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ARE SENIOR JUDGES UNCONSTITUTIONAL?

David R. Stras† & Ryan W. Scott††

With many federal courts facing burgeoning caseloads and persistent judicial vacancies, senior judges play a vital role in the continued well-being of the federal Judiciary. Despite the importance of their participation in the judicial process, however, senior judges raise a host of constitutional concerns that have escaped the notice of scholars and courts. Many of the problems originate with recent changes to the statute authorizing federal judges to elect senior status, including a 1989 law that permits senior judges to fulfill their statutory responsibilities by performing entirely nonjudicial work. Others arise from the ambiguity of the statutory scheme itself, which seems to suggest that senior status represents a separate constitutional office requiring reappointment, even though senior judges nominally “retain” judicial office under federal law.

In the first scholarly article addressing the constitutionality of senior judges, the authors examine two general constitutional questions: first, whether the requirement that senior judges be designated and assigned by another federal judge before performing any judicial work violates the tenure protection of Article III; and second, whether allowing judges to elect senior status, without a second, intervening appointment, violates the Appointments Clause. The authors also examine the constitutional problems created by two individual types of senior judges: the “bureaucratic senior judge,” who performs only administrative duties, and the “itinerant senior judge,” who sits exclusively on courts outside his or her home district or circuit.

The authors conclude that the current statute authorizing senior judges raises serious constitutional problems that Congress, the Judicial Conference of the United States, or the courts should address. To that end, the authors formulate a number of straightforward suggestions to repair senior status without sacrificing any of the considerable benefits that senior judges confer on the federal Judiciary.

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INTRODUCTION

Senior judges are critical to the federal Judiciary.¹ Despite having little or no financial incentive to do so, senior judges continue working well after they have reached the retirement age of most Americans.² Their service ameliorates the problems of expanding caseloads and persistent judicial vacancies in the federal courts.³ Because of their intimate familiarity with the personalities and practices of their home courts, senior judges significantly improve the “judgepower” of the courts, even when they serve only part time.⁴ Their flexibility in sitting by designation on other federal courts makes them “one of the most valuable tools we have” to address workload disparities among federal judicial circuits and districts.⁵ Senior judges also serve as mentors for new judges, imparting the wisdom of their years of experience on the bench while promoting continuity.⁶ Without senior judges, some appellate courts would face “a disastrous build-up of backlogs,”⁷ “severe[]” problems “administer[ing] justice in a timely fashion,”⁸ or even a “total breakdown in the trial of civil cases.”⁹ Senior judges are “indispensable,”¹⁰ “essential,”¹¹ “inestimable,”¹² “invaluable.”¹³

¹ See Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 409 (1990).

² See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 33 (2d ed. 1996).

³ See Darryl Van Duch, *Senior Judge Ranks Close Vacancy Gap*, NAT'L L.J., July 22, 1996, at A1.

⁴ See COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE*, reprinted in 67 F.R.D. 195, 272 (1975); see also Feinberg, *supra* note 1, at 411–12 (stating that a part-time senior judge increases the “judgepower” by fifty percent).

⁵ Randall T. Shepard, *'Good Enough' Isn't Good Enough*, RES GESTAE, Mar. 2005, at 10, 13.

⁶ Cf. Feinberg, *supra* note 1, at 411–12 (noting senior judges' “accumulated insight and wisdom”).

⁷ *Id.* at 413.

⁸ *Senior Judges Help District Courts Keep Pace*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), May 1994, at 1 (quoting L. Ralph Mecham, Dir. of the Admin. Office of the U.S. Courts).

⁹ MARK MENDENHALL, 1990 NINTH CIRCUIT JUDICIAL CONFERENCE REPORT, reprinted in 132 F.R.D. 83, 85 (1990). The Ninth Circuit, for example, is barely able to keep up with its onerous caseload, despite its frequent use of senior judges on its appellate panels. See Jeffrey Sun, *Empty Benches: Judicial Vacancies in the U.S. Courts*, FED. LAW., Aug. 1997, at 12, 12 (“The Court cannot continue to rely on senior judges to bear this much of the caseload.” (quoting Procter Hug, Jr., then-Chief Judge of the Ninth Circuit)).

¹⁰ JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS*, reprinted in 166 F.R.D. 49, 160 (1995) (Recommendation 63) [hereinafter *LONG RANGE PLAN*].

¹¹ MENDENHALL, *supra* note 9, at 85.

¹² Kelly J. Baker, Note, *Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?*, 16 J.L. & POL. 139, 148–49 (2000).

¹³ *Federal Courts Improvement Act of 1995: Hearing on H.R. 1989 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 77 (Mar. 14, 1996) (statement of Mitchell F. Dolin of the American Bar Association) (“[S]enior judges pro-

Unfortunately, as presently defined under federal law, senior judges are also unconstitutional. This Article argues that the office of senior judge raises a host of constitutional concerns, and that individual senior judges may compound the constitutional difficulties by their actions (or inaction) after electing senior status. The constitutional objections are undoubtedly jarring, surprisingly strong, and previously unexplored. Because scholars, judges, and lawyers presume the constitutionality of senior judges, virtually no one has critically examined the statutes that authorize senior status and define the powers and duties of that position.¹⁴

The statute that sets forth the options for judicial retirement, 28 U.S.C. § 371, is difficult to reconcile with other provisions of Title 28 of the United State Code.¹⁵ It provides that a judge “may retain the office but retire from regular active service.”¹⁶ Two interpretations of that language are possible: first, senior judges might “retain” the same office they always held; second, senior judges might retain judicial office but in fact assume a different “office” for constitutional purposes. The former reading is more textually appealing (“retain *the* office”)¹⁷ but creates inconsistency with other statutory provisions that define the number of judges assigned to each federal court and the duties of senior judges. In light of those provisions, the latter reading is more appealing for structural reasons.

Either reading, however, raises two serious constitutional objections. The first objection is based on the Constitution’s grant of life tenure to Article III judges.¹⁸ Senior judges must be designated and assigned by the chief judge or judicial council of their home circuit or by the Chief Justice of the United States before performing any judicial duties.¹⁹ Unlike active judges, senior judges have no statutory guarantee of judicial work²⁰ and face the constant threat that other

vide invaluable service to the courts, litigants, and taxpayers.”); *see also* Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 182 n.17 (1999) (“I do not want to slight the invaluable assistance of either senior or district court judges.”).

¹⁴ Although scholars have not addressed the issue, the Supreme Court indirectly addressed the constitutionality of senior judges under an earlier statute in *Booth v. United States*, 291 U.S. 339 (1934). *See* discussion *infra* Part II.B.

¹⁵ *See* discussion *infra* Part I.C. (examining two statutory anomalies of the judicial retirement statute in detail).

¹⁶ 28 U.S.C. § 371(b)(1) (2000).

¹⁷ *Id.* (emphasis added).

¹⁸ Although the Constitution never uses the words “life tenure,” it does provide that “Judges . . . shall hold . . . their Offices during good Behaviour.” U.S. CONST. art. III, § 1. The best reading of this clause is that it grants life tenure to judges, subject only to impeachment and removal for misbehavior. *See* David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1402–08 (2005).

¹⁹ *See* 28 U.S.C. § 294 (2000).

²⁰ *See id.* § 46(a) (requiring circuit judges in active status to “sit on the court and its panels in such order and at such times as the court directs”); *id.* § 48(a) (directing that the court “shall hold regular sessions” at specified locations).

judges may prevent them from judging. Because stripping a judge of the power to decide cases amounts to a constructive removal from office, and neither Congress nor other judges may remove a judge from office except through the impeachment process,²¹ the designation and assignment statute violates Article III.

The second objection is based on the Appointments Clause. The President must nominate, and the Senate must confirm, all non-inferior officers of the United States.²² A corollary of this rule is that Congress may not add new, fundamentally different duties to an existing office without unlawfully seizing the appointment power for itself.²³ Congress has done exactly that in defining the duties of senior judges, both as a statutory and constitutional matter. In particular, Congress has authorized senior judges to fulfill the requirements of their office by performing “substantial duties for a Federal or State governmental entity,” an option that is not available to active judges.²⁴ In evaluating the Appointments Clause objection, we consider for the first time in academic literature whether a sitting President and Senate may lawfully deprive a future President and Senate of the right to participate in the appointment of future officers by making a “compound appointment,” which simultaneously appoints an individual to consecutive offices.²⁵

In addition to these global constitutional objections, the conduct of certain types of senior judges after they elect senior status raises further concerns. To illustrate the point, we consider two hypothetical senior judges, both of whom fully comply with the statutory requirements of senior status. The first we call the “bureaucratic senior judge,” who stops judging altogether and performs only administrative tasks. A bureaucratic senior judge fails to carry out even the basic duties of a “judge” under the Constitution,²⁶ which at a minimum requires the adjudication of *some* disputes.²⁷ The second we call the “itinerant senior judge,” who abandons his assigned court and instead sits by designation on other courts for the rest of his career. Such conduct calls into question the sufficiency of the judge’s original appointment, which assigned him to a specific court.

Why would anyone challenge an institution so longstanding, widely accepted, deeply appreciated, and inarguably useful as senior

21 See U.S. CONST. art. III, § 1.

22 See U.S. CONST. art. II, § 2, cl. 2.

23 See *Weiss v. United States*, 510 U.S. 163, 173–74 (1994).

24 28 U.S.C. § 371(e)(1)(D) (2000).

25 See discussion *infra* Part III.A.4.b & n.354.

26 See, e.g., U.S. CONST. art. III, § 1.

27 See *Stras & Scott*, *supra* note 18, at 1414–15.

judges?²⁸ After all, it seems unlikely that any federal judge would strike down the judicial retirement statute.²⁹ Declaring senior judges unconstitutional would wreak havoc on the federal courts, calling into question the legitimacy of thousands of previous decisions in which senior judges participated. Also, by invalidating the statute, a few federal judges would be accusing their own esteemed colleagues, as well as generations of the nation's most prominent jurists, of tacit complicity in a continuing constitutional violation taking place right under their noses. Moreover, on a practical level, eliminating senior status would end a wildly popular retirement option.³⁰

We highlight the constitutional deficiencies of senior status not in hopes of bringing about its demise. In fact, we discuss several promising ways to escape the constitutional bind, and we expect that the courts or Congress will find them appealing in the event that senior judges actually find themselves in jeopardy. Rather, our objective is to point out the surprisingly difficult and to-date unexamined constitutional issues that lurk behind this widely accepted and admired retirement program. More broadly, by exposing the potential constitutional problems with senior status, we hope to demonstrate weaknesses in the prevailing "functional" or "flexible" approach to interpreting Article III.

Part I describes the mechanics of senior status, paying particular attention to two statutory anomalies. First, although the statute provides that senior judges "retain the office,"³¹ it also authorizes the President to immediately nominate a "successor,"³² creating apparent tension with other statutes that fix the number of judges on each court.³³ Second, while nominally "retain[ing] the office," senior judges have an entirely different job description.³⁴ They are authorized to take on far less work than active judges, to cease performing work altogether on the court to which they were appointed, and to perform entirely nonjudicial duties.³⁵

²⁸ Cf. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 395–96 (2002) (acknowledging the need to justify a 100-page article arguing that the State of West Virginia is constitutional and that "pure sport" probably is not enough of a justification).

²⁹ Of course, no one would have predicted a decade ago that the Supreme Court would hold, as it did in *United States v. Booker*, that mandatory application of the United States Sentencing Guidelines is unconstitutional. See 543 U.S. 220, 233–37, 266–67 (2005).

³⁰ See Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495, 530, 541 (2005).

³¹ 28 U.S.C. § 371(b)(1) (2000).

³² *Id.* § 371(d).

³³ See, e.g., *id.* §§ 44(a), 133(a) (allocating judges to various federal courts).

³⁴ See *id.* § 371(b), (e).

³⁵ See *id.* § 371(d).

Part II summarizes the limited case law interpreting the predecessors to the current retirement statute. The leading case is *Booth v. United States*,³⁶ a little-known Supreme Court decision from 1934 that holds that senior judges do “retain the office” in the sense that they enjoy the tenure and salary protections of Article III.³⁷ Although *Booth* answered only a question of statutory interpretation, the desire to avoid potential constitutional problems influenced the Court’s construction of the statute.³⁸

Part III sets forth in detail the constitutional arguments outlined above, including two general and two individualized objections to senior judges. The general objections are based on Article III and the Appointments Clause, while the individualized objections address the constitutional problems created by the bureaucratic senior judge and the itinerant senior judge.

Part IV proposes some simple fixes for saving senior judges in the event that they are declared unconstitutional. Congress or the Judicial Conference of the United States can resolve these constitutional objections to senior judges through changes to the governing statutes, the related regulations, and the appointments process.

I

THE STATUTORY MECHANICS OF SENIOR JUDGES

Those familiar with the federal Judiciary likely know that federal judges have the option of electing senior status after meeting certain age and service requirements. Very few people, however, understand the complex set of statutes that authorizes and regulates senior status. This Part explains the statutory scheme and emphasizes two statutory anomalies that suggest that judges assume a new constitutional office upon electing senior status. The first is a counting anomaly: If senior judges truly retain their office, then the Supreme Court and many other federal courts presently exceed their statutory allotment of judges. The second is a job-description anomaly: If senior judges truly retain the same constitutional office, then it seems odd that they can fulfill their statutory responsibilities by performing work of an entirely different nature and in a much smaller quantity than active judges, and potentially in a distant part of the country. Thus, although the statute provides that judges “retain the office”³⁹ upon electing senior status, the best interpretation of that language is that judges retain

³⁶ 291 U.S. 339 (1934).

³⁷ *See id.* at 350–52.

³⁸ *See id.* at 352 (reasoning that a contrary result would be “subversive of the purpose of” Article III, Section 1).

³⁹ *See* 28 U.S.C. § 371(b).

judicial office upon electing senior status, not the same constitutional office that they previously occupied.

A. Two Options for Judicial Retirement

Senior judges are the product of a patchwork of several statutes governing judicial retirement, the most significant of which is 28 U.S.C. § 371. Federal judges become eligible for retirement benefits upon satisfying the “Rule of Eighty”—when the sum of their age and years of service on the federal bench reaches eighty.⁴⁰ At that point, the judge has two retirement options: outright retirement, which for the sake of clarity we will call “resignation,” and the form of semiretirement known as “senior status.”⁴¹ Both options apply to “any justice or judge of the United States appointed to hold office during good behavior,”⁴² which includes Supreme Court Justices and lower court judges, but excludes Article I judges, such as bankruptcy and magistrate judges.

Resignation under § 371(a), called “retirement on salary,” allows an eligible judge to fully “retire from the office.”⁴³ The statute provides that a judge who resigns “shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.”⁴⁴ For judges, a significant advantage of resignation is that pension annuities are not subject to FICA taxes,⁴⁵ and “many states with an income tax exempt such income.”⁴⁶ As a result, after taxes, a judge actually nets more money after resignation than while in office.⁴⁷ On the other hand, a judge who resigns no longer shares in any salary increases offered to active or senior judges.⁴⁸ Resigning

⁴⁰ See *id.* § 371(c). The Rule of Eighty works as a sliding scale but requires a federal judge to be at least sixty-five years of age before becoming eligible for senior status. See Stras & Scott, *supra* note 18, at 1444.

⁴¹ An Article III judge also has the option of remaining in active status even after the Rule of Eighty is satisfied. See 28 U.S.C. § 371(a) (“Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements”). The Good Behavior Clause of the Constitution precludes the application of a mandatory retirement age for federal judges. See Stras & Scott, *supra* note 18, at 1407–08.

⁴² 28 U.S.C. § 371(a), (b).

⁴³ *Id.* § 371(a).

⁴⁴ *Id.*

⁴⁵ See 26 U.S.C. § 3121(a)(5)(B) (2000) (excluding annuity plans from the definition of “wages” taxable under FICA); *id.* § 3121(i)(5) (excluding payments to retired judges from the definition of “wages” taxable under FICA).

⁴⁶ Van Duch, *supra* note 3, at A22.

⁴⁷ See 28 U.S.C. § 371(a).

⁴⁸ See *id.* Judges who resign receive an “annuity,” not a “salary.” See *id.* They not only cease to receive any increases tied to “the salary of the office,” but also cease to receive an annual cost of living adjustment (COLA). Compare *id.* § 135 (cross-referencing *id.* § 461, which provides for annual COLAs in setting the salaries of district court judges), and *id.* § 44(d) (same for circuit court judges), and *id.* § 5 (same for Supreme Court Justices), and

also means fully surrendering judicial office and ceasing to perform any duties as a federal judge.⁴⁹

Senior status under § 371(b) permits an eligible judge to “retain the office but retire from regular active service.”⁵⁰ Electing senior status allows a judge to take on a reduced workload, as little as one-quarter of the work of an active judge, while still receiving the salary of the office, including any increases in pay.⁵¹ Also, like the annuity paid to judges who resign, the income earned by senior judges is not subject to FICA taxes or the income taxes of many states.⁵² Best of all, senior judges may continue to perform judicial duties⁵³ and ordinarily may retain their chambers and support staff.⁵⁴ Given these significant perquisites, it should come as no surprise that most judges, upon retirement, choose senior status rather than resignation.⁵⁵

B. Two Forms of Certification for Senior Judges

Nonetheless, from a judge’s perspective, there are important drawbacks to senior status. Most notably, senior judges must obtain two forms of periodic certification: first, to remain eligible for salary increases, senior judges must obtain annual certification from the chief judge of the circuit in which they sit that they have satisfied the minimum workload requirements;⁵⁶ and second, to perform judicial duties, senior judges must be “designated and assigned,” either by the chief judge or judicial council of their home circuit, or by the Chief Justice of the United States.⁵⁷

First, to remain eligible for salary increases, senior judges must obtain annual certification from “the chief judge of the circuit in which [they] sit[]” that they have satisfied the workload requirements in § 371(e).⁵⁸ When the certification requirement was established in 1989, “the reaction of senior judges . . . ranged from saddened to outraged,”⁵⁹ and at least one chief judge found the certification pro-

id. § 371(b)(2) (same for decertified senior judges), *with id.* § 371(a) (not cross-referencing *id.* § 461 for judges who resign).

