *aff'd sub nom. Hills v. Gautreaux*, 425 U.S. 284 (1976); *Avrech v. Sec'y of Navy*, 477 F.2d 1237 (D.C. Cir. 1973) *rev'd*, 418 U.S. 676 (1974).

<sup>123</sup> SCOTUSBLOG, *supra* note 111, at 3.

<sup>124</sup> SCOTUSBLOG, *supra* note 111, at 3. The state supreme court reversal rate was removed but the percentage of reversal remains 72. A longitudinal analysis of reversal rates of circuit judges since 1937 may shed more light on these results, but such an analysis is beyond this essay's scope.

Justice	Opinions	Cert. Petitions	Cert. Denied	Cert. Granted	Affirmed	Reversed
Clark	223	61	56	5	1	4
Souter	149	30	30	N/A	N/A	N/A
Reed	109	22	19	3	1	2
Powell	67	17	15	2	1	1
O'Connor	58	14	13	1	0	1
White	28	8	8	N/A	N/A	N/A
Burton	26	6	5	1	1	0
Stewart	26	8	8	N/A	N/A	N/A
Marshall	7	2	2	N/A	N/A	N/A
Brennan	1	0	N/A	N/A	N/A	N/A
<b>Totals</b>	<b>694</b>	<b>168</b>	<b>156</b>	<b>12</b>	<b>4</b>	<b>8</b>

Table 4: Cases with a Senior Justice in the Majority

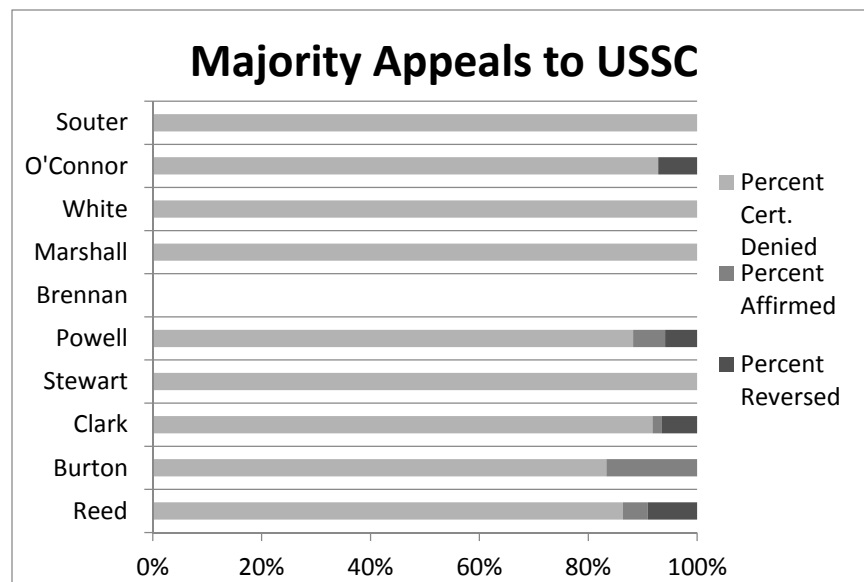


Chart 6: Disposition of Cases Appealed to the Supreme Court (by Percentage) with a Senior Justice in the Majority

The Supreme Court reversed nine percent of appealed panel decisions where Justice Reed (2/22)<sup>125</sup> was in the majority and seven percent of Justice O'Connor's majority votes (1/14).<sup>126</sup> These two senior justices experienced the highest reversal rate among senior justices. Third was Justice Clark, whose panel majorities saw four reversals.<sup>127</sup> These four reversals represent the single most number of reversals, but by the percentages they constitute merely 6.5 percent of his sixty-one cases appealed to the Supreme Court, which is within reach of Justice Powell's 5.9 percent reversal rate, or one<sup>128</sup> out of seventeen cases. All other senior justices were fortunate not to have any panels they joined reversed by the Supreme Court. Overall, two-thirds of the cases granted certiorari were reversed, corresponding with the 63 percent rate of reversal from the October 2011 Supreme Court term and the 72 percent reversal rate for the October 2012 term.<sup>129</sup> Thus senior justices are no better nor worse than circuit judges regarding reversal rates, suggesting that they have no special insight into the outcomes of the Supreme Court, despite their prior careers.

