Cornell Law Review

Volume 92
Issue 3 *March 2007*

Article 4

Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings

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SENIOR STATUS: AN "ACTIVE" SENIOR JUDGE CORRECTS SOME COMMON MISUNDERSTANDINGS

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I had been a federal district court judge for almost eleven years when I took senior status on September 1, 2006. The next day, I interviewed a third-year law student for a clerkship who, upon learning that I was a senior judge, candidly confessed that he applied only to active judges. I soon realized that he associated "senior" with "senile" and did not have a clue as to the differences between active and senior judges other than their perceived relative antiquity. (He did not get the job.) I explained the differences to him—how and why one becomes a senior judge and what life as a senior judge is all about. In doing so, I made a mental note that it might be useful to the bar, and especially to law-clerk applicants, if I found some time to put pen to paper and memorialize what I told that young man. To his credit, he asked, and I answered, the following questions:

WHAT IS "SENIOR STATUS"?

A brief historical overview of the creation of the Judiciary is useful to understanding why the position of senior judge came into existence. Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and further, that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[1] Article II gives the President the power to appoint federal judges "by and with the Advice and Consent of the Senate"[2] and provides that "[t]he President, Vice President and all civil Officers of the United States," including federal judges, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[3] The power to impeach is vested in the

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1 U.S. CONST. art. III, § 1.

2 *Id.* art. II, § 2.

3 *Id.* art. II, § 4.

House of Representatives,[4] and the power to try impeachments is vested in the Senate.[5] Thus, the Constitution provides only the broad framework for the Judiciary. The details—including the size of the Supreme Court, the creation and structure of lower federal courts, and compensation for all federal judges—were left to Congress (subject, of course, to the President's veto power).

Congress wasted no time in filling in these details. The Judiciary Act of 1789 (probably best known as the statute at issue in *Marbury v. Madison*[6]) set the size of the Supreme Court at six[7] and divided the country into thirteen judicial districts—two each for Massachusetts and Virginia[8] and one each for Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Maryland, South Carolina, New Hampshire, and New York.[9] Each district contained a district court with a single district judge.[10] To this small band of judges fell the responsibility of hearing, in the first instance, a wide variety of civil and criminal cases.[11] In addition, the Act required each district judge to "ride circuit" and sit with two Supreme Court Justices on one of the country's three circuit courts to exercise appellate jurisdiction over the district courts.[12] Furthermore, the circuit courts had original jurisdiction over the more serious criminal and civil cases.[13]

The original district judges received an annual salary ranging from $800 for the District of Delaware to $1,800 for the (presumably busier) Districts of Virginia and South Carolina.[14] The Chief Justice of the Supreme Court received $4,000 a year, while each of the five Associate Justices received $3,500.[15] The President, by comparison, received the princely annual sum of $25,000.[16]

Over the years, Congress has tinkered with the structure of the Judiciary. In 1891, for example, it created nine "new" circuit courts.[17]

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4 *See id.* art. I, § 2.

5 *See id.* art. I, § 3.

6 5 U.S. (1 Cranch) 137 (1803).

7 *See* Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73, 73.

8 Massachusetts was divided into the "Massachusetts District" and the "Maine District," which was then part of Massachusetts. *See* § 2, 1 Stat. at 73. Similarly, Virginia, which, in 1789, included the future state of Kentucky, was divided into the "Virginia District" and the "Kentucky District." *See id.*

9 *See id.* At the time the Act was passed, only these eleven of the original thirteen states had ratified the Constitution; soon thereafter, North Carolina ratified it on November 21, 1789, *see* Act of June 4, 1790, ch. 17, 1 Stat. 126, and Rhode Island ratified it on May 29, 1790, *see* Act of June 23, 1790, ch. 21, 1 Stat. 128.

10 *See* § 3, 1 Stat. at 73–74.

11 *See* § 9, 1 Stat. at 76–77.

12 *See* § 4, 1 Stat. at 74–75.

13 *See* § 11, 1 Stat. at 78–79.

14 *See* Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72.

15 *See id.*

16 *See* Act of Sept. 24, 1789, ch. 19, § 1, 1 Stat. 72.