⁴⁹ See ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 18 (2003).

⁵⁰ 28 U.S.C. § 371(b)(1).

⁵¹ See *id.* §§ 371(b)–(e), 461. To receive the salary of the office, senior judges must obtain annual certification that they have satisfied certain workload requirements, which are discussed at length *infra* notes 58–71 and accompanying text.

⁵² See *supra* notes 45–46 and accompanying text.

⁵³ See 28 U.S.C. § 294(b) (2000).

⁵⁴ See Stras & Scott, *supra* note 18, at 1464.

⁵⁵ See Yoon, *supra* note 30, at 495–97, 530, 541.

⁵⁶ See 28 U.S.C. § 371(e)(1).

⁵⁷ *Id.* § 294.

⁵⁸ *Id.* § 371(b)(2), (e)(1).

⁵⁹ Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 651 (1995).

cess to be an “embarrass[ing] . . . bean-counting exercise.”⁶⁰ Yet the statute gives senior judges remarkable latitude, both as to the type and amount of duties they perform.

The most common and straightforward way for a senior judge to obtain annual certification is either to “carry . . . a caseload involving courtroom participation” or to perform “judicial duties not involving courtroom participation” that are “equal to or greater than the amount of work . . . which an average judge in active service would perform in three months.”⁶¹ In other words, senior judges may maintain their certification by performing one-quarter of the judicial duties ordinarily performed by an active judge.⁶²

The statute also authorizes senior judges to perform entirely non-judicial duties. A senior judge may obtain certification based on not only “substantial administrative duties directly related to the operation of the courts” but also any “substantial duties for a Federal or State governmental entity.”⁶³ Presumably, such duties could range from an administrative position with the Federal Judicial Center to full-time policy work for a state lottery commission.⁶⁴ These nonjudicial duties require a greater investment of time, as a senior judge must perform an amount of administrative work “equal to the full-time work of an employee of the judicial branch” to satisfy the requirements of § 371(e).⁶⁵ The statute makes clear, however, that senior judges may fulfill the duties of the office while performing entirely nonjudicial work.⁶⁶ Senior judges may also aggregate courtroom and noncourtroom judicial duties,⁶⁷ and may aggregate administrative duties with any combination of courtroom and noncourtroom judicial duties.⁶⁸

What happens if a senior judge fails to obtain certification under § 371(e) (an event we will call “decertification”)? Section 371(b)(2) provides that a judge who “does not meet the requirements of subsection (e)” continues to receive “the salary that he or she was receiving,”

⁶⁰ James L. Oakes, Chief Judge, U.S. Court of Appeals for the Second Circuit, Remarks at the Annual Judicial Conference, Second Judicial Circuit of the United States (Sept. 7, 1990), *in* 136 F.R.D. 233, 242 (1991).

⁶¹ 28 U.S.C. § 371(e)(1)(A), (B).

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *See infra* Part III.A.3.

⁶⁵ 28 U.S.C. § 371(e)(1)(D). In fact, the statute expressly permits senior judges to perform no duties at all, provided that they certify to the chief judge of the circuit and the Chief Justice of the United States that they were unable to work because of a temporary or permanent disability. *See id.* § 371(e)(1)(E). Once senior judges have been certified as having a permanent disability, they are “deemed to have met the requirements” for a minimum workload indefinitely. *Id.*

⁶⁶ *See id.* § 371(e)(1)(D).

⁶⁷ *See id.* § 371(e)(1)(C).

⁶⁸ *See id.* § 371(e)(1)(D).

including COLAs,⁶⁹ but no longer receives the “salary of the office” provided under § 371(b)(1).⁷⁰ In other words, decertification means that a senior judge will earn the same salary that she received in her last year of certification. Formally, this provision only prevents judges from receiving salary increases, which is hardly a grave punishment given that there have been no salary increases other than COLAs for federal judges since 1991.⁷¹

Practically, however, decertification signals the beginning of the end for a senior judge. It typically means the loss of chambers and support staff, which for obvious reasons makes judging difficult.⁷² It also means limited involvement in the administrative work of the courts, which is reserved for judges who are “substantially active.”⁷³ More than anything, however, it implies that a senior judge is taking advantage of senior status.⁷⁴ Because of the loss of salary increases and accompanying stigma, once a senior judge fails to obtain certification, “[i]t is fair to predict that the contribution of that judge will probably be lost forever.”⁷⁵ Much of the literature on judicial retirement therefore describes decertification using the technically incorrect but revealing shorthand that senior judges must obtain annual certification “to continue serving”⁷⁶ or “to remain in senior status.”⁷⁷

Second, senior judges must be “designated and assigned” to perform any judicial duties. To sit on the court to which they were ap-

⁶⁹ See *id.* §§ 371(b)(2), 461. Regulations promulgated by the Judicial Conference confirm that decertified senior judges do not receive the “salary of the office” or any attendant salary increases, although they continue to receive cost of living adjustments. See 3 JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGE’S GUIDE, Ex. B-3, § 1.1 (2005) (on file with the authors).

⁷⁰ See 28 U.S.C. § 371(b)(1).

⁷¹ See AM. BAR ASS’N & FED. BAR ASS’N, FEDERAL JUDICIAL PAY: AN UPDATE ON THE URGENT NEED FOR ACTION 9, 11 (2003), <http://www.uscourts.gov/newsroom/judgespayaction.pdf>; Tacha, *supra* note 59, at 651–52.

⁷² See WARD, *supra* note 49, at 190, 236, 254.

⁷³ LONG RANGE PLAN, *supra* note 10, at 91 n.16 and accompanying text.

⁷⁴ See Feinberg, *supra* note 1, at 415; see also Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 285 (1993) (stating that decertification “reflect[s] on the incumbent judge’s physical and/or mental capacity” and “constitutes a public vote of no confidence in him . . . aimed directly at his pride and vanity”) (quoting Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals).

⁷⁵ See Feinberg, *supra* note 1, at 415. But see Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 301(a), 110 Stat. 3847, 3851 (permitting retroactive certification of judges for prior years in which they did not satisfy the workload requirements); 28 U.S.C. § 371(e)(3) (allowing senior judges to perform extra duties in one year and “attribute[]” the excess portion to a previous year). Before 1996, however, senior judges who were not certified in a given year were “thereafter ineligible to such a certification.” S. REP. NO. 104-366, at 32 (1996) (quoting 28 U.S.C. § 371(f)(3), which has since been redesignated at 28 U.S.C. § 371(e)(3)), as reprinted in 1996 U.S.C.C.A.N. 4202.

⁷⁶ Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 137 n.24 (2004).

⁷⁷ Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 399 (1993).

pointed, senior judges must be “designated and assigned by the chief judge or judicial council of their circuit to perform such judicial duties within the circuit.”⁷⁸ To sit by designation on other courts, a senior judge must qualify for the “roster [of] senior judges,” which is maintained by the Chief Justice of the United States and lists senior judges who are “willing and able to undertake special judicial duties from time to time outside their own circuit.”⁷⁹ Both the Chief Justice of the United States and chief judges appear to have broad discretion in deciding whether, when, and where to designate and assign senior judges. The only statutory standard that might constrain their discretion is the requirement that the senior judge must be “willing and able” to take on the assigned duties.⁸⁰

Failure to obtain designation and assignment, either from the chief judge or judicial council of the circuit or from the Chief Justice of the United States, prevents a senior judge from judging: “No retired justice or judge shall perform judicial duties except when designated and assigned.”⁸¹ As a result, senior judges “serve at the pleasure of the chief judge”⁸² and Chief Justice of the United States: Other judges can permanently block senior judges from adjudicating disputes.

C. Two Statutory Anomalies

The most puzzling aspect of § 371 is its initial description of senior status. According to the statute, an eligible judge “may retain the office but retire from regular active service.”⁸³ The notion that a senior judge “retain[s] the office”⁸⁴ seems anomalous for two reasons: first, separate statutes fix the number of judges for each federal court,⁸⁵ and counting senior judges causes some circuits, judicial districts, and even the Supreme Court to exceed their statutory allotment of judges; and second, as defined under federal law, the office of a senior judge can differ so dramatically from the office of a judge in regular active service that it is strange to say that a senior judge “retains” the same office.⁸⁶

⁷⁸ 28 U.S.C. § 294(c) (2000).

⁷⁹ See *id.* § 294(d). Before the Chief Justice of the United States may assign a senior judge to sit on a court other than his “home court,” the chief judge of the requesting court must present a certificate of necessity, documenting the need for outside assistance. See *id.*

⁸⁰ *Id.* § 294(c), (d).

⁸¹ *Id.* § 294(e).

⁸² Baker, *supra* note 12, at 142 n.17; see POSNER, *supra* note 2, at 8.

⁸³ 28 U.S.C. § 371(b)(1) (2000).

⁸⁴ *Id.*

⁸⁵ See, e.g., *id.* §§ 1 (number of Supreme Court Justices), 44(a) (number of judges for circuit courts), 133(a) (number of judges for district courts).

⁸⁶ See *supra* Part I.B.

1. *The Counting Anomaly*

Senior judges create a counting anomaly. Section 371(d) directs “[t]he President [to] appoint, by and with the advice and consent of the Senate, a successor” for each judge that elects senior status.⁸⁷ At the same time, however, Title 28 of the United States Code specifies the number of judges for each federal court.⁸⁸ For example, the Supreme Court of the United States “shall consist of a Chief Justice of the United States and eight associate justices.”⁸⁹ The retirement statute, however, permitted Associate Justice Sandra Day O’Connor to “retain the office,” even after the confirmation of Justice Samuel Alito, which brought the total number of Supreme Court Justices to ten.⁹⁰

The clearest example of the counting anomaly concerns the office of Chief Justice of the United States. The Constitution specifically names this officer in the singular, providing that “the Chief Justice shall preside” in the event the President is tried by the Senate after being impeached.⁹¹ Likewise, dozens of federal statutes assign special duties to “the Chief Justice,” in the singular, and many of those duties could not be performed by multiple Chief Justices.⁹² Both the Consti-

⁸⁷ 28 U.S.C. § 371(d).

⁸⁸ *See, e.g., id.* §§ 1, 44(a), 133(a).

⁸⁹ *Id.* § 1.

⁹⁰ *See* Federal Judicial Center, Biography of Sandra Day O’Connor, <http://www.fjc.gov/servlet/GetInfo?jid=1796> (noting that Justice O’Connor assumed senior status on January 31, 2006).

The counting anomaly is not as apparent for judges on the lower courts. Federal law directs the President to appoint a specific number of judges for each federal circuit and judicial district. *See* 28 U.S.C. §§ 44(a) (providing a table with a column entitled “Number of Judges”), 133(a) (providing a table with a column of numbers entitled “Judges”). Counting senior judges against that limit would mean that many federal courts presently exceed that “number.” For example, § 44(a) limits the United States Court of Appeals for the Ninth Circuit to twenty-eight judges. *Id.* § 44(a). As of July 9, 2006, however, the Ninth Circuit listed forty-seven judges, including twenty-three senior judges. *See* 2 ALMANAC OF THE FEDERAL JUDICIARY 3–96 (2006). Yet other provisions indicate that whatever office they hold, senior judges do not count against the number of judges assigned to the lower federal courts. *See* 28 U.S.C. §§ 43(b) (2000) (“Each court of appeals shall consist of the circuit judges of the circuit in regular active service.”), 132(b) (“Each district court shall consist of the district judge or judges . . . in regular active service.”). Thus, it is arguably consistent to treat lower court judges as “retain[ing] the office” in senior status while not counting them against the membership of the federal court to which they were originally appointed.

The problem, however, is that § 371(b)(1) applies to “[a]ny justice or judge,” and provides that both may “retain the office” in senior status. *Id.* § 371(b)(1) (emphasis added). Because the counting anomaly is intractable for Justices of the Supreme Court, and the same statute governs both Justices and judges, the proper construction of the statute must resolve the counting anomaly.

⁹¹ U.S. CONST. art. I, § 3, cl. 6.

⁹² *See* J. Clifford Wallace, *Comparative Perspectives on the Office of Chief Justice*, 38 CORNELL INT’L L.J. 219, 219–20 (2005) (describing the many unique duties of the Chief Justice of the United States, including serving as a member and Regent of the Smithsonian Institution and Trustee of the National Gallery of Art).

tution and federal law make clear, therefore, that as far as the office of Chief Justice of the United States is concerned, there can be only one.⁹³ Yet the retirement statute provides that any retiring Justice, including the Chief Justice of the United States, "retain[s] the office" upon electing senior status.⁹⁴

The counting anomaly can be resolved by interpreting the phrase "retain the office" to mean retain *judicial* office, rather than "retain precisely the same office as before." Under this interpretation, the statutes create a distinct office of senior judge, permitting the President to name a "successor" to the original office without the danger of exceeding the number of judges authorized for a particular court. While this is not the most natural reading of the words "retain the office" in § 371(b)(1), as we will discuss shortly, it does resolve an apparent conflict with other statutory provisions of Title 28.

2. *The Job Description Anomaly*

Senior judges also create a job description anomaly. Senior judges ostensibly "retain" their original office under § 371(b)(1), but the work performed by senior and active judges can be quite different in kind, location, and amount.

a. *Nature of Work Performed*

The most significant distinction between active and senior judges is in the nature of the work they perform. For active judges, the regular performance of judicial duties is compulsory. Ordinary circuit judges, for example, are required to "sit on the court and its panels in such order and at such times as the court directs,"⁹⁵ and the court "shall hold regular sessions" at specified locations.⁹⁶ By contrast, senior judges are barred from many judicial duties, such as voting to reconsider a panel decision en banc or sitting as a member of the en banc court.⁹⁷ The change in the nature of the work is especially stark for senior Supreme Court Justices, who may never again perform judicial duties on their original court.⁹⁸

⁹³ Cf. *THE HIGHLANDER* (20th Century Fox 1986).

⁹⁴ See 28 U.S.C. § 371(b)(1).

⁹⁵ See *id.* § 46(a).

⁹⁶ See *id.* § 48(a).

⁹⁷ See *id.* § 46(c). A senior judge has the option of sitting on an en banc rehearing of a decision by a panel "of which such judge was a member," but only upon designation and assignment by the chief judge. *Id.* A senior judge may also "continue to participate in the decision of a case or controversy" that was heard while the judge was still in active status. *Id.*

⁹⁸ See *id.* § 294(a) (providing that "willing" senior Justices may sit on the lower courts if designated and assigned by the Chief Justice of the United States, but making no mention of further service on the Supreme Court).

Further, upon electing senior status, the performance of judicial duties is always optional and potentially impossible. Section 371(e) allows senior judges to retain the office and continue to receive salary increases, even while performing exclusively administrative tasks unrelated to the business of the courts.⁹⁹ Full-time policy work for a state lottery commission, for example, appears to satisfy the certification requirement.¹⁰⁰ Thus, in theory, Chief Justice Warren Burger “retained” his office as Chief Justice of the United States even as he chaired the Commission on the Bicentennial of the United States Constitution.¹⁰¹ Moreover, even if senior judges earnestly wish to perform judicial duties, the chief judge or judicial council of the circuit and the Chief Justice of the United States can prevent them from doing so by refusing to designate and assign them.¹⁰²

To the extent that senior judges perform judicial duties, they enjoy considerable control over their dockets and may avoid certain types of cases altogether.¹⁰³ A senior judge who dislikes criminal cases or immigration matters, for instance, may refuse to hear cases in both of those areas.¹⁰⁴ As a result, the workload for senior judges is not only dramatically lighter, but often easier, “tempered to their inclinations . . . and their judicial strengths.”¹⁰⁵ Active judges, by contrast, have little or no control over their dockets.

b. *Location of the Work*

The location of the work that senior judges perform may also differ from the location of work performed by judges in regular active service. While active judges *occasionally* sit by designation on other courts,¹⁰⁶ senior judges are under no obligation to sit on their home courts, and may *routinely* request designation to other courts, including those at a higher level of the federal judicial hierarchy.¹⁰⁷ Judge

⁹⁹ See *id.* § 371(e)(1)(D).

¹⁰⁰ See *id.* (providing that a senior judge who has “performed substantial duties for a Federal or State governmental entity” may retain the office).

¹⁰¹ See Feinberg, *supra* note 1, at 414.

¹⁰² See *supra* notes 81–82 and accompanying text.

¹⁰³ See Baker, *supra* note 12, at 154–55.

¹⁰⁴ See 28 U.S.C. § 294(h) (2000) (permitting a senior judge to perform “such judicial duties as he is willing and able to undertake”).

¹⁰⁵ See Dan M. McGill, *Disincentives to Resignation of Disciplined Federal Judges in the Benefits Package of the Federal Judiciary*, in 2 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 1221, 1227 (1993). Also, as discussed previously, disabled senior judges need not perform any duties whatsoever. See *supra* note 65.

¹⁰⁶ See 28 U.S.C. §§ 291(a), 292(b) (2000) (providing that the Chief Justice of the United States’ designation of active district and circuit court judges to other courts must be temporary, but containing no such limitation for senior judges).