*c. Per Curiam Opinions and Concurrences*

Courts use *Per curiam*, or by the court, opinions when they want to speak anonymously or with one voice. No single judge takes credit for the opinion, and no judge's name is attached to the opinion. *Per curiam* opinions are used either for controversial cases, like *Bush v. Gore*,<sup>130</sup> or mundane or routine cases like *KPMG v. Cocchi*.<sup>131</sup>

In all, senior justices sat on panels producing 193 *per curiam* opinions. Nearly one-quarter (23 percent) of *per curiam* dispositions were

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<sup>125</sup> *Grumman v. United States*, 294 F.2d 708 (D.C. Cir. 1961) *rev'd*, 370 U.S. 288 (1962); *Silber v. United States*, 296 F.2d 588 (D.C. Cir. 1961) *rev'd*, 370 U.S. 717 (1962).

<sup>126</sup> *United States v. Miller*, 484 F.3d 964 (8th Cir. 2007) *cert. granted, vacated*, 552 U.S. 1089 (2008)

<sup>127</sup> *Briscoe v. Levi*, 535 F.2d 1259 (D.C. Cir. 1976) *vacated and remanded sub nom. Briscoe v. Bell*, 432 U.S. 404 (1977); *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976) *rev'd*, 435 U.S. 247 (1978); *United States v. Lovasco*, 532 F.2d 59 (8th Cir. 1976) *rev'd*, 431 U.S. 783 (1977); *Sanders v. John Nuveen & Co., Inc.*, 524 F.2d 1064 (7th Cir. 1975) *cert. granted, vacated*, 425 U.S. 929 (1976).

<sup>128</sup> *In re Owen*, 877 F.2d 44 (11th Cir. 1989) *rev'd sub nom. Owen v. Owen*, 500 U.S. 305(1991).

<sup>129</sup> SCOTUSBLOG, *supra* note 111, at 3; SCOSTUSblog, Final Stat Pack October 2011 Term *available at*: [http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog\\_Stat\\_Pack\\_OT11\\_final.pdf](http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog_Stat_Pack_OT11_final.pdf).

<sup>130</sup> 531 U.S. 98 (2000)

<sup>131</sup> 132 S.Ct. 23 (per curiam) (remanding to Florida state court for consideration of whether arbitration is required for some of the claims alleged).

appealed<sup>132</sup> to the Supreme Court, but only one opinion was granted certiorari, representing a 2.2 percent rate. That opinion came from a D.C. Circuit panel that senior Justice Reed sat on, and the Supreme Court affirmed.<sup>133</sup>

It is worth noting that many of the unpublished opinions not presented here were disposed *per curiam*, potentially accounting for the drop in *per curiam* opinions from the time of Justice Clark's senior service to Justice Souter's, with unpublished opinions taking the place of *per curiam* dispositions today. Table 5 below presents the data. Of note, panels featuring either Justice Reed, Burton, or Clark accounted for 84.9 percent of all published *per curiam* cases in the dataset.

Justice	Per Curiam Opinions	Cert. Petitions	Cert. Denied	Cert. Granted	Affirmed	Reversed
Clark	100	21	21	N/A	N/A	N/A
Reed	39	10	9	1	1	N/A
Burton	25	8	8	N/A	N/A	N/A
Powell	13	3	3	N/A	N/A	N/A
Stewart	7	1	1	N/A	N/A	N/A
Souter	4	2	2	N/A	N/A	N/A
O'Connor	3	0	N/A	N/A	N/A	N/A
White	2	0	N/A	N/A	N/A	N/A
Brennan	0	N/A	N/A	N/A	N/A	N/A
Marshall	0	N/A	N/A	N/A	N/A	N/A
Totals	193	45	44	1	1	0

**Table 5: Total Per Curiam Opinions**

Concurrences, on the other hand, were unlikely occurrences according to the dataset. In fact, eight senior justices never concurred. Indeed, Justice Burton, one of the three Justices to concur with a panel's decision, did so only once and without opinion.<sup>134</sup> Justice Powell wrote

<sup>132</sup> See, e.g., *Harrison v. Warden, Md. Penitentiary*, 890 F.2d 676 (4th Cir. 1989) (per curiam) *cert. denied* *Harrison v. Rollins*, 495 U.S. 920 (1990); *Smith v. Bordenkircher*, 671 F.2d 986 (6th Cir. 1982) (per curiam) *cert. denied* *Smith v. Sowders*, 459 U.S. 848 (1982).