17 *See* Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826, 826–27.

The bulk of federal appellate jurisdiction was transferred to these intermediate appellate courts, thereby freeing the Supreme Court to take only those cases it deemed worthy.[18] In addition, these "new" circuit courts (later redesignated as simply the "courts of appeal") rendered redundant the "old" circuit courts; the latter were finally abolished in 1911,[19] leaving the three-tiered structure of Article III courts that we know today.[20]

Congress has also altered the size of the Supreme Court (settling on the current size of nine in 1869),[21] subdivided and added circuits and districts as the country expanded, and periodically increased salaries. Until relatively recently, however, Congress neglected the issue of judicial retirement. In a fine speech commemorating the unveiling of the portraits of the living senior judges of my court, the Eastern District of New York (EDNY), my colleague Judge I. Leo Glasser traced the development of the law in this area:

> Prior to 1869, there was neither a resignation nor a retirement system available for federal judges. Old judges, even those who were either physically or mentally disabled, were compelled to remain in office as a regular active judge or resign without any retirement benefit whatsoever. By an Act of 1869, a judge appointed pursuant to Article III of the Constitution could resign at age 70 after ten years of service with a continued right to receive his salary for life thereafter. That Act, however, made no provision for continued judicial service and deprived the federal judiciary of the service of many very experienced and able judges who were willing to continue to work at least part-time if they were unable to continue to do so full time. Responding to that undesirable situation, [in 1919] Congress created the office of Senior Judge and thus enabled the federal judiciary to continue to benefit from the service of many dedicated and experienced judges.[22]

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18 *See* § 6, 26 Stat. at 827–28.

19 *See* Act of Mar. 3, 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

20 In addition, Congress has provided for magistrate judges to assist the district judges, *see* 28 U.S.C. § 631 (2000), and bankruptcy judges, *see id.* §§ 151, 157(a) ("Each district court may provide that any or all cases under title 11 [i.e., the Bankruptcy Code] and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."). These judgeships are not filled by presidential nomination and senatorial confirmation, *see id.* §§ 631(a) (authorizing district judges to collectively appoint magistrate judges for their respective courts), 152(a)(1) (authorizing circuit judges to collectively appoint bankruptcy judges for districts within their respective circuits based on recommendations from the Judicial Conference of the United States), and do not carry life tenure, *see id.* §§ 631(e) (providing an eight-year term for magistrate judges), 152(a)(1) (providing a fourteen-year term for bankruptcy judges).

21 *See* Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44.

22 Hon. I. Leo Glasser, Remarks at Portrait Unveiling, Brooklyn, N.Y. (May 22, 1996) (on file with author).

Currently, any Article III judge or justice may take senior status after meeting the age and service requirements of the "Rule of Eighty"—your age and years of service must add up to eighty, you must be at least sixty-five years old, and you must have been on the bench for at least ten years.[23] In my case, since I was sixty years old when I became a district court judge, I satisfied all three criteria when I turned seventy, ten years later.

Officially, one takes senior status by "retir[ing] from regular active service."[24] The mechanism for doing so is straightforward: The judge simply writes a letter to the President stating that on a particular date the judge intends to retire from regular active service, having met the requisite age and service requirements, and that the judge intends to continue to render substantial judicial service as a senior judge.

Senior status is not to be confused with full retirement or resignation. Provided they render "substantial service" to the courts, which may be satisfied by simply doing the same work as an active judge for three months per year,[25] senior judges continue to perform the same judicial duties and receive the same salary as active judges.[26] Moreover, like active judges, they continue to serve for life, are barred from the practice of law, and are subject to the same restrictions on earnings from outside sources.[27]

"Full retirement" means that having satisfied the Rule of Eighty, the judge completely retires from the bench; he or she no longer performs judicial duties and is free to pursue, without limitation, any other employment (barring certain ethical conflicts). The retired judge receives an annual annuity equal to the salary at the time of retirement (with no postretirement adjustments or salary increases).[28] "Resignation" means the voluntary relinquishment of all judicial duties and return to the private sector, without having met the age and

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23 28 U.S.C. § 371(c).