¹⁰⁷ See *id.* § 294(c), (d). Senior judges may also be forcibly relocated to other chambers or denied office space altogether. Indeed, some senior Supreme Court Justices have lost their offices in the Supreme Court building upon electing senior status. See Stras &

William Schwarzer of the Northern District of California, for example, assumed senior status and then served for four years as director of the Federal Judicial Center.¹⁰⁸ Since leaving that post in 1995, he has sat by designation, at a minimum, on panels in 132 First Circuit cases, 29 Second Circuit cases, 123 Third Circuit cases, 11 Fifth Circuit cases, 130 Sixth Circuit cases, 16 Eighth Circuit cases, 746 Ninth Circuit cases, and 12 Eleventh Circuit cases.¹⁰⁹ That makes almost 1,200 appearances by a senior district court judge on appellate panels scattered throughout the nation. By contrast, since 1995, Judge Schwarzer has appeared as few as fourteen times on his original court, the Northern District of California.¹¹⁰ Similarly, Judge Ruggero Aldisert, who assumed senior status in 1986 after serving on the Third Circuit for nearly twenty years,¹¹¹ has since moved to California and appeared on panels in more than 700 cases outside his own circuit.¹¹² The contrast is even more stark for senior Supreme Court Justices, who may be assigned *only* to sit by designation on other courts.¹¹³ They do not decide Supreme Court merits cases, vote on certiorari petitions, or otherwise participate in the work of the Court in any way.

Consequently, the transition from active to senior status results in a kind of judicial homelessness. Senior judges become utility players, nominally members of their home courts but susceptible to assignment to any lower court. As federal law makes clear, each appellate circuit “consist[s]” of the judges in regular active status, excluding se-

Scott, *supra* note 18, at 1465 (noting that the chambers for senior Justices have moved to the Thurgood Marshall Federal Judiciary Building in Washington, several blocks from the Court building).

¹⁰⁸ Carl Tobias, *Judge William Schwarzer and Automatic Disclosure*, 28 U.C. DAVIS L. REV. 1123, 1123 (1995).

¹⁰⁹ These figures are derived from Westlaw searches performed in October 2006, searching for cases from the relevant circuit with “Schwarzer” in the panel field. We realize that Westlaw does not capture every appearance on a panel or decision by a judge and that it may, in particular, underestimate appearances on district courts because fewer of those appearances result in orders published in an electronic database. Nonetheless, these statistics give an estimate of the breakdown of a judge’s workload.

¹¹⁰ These figures are derived from a Westlaw search performed in October 2006, searching for cases from the Northern District of California after 1995 with “Schwarzer” in the judge field.

¹¹¹ See Federal Judicial Center – Biography of Aldisert, Ruggero John, <http://www.fjc.gov/servlet/tGetInfo?jid=21>.

¹¹² According to Westlaw searches identical to those described in *supra* note 109, since assuming senior status on December 31, 1986, Judge Aldisert has appeared on panels of the Third Circuit in 692 cases and panels of other circuits in 725 cases, including 485 on the Ninth Circuit. Judge Aldisert maintains chambers in Santa Barbara, California, and describes his experience sitting by designation on so many courts of appeals as “rich and valuable.” Howard Bashman, *20 Questions for Senior Circuit Judge Ruggero J. Aldisert* (July 7, 2003) (quotations omitted), http://20q-appellateblog.blogspot.com/2003_07_01_20q-appellateblog_archive.html.

¹¹³ See 28 U.S.C. § 294(a) (2000).

nior judges.¹¹⁴ Likewise, federal district courts “consist” only of active service judges, not senior district judges.¹¹⁵ Add in the fact that senior circuit judges usually may not vote in en banc decisions,¹¹⁶ and senior judges are in many ways alienated from the work of their home courts.

An excellent example of this phenomenon occurred in 1995 when President Bill Clinton nominated Judge William Fletcher to the United States Court of Appeals for the Ninth Circuit. Senator Orrin Hatch, then-chairman of the Senate Judiciary Committee, objected to the nomination because Fletcher’s mother, Betty Binns Fletcher, already sat on the Ninth Circuit.¹¹⁷ Under the judicial antinepotism statute applicable at the time, no person could be “appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.”¹¹⁸ Although some authorities claimed that the statute contained an implicit exception for the appointment of federal judges,¹¹⁹ Senator Hatch and others believed that the broad and unequivocal language of the statute applied to Judge William Fletcher’s nomination.¹²⁰

Congress resolved the interpretive dispute on October 27, 1998, by amending the antinepotism statute to make clear that it applies to Article III judges, with the exception of Supreme Court Justices.¹²¹ Still, the political solution worked out by the Senate shortly before the amendment took effect is revealing. During the logjam over the nomination, which extended for several years, Senator Hatch suggested

¹¹⁴ *Id.* § 43(b).

¹¹⁵ *Id.* § 132(b).

¹¹⁶ *See id.* § 46(c).

¹¹⁷ *See* Michael E. Solimine, *Nepotism in the Federal Judiciary*, 71 U. CIN. L. REV. 563, 565–66 (2002). Senator Hatch said he was unaware that the statute existed when he failed to lodge an objection to Morris Arnold’s appointment to the Eighth Circuit in 1992. *See id.* at 566.

¹¹⁸ Act of June 25, 1948, ch. 646, 62 Stat. 908 (codified at 28 U.S.C. § 455 (1964)), amended by Act of Oct. 27, 1998, Pub. L. No. 105-300, § 1(a)(2), 112 Stat. 2836, 2836 (codified at 28 U.S.C. § 458(b)(2) (2000)).

¹¹⁹ *See* Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. Off. Legal Counsel 350, 351–53 (1995) (Walter Dellinger) (arguing that the statute lacked a clear statement that the word “appointed” applied to appointments by the President, and courts should construe the statute to avoid unconstitutionally constraining the President’s appointment power and disturbing the separation of powers).

¹²⁰ *See, e.g.*, Letter from Michael Stokes Paulsen, Professor of Law, University of Minnesota Law School, to Senators Orrin Hatch and Jon Kyl, at 1–3 (Feb. 13, 1996) (on file with authors) (opining, in response to a request from members of the Senate Judiciary Committee, that the language of the antinepotism statute plainly covered judicial appointments). The current antinepotism statute expressly applies to persons “appointed to the position of judge” of an Article III court. *See* 28 U.S.C. § 458(b)(2).

¹²¹ § 1(a)(2), 112 Stat. at 2836 (“No person may be appointed to the position of judge of a court exercising judicial power under article III of the United States Constitution (other than the Supreme Court) who is related by affinity or consanguinity within the degree of first cousin to any judge who is a member of the same court.”).

that Judge Betty Fletcher's outright resignation would permit the Senate to confirm her son.¹²² Instead, Democrats and Republicans reportedly struck a deal: Judge Betty Fletcher would assume senior status if William Fletcher won confirmation.¹²³ The agreement apparently held up, and the Senate confirmed Judge William Fletcher on October 8, 1998.¹²⁴ Yet the legal theory behind the compromise seems nonsensical if Judge Betty Fletcher "retain[ed]" her original office on the Ninth Circuit. Congress's action suggests that, in the eyes of some of its members, senior judges were no longer "members" of the court to which they were appointed.¹²⁵ Otherwise, the Senate would have squarely violated the antinepotism statute by confirming Judge William Fletcher when his mother, Judge Betty Fletcher, remained on the court in senior status.¹²⁶

c. *Amount of Work Performed*

The most well-known distinction between senior and active judges is the required workload.¹²⁷ Senior judges need only perform one-quarter of the judicial work ordinarily performed by active judges to obtain certification and thus remain eligible for the salary increases associated with "the office."¹²⁸

The vast differences in workload between senior and active judges are more than a theoretical possibility. In a recent article

¹²² See Solimine, *supra* note 117, at 566.

¹²³ See *id.*

¹²⁴ See *id.* at 567 n.17.

¹²⁵ Prior to its amendment in 1998, § 458 gave mixed signals, as it did not define "member[ship]" in a circuit court, see *supra* note 118, but senior judges arguably did not qualify as members. Compare 28 U.S.C. § 43(b) (2000) ("Each court of appeals shall consist of the circuit judges of the circuit in regular active service."), with *id.* ("[J]udges designated or assigned shall be competent to sit as judges of the court."), and *id.* § 332(a)(3) (authorizing senior judges to participate as members of the judicial council of a circuit).

¹²⁶ In an understandably vigorous response, Judge Betty Fletcher takes exception to our statement that, if she indeed "retain[ed]" her office on the Ninth Circuit upon taking senior status, then the confirmation of her son, Judge William Fletcher, would have "squarely violated" the antinepotism statute. Betty Binns Fletcher, *A Response to Stras & Scott's Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 523, 531 (2007). We do not mean to take sides in the interpretive debate over the pre-amendment version of the statute, however, and we acknowledge that prior practice under the statute and the background presumption of executive prerogative in nominating constitutional officers favored the construction advanced by the President. See *id.* at 527-30. Our point is simply that some influential senators raised nontrivial concerns, grounded in the text of the antinepotism statute, that the appointment of William Fletcher "squarely violated" federal law. For those lawmakers, Judge Betty Fletcher's move to senior status seemed to clear up any doubts about the legality of the appointment, which says a lot about those lawmakers' understanding of the office. Indeed, the Senate confirmed Judge William Fletcher only *after* his mother agreed to take senior status. Under this view, a senior judge apparently becomes such a minor participant in the work of a court that there is no need for concern that she will wield her influence improperly to secure jobs for her relatives.

¹²⁷ See Weinstein, *supra* note 76, at 137 n.24.

¹²⁸ See *supra* note 61 and accompanying text.

based on an extensive survey of federal judges and statistics provided by the Federal Judicial Center, Professor Albert Yoon described the contribution of senior judges to the work of the federal Judiciary.¹²⁹ In 2002, the average senior circuit judge handled about thirty-three percent of the caseload of an active judge.¹³⁰ Notably, senior district judges “appear[ed] to be carrying a proportionately heavier caseload [(approximately sixty-three percent)] than their counterparts on the circuit court.”¹³¹ Among district court judges, there was wide variation in caseloads, with thirty-five percent reporting that they carried between twenty-six percent and fifty percent of a full caseload, and twenty-three percent reporting that they still heard a full caseload.¹³² Although Professor Yoon’s statistics demonstrate that some judges do not change their work habits after electing senior status, most senior judges do in fact carry a substantially reduced workload.

Together, these three differences between active and senior judges—the nature, location, and amount of work—indicate that, as a statutory matter, senior judges hold a separate office from their colleagues in active service.¹³³

3. *The Meaning of “Retain the Office”*

Like the counting anomaly, the job-description anomaly can be resolved by construing the words “retains the office” to mean “retains judicial office.” Under this reading of § 371(b)(1), judges who elect senior status in fact assume a separate office: One that still allows the exercise of Article III judicial power but which involves fundamentally different duties and expectations.

To be sure, the text of § 371(h)(1) cuts in the opposite direction. Both the verb and the definite article in the phrase “retain the office” suggest that senior judges retain the particular office they have always

¹²⁹ See Yoon, *supra* note 30.

¹³⁰ See *id.* at 518 (explaining that the average active circuit judge decided 467 appeals in 2002, while the average senior circuit judge decided only 155 appeals).

¹³¹ *Id.* at 522.

¹³² See *id.*

¹³³ We do not mean to suggest that simply changing the location and amount of work transforms the office. Congress has enacted geographic reorganizations of the lower courts on several occasions, *see, e.g.*, Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980) (codified at 28 U.S.C. § 41 (2000)), and the workload of active judges varies among courts and over time, *see* Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163, 170–71, 176–77 (2006). However, Congress’s decision to permit senior judges to perform work of an entirely different nature is both unprecedented and remarkable. Together with potentially significant changes in the location and amount of work, the option to perform exclusively nonjudicial duties means that a senior judge’s new job description is worlds apart from that of an active judge.

held. “Retain” implies continuity of ownership,¹³⁴ and “the” implies continuity with respect to a particular office.¹³⁵ Standing alone, this language suggests that senior judges do not change offices, but merely change status within the same office.

The “judicial office” reading, however, is textually defensible and structurally preferable. The verb “retain” is actually neutral as between the two interpretations because active judges hold both judicial office and a particular office on a specific court. In addition, the definite article “the” might refer to a particular *kind* of office. Indeed, the phrase “retain the office” immediately follows a reference to judges “appointed to hold office during good behavior.”¹³⁶

In context, therefore, “the office” might refer to the specific type of office held during good behavior—a judicial office.¹³⁷ Because of the counting and job description anomalies, construing the statute to mean that senior judges merely retain judicial office better comports with other provisions of § 371 and of Title 28 more broadly.

Astute readers no doubt have guessed that this puzzle of statutory construction has constitutional implications. Whether senior judges hold judicial office determines whether they are entitled to the tenure and salary protections of Article III, Section 1.¹³⁸ Whether senior judges in fact change offices upon electing senior status has implications for whether reappointment is necessary under Article II, Section 2.¹³⁹ We will address these constitutional issues at length in Part III, but not before surveying the limited case law on the statutory and constitutional status of senior judges.

II

THE LIMITED CASE LAW ON SENIOR JUDGES

Surprisingly, few cases have addressed the construction of the judicial retirement statute, the constitutional status of senior judges, or

¹³⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1938 (Philip Babcock Grove ed., 2002) [hereinafter WEBSTER'S THIRD] (defining “retain” as “to hold or continue to hold in possession or use”).

¹³⁵ THE NEW OXFORD AMERICAN DICTIONARY 1748 (2d ed. 2005) [hereinafter NEW OXFORD AMERICAN] (noting that “the” functions as a “definite article”) (emphasis omitted).

¹³⁶ See 28 U.S.C. § 371(b)(1) (2000) (“Any justice or judge of the United States appointed to hold office during good behavior may retain the office but retire from regular active service after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section . . .”).

¹³⁷ See NEW OXFORD AMERICAN, *supra* note 135, at 1748 (defining “the” as “denoting one or more people or things *already mentioned* or assumed to be common knowledge”) (emphasis added); WEBSTER'S THIRD, *supra* note 134, at 2368 (defining “the” as “a function word to indicate that a following noun or noun equivalent refers to someone or something *previously mentioned* or clearly understood from the context or the situation”) (emphasis added).

¹³⁸ See U.S. CONST. art. III, § 1.

¹³⁹ See *id.* art. II, § 2.

the various constitutional challenges discussed in Part III. Perhaps the dearth of case law reflects litigants' perceived chances of success or the novelty of their arguments. It may also reflect the fact that judges have little incentive to challenge the constitutionality of a statutory scheme that obviously benefits them. Regardless, despite almost a century of experience with senior judges, courts have barely begun to appreciate or evaluate the statutory and constitutional status of senior status.

A. A Brief History of the Federal Judicial Retirement Statute

Understanding the limited case law addressing senior judges requires some familiarity with the origins and evolution of the laws governing judicial retirement. During the Republic's first eighty years, federal judges received no retirement benefits of any kind.¹⁴⁰ In 1869, anxious to prevent judges from remaining in office despite mental or physical infirmity,¹⁴¹ Congress enacted the first judicial pension.¹⁴² The statute allowed federal judges who had served for ten years and reached seventy years of age to resign and draw a pension for life equal to their salary at resignation.¹⁴³ Although the rules for eligibility have changed, the operation of the resignation option has remained essentially the same for the past 138 years.¹⁴⁴

Senior status did not emerge until 1919, when Congress authorized a second option for judges, allowing them to retire from active service but to continue judging, to encourage their timely retirement from office:

But, instead of resigning, any judge other than a justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor¹⁴⁵

¹⁴⁰ See WARD, *supra* note 49, at 51–52.

¹⁴¹ Johnson v. United States, 79 F. Supp. 208, 210–11 (1948); WARD, *supra* note 49, at 51; Stras & Scott, *supra* note 18, at 1440–41.

¹⁴² See Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45 (codified as amended at 28 U.S.C. § 371(a) (2000)).

¹⁴³ The language of the 1869 Act bears a strong resemblance to the resignation provision in the current statute:

[A]ny judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

Id.

¹⁴⁴ See 28 U.S.C. § 371(a).

¹⁴⁵ Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157 (current version at 28 U.S.C. § 371).

The 1919 statute also provided that “a judge so retiring may nevertheless be called upon” by the senior circuit judge of his circuit,¹⁴⁶ the Chief Justice of the United States, or the presiding judge or senior judge of any other federal court “and be by him authorized to perform such judicial duties in [that court] as such retired judge may be willing to undertake.”¹⁴⁷

Note that several features of senior status have remained constant since its inception. Senior judges have always required some form of “authoriz[ation]” from the ranking judge on a federal court before performing judicial duties.¹⁴⁸ Accordingly, they have always served, in essence, at the pleasure of their colleagues in the judicial branch. Also, senior judges have never been required to perform judicial work that they are not “willing to undertake,” even when “called upon.”¹⁴⁹

Other features of senior status, however, have changed over time. Originally, senior judges were authorized to perform only “judicial duties,” not administrative work or other duties for state and federal governmental entities.¹⁵⁰ In addition, senior status was initially available only to judges of the inferior federal courts, but Congress amended the statute in 1937 to permit Supreme Court Justices to elect senior status as well.¹⁵¹

The 1919 statute also left an important question unanswered: It did not explicitly state whether senior judges retained their original office, or even judicial office. It characterized senior status simply as “retire[ment]” from “regular active service,” and as an alternative to outright resignation from office.¹⁵² Although it contemplated that senior judges could continue to perform “judicial duties,” it also authorized the President to nominate a “successor” immediately.¹⁵³ Uncertainty about the constitutional status of senior judges under the original statute led to the Supreme Court’s decision in *Booth v. United States*.