<sup>133</sup> *Hutcheson v. United States*, 285 F.2d 280 (D.C. Cir. 1960) (per curiam) *aff'd*, 369 U.S. 599 (1962).

<sup>134</sup> *Stevan v. Union Trust Company of D.C.*, 316 F.2d 687, 694 (D.C. Cir. 1963) (Burton, J., concurring without opinion).

three concurrences during his senior tenure.<sup>135</sup> Parties appealed one of these three, and the Supreme Court denied certiorari.<sup>136</sup> Finally, Justice White authored two concurrences, one on the Tenth Circuit in 1994,<sup>137</sup> another on the Fifth in 1995.<sup>138</sup> In the second case, Justice White concurred without opinion.<sup>139</sup> The table below shows these data.

Justice	Concurrences	Cert. Petitions	Cert. Denied	Cert. Granted	Affirmed	Reversed
Powell	3	1	1	0	N/A	N/A
White	2	0	N/A	N/A	N/A	N/A
Burton	1	0	N/A	N/A	N/A	N/A
Totals	6	1	1	0	N/A	N/A

**Table 6: Total Concurrences**

Senior justices, it seems, are far less likely than active justices today to concur. Indeed active Supreme Court justices concurred on average four times in the October 2001 and 2012 terms, as opposed to the near negligible numbers found here.<sup>140</sup> In addition, the composite active judge concurred four times in the period studied and the composite senior judge concurred on average more than once in the same period.<sup>141</sup> The numbers show that both senior justices and judges are far less likely to concur than their active counterparts. Perhaps the varying caseloads of the circuits and Supreme Court explain this discrepancy, at least in part. The Supreme Court may have a much more contentious caseload. Additionally, Supreme Court concurrences can later take the place of majority opinions—as seen in Justice Jackson’s concurring opinion in *Youngstown*

<sup>135</sup> *Mickles v. Shalala*, 29 F.3d 918, 921 (4th Cir. 1994) (Powell, J., concurring); *Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994) (Powell, J., concurring) *cert. denied* 513 U.S. 1018 (1994); *Morgan v. Foretich*, 846 F.2d 941, 950 (4th Cir. 1988) (Powell, J., concurring).

<sup>136</sup> *Hodge*, 31 F.3d at 168 (Powell, J., concurring) *cert denied* 513 U.S. 1018 (1994).

<sup>137</sup> *TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir. 1994) (White, J., concurring).

<sup>138</sup> *United States v. Maldonado*, 42 F.3d 906, 914 (5th Cir. 1995) (White, J., concurring).

<sup>139</sup> *Id.*

<sup>140</sup> *See Stat Pack for October Term 2012*, SCOTUSBLOG (June 27, 2013), [http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog\\_StatPack\\_OT121.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2013/09/SCOTUSblog_StatPack_OT121.pdf) at 8; SCOTUSblog, *Final Stat Pack October 2011 Term available at: http://dailywrit.com/blog/uploads/2012/06/SCOTUSblog\_Stat\_Pack\_OT11\_final.pdf at 7.*

<sup>141</sup> *See, e.g., Tucker v. Las Vegas Met. Police Dept.*, 470 Fed. Appx. 627, 629 (9th Cir. 2012) (Tallman, J., concurring); *Peak v. Webb*, 673 F.3d 465, 474 (6th Cir. 2012) (Merritt, J., concurring).



*Sheet & Tube Co. v. Sawyer*<sup>142</sup>—potentially explaining why active justices are likely to concur, although the same rationales do not hold for active circuit judges.