24 *Id.* § 371(b)(1).

25 *See id.* § 371(e)(1).

26 See *id.* §§ 294(b) (judicial duties), 371(b)(1) (salary). This equivalency, however, is contingent upon certain statutory requirements, discussed *infra* text accompanying notes 46–54.

27 The Code of Conduct for United States Judges prohibits judges from practicing law, *see* CODE OF CONDUCT FOR UNITED STATES JUDGES, ch. 1, Canon 5F, and from "serv[ing] as an officer, director, active partner, manager, advisor, or employee of any business other than a business closely held and controlled by members of the judge's family." *Id.* at Canon 5(C)(2). In addition, a judge is prohibited from receiving any honoraria and from earning outside income more than 15% of a district judge's salary. *See* 2 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES VI-15 (implementing the Act for federal courts). Judges are, however, free to teach (subject to the approvals of the chief judges of their circuits). *See id.* For senior judges who continue to provide "substantial service," income derived from approved teaching does not count towards the 15% cap on outside income. *See id.*

28 *See* 28 U.S.C. § 371(a).

service requirements of the Rule of Eighty; there are no retirement benefits, and all compensation ceases.

In contrast to the federal system, many states subject their judges to mandatory retirement. In New York, for example, every judge is required to retire on "the last day of December in the year in which he or she reaches the age of seventy."[29] Postretirement, judges of the New York Court of Appeals and justices of the New York Supreme Court may continue to "perform the duties of a justice of the supreme court," but "[a] retired judge or justice shall serve no longer than until the last day of December in the year in which he or she reaches the age of seventy-six."[30]

Life tenure versus mandatory retirement remains a subject of much debate. For example, this past summer, the president of the New York State Bar Association appointed a Task Force on the Mandatory Retirement of Judges, charged with "examin[ing] and mak[ing] recommendations as to whether New York's policy of mandatory retirement for judges should be retained, modified or eliminated."[31] Although an analysis of the merits of each system is beyond the scope of this Comment, the principal divide focuses on the issue of whether the public should be protected against the aging judge from drifting into senility on the bench. On that issue, I find myself in league with Alexander Hamilton who in defending federal lifetime tenure in 1788 leveled the following criticism at New York's constitution, which, at that time, imposed mandatory retirement at age sixty:

> There is no station, in relation to which [mandatory retirement] is less proper than to that of a judge. The deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it; and when, in addition to this circumstance, we consider how few there are who outlive the season of intellectual vigor, and how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time, we shall be ready to conclude that limitations of this sort have little to recommend them. In a republic, where fortunes are not affluent, and pensions not expedient, the dismission of men from stations in which they have served their

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29 N.Y. CONST. art. 6, § 25(b).

30 *Id.* This effective extension of the retirement age requires a certification that "the services of such judge or justice are necessary to expedite the business of the court and that he or she is mentally and physically able and competent to perform the full duties of such office," *id.*, which certifications must be renewed every two years. *See id.* The certifications are made by the Administrative Board of the Courts, *see* N.Y. JUD. L. §§ 114, 115 (McKinney 2001), a body consisting of the chief judge of the Court of Appeals and the presiding justice of each of New York's four judicial departments, *see* N.Y. CONST. art. 6, § 28(a).

31 Mark H. Alcott, *President's Message: Taking the Initiative*, N.Y. ST. B.J., July–Aug. 2006, at 5.

> country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench.[32]

While the "graying of America" has weakened Hamilton's point that nature would take care of elderly judges without the need for a mandatory retirement age, the remainder of his argument is as true today as it was then. Indeed, most judges are able and willing to serve beyond their seventieth (or even seventy-sixth) birthday and New York State is depriving its residents of valuable judicial talent. By contrast, five of my colleagues on the EDNY are fully functioning in their eighties, led by the eldest, Judge Jack Weinstein who at the age of eighty-five after forty years on the bench, remains one of the stalwarts of the entire Judiciary.[33]

WHAT ARE THE ADVANTAGES OF TAKING SENIOR STATUS?