¹⁴⁶ See *id.* By using the term “senior” in the statute, Congress was referring to ranking members of a particular court or those judges with greatest seniority, not other judges who had elected senior status. See *id.* at 1158 (“And the judge so retiring voluntarily . . . shall be held and treated as if junior in commission to the remaining judges of said court, who shall, in the order of the seniority of their respective commissions, exercise such powers and perform such duties as by law may be incident to seniority.”).

¹⁴⁷ See *id.* at 1157.

¹⁴⁸ See, e.g., 28 U.S.C. § 294 (2000).

¹⁴⁹ *Id.*

¹⁵⁰ Compare § 6, 40 Stat. at 1157 (providing that a senior judge may be called upon and authorized to perform “judicial duties”), with 28 U.S.C. § 371(e)(1) (allowing senior judges to perform judicial or administrative work).

¹⁵¹ See Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24.

¹⁵² See *supra* text accompanying note 145.

¹⁵³ See *supra* notes 145–147 and accompanying text.

B. *Booth v. United States*

Booth v. United States is a little known and rarely cited Supreme Court opinion from 1934. Writing for a unanimous Court, Justice Owen Roberts considered two questions on certification from the Court of Claims: first, whether a senior judge “continue[s] in office” for purposes of Article III, Section 1; and second, whether a reduction in the salary for senior judges violates Article III, Section 1.¹⁵⁴ To both questions, the Court answered in the affirmative.¹⁵⁵ Its careful analysis of the judicial retirement statute and its sensitivity to constitutional concerns make *Booth* the most important precedent on senior judges today.

Judge Wilbur Booth served for more than a decade as a federal district court judge for the District of Minnesota before being elevated to the Eighth Circuit in 1925.¹⁵⁶ He assumed senior status in 1932, under the precursor to today’s § 371 that provided: “But, instead of resigning, any judge . . . who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench”¹⁵⁷

Anxious to minimize expenditures on judicial salaries during the Great Depression, Congress passed the Independent Offices Appropriation Act in 1933, which provided that “the retired pay of judges (whose compensation, prior to retirement or resignation, could not, under the Constitution, have been diminished) is reduced by 15 per centum.”¹⁵⁸ The reduction applied both to judges who had resigned and to those who had elected senior status, including Judge Booth.¹⁵⁹ When the federal government withheld \$697.93 from his salary, Judge Booth brought an action in the Court of Claims to recover that sum.¹⁶⁰ The case is unusual, and especially helpful, because Congress rarely attempts to reduce the salaries of federal judges so brazenly.

Although formally a case about statutory construction,¹⁶¹ both parties framed their arguments in terms of the constitutional consequences of senior status. Judge Booth argued that senior judges must retain judicial office because the “statute ha[d] now been in effect

¹⁵⁴ See *Booth v. United States*, 291 U.S. 339, 346 (1934).

¹⁵⁵ See *id.* at 352.

¹⁵⁶ See *id.* at 346.

¹⁵⁷ *Id.* at 346, 349–50 (quoting the judicial retirement statute, then codified at 28 U.S.C. § 375 (1928)) (alterations in original). It bears noting that the 1919 statute did not contain some of the constitutional defects found in today’s retirement statute, including most notably the provision permitting senior judges to satisfy their statutory responsibilities by performing entirely nonjudicial duties. See *supra* Part I.C.2.

¹⁵⁸ Independent Offices Appropriation Act, ch. 101, § 13, 48 Stat. 283, 307 (1933).

¹⁵⁹ See *Booth*, 291 U.S. at 350–51.

¹⁶⁰ See *id.* at 347.

¹⁶¹ See *id.* at 348.

fourteen years" and it was "too late to say that by retirement [senior judges] cease to hold office and that [their] judicial service ha[d] been without authority of law."¹⁶² The government countered that "[a]lthough the statute authorizes a retired judge to perform judicial duties if called upon and willing to do so, he is under no duty to render any services whatever."¹⁶³ Senior judges *must not* have held judicial office, according to the government, because "[t]he duty of performing judicial functions is an integral part of the office of judge, and the salary to which a judge is entitled."¹⁶⁴

The parties agreed that if Judge Booth held judicial office after electing senior status, then Congress had impermissibly diminished his salary.¹⁶⁵ The Court held that senior judges do in fact retain judicial office, but it placed little emphasis on the text of the retirement statute and made only passing reference to Congress's purpose.¹⁶⁶ Instead, it dedicated most of its discussion to two considerations: first, as a practical matter, how senior judges had actually behaved under the statute; and second, how best to avoid potentially serious constitutional concerns.¹⁶⁷

First, the Court examined how senior judges had actually behaved under the statute: "[I]t is common knowledge that retired judges have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular active service."¹⁶⁸ Whatever the *theoretical* problems with senior judges, the Court seemed to say, the case does not present any *practical* problems because senior judges have acted in an unobjectionable manner. The Court thereby anticipated the "flexible" or "functional" approach to Article III applied in cases such as *Commodity Futures Trading Commission v. Schor*¹⁶⁹ fifty years later. The question under the functional approach is not whether the statute formally violates Article III, but whether it offends the deeper constitutional values animating Article III.¹⁷⁰ In *Booth*, the functional approach made it easy to reject the government's constitutional arguments. Even if the Constitution formally prohibited Congress from authorizing a category of judges who

¹⁶² Brief for the Plaintiffs at 11, *Booth*, 291 U.S. 339 (Nos. 656, 657).

¹⁶³ Brief for the United States at 5, *Booth*, 291 U.S. 339 (Nos. 656, 657).

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 26 ("[I]f a retired judge continues in office so that his compensation cannot be diminished, he is entitled to be paid the salary which he received at the time of his retirement.")

¹⁶⁶ *See Booth*, 291 U.S. at 350.

¹⁶⁷ *See id.* at 350-51.

¹⁶⁸ *Id.* at 350.

¹⁶⁹ 478 U.S. 833 (1986).

¹⁷⁰ *See, e.g., id.* at 847 (explaining that the constitutional challenge "cannot turn on conclusory reference to the language of Article III," but must instead "be assessed by reference to the purposes underlying the requirements of Article III").

had no obligation to perform judicial duties, the scheme did not threaten Article III values because senior judges had in reality “discharged a large measure” of judicial duties.¹⁷¹ We address the analytical and interpretive shortcomings of the functional approach in Part III.¹⁷²

Second, the Court based its decision on a desire to avoid doubt about the constitutionality of the actions of senior judges.¹⁷³ “It is scarcely necessary to say,” Justice Roberts explained, “that a retired judge’s judicial acts would be illegal unless he who performed them held the office of judge.”¹⁷⁴ The notion that a senior judge could perform judicial duties “and yet not hold the office of a judge” struck the Court as “a contradiction in terms.”¹⁷⁵ Accordingly, even if the statute had authorized nonjudges to perform judicial duties, it was “too late to contend that services so performed were extra-legal and unconstitutional.”¹⁷⁶

The Court’s decision is also important because a postscript to *Booth* helps us to understand the current judicial retirement statute. In 1948, Congress amended and consolidated several provisions relating to judicial retirement.¹⁷⁷ The new statute, codified at 28 U.S.C. § 371, provided that a judge “may retain his office but retire from regular active service.”¹⁷⁸ A revision note explained that those “[w]ords . . . were used to clarify the difference between resignation and retirement. Resignation results in loss of the judge’s office, while retirement does not.”¹⁷⁹ For support, the note cited *Booth*.¹⁸⁰

¹⁷¹ See *Booth*, 291 U.S. at 350.

¹⁷² See *infra* notes 276–278 and accompanying text.

¹⁷³ Justice Louis Brandeis’s seminal explanation of the constitutional avoidance canon came just two years after *Booth* in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring).

¹⁷⁴ *Booth*, 291 U.S. at 350. The most fascinating dictum in the opinion is also the most perplexing: “The Act does not, and indeed could not, endue [a retiring judge] with a new office, different from, but embracing the duties of the office of judge.” *Id.* This statement can be interpreted in either of two ways. On one hand, it might mean that any interpretation of the statute that would grant a new office, even another judicial office, to senior judges would be impermissible—perhaps because it would circumvent the appointment process laid out in Article II. On the other hand, the statement might simply articulate the bedrock premise that only judicial officers can decide cases under Article III, and any statute that takes away *judicial* office from senior judges would raise constitutional concerns. The latter reading, which better comports with the rest of the Court’s opinion, is the better interpretation of the Court’s statement.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 351.

¹⁷⁷ See Act of June 25, 1948, ch. 646, § 371, 62 Stat. 903, 903 (codified as amended at 28 U.S.C. § 371 (2000)).

¹⁷⁸ *Id.*

¹⁷⁹ See 28 U.S.C. § 371 (Historical and Revision Notes).

¹⁸⁰ See *id.*

The statutory change reinforces our proposed construction of the current version of § 371 that the words “retain the office” in fact mean “retain *judicial* office.”¹⁸¹ The language was originally introduced, it appears, to codify *Booth*, which held only that senior judges continue to hold judicial office and are therefore entitled to Article III salary protection.

A subsequent change makes the case for our interpretation even stronger. As of 1948, a judge assuming senior status would “retain *his* office.”¹⁸² The possessive adjective “his” did not preclude the “judicial office” reading, as the judicial office was no less “his” than the particular office he had previously held. It perhaps hinted, however, at individual ownership of the office. In 1984, however, Congress tweaked the language again, such that a judge assuming senior status would “retain *the* office.”¹⁸³ Congress did not make this change merely to correct the gender-specificity of the old wording, as the 1984 act used “his” or “he” ten times, including twice in the same sentence—“the salary he was receiving at the time he retired.”¹⁸⁴ These textual changes in the wake of *Booth* strongly support our argument, based on the counting anomaly and the job description anomaly, that senior status in fact represents a separate office, and that § 371(b)(1) simply means that senior judges remain Article III judges.

C. *Steckel v. Lurie*

One lower court decision deserves brief discussion. In the 1951 case of *Steckel v. Lurie*,¹⁸⁵ the Sixth Circuit rejected a constitutional challenge to § 294(d), which prohibits senior judges from performing judicial duties without obtaining designation and assignment from either the chief judge of the circuit or the Chief Justice of the United States.¹⁸⁶ Judge Robert Wilkin of the Northern District of Ohio assumed senior status in 1949.¹⁸⁷ On October 5, 1949, the chief judge of the Sixth Circuit designated and assigned Judge Wilkin to continue to sit on his old court, but withdrew the designation a few hours later “‘at the request of Judge Wilkin.’”¹⁸⁸ When Judge Wilkin heard arguments in a case anyway, the parties questioned his authority to act

¹⁸¹ See *supra* Part I.C.3.

¹⁸² 28 U.S.C. § 371 (Historical and Revision Notes) (emphasis added).

¹⁸³ See Act of July 10, 1984, Pub. L. No. 98-353, §§ 204–211, 98 Stat. 333, 350–51 (codified as amended at 28 U.S.C. § 371) (emphasis added).

¹⁸⁴ See *id.*

¹⁸⁵ 185 F.2d 921 (6th Cir. 1950).

¹⁸⁶ See Act of June 25, 1948, ch. 646, § 294(d), 62 Stat. 901, 901 (codified as amended at 28 U.S.C. § 294(e) (2000)).

¹⁸⁷ See *Lurie v. Steckel*, 87 F. Supp. 702, 702 (N.D. Ohio 1949), *aff'd*, 185 F.2d 921 (6th Cir. 1950).

¹⁸⁸ *Steckel*, 185 F.2d at 923.

without designation.¹⁸⁹ In response, Judge Wilkin asserted in a memorandum opinion that “[t]he commission of a United States District Judge is his grant of authority to perform all the duties of a judge of such a court,” and that “[i]t is therefore unnecessary for a retired judge to have a designation to act in the court of which he is a member.”¹⁹⁰ A contrary statute, he claimed, would deprive him of life tenure.¹⁹¹

The Sixth Circuit disagreed, holding that the designation and assignment statute “is not concerned with [senior judges’] removal or deposition, or deprivation of their compensation or of their office.”¹⁹² Instead, the statute simply allows the chief judge to bar judges who are “permanently disabled, physically or mentally,” from performing judicial duties—a result that “do[es] not seem unreasonable.”¹⁹³ The Sixth Circuit saw no need for constitutional concern because § 294(d) operated merely as a limitation on the jurisdiction of the lower courts, which is well within Congress’s power.¹⁹⁴ Nonetheless, the court upheld Judge Wilkin’s power to perform judicial duties because, for statutory reasons, the withdrawal of his designation was deemed ineffective.¹⁹⁵

The statutory holding of *Steckel* is questionable, and the constitutional holding appears flatly wrong. Although the designation and assignment language of the statute says nothing about senior judges’ tenure in office, it does permit the chief judge or judicial council of the circuit in which they sit and the Chief Justice of the United States to prevent senior judges from performing any judicial duties.¹⁹⁶ It is not at all clear that the statute limits nondesignation and nonassignment decisions to cases of physical or mental disability, as the Sixth Circuit held.¹⁹⁷ In fact, chief judges and even the Chief Justice of the United States have been accused on occasion of withholding designation and assignment for political or personal reasons.¹⁹⁸

The constitutional holding is similarly flawed. Vesting other Article III judges with the power to prevent senior judges from ever judg-

189 See *Steckel*, 87 F. Supp. at 702.

190 *Id.* at 703.

191 *See id.* at 702–03.

192 *Steckel*, 185 F.2d at 924.

193 *See id.* at 924.

194 *See id.* at 924–25.

195 *See id.* at 925.

196 See 28 U.S.C. § 294 (2000).

197 See *infra* Part III.A.1.

198 See Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction*, 17 HARV. J.L. & PUB. POL’Y 157, 215 (1994). For example, Chief Justice Earl Warren refused to designate senior Justice Charles Evans Whittaker for service on the lower courts because Warren found that Whittaker was too indecisive during his tenure as an active member of the Supreme Court. See *infra* notes 221–222 and accompanying text.

ing threatens senior judges' tenure in office.¹⁹⁹ Regardless, the court plainly erred in holding that the designation requirement implicates the jurisdiction of the courts. Designation is simply a means of *staffing* the court with a qualified judge; Congress gives the lower courts *jurisdiction* over cases through its general grants of federal question and diversity jurisdiction, among others.²⁰⁰ Moreover, even if the court correctly characterized the statute as jurisdictional, the fact that Congress has considerable control over the jurisdiction of the lower courts under Article III, Section 2 does not answer the separate constitutional objection based on the "good Behaviour" Clause of Article III, Section I.²⁰¹

Thus, the limited case law on senior judges, while interesting, does not answer the question whether the *current* statutory scheme authorizing senior judges is unconstitutional. *Booth* resolved only a question of statutory construction and predated Congress's use of the key phrase "retain the office."²⁰² The Sixth Circuit incorrectly framed and analyzed the issue in *Steckel*, which is the only case that squarely addresses the constitutional questions raised in this Article, and which has limited precedential value beyond the Sixth Circuit. Having canvassed the case law, we now confront the statutory and constitutional status of senior judges.

III

CONSTITUTIONAL OBJECTIONS TO SENIOR JUDGES

For the sake of clarity, we divide the potential constitutional objections to senior judges into two categories. First, we consider "global" objections, by which we mean objections to the overall statutory scheme regulating senior judges, independent of the actions of any particular senior judge. Second, we consider "individualized" objections, by which we mean objections to the conduct of individual senior judges.

A. Global Constitutional Objections to the Overall Statutory Scheme

The judicial retirement statute raises two general constitutional objections. The first relates to Article III. Senior judges hold judicial office, yet there is no guarantee that they will receive permission to perform judicial work.²⁰³ Consequently, the office violates the tenure protection of Article III, Section 1 by exposing senior judges to the

¹⁹⁹ We take up this argument in greater depth *infra* Part III.A.2.a.

²⁰⁰ See 28 U.S.C. §§ 1331, 1332 (2000).

²⁰¹ See U.S. CONST. art. III, §§ 1, 2.

²⁰² 28 U.S.C. § 371(b)(1) (2000).

²⁰³ See *id.* § 294.

risk of constructive removal by other judges. The second relates to the Appointments Clause.²⁰⁴ If, as we have argued, judges actually assume a different constitutional office upon electing senior status, the statute circumvents the appointment process by depriving the President and Senate of their constitutional role.

1. *The Article III Objection*

The first global constitutional objection derives from Article III, Section 1, which grants life tenure to federal judges by providing that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”²⁰⁵ Upon assuming senior status, however, judges no longer have the right to perform judicial duties.²⁰⁶ Other Article III judges have discretion to decide whether to allow senior judges to sit on any court, including their “home” court.²⁰⁷ The possibility that a senior judge could be barred from performing judicial duties amounts to a constructive removal from office, which violates the tenure protection of Article III.²⁰⁸

Under § 294, senior judges must obtain permission any time they wish to perform judicial duties, and there is no guarantee that they will receive it. To sit on the court to which he was originally appointed, a senior judge must be “designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties.”²⁰⁹ To sit elsewhere, not only must a senior judge be designated and assigned by the Chief Justice of the United States to appear on the “roster of senior judges,” but also the chief judge of the requesting circuit must provide a “certificate of necessity” to the Chief Justice of the United States documenting the need for assistance.²¹⁰ Without designation and assignment by either the chief judge of the circuit or the Chief Justice of the United States, no senior judge may perform judicial duties.²¹¹ There is no comparable statute for active judges.²¹²

A “willing,” able-bodied, and able-minded judge might be refused designation under § 294. In fact, from time to time, chief judges have been accused of refusing to designate and assign judges for purely

²⁰⁴ U.S. CONST. art. II, § 1.

²⁰⁵ U.S. CONST. art. III, § 1.