*d. In the Minority and/or Dissenting*

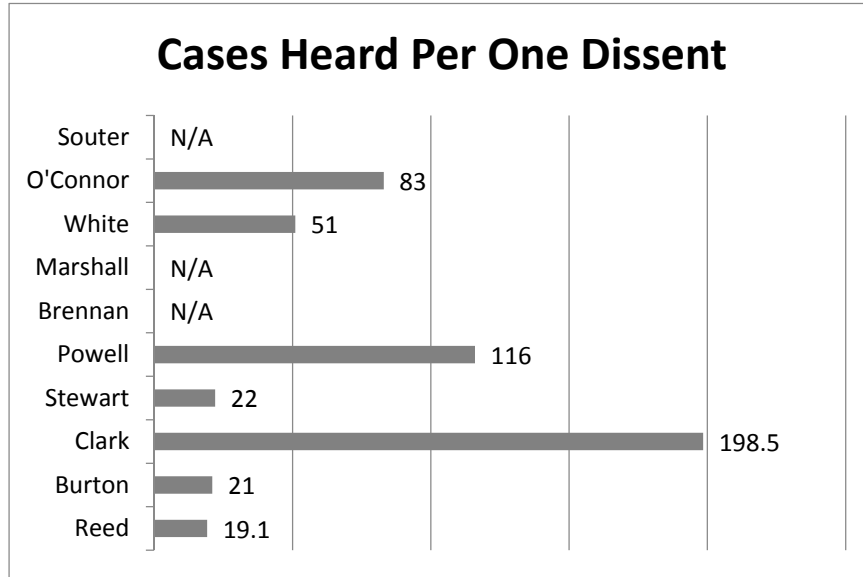
Seven of the ten senior justices who served on appellate courts after leaving the Supreme Court dissented on lower court panels. Only Justices Brennan, Marshall, and Souter did not. Given the small number of cases Justices Brennan and Marshall heard, this is not unexpected. Justice Souter, however, has yet to author a dissent despite the significant number of cases he has heard, thus breaking the pattern. Still, as the numbers show, dissenting is rare.

Justice	Dissents	Cert. Petitions	Cert. Denied	Cert. Granted	Affirmed	Reversed
Reed	10	3	2	1	0	1
Burton	3	1	1	0	0	0
Clark	2	1	1	0	0	0
Stewart	2	2	2	0	0	0
Powell	1	1	1	0	0	0
O'Connor	1	0	0	0	0	0
White	1	0	0	0	0	0
Brennan	0	N/A	N/A	N/A	N/A	N/A
Marshall	0	N/A	N/A	N/A	N/A	N/A
Souter	0	N/A	N/A	N/A	N/A	N/A
<b>Totals</b>	<b>20</b>	<b>8</b>	<b>7</b>	<b>1</b>	<b>0</b>	<b>1</b>

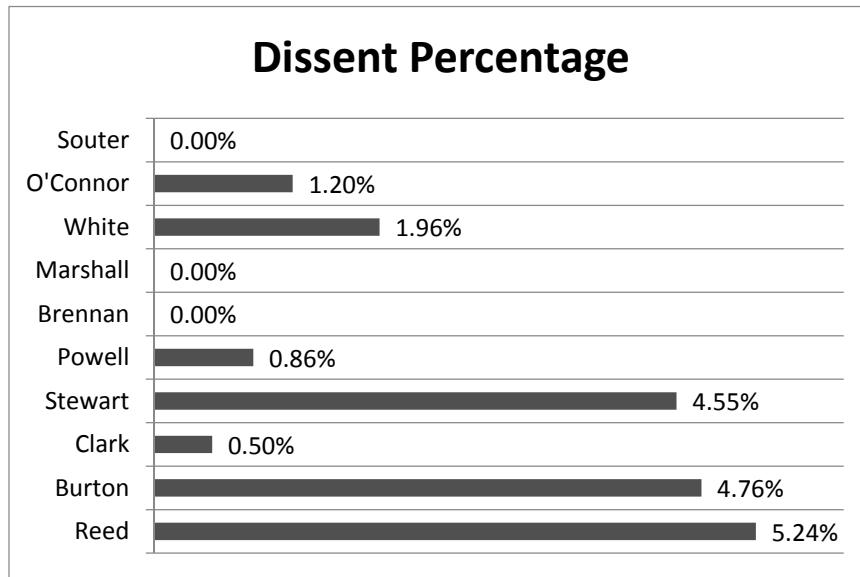
**Table 7: Total Dissents per Senior Justice**

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<sup>142</sup> 343 U.S. 579, 634 (1952) (Jackson, J., concurring).