There are three principal advantages to taking senior status: (1) it allows the judge to continue with the judge's coveted judicial career, the intellectual stimulation it affords, and the judge's commitment to public service; (2) it gives the judge the opportunity to have more control over the quantity and quality of his or her workload, without loss of pay, provided the judge continues to perform "substantial service"; and (3) it creates a vacancy, thereby paving the way for additional judicial help for the courts.[34]

In taking senior status, the judge has decided to forgo the significant income that a return to the private sector would undoubtedly offer (which would be in addition to the judge's retirement annuity) and to continue to rely on his or her judicial salary. Congress has, however, provided some relatively small economic incentives to entice the judge to remain on the bench. For example, unlike a retired judge, who receives an annuity frozen at the time of retirement,[35] the senior judge's salary for performing "substantial service," being the same as active judges, includes all cost of living adjustments and salary increases.[36] In addition, Congress has provided that the senior

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32 THE FEDERALIST No. 79, at 404 (Alexander Hamilton) (J.M. Dent & Sons ed., 1961).

33 Realistically, the public need not fear that the aging judge who is no longer able to effectively perform his or her judicial duties will become a loose cannon. In the first place, those who have taken senior status are subject to the rules discussed *infra* text accompanying notes 46–54. In any event, in the rare instances in which intervention has been indicated, the judges of the respective court use their collegial powers of persuasion to address the problem.

34 *See* 28 U.S.C. § 371(d) (2000).

35 *See id.* § 371(a).

36 *See id.* § 371(b)(1).

judge's salary is not subject to deductions for FICA and Medicare taxes.[37] While it is still subject to federal income taxation, New York State (along with several other states) and New York City exempt senior-status compensation from state and city income taxes.[38]

Nonetheless, there are those who, upon becoming eligible for senior status, are drawn to the economic lure of private practice. There are also an increasing number of active judges who are also economically driven to return to private practice even though they have not qualified for senior status, thereby relinquishing any further judicial salary or the prospects of a retirement annuity. Regrettably, Congress has not taken significant steps to address judges' financial sacrifices in choosing judicial service over private practice because it has not increased judicial salaries (other than small cost-of-living adjustments) since 1991; they are currently $165,200 for district judges, $175,100 for circuit court judges, $203,000 for Associate Justices, and $212,100 for the Chief Justice.[39]

In his most recent annual report on the state of the Judiciary, Chief Justice John Roberts highlighted the problem by describing Congress's failure to raise federal judges' salaries as "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary."[40] The Chief Justice noted that, adjusted for inflation, "the average U.S. worker's wages have risen 17.8% in real terms since 1969," while during the same time period "[f]ederal judicial pay has *declined* 23.9%—creating a 41.7% gap,"[41] with the result that "many judges who must attend to their families and futures have no realistic choice except to retire from judicial service and return to private practice."[42]

In an obvious show of respect for senior judges, the Judicial Conference of the United States has determined that senior judges who provide "substantial service" are "entitled to continued office space

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37 *See* 26 U.S.C. § 3121(i)(5); 42 U.S.C. § 409(h).

38 Section 111, title 4 authorizes states to tax the incomes of federal officers and employees as long as "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." In *Davis v. Michigan Department of Treasury*, the Supreme Court held that the same antidiscrimination principle applies to state taxation of the retirement benefits of federal officers and employees. *See* 489 U.S. 803, 817 (1989).

39 *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL SALARIES SINCE 1968, http://www.uscourts.gov/salarychart.pdf. The dearth of pay raises for the Judiciary is attributable in large part to the fact that judges' salaries are linked to the salaries of members of Congress. *See* 28 U.S.C. §§ 5, 44, 135. Thus, to give members of the Judiciary a raise, Congress must give itself a raise, often a politically unpopular move.

40 JOHN G. ROBERTS JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1, http://www.supremecourtus.gov/publicinfo/year-end/2006year-endreport.pdf.

41 *Id.* at 3.

42 *Id.* at 6.

and secretarial and law clerk support."[43] While the circuit judicial councils are the ones who ultimately make specific staffing decisions,[44] in practice a senior judge is allocated the same number of law clerks as an active judge, absent a significant reduction in workload.