²⁰⁶ By a “right to perform judicial duties,” we mean a right to adjudicate the kind of disputes described in Article III, Section 2: justiciable cases and controversies within the constitutional and statutory jurisdiction of the federal courts. *See id.* § 2.

²⁰⁷ 28 U.S.C. § 294(c), (d).

²⁰⁸ *See* U.S. CONST. art. III, § 1.

²⁰⁹ 28 U.S.C. § 294(c).

²¹⁰ *Id.* § 294(d).

²¹¹ *See id.* § 294(b), (e).

²¹² Active status judges must obtain permission before sitting by designation on other courts, *see id.* §§ 291 (circuit judges), 292 (district judges), but no one can prevent them from sitting on the court to which they were appointed.

political or personal reasons.²¹³ Even if the chief judge, the judicial council, and the Chief Justice of the United States strive to make each designation and assignment decision based on objective factors such as physical and mental capacity, efficiency, and effectiveness, in “borderline” cases they may tend to err on the side of nondesignation when they disagree with a senior judge’s political or judicial philosophy.²¹⁴ Regardless of the practical likelihood that a senior judge will be barred from performing judicial duties, the statute unquestionably makes such a result possible.²¹⁵

The language of § 294 hints at a neutral standard for designation and assignment decisions, and one that arguably limits the discretion of the relevant decision makers. Section 294(c) provides that a senior judge “may be designated” to perform “such judicial duties within the circuit as he is willing and able to undertake.”²¹⁶ Similarly, § 294(d) directs the Chief Justice of the United States to maintain a roster of senior judges who are “willing and able to undertake special judicial duties from time to time outside their own circuit.”²¹⁷ These provisions might constrain designation and assignment decisions by limiting such decisions to whether a “willing” senior judge is “able” to perform judicial duties, without consideration of any other factors.²¹⁸

The statute provides, however, that the relevant decision makers “may” designate and assign a “willing and able” senior judge, not that they shall or must do so.²¹⁹ Section 294, therefore, leaves chief judges, judicial councils, and the Chief Justice of the United States with unchecked and unreviewable authority to refuse designation to senior judges. Despite issuing a judge’s handbook containing many of the details about Article III service, the Judicial Conference has never issued regulations interpreting the “willing and able” language.²²⁰ With little administrative guidance, any reason seems to be enough, and in the past senior judges have been refused designation and assignment because of issues unrelated to inability. For example, Chief Justice Earl Warren refused to designate and assign Justice Charles

²¹³ See Broyde, *supra* note 198, at 215.

²¹⁴ See *infra* notes 219–222 and accompanying text.

²¹⁵ See Broyde, *supra* note 198, at 216–17 n.261 (characterizing § 294(c) as a provision for entirely “remov[ing] a judge’s caseload once he takes senior status”).

²¹⁶ 28 U.S.C. § 294(c).

²¹⁷ *Id.* § 294(d).

²¹⁸ Strangely, the statute uses the phrase “willing and able” when describing designation and assignment decisions as to lower court judges but uses only the word “willing” for such decisions with respect to senior Supreme Court Justices. Compare *id.* § 294(a), with *id.* § 294(b)–(d). As a result, there is no question that the Chief Justice of the United States’ decision to designate and assign a senior Justice to work on the lower courts appears discretionary and standardless.

²¹⁹ *Id.* § 294(a)–(d).

²²⁰ See 3 ADMIN. OFFICE OF THE U.S. COURTS, JUDGES MANUAL, GUIDE TO JUDICIARY POLICIES AND PROCEDURES (2000).

Evans Whittaker to perform work on the lower courts, despite Justice Whittaker's willingness to undertake those duties, because Chief Justice Warren found him too indecisive during his active service on the Supreme Court.²²¹ Chief Justice Warren reportedly told 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."²²²

Assuming, however, that the "willing and able" language in § 294 indeed controls designation and assignment decisions, the statute violates Article III, Section I for two reasons. First, whatever "willing and able" means, it does not correspond to "good Behaviour." Inability to perform judicial duties is not even behavior, let alone bad behavior.²²³ Perhaps a senior judge's willingness to perform judicial duties despite physical or mental infirmity is an ominous sign, but until a judge has misbehaved, the judge cannot be removed from office, constructively or otherwise.²²⁴

²²¹ See DAVID N. ATKINSON, *LEAVING THE BENCH* 4 (1999). In the case of *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003), Sixth Circuit Judge Alice Batchelder alleged that Chief Judge Boyce Martin "used his position in 2001 to delay consideration of race-conscious admissions at the University of Michigan [L]aw [S]chool until two judges opposed to the policy became ineligible to vote on it." Charles Lane, *Judges Spar Over Affirmative Action*, WASH. POST, June 7, 2003, at A4. Judge Danny Boggs further charged that Chief Judge Martin "improperly put himself on the three-judge panel that would have heard the case had the full court not granted" en banc review. Adam Liptak, *Court Report Faults Chief Judge in University Admissions Cases*, N.Y. TIMES, June 7, 2003, at A16. Chief Judge Martin has denied any wrongdoing. See *id.* As outsiders, it is almost impossible to know which side of the story is correct. Chief judges often make their administrative decisions in secret without giving reasons and without the possibility of review. The *Grutter* example is unusual and helpful because other judges, alarmed by the behavior of their colleague, sounded a rare public alarm. This incident demonstrates that chief judges may consider ideology when making designation and assignment decisions.

Judge Fletcher finds the problem of a "vindictive, venal, or politically motivated chief" unrealistic, even "imaginary," and argues that the only "possible abuse" by a chief judge is to underuse the designation and assignment power by failing to intervene in cases of infirmity. Fletcher, *supra* note 126, at 524. We do not doubt that the vast majority of senior judges never encounter abuse by chief judges (or the Chief Justice of the United States) in making assignment and designation decisions. As these alleged instances of politically motivated decision making show, however, chief judges and Chief Justices are as capable as any other officer of abusing their power. As a result, a statute that vests total and unreviewable power in those decision makers over their senior colleagues' ability to perform any judicial work raises more than just theoretical concerns.

²²² Lawrence H. Larson, *Observations on One Hundred Years of Federal Judging in the Western Missouri District*, in *LAW AND THE GREAT PLAINS: ESSAYS ON THE LEGAL HISTORY OF THE HEARTLAND* 146 (John R. Wudner ed., 1996) (quoting Chief Justice Warren) (quotations omitted).

²²³ See Stras & Scott, *supra* note 18, at 1407 (making a similar argument about growing old, which is "neither an act nor an omission").

²²⁴ At common law, offices held during good behavior were defeasible only upon some affirmative misbehavior by the officeholder. See 6 MATTHEW BACON, *A NEW ABRIDGMENT OF THE LAW* 30 (7th ed. 1832) ("If an Office be granted to a Man to have and enjoy so long as he shall behave himself well in it; the Grantee hath an Estate of Freehold in the Office; for since nothing but his Misbehaviour can determine his Interest, no Man can prefix a

Second, to the extent that the designation and assignment of senior judges is dictated by a *statutory* standard of ability, Congress itself directs the constructive removal of judges by defining the appropriate circumstances for assignment and delegation.²²⁵ That arrangement violates the Constitution. As an initial matter, Congress may not delegate its removal power to Article III judges because that action circumvents the impeachment process.²²⁶ Moreover, the standard of ability for assignment and delegation decisions codified in § 294 differs from the “good Behaviour” standard set forth in Article III, Section 1.²²⁷ Section 294, therefore, takes the removal decision out of the hands of the appropriate decision maker (Congress) and applies a standard (ability) that does not appear in the Constitution.²²⁸ Accordingly, the specter of constructive removal of senior judges, even if it does not occur regularly, renders the designation and assignment statute for senior judges unconstitutional.²²⁹

2. Responses to the Article III Objection

Three responses might be raised against the Article III objection. First, a decision not to designate and assign a senior judge might fall

shorter time than his Life; since it must be his own Act (which the Law does not presume to foresee) which only can make his Estate of shorter continuance than his Life . . .”).

²²⁵ See 28 U.S.C. § 294 (2000).

²²⁶ Some scholars, citing a 1790 Act that automatically removed judges from office upon a conviction for bribery, have argued that “impeachment is the traditional but not the only means for removing federal judges.” See, e.g., Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 69 (1989). Whether or not the bribery statute is sufficient to overcome the considerable evidence from the Founding era that impeachment was understood as the exclusive mechanism for removal, however, the statute “rest[ed] on the notion that judges are not immune from and must comply with the criminal law.” *Id.* at 68. There is no historical precedent for assigning to any other actor the discretionary (and unreviewable) power to remove judges from office for nonimpeachable offenses.

²²⁷ Compare § 294(b) (“[M]ay continue to perform such judicial duties as he is willing and able to undertake . . .”), with U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

²²⁸ See Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 701 (1999) (arguing that the suspension of a judge’s caseload by a judicial council as a disciplinary method would be unconstitutional). The most widely shared view is that “the good-behavior language does nothing more than provide a cross-reference to the impeachment process.” *Id.* at 699. This orthodox view has two consequences for senior judges: first, any removal of judges by *other* judges is unconstitutional, and second, impeachment is the only means available to Congress for removal of judges from office. See *id.* at 697–99.

²²⁹ Senior judges who have been indefinitely denied designation or assignment by the Chief Justice of the United States or the judicial council or chief judge of their home circuit would presumably have standing to challenge § 294 on Article III grounds. It is also possible that senior judges would have standing to sue based on the threat to judicial independence posed by constructive removal before the relevant decision makers take any formal action. Finally, because the threat to judicial independence impairs the personal interests of litigants, litigants appearing before senior judges might also have standing to advance the Article III claim. See *infra* notes 271–273 and accompanying text.

short of constructive removal from office, making the tenure protection inapposite. Second, even if § 294 formally violates Article III, it might be constitutional on “functional” grounds because it does not offend structural Article III values. Third, the fact that senior status is strictly voluntary might cure any constitutional defect. Ultimately, each one of these responses is unconvincing.

a. *The “No Constructive Removal” Response*

First, it might be argued that nondesignation does not amount to a constructive removal from office.²³⁰ Several characteristics of the designation and assignment process differ from traditional methods of removal: for example, removal by address in England²³¹ or by impeachment in the United States. The decision not to designate and assign a senior judge is temporary.²³² Even after nondesignation, however, senior judges can reiterate that they are “willing” to perform judicial duties, and nothing prevents the relevant decision makers from changing their minds. In contrast, ordinary removal methods terminate an officer’s tenure without any prospect of reinstatement. Michael Gerhardt has argued, along these lines, that “[r]emoval results in the permanent loss of the judge’s power to decide cases or controversies” and that temporarily “[r]emoving a caseload because of illness or a backlog is not the same.”²³³

In addition, the decision not to designate and assign senior judges affects only their ability to judge. They keep their salary and title, and remain free to perform nonjudicial duties as authorized by § 371(e)(1).²³⁴ Ordinary removal from office, on the other hand, strips an officer of the salary of the office and all of its corresponding powers and duties.²³⁵ Designation and assignment decisions also *feel* different because they are private, essentially administrative acts.²³⁶ Removal by address or impeachment, by contrast, is a high-profile public spectacle subject to the vagaries of the political process.²³⁷

²³⁰ Cf. *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 67 n.5 (D.C. Cir. 2001) (reserving the question whether “a long-term disqualification from cases could . . . affect an unconstitutional ‘removal’” because a public reprimand fell well short of removal).

²³¹ Under the Act of Settlement of 1701, Parliament could remove any judge without cause by address, through a vote of both houses. See 12 & 13 Will. 3, c. 2 (Eng.) (requiring that “[j]udges['] commissions be made *quamdiu se bene gesserint* [(during good behavior)], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them”).

²³² No statutory mechanism, however, prevents such a decision from becoming indefinite.

²³³ Gerhardt, *supra* note 226, at 72.

²³⁴ See 28 U.S.C. § 371(e)(1) (2000).

²³⁵ See U.S. CONST. art. III, § 1; Gerhardt, *supra* note 226, at 72.

²³⁶ See Gerhardt, *supra* note 226, at 72.

²³⁷ See *id.* at 4–5.

The Supreme Court considered a similar constructive removal claim in *Chandler v. Judicial Council of the Tenth Circuit of the United States*.²³⁸ Judge Stephen S. Chandler, an Oklahoma district court judge, challenged an order of the Tenth Circuit Judicial Council that responded to his severe backlog of cases by reassigning all matters pending before him and directing that “no cases or proceedings filed or instituted in the United States District Court for the Western District of Oklahoma shall be assigned to him for any action whatsoever.”²³⁹ Judge Chandler argued that the Judicial Council’s action amounted to constructive impeachment, in violation of separation of powers and Article III.²⁴⁰ The Court held that jurisdictional defects barred consideration of his claims,²⁴¹ avoiding the “ultimate question” of whether the Council’s order fell “to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence.”²⁴²

Several opinions, however, expressed views on the merits. The dissenters, Justices Hugo Black and William O. Douglas, would have held that the Council’s order amounted to a constructive removal from office: “[T]here is no power under our Constitution for one group of federal judges . . . to declare [any federal judge] inefficient and strip him of his power to act as a judge.”²⁴³ The sole constitutional mechanism for removal of a judge, they argued, was the impeachment process reserved to Congress by the Constitution.²⁴⁴

The five-Justice majority, led by Chief Justice Burger, did not reach the merits, but stated in dictum that it had some doubt about the constructive removal claim advanced by the dissenters.²⁴⁵ The Court suggested, without deciding, that the Council’s order reflected a “reasonable standard[]” as to a “routine matter”—just one decision among “an almost infinite variety of others of an administrative nature” necessary to enable “a complex judicial system [to] function efficiently.”²⁴⁶ In a solo concurrence, Justice John Marshall Harlan would have held that the Council’s action was “a supportable exercise of the

²³⁸ 398 U.S. 74 (1970).

²³⁹ *Id.* at 78 (quoting the Judicial Council’s order).

²⁴⁰ *See id.* at 82.

²⁴¹ *See id.* at 86 (refusing to determine whether the Court had appellate jurisdiction over Judicial Council administrative orders).

²⁴² *Id.* at 84.

²⁴³ *See id.* at 137 (Douglas, J., dissenting).

²⁴⁴ *See id.* at 141–42 (Black, J., dissenting).

²⁴⁵ *See id.* at 84–85 (majority opinion).

²⁴⁶ *Id.* at 84–85. Chief Justice Burger, writing for the majority, compared the Council’s order to a “reasonable, proper, and necessary” directive withholding the assignment of new cases to a judge with a large “backlog.” *See id.* at 85. That comparison is inapt, however, as a judge with a backlog continues to perform judicial duties, as is his constitutional right and obligation.

Council's responsibility to oversee the administration of federal justice," posing no threat to judicial independence.²⁴⁷

Although our sympathies lie with the dissenters in *Chandler*, we do not mean to suggest that the Constitution forbids all administrative or disciplinary actions against Article III judges by their colleagues. At the Founding and throughout the history of the federal Judiciary, judges routinely exercised administrative control over their courts.²⁴⁸ Accordingly, a statute that allows judges, acting in their administrative capacity, to withhold designation and assignment of a senior judge temporarily would not pose a problem.²⁴⁹ Such a statute would not place judges in any danger of constructive removal, and therefore would not violate Article III.

The trouble is that § 294 does not limit the chief judge, the judicial council, or the Chief Justice of the United States to temporary decisions. Nothing in the statute prevents them from repeatedly refusing to designate and assign a senior judge, effectively resulting in an indefinite prohibition on the performance of judicial duties. Undoubtedly, *permanently* or *indefinitely* blocking senior judges from performing judicial duties implicates their tenure in office, even if it is accomplished using a statute with a strictly administrative purpose.²⁵⁰

²⁴⁷ *Id.* at 129 (Harlan, J., concurring). Another analogous case is *McBryde v. Committee to Review Circuit Council Conduct*, 264 F.3d 52 (D.C. Cir. 2001), which considered a facial challenge to the federal statute governing judicial discipline. The Judicial Council of the Fifth Circuit disciplined Judge John H. McBryde for a "pattern of abusive behavior" toward litigants and attorneys that appeared before him. *Id.* at 54 (quotations omitted). The court dismissed several challenges as moot, *see id.* at 55, but considered two facial attacks: (1) that the discipline statute violated the separation of powers, and (2) that federal judges are immune from all forms of discipline for their official actions. *See id.* at 64–67. The Court of Appeals for the District of Columbia Circuit rejected both of those challenges, holding that the separation of powers is not violated by intrabranch discipline and that judges are not "absolute monarch[s]" who enjoy immunity from all forms of discipline. *See id.* at 66–68. The court made much of the fact that the discipline imposed by the Fifth Circuit was of a "lesser" variety and expressly declined to consider whether "long-term disqualification from cases" would be unconstitutional. *Id.* at 67, 67 n.5. Judge McBryde did not make a facial challenge based on the *threat* of constructive removal, along the lines we have proposed. He did not make that argument because unlike the designation and assignment statute for senior judges, the disciplinary statute expressly prohibited judges from effectuating a removal from office. *See* Judicial Conduct and Disability Act of 1980, Pub. L. 96-458, § 3, 94 Stat. 2035, 2035 (providing that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior" (then codified at 28 U.S.C. § 372(c)(6)(B)(vii)(I) (2000))). That limitation is now located at 28 U.S.C.A. § 354(a)(3)(A) (2006), following a 2002 reorganization of the section, and now reads: "Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior."

²⁴⁸ *See* RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 177–80 (1973).

²⁴⁹ A refusal to designate or assign a judge on purely political or ideological grounds, however, likely violates Article III even if it lasts only for a short period. *See infra* notes 271–73 and accompanying text.