**Chart 7: Cases Heard per One Dissent by Senior Justice**



**Chart 8: Percentage of Dissents per Cases Heard as a Senior Justice**

As Table 7 and Charts 7 and 8 indicate, Justice Reed was the most likely senior justice to dissent. For every nineteen cases he heard, he dissented in one.<sup>143</sup> In one case, he dissented when a later Court of Claims panel overruled an earlier opinion he joined.<sup>144</sup> He was also the only senior justice to dissent and see his rationales later win in the Supreme Court on appeal.<sup>145</sup> Justice Clark was the least likely to dissent, publishing two dissents over the 397 published opinions he joined or authored, equating to a 0.5 percent dissent rate.<sup>146</sup> Interestingly, Justice Stewart authored two dissents in the same case. First, he dissented from a panel decision of the Seventh Circuit that vacated the trial court and then from the subsequent en banc decision.<sup>147</sup> Ultimately the Supreme Court reversed the Circuit, three years after Justice Stewart's original dissent, which the Court cited for its correct conclusion that state court judgments do not bar subsequent federal antitrust claims.<sup>148</sup>

The average senior justice dissented every 72 cases or 1.9 percent of the time, while the median length between dissents was 51 published decisions or in 1.03 percent of cases. In the October 2011 term, Supreme Court Justices dissented, on average, every 5.67 cases, or 7.5 percent of the time,<sup>149</sup> while in the October 2012 term, they dissented every 5.9 cases, or 7.5 percent of the time.<sup>150</sup> Active justices, therefore, were much more likely to dissent over the last two terms than the average senior justice over his or her senior career. This result is likely the product of the high stakes of Supreme Court jurisprudence as opposed to the appeals of right heard on the circuit courts.

In addition, the composite active circuit judge dissented 5.5 times, while the composite senior judge did so 1.5 times in the period studied,

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<sup>143</sup> See, e.g., *Carson v. United States*, 317 F.2d 370, 379 (Ct. Cl. 1963) (Reed, J., dissenting); *Brewster v. U.S.*, 255 F.2d 899 (D.C. Cir. 1958) (Reed, J., dissenting).

<sup>144</sup> *Hynning v. United States*, 141 Ct. Cl. 486, 494 (1958) *overruled in part by* *Zeiger v. United States*, 295 F.2d 915, 917 (Ct. Cl. 1961) (Reed, J., dissenting).

<sup>145</sup> *Midwestern Gas Transmission Co. v. Fed. Power Comm'n*, 258 F.2d 660, 670 (D.C. Cir. 1958) *vacated sub nom.* *Fed. Power Comm'n v. Midwestern Gas Transmission Co.*, 358 U.S. 280, 79 S. Ct. 316, 3 L. Ed. 2d 299 (1959).

<sup>146</sup> *United States v. Williams*, 561 F.2d 859, 865 (D.C. Cir. 1977) (Clark, J., dissenting); *Mayer Paving & Asphalt Co. v. Gen. Dynamics Corp.*, 486 F.2d 763, 772 (7th Cir. 1973) (Clark, J., dissenting) *cert denied* 414 U.S. 1146 (1974).

<sup>147</sup> *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 692 F.2d 1083, 1096 (7th Cir. 1982) (Stewart, J., dissenting) *vacated*, 706 F.2d 1488, 1499 (7th Cir. 1983) (Stewart, J., dissenting) *on reh'g*, 726 F.2d 1150 (7th Cir. 1984) *rev'd*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985).

<sup>148</sup> *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 383 (1985).

<sup>149</sup> See SCOTUSBLOG, *supra* note 129, at 7.

<sup>150</sup> See SCOTUSBLOG, *supra* note 111, at 7.

amounting to just over 1 percent of the time, or once every 99 cases.<sup>151</sup> Thus senior judges are even less likely to dissent than senior justices. Given that many of the senior justices sat on different circuits, perhaps they were more comfortable dissenting from their colleagues, as opposed to the senior judges, who, for the most part, heard cases only in their own circuits. Or, perhaps senior justices are trying to get the Supreme Court's attention to grant certiorari or protect areas of the law they have a particularly high stake in from their active tenures. Definite answers require more research beyond this essay's scope.

#### IV. EXPLANATIONS

##### *A. Results and Reality*

The analyses presented in Part III, disprove the hypotheses presented in Part II. No overarching theory explains the results. While the dataset and its analyses paint a vivid picture of the careers of the senior justices, only modest and partial explanations attend particular findings and results. Building upon the data presented, this section first compares the careers of senior justices. Then it offers some observations and interpretations of the tenures of senior justices vis-à-vis active justices, active circuit judges, and senior circuit judges.