The nature of the senior judge's workload is the product of the customs and practices of the particular court and the predilections of the particular senior judge. The general notion outside the Judiciary is that senior status is akin to semiretirement because senior judges are entitled to reduce their caseloads. Though most senior judges nationwide do so, they nonetheless remain an invaluable asset to their courts: As of September 30, 2006, 36% of the country's complement of 1,018 district judges were senior judges (364), and as reflected in the most recent statistics available, during the period from July 1, 2005 to June 30, 2006, senior judges disposed of 17% of all terminated cases and presided over 18.3% of all trials. During those same respective time frames, 37% of all circuit judges (109 out of 292) were senior judges, and they handled 17.1% of their courts' cases. It is at once apparent that the federal judicial system would be enormously burdened if the senior judges were to retire rather than continue to serve, even though there is little economic incentive to do so.

Notably, this concept of semiretirement and the resultant nationwide approximate 50% reduction in the senior judges' workloads in the district and circuit courts is not the case with my court for which, remarkably, current statistics compiled by the Clerk of the EDNY reveal that senior district judges have on average higher caseloads than the active judges: As of October 31, 2006, 42% of the EDNY's judges were senior judges (10 out of 24) and carried 46% of the court's caseload (4,742 out of 10,302 cases).

What is different in the EDNY is a shift in the nature of the senior judges' work; they can decide that they no longer wish to preside over certain types of cases. For example, many EDNY senior judges stop

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43 3 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES § B, ch. 6, pt. 7. The Judicial Conference of the United States is composed of the "Chief Justice of the Supreme Court[,] . . . the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit." 28 U.S.C. § 331. It acts as the principal policy-making body of the Judiciary, charged with "mak[ing] a comprehensive survey of the condition of business in the courts of the United States[,] . . . prepar[ing] plans for assignment of judges to or from circuits or districts where necessary[, and] . . . submit[ting] suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." *Id.*

44 Each circuit has a judicial council "consisting of the chief judge of the circuit, who shall preside, and an equal number of circuit judges and district judges of the circuit, as such number is determined by majority vote of all such judges of the circuit in regular active service." 28 U.S.C. § 332(a)(1). "Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." *Id.* § 332(d)(1).

handling pro se litigation. This does not mean that there are not worthy pro se cases; indeed, the court is open to all and there are many pro se litigants who bring important cases for judicial resolution, especially in the metropolitan New York area where the cost of legal representation is so high. There is, however, a surfeit of pro se cases that are patently frivolous and take up a good amount of judicial time to process, so senior judges cannot be faulted for deciding to forgo disposing of lawsuits against Jesus, Moses, and Mohammed. But, as statistics show, a shift in the type of cases that EDNY senior judges handle does not equate to fewer cases; the senior judges remain in the same assignment wheel as the active judges and usually wind up with more challenging and demanding substitute cases. In addition, EDNY senior judges are free to further enhance the breadth of their judicial work by accepting out-of-district assignments, thereby increasing their workloads well beyond that of many active judges.[45]

In sum, senior judges in general, and EDNY senior judges in particular, have more control over the quantity and quality of their workworlds; judges are free to determine how they wish to shape this stage of their judicial careers.

WHAT ARE THE DISADVANTAGES OF TAKING SENIOR STATUS?

There are a few statutory restrictions. On paper, one looms large: Under 28 U.S.C. § 294(b), a senior judge cannot perform judicial duties unless "designated and assigned" to do so; the chief judge of the circuit makes designations for assignments within the senior judge's circuit,[46] while the Chief Justice of the Supreme Court makes designations for assignments outside the circuit in response to a certificate of necessity from the circuit of the "borrowing" court.[47] Supreme Court Justices who retire may also take senior status and are eligible for assignments by the Chief Justice to sit on the circuit and district courts.[48]

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45 *See* 28 U.S.C. § 294(d). The chief judge of a circuit may assign district judges to serve on the circuit court or any district court within the circuit. *See id.* § 292(a)–(b). District judges may also be assigned to serve on a circuit or district court outside their "home" circuits, but such intercircuit assignments require a certificate of need from the chief judge of the "borrowing" circuit and the approval of the Chief Justice. *See id.* § 292(d). Under guidelines promulgated by the Judicial Conference, a court that is "borrowing" a judge from another circuit cannot simultaneously "lend" an active judge to another circuit. *See* 3 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES § B, ch. 2, Ex. A-1. For example, the EDNY, with its busy docket, has been a "borrowing" district for many years. But this so-called "lender versus borrower rule" does not apply to senior judges; thus, a willing senior judge from a "borrowing" court may nevertheless serve wherever needed.