²⁵⁰ *See* U.S. CONST. art. III, § 1. Raoul Berger, among others, has argued that removal from office by fellow judges, rather than by Congress, poses different and less serious con-

How can one "hold" the office of a judge, within the meaning of Article III, if one is quietly prevented from judging? Professor Gerhardt acknowledges as much, noting that "[g]ranting sitting judges the power to evaluate the suitability of allowing other judges to retain their offices injects an element of intimidation that, no doubt, would threaten not only collegiality among judges but also independent judicial decision making itself."²⁵¹

It does not matter that a judge might retain the salary and title of the office, even as the judge is prohibited from performing judicial duties. The salary and title are significant *benefits* of the office, to be sure, but Article III directs that judges shall hold the "office," which includes its powers and duties, "during good Behaviour." As Judge Richard Posner has observed, the bottom line is that senior judges effectively relinquish life tenure, serving at the pleasure of their colleagues in the judicial branch.²⁵²

stitutional concerns because judges at common law had the power to adjudicate the question of "good Behaviour" through the writ of *scire facias*. See Raoul Berger, *Impeachment of Judges and "Good Behaviour" Tenure*, 79 YALE L.J. 1475, 1479-87 (1970). We have expressed doubts about the strength of the historical precedent for judge-initiated determinations of another judge's good behavior under English letters patent. See Stras & Scott, *supra* note 18, at 1406-08. Regardless, under §§ 294(c) and 294(d), the judiciary does not wait passively for the Executive to initiate proceedings to remove a judge for bad behavior, as was the practice under the *scire facias* regime. Rather, some judges must make designation and assignment decisions about other judges pursuant to statute and their decisions are apparently standardless, discretionary, and unreviewable. Most significantly, the relevant decision makers need not decide that a judge has misbehaved, which is an important distinction between the assignment and delegation procedure and the common law writ of *scire facias*.

²⁵¹ Gerhardt, *supra* note 226, at 72-73. Professor Gerhardt has proposed evaluating disciplinary and administrative actions against judges on a case-by-case basis. He has concluded, for example, that the Tenth Circuit's action in *Chandler* did not threaten judicial independence because its "intent or effect" was simply to address a backlog of cases. *Id.* at 72. No other judges, he suggests, could possibly find that decision threatening. See *id.* As a historical matter, that assessment seems dubious, as other judges did in fact find *Chandler* threatening. See Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 769-70 (1989). It came as a shock to many in the federal judiciary (most prominently, Justices Black and Douglas), that a group of judges could totally deprive one of their colleagues of the power to hear cases. See *id.*

Moreover, as a functional matter, the constitutional objection arises the moment Congress passes a statute that *threatens* judges with removal from office. Judicial independence requires the absence of any danger of involuntary removal, not just the absence of some specific recent instance of removal. See THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defending the tenure protection of Article III as a measure not only to prevent the judiciary from being "overpowered," but also from being "awed" or "influenced"); *id.* NO. 79, at 472-73 (Alexander Hamilton) (defending the salary protection of Article III on the ground that it prevents judges from being "deterred from [their] duty by the apprehension of being placed in a less eligible situation" (emphasis added)).

²⁵² See POSNER, *supra* note 2, at 8.

b. *The “Functional Article III” Response*

Second, even if § 294 raises formal Article III concerns, it might be defended on functional grounds if it does not offend the deeper structural values of Article III. Similar reasoning guided the Supreme Court’s decision in *Commodity Futures Trading Commission v. Schor*. To see why this response is incorrect here and to illustrate a general risk associated with the functional approach, we briefly summarize *Schor* and its precursors, which address the constitutionality of Article I courts.

In 1982, the Supreme Court’s decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*²⁵³ struck down Congress’s broad grant of judicial power and jurisdiction over state-law contract claims to Article I bankruptcy courts.²⁵⁴ Justice Brennan’s plurality opinion held that the Bankruptcy Act of 1978 violated Article III, Section 1 by vesting the “judicial power of the United States” in judges who lacked tenure and salary protections.²⁵⁵ Although it acknowledged several longstanding exceptions to the prohibition on the exercise of federal judicial power by non-Article III judges—for territorial courts, courts-martial, and so-called “public rights” cases²⁵⁶—the plurality concluded that Article III prohibits other types of legislative courts that exercise such power.²⁵⁷

The *Northern Pipeline* approach began to unravel in 1985 with *Thomas v. Union Carbide Agricultural Products Co.*,²⁵⁸ which upheld a system of binding arbitration reviewable in court only for fraud or misrepresentation for claims arising under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).²⁵⁹ The majority opinion, written by Justice Sandra Day O’Connor, rejected an “absolute construction of Article III,” construed *Northern Pipeline* narrowly, and urged attention “‘not to mere matters of form but to the substance of what is required.’”²⁶⁰ The Court held that in substance, FIFRA represented “a pragmatic solution to the difficult problem of spreading the costs of generating adequate information regarding the safety, health, and environmental impact of a potentially dangerous product.”²⁶¹ Besides, the arbitration system adequately guarded the underlying values

²⁵³ 458 U.S. 50 (1982) (plurality opinion).

²⁵⁴ *See id.* at 76 (Brennan, J., plurality opinion).

²⁵⁵ *See id.* at 60–61.

²⁵⁶ *See id.* at 64–67.

²⁵⁷ *See id.* at 70 (calling these exceptions the “three situations in which Art. III does not bar the creation of legislative courts”).

²⁵⁸ 473 U.S. 568 (1985).

²⁵⁹ *Id.* at 571.

²⁶⁰ *Id.* at 583–84, 586 (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

²⁶¹ *Id.* at 590. The Court ultimately held in *Thomas* that legislative courts are permissible “for private disputes that were closely related to government regulatory activities.” ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 4.5, at 252 (4th ed. 2003).

of Article III because it provided for civilian arbitrators “selected by agreement of the parties or appointed on a case-by-case basis by an independent federal agency” and did not “diminish the likelihood of impartial decisionmaking, free from political influence.”²⁶²

One year later, *Schor* sounded the death knell for the formal, textual approach to assessing the constitutionality of Article I courts. The decision upheld Congress’s grant of jurisdiction over state-law counterclaims to the Commodity Futures Trading Commission (CFTC).²⁶³ The Court, again led by Justice O’Connor, insisted that claims like *Schor*’s “cannot turn on conclusory reference to the language of Article III” but must instead “be assessed by reference to the purposes underlying the requirements of Article III.”²⁶⁴ The Court adopted a balancing test, weighing the legislative interests—or “the benefits of an administrative alternative to federal court litigation in terms of efficiency and expertise”²⁶⁵—against the personal guarantee of “an independent and impartial adjudication by the federal judiciary”²⁶⁶ and the “‘structural role’ of the judiciary in the scheme of separation of powers.”²⁶⁷ The functional approach, according to the Court, focuses on the “practical consequences” of deviating from Article III rather than on strict adherence to its formal requirements.²⁶⁸

The functional approach suggests a powerful answer to our Article III objection to senior judges: The remote prospect of the constructive removal of senior judges violates at most formal Article III niceties, but not the structural values that animate Article III. Indeed, the practical consequences of permitting the chief judge or judicial council of a circuit or the Chief Justice of the United States to refuse designation and assignment to senior judges are overwhelmingly positive, as those officials gain greater leverage in addressing the serious problems of mental and physical infirmity among senior judges, which damages the performance and reputation of the courts.²⁶⁹ Often, the

²⁶² See *Thomas*, 473 U.S. at 590.

²⁶³ See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986).

²⁶⁴ *Id.* at 847.

²⁶⁵ See CHEMERINSKY, *supra* note 261, at 254 (citing *Schor*, 478 U.S. at 856).

²⁶⁶ *Schor*, 478 U.S. at 848.

²⁶⁷ CHEMERINSKY, *supra* note 261, at 254. The Court articulated the following factors to consider with respect to the nonwaivable “structural” interests underlying Article III:

[T]he extent to which the “essential attributes of judicial power” are reserved to Article III courts, and conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Schor, 478 U.S. at 851.

²⁶⁸ See *id.* at 857.

²⁶⁹ See Charles Gardner Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil*

chief judge need not even formally block a senior judge from performing judicial duties because informal pressure to stop hearing cases is sufficient—at least when it is backed up by the power of constructive removal.²⁷⁰ Undoubtedly, the vast majority of designation and assignment decisions reflect good-faith judgments about senior judges' ability to carry out judicial duties.

The Article III objection, however, is about more than mere formalism because the specter of constructive removal also raises functional concerns. *Schor* itself acknowledges that Article III guards not only the interbranch independence of the Judiciary, but also the “primarily personal, rather than structural, interests” of litigants in the “independent and impartial adjudication by the federal judiciary of matters within the judicial power of the United States.”²⁷¹ Whether the pressure comes in the form of direct threats from Congress or indirect threats from judges who derive their de facto removal power from an act of Congress, the prospect of removal seems to compromise the independence and impartiality of judicial decisions. Indeed, Justice Douglas in his dissent in *Chandler* warned that judicial councils might wield their power against “nonconformist” judges whose views irritated their colleagues on the bench.²⁷² It is hard to disagree with his descriptive statements that “[j]udges are not fungible,” that “they cover the constitutional spectrum,” and that the ability to keep a particular judge from hearing “a racial case, a church-and-state case, a free-press case,” or the like, “may have profound consequences.”²⁷³ Because those consequences affect the litigants, the lack of secure tenure for senior judges implicates the personal interests of litigants in an “independent and impartial” tribunal to hear their claims.²⁷⁴

More broadly, however, we disagree with the *interpretive* approach of *Schor*, which values “function” at the expense of the textual commands of Article III, and the case of senior judges illustrates why.²⁷⁵

Justice Reform Act, 41 CLEV. ST. L. REV. 511, 519 (1993). For an excellent history of the problems associated with mental infirmity on the Supreme Court, see David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).

²⁷⁰ Cf. Geyh, *supra* note 74, at 246 (“[A] significant body of evidence points to the conclusion that . . . informal disciplinary mechanisms are thriving, and are doing so not despite, but because of the formal disciplinary process.”).

²⁷¹ See *Schor*, 478 U.S. at 848.

²⁷² *Chandler v. Judicial Council of Tenth Circuit of the U.S.*, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

²⁷³ *Id.*

²⁷⁴ See *Schor*, 478 U.S. at 848.

²⁷⁵ The values underlying Article III play an important role in understanding the text. Indeed, we mention some of those functional values in explaining our constitutional objections to senior judges. Our objection to *Schor*, therefore, is not with the Court's recognition that Article III guards judicial independence but with its decision to relegate the text to secondary importance in evaluating Article III challenges. See, e.g., *id.* at 847 (noting

The designation and assignment statute arguably does not threaten all Article III values, or even the most important ones. The tenure and salary clauses were principally motivated by a desire to protect judges from the executive and legislative branches, not from other judges.²⁷⁶ Yet the text speaks in absolute terms, without limitation as to the reasons or source of the removal or diminishment: "The Judges . . . shall hold their Offices during good Behaviour, and shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."²⁷⁷ That absolutism is itself an Article III value; judicial independence depends in no small part on judges' confidence that their tenure and salary protections are not subject to unpredictable judicially discovered exceptions.²⁷⁸ The *Schor* approach ultimately disservices Article III values because it trades away strong textual protections for weaker, more permeable protections at a higher level of abstraction.²⁷⁹

c. The "Waiver" Response

Third, it might be argued that Article III should accommodate senior judges because they voluntarily choose to assume senior status. The possibility that a judge might voluntarily resign has never been thought to threaten the constitutional protection of life tenure; why should an optional retirement program like senior status work any differently? On this theory, the tenure and salary protections are waivable. An Article III judge may voluntarily exchange them for some

that the analysis "cannot turn on conclusory reference to the language of Article III" and must instead be guided by "the purposes underlying the requirements of Article III"). The functional values underlying Article III should never serve as a *substitute* for its text.

²⁷⁶ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–60 & nn.10–11 (1982) (plurality opinion); THE FEDERALIST NO. 78, *supra* note 251, at 468–69 (Alexander Hamilton) (noting that the tenure clause is an essential protection in order to ensure the judiciary's status as a "bulwark[] . . . against legislative encroachments").

²⁷⁷ U.S. CONST. art. III, § I (emphasis added).

²⁷⁸ Cf. John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, in REFORMING THE COURT 361, 371 (Roger C. Cramton & Paul D. Carrington eds., 2006) (suggesting that even "[f]or a non-formalist . . . constitutionalization itself is often a good thing").

²⁷⁹ Our criticism of *Schor* should not be mistaken for a comprehensive treatment of the relative merits of functionalism and formalism in constitutional interpretation. For further discussion about that debate, we direct your attention to the rich literature on the role of formalism and functionalism in determining the proper scope of separation of powers. Compare MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 100–02 (1995) (describing the concept of "pragmatic formalism"), and Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (criticizing judicial balancing tests), with Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1802–07 (1996) (setting forth the Federalist case for functionalism), and Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–94 (1987) (describing the functionalist approach).

other benefit, such as a reduced workload, perhaps with a condition that the waiver not be improperly coerced.

The text of Article III refutes this argument. The language of Article III, Section 1 commands that judges hold office during good behavior and receive an undiminishable salary.²⁸⁰ It neither requests nor requires the consent of the judges who enjoy the benefits of those provisions;²⁸¹ Congress could not create a voluntary program whereby judges could surrender their salary protections, even for a good reason such as budget cuts.²⁸² Nor could the language of Article III, Section 1 allow judges to surrender their tenure protection voluntarily, even for a good reason such as facilitating the removal of inept or infirm judges. For the same reasons, this language cannot permit the creation of a voluntary program like senior status that subjects judges to the threat of constructive removal from office.

Even as a functional matter, the waiver response is unpersuasive.²⁸³ The function of the tenure and salary protections of Article III is to protect judicial independence, not just the interests of individual judges.²⁸⁴ Judicial independence, in turn, ensures that litigants receive a fair trial before an impartial tribunal, and safeguards the independence of the Judiciary as a coequal branch of government.²⁸⁵ Individual judges cannot waive those protections on behalf of litigants or the Judiciary as a whole, any more than they can waive criminal defendants' trial rights, or individual Senators can waive the right of the Senate to "determine the Rules of its Proceedings."²⁸⁶ Because the Judiciary as a whole benefits from judicial independence, it is

²⁸⁰ See U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour, and shall . . . receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." (emphasis added)).

²⁸¹ See *id.*

²⁸² Antifederalists sharply criticized the salary protection of Article III for its inflexibility. See, e.g., FEDERAL FARMER NO. 15 (Jan. 18, 1788) reprinted in 4 THE FOUNDERS' CONSTITUTION 140 (Philip B. Kurland & Ralph Lerner eds., 1987) (warning that "there may often be times . . . when [a judge's] salary may reasonably be increased one half or more; in a few years money may become scarce again, and prices fall, and his salary, with equal reason and propriety be decreased and lowered"). Federalists, for their part, defended the decision to allow judicial pay raises but to prohibit the diminishment of judicial salaries. See THE FEDERALIST NO. 79, *supra* note 251, at 473 (Alexander Hamilton) ("The salaries of judicial offices may from time to time be altered, as occasion shall require, yet so as *never to lessen* the allowance with which any particular judge comes into office, in respect to him." (emphasis added)).

²⁸³ It should be clear by now that we do not subscribe to the *Schor* approach generally. Our point is that even functionalists should find the waiver response unpersuasive.

²⁸⁴ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–60 & nn.10–11 (1982) (plurality opinion).

²⁸⁵ In the words of the Supreme Court, the tenure and salary protections represent structural protections that cannot be waived by litigants because they "safeguard[] the role of the Judicial Branch in our tripartite system." See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

²⁸⁶ U.S. CONST. art. I, § 5, cl. 2.

doubtful that litigants can waive the protections of judicial independence, which is the principal characteristic of a purely personal interest held under *Schor*.²⁸⁷ Therefore, any statutory threat of constructive removal—even at the hands of other members of the Judiciary—arguably implicates the kind of structural interests recognized by the Supreme Court.²⁸⁸ As Judge Irving Kaufman observed nearly thirty years ago, “[I]t is . . . essential to protect the independence of the individual judge, even from incursions by other judges.”²⁸⁹

To be sure, judicial actors, such as chief judges, judicial councils, and the Chief Justice of the United States, make the designation and assignment decisions.²⁹⁰ It bears emphasizing, however, that those decision makers exercise a power expressly assigned to them by Congress. The threat of constructive removal originates with the political branches: Congress has directed members of the Judiciary to exercise a power that Congress itself does not possess—the ability to constructively remove judges.²⁹¹ Even for functionalists, the statutory scheme is problematic because it implicates the separation of powers and the Judiciary’s status as a coequal branch of government.

3. *The Appointments Clause Objection*

The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other officers of the United States.”²⁹² The Clause applies to Supreme Court Justices by its express terms, but its application to other Article III judges is less clear.²⁹³ “[F]rom the early days of the Republic,” however, lower court judges have been considered non-inferior officers of the United States, requiring appointment pursuant to the requirements of Article II, Section 2.²⁹⁴ As

²⁸⁷ See *Schor*, 478 U.S. at 848–49.

²⁸⁸ See *N. Pipeline Constr. Co.*, 458 U.S. at 60 (“The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism.”).

²⁸⁹ Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979); see also *Chandler v. Judicial Council of Tenth Circuit of the U.S.*, 398 U.S. 74, 136 (1970) (Douglas, J., dissenting) (“An independent judiciary is one of this Nation’s outstanding characteristics. Once a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge.”).

²⁹⁰ See 28 U.S.C. § 294(c), (d) (2000).

²⁹¹ See *id.* § 294.

²⁹² U.S. CONST. art. II, § 2, cl. 2.