Indeed, the data demonstrate that senior justices perform similarly to active and senior circuit court judges. The only significant exception being that senior justices are more likely to author a panel opinion than senior circuit judges. But senior justices are not afforded extra deference, as measured by percentage as opinion author and dissent rates, among other data points. Nor do senior justices have any "extra insight" into the Supreme Court, with a comparable reversal rate to circuit judges. With the exception of Justice Clark's famous circuit split anecdote and the Supreme Court's affirmance of his legal interpretation, senior justices do not seem to have any special insight. Indeed, just as Justice Clark's anecdote illustrates special pull, Justice Stewart's double dissent suggests the opposite.

These findings do not diminish the importance of the gathered data. Future scholars and researchers may find patterns or have insights enabling them to mine more information from these raw results. Nevertheless, the comparisons offered below show shed light on the

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<sup>151</sup> See, e.g., *Overstreet v. Wilson*, 686 F.3d 404, 410 (7th Cir. 2012) (Wood, J., dissenting); *Milligan v. Brd. Of Trustees of Southern Ill. U.*, 686 F.3d 378, 390 (7th Cir. 2012) (Ripple, J., dissenting).

important careers of senior Supreme Court justices and mark the first attempt to do so.

### *B. Senior Justices Compared*

Senior justices have varied careers. Since senior status became available to Supreme Court justices, some, like Justices Powell and Souter, returned to their hometowns, while others, like Justices Clark and O'Connor have crisscrossed the nation to sit on appellate court panels. Some justices had short senior careers, like Justices Brennan and Marshall, while others served for many years, like Justices Reed and Clark.

Justice Clark heard the most cases as a senior justice. Justice Souter, who has only been a senior justice since 2009, has already heard 239 cases, and may one day overtake Justice Clark's records, given his forty-eight case a year pace.<sup>152</sup> The data show that Justices Souter, Stewart, and Powell, in descending order, heard the most cases a year, doubling the average among senior justices. These three also wrote the most opinions per year of senior service. Justice White was the most likely to author an opinion while sitting on a lower court, writing in 35 percent of the cases he heard and besting the approximate average of 24 percent. While only three justices concurred in panel decisions during their senior tenure, all but three senior justices dissented, with Justice Reed being the most likely to so.

Variety and uniqueness describe these senior justices' service, as measured by performance, location, and longevity. Overall, senior justices have careers as varied as the individuals themselves with each molding his or her senior career to fit his or her circumstances.

### *C. Senior Justices and Others*

When compared senior justices against active justices, active circuit judges, and senior circuit judges, a complex image emerges. Although further scholarly inquiry will be necessary to determine the underlying causes of these many differences, this essay will offer initial thoughts and conclusions to account for the presented results.

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<sup>152</sup> Perhaps the reduced workload, or being in his native New Hampshire, has removed the sting of his Supreme Court experience, whose terms he described as "sort of an annual intellectual lobotomy." Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES, May 2, 2009, available at: <http://www.nytimes.com/2009/05/03/weekinreview/03greenhouse.html?adxn1=1&ref=davidhsouter&adxn1x=1368030753-1hs+G5ZKxU4sN5ynnaeiqA> (last visited May 8, 2013).

i. Senior Justices and Active Justices

Senior justices heard about a quarter of the cases per year active justices hear today. This is in line with the statutory requirements. Senior justices authored opinions nearly a quarter of the time they heard a case, more than doubling the active percentage. However, senior justices authored only 3.46 cases a year, less than half the average for an active Supreme Court justice. Senior justices also were far less likely to concur than today's Supreme Court justices, and they dissented much less often than the nine current Supreme Court justices. Senior justices almost never concurred, while the average active justice concurred just over four times in the Court's last two terms alone. On average, senior justices dissented 1.9% of the time, while active Supreme Court justices dissented in 7.5% of the cases they heard in the October 2012 term. This difference is most likely a product of the distinctive docket of the Supreme Court, which is mostly discretionary, and the higher societal and jurisprudential stakes of the Supreme Court.<sup>153</sup> Senior justices also may simply have less skin in the game.