46 *See* 28 U.S.C. § 294(c).

47 *See id.* § 294(d).

48 *See id.* § 294(a).

This "designation and assignment" requirement directly affects a senior judge's compensation:

> In order to continue receiving the salary of the office . . . , a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements for ["substantial service."][49]

A senior judge who is not designated and assigned to perform judicial duties obviously cannot meet the "substantial service" requirement.

One prominent jurist (who has not taken senior status) has viewed submission to the "designation and assignment" requirement of § 294 in exchange for continued compensation as a relinquishment of lifetime tenure, being "a variant of the 'buy out' schemes by which universities and other employers try to induce retirement."[50] David Stras and Ryan Scott take that argument a step further and suggest that this feature of senior status, among others, makes it unconstitutional.[51] In practice, however, the requirements of § 294 have proven to be pro forma as long as the judge is rendering "substantial service," and they have had little impact on deterring judges from taking senior status. I know of no case in which this "veto power" has been exercised.

On a more practical level, a senior judge cannot serve as the chief judge of his or her court. By statute, the chief judgeship of each circuit and district court is filled upon a vacancy by the judge with the most seniority who, at the time of the vacancy, (1) is under sixty-five years of age, and (2) has not retired or taken senior status.[52] As the position of chief judge carries a seven-year term,[53] however, in a good-sized court like the EDNY, only a few of the judges would ever qualify for chief judge; hence, this limitation is academic for almost all of the judges.

The only other statutory restrictions are those contained in 28 U.S.C. § 296, which, for some inexplicable reason, precludes a senior

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49 *See id.* § 371(e)(1); *see also supra* text accompanying notes 25–26 (differentiating senior judges from retired judges and judges who have resigned).

50 Posting of Richard Posner to Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/03/judicial_term_l.html (Mar. 12, 2005, 14:09 EST).

51 *See* David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

52 *See* 28 U.S.C. §§ 45(a)(1) (circuit judges), 136(a)(1) (district judges). The ascension to a chief judgeship is automatic and carries a seven-year term, *see id.* §§ 45(a)(3)(A) (circuit judges), 136(a)(3)(A) (district judges); however, a chief judge must step down when he or she reaches the age of seventy or takes senior status, *see id.* §§ 45(a)(3)(C) (circuit judges), 136(a)(3)(C) (district judges). In addition, a chief judge may step down at any time by so informing the Chief Justice. *See id.* §§ 45(c) (circuit judges), 136(d) (district judges).

53 *See id.* §§ 45(a)(3)(A), 136(a)(3)(A).

judge from appointing any person to a statutory position in the court and from designating depositories for funds or newspapers for publication of notices. As a general proposition, senior judges do not become involved in matters of court administration, although most would probably consider this as another advantage rather than a limitation. In the EDNY, however, which has a proud history and tradition of treating its senior judges with dignity and respect, the senior judge participates fully in all aspects of the court's work, having an equal voice in all board-of-judges meetings and the selection process for the district's magistrate judges.[54]

WHY DOESN'T EVERY JUDGE TAKE SENIOR STATUS AS SOON AS HE OR SHE IS ELIGIBLE?

With so many advantages and so few practical disadvantages, one would think that every judge who wished to remain on the bench would take senior status as soon as eligible. This is not always the case. From my observations, judges deciding whether and when to take senior status—other than those who are troubled by the statutory power of the chief judge of their circuits to preclude them from continuing to perform their judicial duties—fall into five categories: (1) the money-concerned judge, (2) the successor-concerned judge, (3) the psychologically challenged judge, (4) the semiactive senior judge, and (5) the *active* senior judge.