²⁹³ See generally Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 499–529 (1930) (analyzing applicability of the Appointments Clause to district and circuit court judges).

²⁹⁴ See *Weiss v. United States*, 510 U.S. 163, 191–92 n.7 (1994) (Souter, J., concurring); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES

a result, every judicial appointment under Article III requires action by both the President and the Senate.

A corollary of the Appointments Clause is that Congress may not circumvent the appointments process by assigning new and fundamentally different duties to an existing officer.²⁹⁵ In part, the concern is formal: Congress does not appear among the actors who may appoint officers under Article II, Section 2.²⁹⁶ Article II provides that the President “shall nominate . . . and with the Advice and consent of the Senate, shall appoint” principal officers, and it permits Congress to vest the power to appoint inferior officers “in the President alone, in the Courts of Law, or in the Heads of Departments,” but not in itself.²⁹⁷

Two functional principles animate the corollary to the Appointments Clause that Congress may not fundamentally change an existing office’s duties. The first is a self-aggrandizement principle, grounded in the separation of powers. Responsibility to *create* an office falls on Congress, but responsibility for choosing individuals to *fill* the office falls on the President.²⁹⁸ The Senate may give its advice or withhold its consent, but it may not select officers on its own, and the House of Representatives plays no role at all in the appointment process.²⁹⁹ By altering the duties of an existing office, however, Congress can not only effectively create a new office, but also hand-pick the officer from among the ranks of current officeholders—a power that would intrude on the exclusive province of the Executive branch.

The second is an accountability principle. The appointment process ensures that the public can identify and hold accountable those responsible for selecting ineffective federal officers.³⁰⁰ Post hoc

§ 1593, at 456 n.1 (1833) (describing this as the “uniformly” shared “practical construction” of the Appointments Clause).

²⁹⁵ See *Weiss*, 510 U.S. at 173–74.

²⁹⁶ See U.S. CONST. art. II, § 2, cl. 2; cf. *Weiss*, 510 U.S. at 196 (Scalia, J., concurring in part and concurring in the judgment) (arguing that Congress violates the Appointments Clause whenever it “effectively lodges appointment power in any person other than those whom the Constitution specifies”).

²⁹⁷ U.S. CONST. art. II, § 2, cl. 2.

²⁹⁸ See *Shoemaker v. United States*, 147 U.S. 282, 300 (1893) (“[W]hile Congress may create an office, it cannot appoint the officer . . .”).

²⁹⁹ See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (denying Congress the ability to unilaterally appoint “officers of the United States”).

³⁰⁰ See THE FEDERALIST No. 77, *supra* note 251, at 461 (Alexander Hamilton) (“If an ill appointment should be made, the executive, for nominating, and the Senate, for approving, would participate, though in different degrees, in the opprobrium and disgrace.”); JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENT BY THE UNITED STATES SENATE 376 (1953) (“If one principle in regard to appointments was prized above others by the framers of the Constitution, it was that of establishing definite responsibility.”). For elaboration on the accountability principle, see Ross E. Wiener, *Inter-branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 MINN. L. REV. 363, 390–92 (2001). Michael Gerhardt has ob-

changes to the duties of an office threaten the accountability principle by allowing Congress to shift responsibility to the other branches of government for its own actions. In other words, the public may hold the President and Senate accountable for a poor choice, when in fact the original appointment was for an office that involved fundamentally different duties.

The conceptual problem with a rule confining Congress's power to modify offices, however, is that Congress routinely makes small changes to the duties of existing offices. Examples are legion: in 1996, Congress directed the Secretary of Commerce to review and develop fishery management plans;³⁰¹ in 1969, it instructed the Secretary of the Smithsonian to set annual pay rates for police at the National Zoological Park;³⁰² in 1789, it added certain bookkeeping duties to the office of the Secretary of State.³⁰³ Minor changes or additions like these do not require reappointment because they involve duties squarely within the original purview of the office. Congress circumvents the Appointments Clause only when it changes the duties of an office so dramatically that it creates a *different office* for constitutional purposes.

The text of the Appointments Clause suggests a clear example. It refers by name to several distinct offices subject to the appointment procedure: "ambassadors, other public ministers and consuls, [and] judges of the Supreme Court."³⁰⁴ Suppose Congress changed the duties of the office of Ambassador to Switzerland such that it involved sitting as a Supreme Court Justice. That change would be unconstitutional. Those offices are textually separate, and transforming one office into the other would require separate appointment to both. Yet, the Constitution refers to only a handful of federal offices by name. When the text is silent, how does one distinguish ordinary changes in an officer's duties from fundamental changes that transform the "office" and thus require reappointment?

The Supreme Court confronted this question in *Weiss v. United States* and focused on whether the new duties are "germane" to the old office.³⁰⁵ In *Weiss*, the Court considered an Appointments Clause

served that the Appointments Clause also creates greater accountability for delays in filling offices as well, and that one consequence of this accountability is an incentive for consensus between the President and Senate. See Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 482 (1998).

³⁰¹ See Sustainable Fisheries Act, Pub. L. No. 104-297, § 109, 110 Stat. 3559, 3581-86 (1996).

³⁰² See Pub. L. No. 91-34, § 1(a), 83 Stat. 41 (1969) (codified as amended at 5 U.S.C. § 5375 (2000)).

³⁰³ See Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68, 68.

³⁰⁴ U.S. CONST. art. II, § 2, cl. 2.

³⁰⁵ 510 U.S. 163, 174 (1994). An earlier formulation of the analysis used the word "germane" but also asked whether the new duties "can[] fairly be said to have been dissim-

challenge to a statute that added to the duties of certain commissioned military officers—those who held a bar membership and were selected by the Judge Advocate General—by authorizing them to serve as military judges.³⁰⁶ According to the Court, the new duties were germane to the office of commissioned officer because even “nonjudicial military officers play a significant part in the administration of military justice.”³⁰⁷ To demonstrate the breadth of the responsibilities of the original office, the Court provided three examples: (1) commissioned officers had the power to quell frays and to apprehend those involved, as well as the power to serve as a summary court-martial or as part of a general or special court-martial; (2) commanding officers had the power to impose nonjudicial disciplinary punishments; and (3) convening authorities³⁰⁸ had the power to review sentences imposed by courts-martial.³⁰⁹ To demonstrate the narrow scope of the new duties, the Court pointed out that military judges were powerless to take judicial action except when “detailed” to a court-martial or “assigned” to the Court of Military Review, and that military judges could continue to perform duties entirely “unrelated to their judicial responsibilities” with the permission of the Judge Advocate General.³¹⁰ Based on these factors, the Court concluded that “the role of military judge is ‘germane’ to that of military officer.”³¹¹

There has been virtually no scholarly discussion of the Appointments Clause holding in *Weiss*. Gary Lawson and Guy Seidman have parenthetically called the germaneness standard “correct,” but also have suggested that the standard is hopelessly imprecise and perhaps question-begging.³¹² Not long after *Weiss*, in a 1996 memorandum by the Office of Legal Counsel, Assistant Attorney General Walter Dellinger³¹³ found the germaneness analysis “persuasive” and recommended that “the executive branch should urge the Court expressly to accept it” in all cases where Congress adds new duties to an existing

ilar to, or outside of the sphere of,” the responsibilities of the old office. *See Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

³⁰⁶ *See Weiss v. United States*, 510 U.S. 163, 166–69 (1994).

³⁰⁷ *Id.* at 175.

³⁰⁸ “Convening authority” refers to the “authority to convene a general court martial” and “is conferred on the President of the United States, the Secretary of Defense or other Secretary concerned, commanding officers of specified armed forces units, or commanding officers designated or empowered by the President or Secretary concerned.” 57 C.J.S. *Military Justice* § 143 (1992).

³⁰⁹ *See Weiss*, 510 U.S. at 175.

³¹⁰ *Id.* at 175–76.

³¹¹ *Id.* at 176.

³¹² *See* Gary Lawson & Guy Seidman, *Taking Notes: Subpoenas and Just Compensation*, 66 U. CHI. L. REV. 1081, 1103 n.80 (1999).

³¹³ Professor Dellinger would later serve as Solicitor General and currently teaches at Duke Law School.

office.³¹⁴ We share these scholars' general agreement with the germaneness standard, and we doubt that we could formulate a more textually satisfying method of determining whether added duties change an office so fundamentally that the President must reappoint the officeholder.³¹⁵

Nonetheless, important unanswered questions remain about the mechanics of the germaneness standard. Along those lines, two aspects of *Weiss*—one correct and one incorrect—are especially noteworthy. First, the Court correctly focused on the statutory definition of the original office, rather than the duties typically carried out by the officeholders.³¹⁶ It is possible, for example, that in fact most military officers do not regularly participate in courts-martial. Nonetheless, the statutes *authorize* officers to perform many judicial and quasi-judicial duties.³¹⁷ The Court's focus on the statutory scope of the office was appropriate because Appointments Clause challenges are aimed at the act of appointment, not the execution of the office.³¹⁸ A court determining whether the President and Senate contemplated some new set of duties for a given office at the time of appointment must examine the full universe of duties associated with that office at that time, not just the work typically performed by the officeholder.³¹⁹

Second, the majority in *Weiss* incorrectly concluded that its own germaneness analysis was not strictly necessary, and therefore dictum,

³¹⁴ Walter Dellinger, The Constitutional Separation of Powers Between the President and Congress: Memorandum for the General Counsels of the Federal Government (May 7, 1996), *reprinted in* 63 LAW & CONTEMP. PROBS. 514, 549 (2000). The only other pre-*Weiss* nonjudicial discussion of the issue appears in another opinion letter from the Office of Legal Counsel, which formulated the proper test in substantially similar terms: whether "it could be said" that the new duties "were within the contemplation of those who were in the first place responsible for [the existing officers'] appointment and confirmation." Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. Off. Legal Counsel 538, 541 (1980). The Court in *Weiss* approaches the same question through an objective analysis of whether the new duties are germane to the old office. *See supra* notes 307–311 and accompanying text.

³¹⁵ One risk is that Congress could circumvent the germaneness standard by making small, incremental changes that gradually expand the scope of the office to the point where even fundamentally unrelated duties appear germane. Properly applied, however, the germaneness standard always compares any newly added duties with the *original* scope of the office (that is, the scope of the office at the time of appointment), not with the *latest* set of responsibilities.

³¹⁶ *See Weiss*, 510 U.S. at 174–76.

³¹⁷ *See id.* at 175.

³¹⁸ *Cf. Selig v. Young*, 531 U.S. 250, 272 (2001) (Thomas, J., concurring) (asserting that in determining whether a statute is civil or criminal under the Ex Post Facto Clause, the appropriate inquiry is to examine the statute on its face, rather than judge it according to its implementation).

³¹⁹ *See Weiss*, 510 U.S. at 175–76. A purely statutory approach cuts *against* most Appointments Clause challenges, as courts presume that the President and Senate understand the scope of an office at the time of appointment even if, in reality, the officers rarely (or never) exercise some of their powers.

because there was “no ground for suspicion . . . that Congress was trying to both create an office and also select a particular individual to fill the office.”³²⁰ The Court noted that Congress had authorized an indefinite number of military judges, and that the pool of qualified commissioned officers consisted of “hundreds or perhaps thousands” of individuals.³²¹ This approach was entirely functional: Even if Congress had violated the text of the Appointments Clause, the Court reasoned, it had not acted contrary to the self-aggrandizement principle that animated the text in the first place.³²²

Weiss illustrates a recurring problem with the functional approach to constitutional interpretation. The Court ostensibly found no need to analyze germaneness because there was no risk of self-aggrandizement by Congress.³²³ Yet the Appointments Clause serves other values as well—most notably, the accountability principle.³²⁴ If the officers who took on the duties of a military judge under the statute had performed poorly, those affected might well have blamed the President who had appointed those officers, rather than the Congress that redefined the office after the appointment.³²⁵ As in *Schor*, the *Weiss* Court based its analysis on a functional assessment of the harm to deep-seated constitutional values, but did so by choosing from among the several constitutional values served by the Appointments Clause. Fidelity to the text of the Constitution, rather than its purported underlying purposes, avoids the risk of improperly focusing on but one of the overlapping or even competing purposes animating a particular provision.³²⁶

Based on the analysis in *Weiss*, the question in evaluating whether senior judges present an Appointments Clause problem is whether their new duties are germane to the office to which they were originally appointed, that of a federal judge. If not, then a senior judge

³²⁰ *Id.* at 174. Justice Antonin Scalia disagreed and would have reached the question of germaneness. *See id.* at 196 (Scalia, J., concurring). If the duties of military judges were in fact nongermane to the office of a commissioned officer, he explained, then the offices would be separate for Article II purposes. *See id.* Under those circumstances, Congress would have squarely violated the Appointments Clause by authorizing Judge Advocates General to appoint military officers to serve as military judges, because Article II vests the appointment power in the President, not the Judge Advocate General. *See id.*

³²¹ *Id.* at 174.

³²² *See id.* at 174–76.

³²³ *See supra* notes 297–99 and accompanying text.

³²⁴ *See supra* note 300 and accompanying text.

³²⁵ *See id.*

³²⁶ *See* Michael W. McConnell, Book Review, *Active Liberty: A Progressive Alternative to Textualism and Originalism*, 119 HARV. L. REV. 2387, 2405–06 (2006) (arguing that “in difficult, controversial cases . . . there is generally no consensus regarding statutory purpose” because many statutes are “compromises between conflicting purposes” or “the product of overlapping purposes that diverge in particular applications,” and that in the context of constitutional interpretation “the purposes behind various provisions are much contested”).

assumes a different office, for constitutional purposes, upon electing senior status.³²⁷ At first blush, the issue seems straightforward. Most senior judges perform exactly the same judicial work as active judges: issuing orders, trying cases, rendering judgments, and the like.³²⁸ Indeed, many judges continue to carry a full caseload after assuming senior status.³²⁹ If the work of the average senior judge were not “germane” to the work of a judge in regular active service, the concept would be meaningless. For most judges, senior status is “judge lite”: same duties, less filling.

On closer inspection, however, some statutory duties associated with senior status are entirely dissimilar to those performed by active judges. The judicial retirement statute enables senior judges to perform entirely unrelated duties, and yet fully discharge the responsibilities of the office.³³⁰ The most troublesome provision is § 371(e)(1)(D), which authorizes senior judges to perform “substantial duties for a Federal or State governmental entity” on a full-time basis and to do so *instead of* performing judicial duties.³³¹ A senior judge could, consistent with the statutory definition of the office, serve as a policy analyst for a state lottery commission or a receptionist at a state motor vehicle office.³³² Indeed, the wording of § 371(e)(1)(D) would seem to permit a senior judge to serve as a full-time ambassador, since the State Department is “a Federal . . . governmental entity.”³³³ If an ambassador functioning as a federal judge illustrates the

³²⁷ It might be argued that senior judges are “inferior Officers” under the Constitution, such that Congress can vest their appointment “in the Courts of Law.” U.S. CONST. art. II, § 2, cl. 2; *see also* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 826–35 (2006) (arguing that judges of the inferior courts are inferior officers for purposes of the Appointments Clause). Under this argument, the President would not need to reappoint senior judges, nor would the Senate be required to consent to the change in office. *See id.* The argument is ultimately unavailing because, from the earliest days of the Republic, all Article III judges have been treated as “Officers of the United States.” *See* John S. Baker, Jr., *Ideology and Confirmation of Federal Judges*, 43 S. TEX. L. REV. 177, 191 (2001); Harold H. Bruff, *Can Buckley Clear Customs?*, 49 WASH. & LEE L. REV. 1309, 1310 (1992). Indeed, the removal of federal judges requires that Congress follow the constitutional impeachment process because judges are considered “civil Officers of the United States.” *See* U.S. CONST. art. II, § 4; *see also infra* notes 381–384 and accompanying text (describing the impeachment of Judge West Humphries). Based on this rich historical evidence, we doubt that any officer who possesses life tenure and decides cases under Article III could be considered “inferior” for Appointments Clause purposes.

³²⁸ *See supra* notes 53–54 and accompanying text.

³²⁹ *See* Sun, *supra* note 9, at 13.

³³⁰ *See* 28 U.S.C. §§ 371(b)(1), (e)(1) (2000).

³³¹ *Id.* § 371(e)(1)(D).

³³² At the federal level, Chief Justice Burger elected senior status and served as the chairman of the commission planning the Bicentennial Celebration of the United States Constitution. *See* Feinberg, *supra* note 1, at 414; *see also* Tony Mauro, *More Than One Justice Among Nine*, LEGAL TIMES, Sept. 12, 2005, at 10.

³³³ *See* 28 U.S.C. § 371(e)(1)(D).

paradigmatic textual example of adding nongermane duties to an existing office,³³⁴ Congress has accomplished precisely that scenario in reverse.

A further hypothetical should illustrate the Appointments Clause problem with § 371. Suppose Congress amended the duties of the Ambassador to Switzerland by requiring that the Ambassador make at least one annual visit to Washington to consult with the President concerning Swiss politics. In addition, Congress also gave the Ambassador the option to sit as a Justice of the Supreme Court during the visit. In this hypothetical, some of the new duties are obviously germane. Also, the typical ambassador might have no interest in judging, and Congress may not know with certainty whether the ambassador will actually sit on the Supreme Court. Those facts, however, are irrelevant.³³⁵ The amendment would violate the Appointments Clause because it would fundamentally change the office by making *possible* the exercise of nongermane duties by the officeholder, regardless of whatever else it may accomplish in the process.