Given that senior justices hear a quarter of the cases the active justices do, at first glance their much higher percentage as opinion author seems noteworthy and may be significant. However, senior justices sit on panels of three, while their active counterparts must divide their cases among nine colleagues. This difference likely accounts for the proportional variation of opinion writing. The fact that senior justices are far less likely to dissent or concur is an interesting finding. It may partly be explained by the fact that the cases they hear are less controversial than those that reach the Supreme Court with fewer legal consequences on the line. Therefore dissents and concurrences are less important. Further research is necessary, however, to validate this hypothesis.

ii. Senior Justices and Active Circuit Judges

As compared to senior justices, active circuit judges wrote ten times as many majority opinions in a year. Active circuit judges also concurred more often, writing four concurrences in 2012, compared to the negligible number of concurrences senior justices authored. Senior justices dissented once every seventy-three cases or 1.9% of the time, compared to the 5.5 dissents active circuit judges wrote during the study period. Given that the average senior justice heard twenty-two cases and dissented once every seventy-three cases, each would dissent fewer than once every three years.

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<sup>153</sup> Posner, *supra* note 90, at 8 (“[T]he Supreme Court . . . is largely a political court when it is deciding constitutional cases.”); Posner, *supra* note 90 at 205-06 (describing the discretionary docket of the Supreme Court versus the Circuit Courts).

Thus, across all measures, senior justices author far fewer opinions, concurrences, or dissents than active circuit judges. This result is to be expected, given that active judges hear far more cases than senior justices.

Active judges are also more likely to write a panel opinion than a senior justice. Senior justices write opinions 24 percent of the time, while active circuit judges presumably write 33 percent on a panel of three. This last conclusion, however, rests on the assumption that active circuit judges write one-third of panel opinions. As the data show, senior judges certainly do not write in one-third of the cases they hear, so the assumption should be viewed with some skepticism. Further research into the precise proportion of opinions any active circuit judge authors per case heard is needed to determine this finding's importance.

The fact that senior justices author fewer dissents than active circuit judges seems to partially prove the first hypothesis, that their position commands respect and so they are followed more often on any given panel. However, they also author fewer opinions than active circuit judges, precisely the opposite result than expected. Thus the predicted results proved only partially true, suggesting other factors account for the data.

Interestingly, senior justices do mirror active circuit judges when it comes to interpreting the law correctly, as measured by the number of times the Supreme Court overturned a panel. Overall, senior justices were, on average, slightly less likely to be reversed by the Supreme Court than current appellate judges, either as authors or members of a panel majority. Current Courts of Appeals are reversed 72 percent of the time when certiorari is granted, while senior justices were reversed 60 percent of the time as opinion authors and 66 percent of the time as members of a panel's majority. Thus, as compared across this dataset, against active circuit judges, senior justices equal or slightly outperform active circuit judges.

These data demonstrates that former justices have little if any special insight into the workings of the Supreme Court, nor are they more likely to predict how the Court may rule on a case than active appellate judges. Changing Court dynamics—one justice's assumption of senior status does introduce a new active justice to the bench—may account for this result. Thus, despite the differences in caseload and written material, senior justices come out on par with their active circuit judge colleagues. This finding invalidates the second hypothesis that senior justices would have some special insight into the Court's operations, reasoning, or interests and thus have a lower reversal rate than judges lacking their high court experience.

### iii. Senior Justices and Senior Circuit Judges

Senior circuit judges offer good comparisons for senior justices. Senior circuit judges heard, on average, 145 cases. They authored the opinion of their panels fifteen times in 2012 or in 10 percent of the cases they heard. Senior judges also concurred only once a year, coming far closer to the senior justice tally. Senior judges dissented 1.5 times in the period studied or in just over 1% (1/99) of the cases they heard. This result is comparable to senior justices who dissented 1.9% (1/73) of time, or once every three years. This represents a proportional difference but perhaps a statistically insignificant one. Senior justices only best senior judges in their average of being any panel's majority writer, writing a quarter of the time to senior judges' average of one in every ten cases.

Intuitively, these parallels make sense. Senior judges have reduced workloads, like senior justices. And because senior judges also must perform a quarter of their old judicial work, and have a much higher baseline of cases compared to senior justices, this likely explains the differences in opinions written and percentages as author. Overall, therefore, senior justices resemble their senior circuit judge counterparts across a range of variables, disproving the second hypothesis.

### CONCLUSION

At the outset of this project, it seemed that senior justices would have an outsized impact on the federal judiciary, as measured through their service on the circuit courts. Given their former positions, one expects their insight to be special, their savvy to produce unique results regarding reversals or certiorari, or their opinion and dissent writing to be active. These expectations were unmet. Instead, the research has generated many more questions to be answered.