1. *The Money-Concerned Judge*

This judge wishes to immediately capitalize on the monetary benefits bestowed on senior judges because their salaries are not subject to federal FICA and Medicare taxes and, in some localities, to state and city taxation. These tax savings help to a small degree to assuage the loss of income the judge could make in the private sector and Congress's failure to provide for any salary increases during the better part of the last two decades. Thus, this judge's senior status letter to the President is usually dated and mailed on the first date of eligibility.

2. *The Successor-Concerned Judge*

While senior judges have no formal role—nor should they—in the selection of their successors, there are those who nonetheless desire to impact the appointment of the person who will fill the resulting

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54 As noted, bankruptcy judges are selected by the circuit courts based on recommendations from the Judicial Conference of the United States. *See* 28 U.S.C. § 152(a)(1). The Judicial Conference makes its recommendation based on recommendations from the Director of Administrative Office of the United States Courts, which, in turn, consults "with the judicial council of the circuit involved." *Id.* § 152(b)(1). Despite this circuitous process, in practice, the recommendations of the relevant judicial council are usually heeded.

vacancy. Strong political or other convictions often influence these successor-concerned judges, who may consequently defer taking senior status. To understand this, one should have a sense of how the appointment process realistically works.

Although the President nominates and the Senate confirms all Article III judges,[55] the process usually begins at the local political level. The generally understood practice is that the U.S. senators from the same political party as the President agree amongst themselves to recommend a candidate to the President whenever a vacancy occurs in their state.[56] When the senators are from different political parties, they usually agree amongst themselves on how to divide the recommendations.

If, however, there is no senator from the President's political party, the White House will either turn to other state political sources from the President's party, such as a governor or congressional leader, or directly solicit potential candidates from other sources. At the time when I qualified for senior status, there was a Republican President, two Democrat New York senators, and a Republican governor. The White House looked to the Republican governor for recommendations. However, the White House, the senators, and the governor reached a collaborative understanding that, in keeping with the bipartisan tradition that Senators Pat Moynihan and Al D'Amato established, there would be a 3–1 division, with the governor having the dominant number of recommendations. This did not mean that the White House would necessarily accept the recommendations, but most times that was the case.[57]

The last vacancy filled on my court prior to my qualifying for senior status came from a recommendation by Senator Chuck Schumer. Not surprisingly, the appointee was a Democrat; therefore, I surmised that the recommendation to the President to fill my vacancy would likely come from the governor and would probably be a Republican. This reality required me to decide whether I would defer taking senior status until it was more likely that my successor would be of my political persuasion, which would require waiting until one of the Democratic Senators had a pick or a Democrat might be elected President three years hence. The answer for me was easy: I and, from my observations throughout the years, all of my colleagues in the EDNY have taken pride in discharging our judicial responsibilities without political partisanship and, regarding vacancies, have been of the sin-

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55 *See* U.S. CONST. art. II, § 2.

56 *See* David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 487–88 (2005).

57 With New York's election this year of a Democratic governor, the process the White House will use to select nominees for future vacancies in the state is uncertain.

gular mind that they should simply be filled by highly qualified and respected lawyers who would grace the bench. My decision to take senior status would not therefore be driven by my personal political beliefs but rather by the hope that my successor would meet that standard of excellence.

My hope for such a successor was soon realized when the governor's office told me that the governor had two candidates whom he would recommend to the White House to fill my vacancy should I take senior status: One was a former law clerk of mine and one of the very best; the other was also known by me to be extraordinarily well-qualified. I had no trouble "making way" for either candidate, and I immediately submitted my letter to the President taking senior status. The Governor quickly sent both candidates to Washington, D.C. to be interviewed by the White House Counsel's Office, and one of them, Brian Cogan, now Judge Cogan, soon became my successor.[58]

3. *The Psychologically Challenged Judge*

There are those who simply have a difficult time accepting the label "senior" as compared to "active," even in those districts such as the EDNY where there are only substantive positives to taking senior status. These judges somehow feel that they will become lesser judges. Once they recognize that this is not so and that the dates on their birth certificates will be the same, be they "active" or "senior," they usually see the virtue in the new opportunities, especially in districts like the EDNY, that comes with senior status, as well as the value to the courts in creating vacancies, and overcome this psychological hurdle.

4. *The Semiactive Senior Judge*

As shown by the statistics, the nationwide average reflects that most senior judges reduce their caseloads by about 50%, although they continue to dispose of a significant amount of the Judiciary's work; if not for their contributions, the Judiciary would be seriously understaffed. Senior judges have earned the right to work less hard and cannot be faulted for balancing their judicial responsibilities and the opportunity to spend more time with their families and their avocations in their senior years.

5. *The Active Senior Judge*

Not every senior judge decides to cut back on his or her workload; there are many who continue full-steam ahead: I refer to them

58 Political considerations in the selection process for district judges are generally less profound than they are in the selection of circuit judges, who, by virtue of the right of appeal conferred by 28 U.S.C. § 1291, will have the final word in most cases, subject only to discretionary certiorari review by the Supreme Court. *See* 28 U.S.C. § 1254.

as "active" senior judges. As statistics show, EDNY's senior judges clearly as a group fall into this category, currently maintaining on average a larger caseload than the court's active judges. They obviously find the work of the court more fulfilling than retirement, and many of them avail themselves of the opportunity that senior status affords to increase their involvement in diverse legal interests. I see myself as falling into the category of the active senior judge. For example, I will undoubtedly do some more writing and teaching on legal issues that interest me outside of my case-specific responsibilities. Last year, I sat by designation as a visiting judge on the Court of Appeals for the Ninth Circuit in San Francisco.[59] My courtroom deputy clerk has suggested that I should even try to arrange to sit on each of the thirteen circuit courts, something akin to climbing all the forty-six peaks of the Adirondacks. These are all broadening experiences, good for the aging mind, body, and soul; they are also great for the judges' law clerks. (I took two of mine to San Francisco).

WHAT THEN SHOULD THE LAW-CLERK ASPIRANT DO?

It should be perfectly apparent by now that those bright, graduating law school students who would like to have the extraordinary experience of a federal circuit or district court clerkship should not rule out the opportunity to clerk for an active senior judge. To the contrary, it may be the very best of clerkships, given the judge's wealth of experience and knowledge. Who, for example, would not want to clerk for Judge Weinstein? To be sure, given the degree of difficulty in being chosen for a clerkship of any stripe, there are still many fine applicants for any senior judge to choose from. Nonetheless, as exemplified by that young man who motivated me to write this Comment, there may still be a goodly number of clerkship applicants who do not want to run the risk of taking a less-rewarding clerkship for a semiactive senior judge (although this may not necessarily be the case) and believe that only applying to judges who have not yet taken senior status is the better course.

Not to miss the special opportunities that clerking for an active senior judge may present, I suggest that the clerk applicant do some judge-specific due diligence. In addition to inquiring from the law school's career placement office about the judge's general reputation, the aspiring law clerk can obtain the monthly district court judges'

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59 Of the three judges comprising a circuit court panel, one may be district judge. *See* 28 U.S.C. § 46 ("[Absent extraordinary circumstances,] at least a majority of [each three-judge panel] shall be judges of that court."). As noted, designation of district judges to the circuit court is made in the case of intracircuit assignments by the chief judge of the circuit and in the case of intercircuit assignments by the chief judge of the "borrowing" circuit with the approval of the Chief Justice.

caseload statistics, both civil and criminal, from the Clerk of the judge's court and may possibly obtain such statistics from the clerk's office of the other district courts.[60] As for senior circuit court judges, the putative law clerk should inquire from the circuit executive's office as to the extent that the senior judges have cut back on their sittings. Moreover, each senior judge's recent reported decisions of note would also be a good barometer of the dimension and quality of his or her senior work. And, of course, having read this Comment, the aspiring law clerk will now understand the differences between an active judge, a senior judge, and an *active senior judge.*

60 In preparing this Comment, I discovered that the availability of statistics varies widely from court to court; nevertheless, most courts should be able to provide the caseloads of individual judges.