Nevertheless, this study has made the following findings and interpretations and calls for further study and analysis on each point.

First, senior justices seem to make an outsized impact only with regards to opinion writing. They author opinions at a far higher proportion than active justices or senior circuit judges. Their increased proportions vis-à-vis active justices is likely because senior justices participate on three-judge panels, not a full bench of nine justices, where opinions are divided roughly equally. Their results compared with senior circuit judges may be a product of their reduced workloads or presence on the panel, as they hear fewer cases and can presumably write more often when they are on a panel, and their prior position as an active justice may generate deference from the other panel members. However, this finding does not hold true vis-à-vis active circuit judges. Thus, deference alone does not explain this finding.



Second, senior justices hear far fewer cases than active justices, active circuit judges, and senior circuit judges. The varying caseloads of each group likely explain this result. Senior justices need only fulfill a 25 percent judicial workload requirement to remain eligible for Article III pay increases. And reaching that number—with today’s small Supreme Court docket—is not difficult. Further inquiry is needed to determine the extent to which senior justices contemplate their statutory requirements when deciding whether to sit by designation on a given circuit panel.

Third, senior justices are overruled at the same rate as circuit judges. This result surprised the author the most. Senior justices should be adept at avoiding reversal. Further research may wish to inquire whether senior justices lose their ability to predict the Court’s outcomes overtime, or to what extent shifts in Court personnel impact the chances of being reversed. Nevertheless, senior justices are not endowed with special abilities after leaving the high court.

Fourth, senior justices rarely concur, but neither do senior circuit judges. This result presents a conundrum. Perhaps senior justices and judges disdain concurring for personal reasons. Perhaps concurring on a lower level offers less impact than doing so on the Supreme Court. Indeed, concurrences on the Supreme Court often have long-lasting consequences, such as Justice Jackson’s concurrence in *Youngstown*.<sup>154</sup> Additional research into the different results vis-à-vis active circuit judges is necessary to explain the discovered disparity in concurrences and determine the likelihood of concurring for any single active judge to offer a more complete comparison.

Fifth, senior justices dissent less than active justices but more than senior circuit judges. As with concurrences, it seems likely that the Supreme Court’s higher stakes and discretionary docket make dissenting more attractive to any single justice than the standard appeals by right senior justices hear.<sup>155</sup> Of note, however, senior justices are more willing to dissent than senior judges, as a proportion of the cases they hear. One explanation is that senior justices travel the country hearing cases more often than senior circuit judges and thus are more willing to dissent because they may not face repercussions over time for their dissents.<sup>156</sup>

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<sup>154</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>155</sup> Edwards, *supra* note 77, at 1644 (“[T]he Supreme Court’s docket consists of many more ‘very hard’ cases than do those of lower appellate courts. The majority of the cases in the circuit courts admit of a right or a best answer and do not require the exercise of discretion.”); Posner, *supra* note 90, at 205-06.

<sup>156</sup> *Contra* Edwards, *supra* note 77, at 1647 (“Unfamiliar group members . . . are likely to be concerned with social acceptance within the group. This leads to a tendency to conform: unfamiliar group members are apprehensive about how they will be evaluated, which leads

Alternatively, they may seek to signal to the Supreme Court that a significant issue exists, as Justice Clark did in a similar vein when he generated a circuit split. Additional study on this point could yield significant details into the careers of senior justices and their decision-making processes, and shed more light on my first hypothesis, which was seemingly disproved.

Senior justices' service differs from that of active justices, active circuit judges, and senior circuit judges in several respects. The data present numerous questions, and the comparisons offered here represent a starting point in understanding senior justices' careers. The varying conclusions presented throughout this essay and summarized here require further study to determine if invisible rationales or confounding variables are affecting the interpretations offered. The hypotheses offered seem poorly supported and thus disproved. It is for future authors and scholars to debate the interpretations presented herein and find other correlations. Hopefully this essay spurs further interest and examination into the careers of senior justices of the United States Supreme Court as they don their robes and continue to hear and dispose of cases across the thirteen Courts of Appeals of the United States.

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them to suppress alternative perspectives and judgments and to behave like other group members, regardless of the nature of their private beliefs.”) (internal citation omitted).