The judicial retirement statute works in much the same way. Many duties of a senior judge are identical to those of an active judge,³³⁶ and Congress may not know with certainty that any given senior judge will ever perform nongermane duties. Yet the statute explicitly authorizes senior judges to perform duties entirely unrelated to the original scope of their office.³³⁷ Indeed, since *Hayburn's Case* in 1792,³³⁸ the Supreme Court has recognized a fundamental difference between judicial and nonjudicial work:

That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

That neither the *Legislative* nor the *Executive* branches, can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.³³⁹

³³⁴ See *supra* note 304 and accompanying text.

³³⁵ See *supra* notes 316–319 (explaining that the correct approach to Appointments Clause challenges examines only the statutory definition of the office and the new duties, not actual or anticipated practice).

³³⁶ See discussion *supra* Part I.C.2.

³³⁷ See 28 U.S.C. § 371(e)(1)(D).

³³⁸ 2 U.S. (2 Dall.) 409 (1792).

³³⁹ *Id.* at 410 (attached circuit court opinion joined by Jay, C.J., and Cushing, J.) (quotations omitted); see also *Morrison v. Olson*, 487 U.S. 654, 677 n.15 (1988) (“This Court did not reach the constitutional issue in *Hayburn's Case*, but the opinions of several Circuit Courts were reported in the margins of the Court’s decision in that case, and have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution.” (citing *United States v. Ferreira*, 54 U.S. (13 How.) 40, 50–51 (1851))). Of course, the central issue in *Hayburn's Case* was whether Congress may grant executive officers the power to rescind or modify decisions of federal courts. See 2 U.S. (2 Dall.) at 409. Such a

Despite that principle, Congress has permitted senior judges to fulfill their statutory responsibilities by performing exclusively nongermane, nonjudicial duties. Because these added functions effectively transform the office for constitutional purposes, the President must reappoint senior judges.³⁴⁰

4. *Responses to the Appointments Clause Objection*

The Appointments Clause objection may seem implausible at first glance because today the President appoints all federal judges with full knowledge that they may one day elect senior status. Most senior judges undertake new, nongermane duties not because of a sudden change in the law during their tenure, but because of a preexisting and well-understood statutory retirement program.³⁴¹ Further, senior status today poses no risk of congressional self-aggrandizement because every federal judge, not just a select group chosen by Congress, has the option of becoming a senior judge upon satisfying neutral age and service requirements.³⁴²

Cast in Appointments Clause terms, this response may assume two forms: the “single-office” response and the “compound-appointment” response. First, a federal judge’s original appointment might be constitutionally sufficient because federal judges continue to hold a single office and merely switch from one set of duties to another, within that same office, late in their careers. Second, if senior judges in fact hold a separate office from judges in active service, a federal judge’s original appointment might nonetheless be considered a compound appointment that extends to both offices.

scheme violates Article III by intruding on the ability of the judicial branch to render final judgments. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25 (1995) (discussing the historical circumstances leading the Framers to separate the judicial and legislative powers); *Ferreira*, 54 U.S. (13 How.) at 50–51. At the same time, however, *Hayburn’s Case* reveals that from the earliest days of the federal Judiciary, the Supreme Court has recognized that nonjudicial duties are nongermane to the work of the judicial branch. See 2 U.S. (2 Dall.) at 410–11. As a result, Congress cannot compel judges to perform nonjudicial work. See *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. Off. Legal Counsel 200, 203 (1984).

³⁴⁰ One recurring question in the comments to drafts of this Article was whether any party would have standing to challenge the President’s failure to properly appoint a senior judge under U.S. CONST. art. II, § 2, cl. 2. Based on the Court’s recent decision in *Nguyen v. United States*, it appears that litigants appearing before a senior judge would have standing to raise the Appointments Clause objection. See 539 U.S. 69, 71 (2003) (deciding whether a three-judge panel that included two Article III judges and an Article IV territorial judge violated federal law).

³⁴¹ See *supra* notes 43–55 and accompanying text.

³⁴² See 28 U.S.C. § 371(b)(1), (c), (e)(1).

a. *The "Single-Office" Response*

The "single-office" response is, at bottom, a statutory response that depends on a particular construction of the judicial retirement statute. If Congress expected senior and active judges to occupy a single office with varying duties, then it would present no Appointments Clause problem for a judge to transition into senior status without an additional appointment. The question is whether Congress has in fact created a single office.

For the reasons set forth in Part II, when judges elect senior status under § 371(b), they assume a distinct judicial office. It is true that the statute provides that a judge may "retain the office but retire from regular active service."³⁴³ Based on the counting anomaly and the job description anomaly, however, the best reading of that provision is that senior judges retain *judicial* office but assume a new and separate office for constitutional purposes.

Recall the counting anomaly. When a Justice elects senior status, the President may immediately nominate a "successor" to fill the seat.³⁴⁴ If a senior Justice such as Sandra Day O'Connor retains the same office as before, then the Supreme Court now "consists of" ten Justices, rather than nine as required by statute.³⁴⁵ Likewise, if Chief Justice Burger, upon electing senior status in 1986, retained the same office as before, then the appointment of Chief Justice William Rehnquist as his successor created two Chief Justices, in contravention of the description of the office in the singular in the Constitution and other federal laws.³⁴⁶

Also recall the job description anomaly. The life of a senior judge is irreducibly different from the life of a judge in active status. First, the nature of the work changes, as senior judges may perform entirely nonjudicial duties to satisfy their statutory responsibilities.³⁴⁷ Second, the location of the work may change because senior judges have greater time and discretion to sit by designation on other courts.³⁴⁸ Third, the amount of work usually changes, as certified senior judges are required to undertake only one-quarter of a standard caseload,³⁴⁹ or even no work at all in the event of a disability.³⁵⁰ Finally, the treatment of senior judges under various federal statutes changes, as they become free-floating judges of the lower courts, not entitled to work anywhere and arguably considered homeless under

³⁴³ *Id.* § 371(b)(1) (2000).

³⁴⁴ *Id.* § 371(d).

³⁴⁵ *See supra* note 89 and accompanying text.

³⁴⁶ *See supra* notes 91–93 and accompanying text.

³⁴⁷ *See supra* notes 95–105 and accompanying text.

³⁴⁸ *See supra* notes 106–16 and accompanying text.

³⁴⁹ *See supra* notes 127–32 and accompanying text.

³⁵⁰ *See discussion supra* note 65.

the antinepotism statute.³⁵¹ For senior Supreme Court Justices, the change is especially dramatic, as they are not only prohibited from participating in any Supreme Court business again, but are also occasionally denied chambers in the Supreme Court building.³⁵² As a matter of statutory construction, therefore, Congress has not designed a single office with varying responsibilities encompassing both senior and active statuses.³⁵³

b. *The "Compound-Appointment" Response*

The "compound-appointment" response is more interesting and, as of yet, unexplored in the academic literature. Assuming that senior judges occupy a separate office from active judges, what prevents the President from simultaneously appointing one person to both offices?³⁵⁴ This theory seems especially plausible in the case of senior judges, where one office derives entirely from another office. Congress does not staff a fixed number of senior judge positions but merely holds the option open to active judges once they satisfy neutral age and service requirements. Descriptively, the notion of a compound appointment is appealing because the President and Senate most likely believe that they are endorsing every judicial appointee for both offices. Further, compound appointments are a great deal more efficient. They require only a single appointment for both offices rather than requiring a second appointment years later.

The major flaw in the compound-appointment theory is that it accelerates the timing of the second appointment. Ordinarily, the sitting President is entitled to appoint an officer each time a vacancy

³⁵¹ See *supra* notes 114–26 and accompanying text (describing the controversy surrounding the appointment of Judge William Fletcher).

³⁵² See Stras & Scott, *supra* note 18, at 1465. Ironically, the strongest evidence that Congress intended active judges and senior judges to share a single office is that, to our knowledge, no one has ever proposed that senior judges might require reappointment. It is no answer to charges of an Appointments Clause violation, however, to say that the President and Senate have neglected their constitutional responsibilities.

³⁵³ Even if Congress did create a single office with two stages, encompassing both active and senior status, the addition of nongermane, nonjudicial functions to senior judges may violate the notion of "judge" under Article III. See Stras & Scott, *supra* note 18, at 1414–15; *infra* notes 376–379 and accompanying text. At the Founding and for over two hundred years of this nation's history, federal judges were not permitted to satisfy the duties of their office by performing "substantial duties for a Federal or State governmental entity." See Stras & Scott, *supra* note 18, at 1414–15.

³⁵⁴ By a "compound appointment," we do not mean the appointment of a single individual to hold two offices simultaneously. Arrangements of this kind do not violate the Appointments Clause and were common in the early years of the Republic. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-self-execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2081 (1999) (noting that John Jay, for example, served as Ambassador to Great Britain and brokered the Jay Treaty while simultaneously serving as Chief Justice of the United States). Instead, a compound appointment is the appointment of a single individual to hold *separate* and *consecutive* offices.

occurs;³⁵⁵ the recess appointment power even allows the President to “fill up all vacancies that may happen during the recess of the Senate” without its consent.³⁵⁶ By appointing a single officer to two consecutive offices, however, the sitting President can rob a future President of the rightful opportunity to fill the vacancy in the second office.³⁵⁷ The Appointments Clause vests the appointment power in the current President, not the former President. The danger is a kind of intergenerational self-aggrandizement.

Consider one of the ways that a compound-appointment power could be abused. Suppose the Federalists, who famously packed the courts with their political allies shortly after the Republicans defeated them in the elections of 1800,³⁵⁸ could have filled not only existing judicial vacancies but also future vacancies. President John Adams and the outgoing Federalist Senate could have named young Federalists to newly created offices on the circuit courts and simultaneously confirmed them to the Supreme Court, poised to take office whenever the next vacancies occurred. Such compound appointments certainly would have been efficient, but they also would have deprived President Thomas Jefferson and the Republicans of their constitutionally protected role in appointing judges to future vacancies on the Supreme Court.

The best argument in favor of the compound-appointment response is that senior judges pose no such risk. There is no permanent slate of senior judges, so no “vacancies” in the office of senior judge ever arise. Instead, the office of senior judge exists only as a contingency, available to duly appointed active judges upon their satisfying the age and service requirements. Thus, by appointing a single individual simultaneously to the offices of “judge” and “senior judge,” a sitting President arguably does not deprive a future President of anything. In fact, the opposite may be true: Senior status is designed to *induce* judges to retire earlier and to allow the future President to appoint a successor immediately, not to extend the influence of the President who makes the original appointment.

On the other hand, authorizing senior judges to take on a reduced workload or even entirely nonjudicial duties late in their careers arguably does extend the influence of the President who appointed them. A judge who has served twenty-five years in the first office might extend that tenure to thirty or thirty-five years because of

³⁵⁵ See U.S. CONST. art. II, § 2, cl. 2.

³⁵⁶ *Id.* § 2, cl. 3.

³⁵⁷ Likewise, a future Senate is deprived of the opportunity to advise and consent to the officeholder’s appointment to the second office.

³⁵⁸ This episode, which began with the short-lived Judiciary Act of 1801, paved the way for *Marbury v. Madison*. See Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 739–42 (2005).

the availability of senior status.³⁵⁹ In any case, special functional considerations about senior judges cannot overcome the basic formal problem: If senior judges indeed hold a separate office, then that office becomes available long after the original appointment. At that point, the only person constitutionally authorized to fill the office, even a contingent office, is the sitting President.³⁶⁰

Both the single-office and compound-appointment responses are less than fully satisfactory for another reason. Although today the President appoints new judges with full knowledge that they may one day assume all of the duties associated with senior status, he has not always done so. The single-office and compound-appointment responses implicitly admit that at some point, either when Congress first created senior status or when the office evolved to embrace a wholly unrelated set of duties, Congress violated the Appointments Clause by authorizing previously appointed federal judges to perform nongermane duties. Because the most troublesome provision is § 371(e)(1)(D), which permits senior judges to perform any “substantial duties for a Federal or State governmental entity,”³⁶¹ the addition of nongermane duties may be traced to the Ethics Reform Act of 1989, which first introduced the annual certification requirement for senior judges.³⁶² Thus, the single-office or compound-appointment responses effectively concede that Congress unconstitutionally changed the duties of the office seventeen years ago. Even today, that circumvention of the Appointments Clause would affect at least three sitting Supreme Court Justices, thirty-seven current circuit judges, and eighty-eight district court judges who remain on the bench in active status but were appointed before the Act went into effect on November 30, 1989.³⁶³

The Appointments Clause and Article III objections raise serious doubt about the constitutionality of the statutory scheme regulating senior status, independent of the actions (or inaction) of any particular senior judge. Based in part on the constitutional arguments un-

³⁵⁹ In addition, carving out an exception for contingent offices might simply encourage greater innovation. President John Adams and the Federalists, for example, could have exploited such an exception by adding new, “contingent” seats to the Supreme Court, specifying by statute that certain newly appointed Federalist judges could assume those seats, solely at the discretion of the judges themselves, after some period of years.

³⁶⁰ See U.S. CONST. art. II, § 2, cl. 2.

³⁶¹ 28 U.S.C. § 371(e)(1)(D) (2000).

³⁶² See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705(a)(2), 103 Stat. 1716, 1770 (codified as amended at 28 U.S.C. § 371(b)(2) (2000)).

³⁶³ See FED. JUDICIAL CTR., JUDGES OF THE UNITED STATES COURTS, <http://www.fjc.gov/public/home.nsf/hisj> (follow “The Federal Judges Biographical Database” hyperlink) (last visited Oct. 30, 2006). It would also call into doubt the constitutionality of the appointments of any judges who have already elected senior status but were appointed prior to November 30, 1989. The Federal Judicial Center’s database lists 409 federal judges who fit those criteria. See *id.*

derlying these global objections, we now turn our attention to a class of individualized objections that depend entirely on the decisions made by particular senior judges.

B. Individualized Constitutional Objections to Certain Categories of Senior Judges

Other constitutional objections to senior judges depend less on the statutory definition of the office and more on the actions of individual senior judges within that statutory framework. We call these “individualized” objections. Rather than focusing on particular real-life judges, we develop two hypothetical judges who push the constitutional envelope: (1) the “bureaucratic senior judge,” who becomes a full-time administrator and never performs judicial duties again, and (2) the “itinerant senior judge,” who ceases to sit on his home court and instead sits exclusively by designation on other courts.

1. *The Bureaucratic Senior Judge*

Imagine a senior judge who decides to stop judging. Rather than sit on any court, he dedicates the remainder of his career to purely administrative duties. To make the hypothetical more interesting, suppose that those duties do not relate in any way to the Judiciary or to the administration of justice, such as full-time work as a policy analyst for a state lottery commission. We call this hypothetical judge a “bureaucratic senior judge.”

Section 294 implicitly authorizes the strictly nonjudicial workload of the bureaucratic senior judge by imposing upon senior judges no obligation to perform judicial duties and by allowing the chief judge and Chief Justice of the United States to designate and assign senior judges to perform only such judicial work as they are “willing” to undertake.³⁶⁴ Section 371(e)(1)(D) goes further, explicitly authorizing senior judges to perform exclusively nonjudicial duties by providing for certification of senior judges who perform full-time “substantial duties for a Federal or State governmental entity.”³⁶⁵

The objection to the bureaucratic senior judge is that he performs no judicial duties and thus violates the Article III notion of a “judge[.]”.³⁶⁶ The objection begins from the premise that all constitutional “offices” must impose some set of duties. At common law, the word “office” was defined in terms of the duties associated with it: “It is said, that the Word *Officium* principally implies a Duty, and in the

³⁶⁴ 28 U.S.C. § 294(c), (d) (2000).

³⁶⁵ *Id.* § 371(e)(1)(D).

³⁶⁶ U.S. CONST. art. III, § 1.

next Place the Charge of such Duty.”³⁶⁷ As Chief Justice Marshall declared in 1823 while riding circuit, “An office is defined to be ‘a public charge or employment,’ and he who performs the duties of the office, is an officer.”³⁶⁸

The Constitution also suggests that every office must have duties. First, it authorizes the President to demand written opinions from “the principal Officer in each of the executive Departments, upon any Subject related to the *Duties* of their respective Offices.”³⁶⁹ That reference is significant because the Constitution never defines any other duties of department heads; the clause makes sense only because, by implication, there must be “duties” attached to “their respective offices.”³⁷⁰ Second, the Constitution uses other terms that would more accurately describe an “office” with no duties—for example, a post with purely voluntary functions, ceremonial functions, or a cash payout with no tasks assigned. Under Article I, Section 9, an “[o]ffice” differs from a “[t]itle of [n]obility,” a “present,” or a simple “[t]itle.”³⁷¹ Most significantly, an office is not the same thing as an “[e]molument,”³⁷² although an office may have emoluments attached to it.³⁷³ The term “emolument” captures the notion of monetary remuneration related to an office.³⁷⁴ The difference between an office and an emolument is that the former implies some set of required duties, whereas the latter does not.³⁷⁵

³⁶⁷ 3 BACON, *supra* note 224, at 718 (footnote omitted). Other definitions of an “office” are substantially similar. *See, e.g., State ex rel. Attorney General v. Wilson*, 29 Ohio St. 347, 348 (Ohio 1876) (“Offices consist of a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it.” (quoting 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 454)).

³⁶⁸ *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747).

³⁶⁹ U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

³⁷⁰ *See Stras & Scott, supra* note 18, at 1413.

³⁷¹ U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); *see also id.* § 10, cl. 1 (prohibiting states from granting “any Title of Nobility”).

³⁷² *Id.* § 9, cl. 8.

³⁷³ *See id.* § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time . . .”).

³⁷⁴ *See* BLACK’S LAW DICTIONARY 542 (7th ed. 1999) (defining “emolument” as something “annexed to the possession of office as salary, fees, and perquisites,” and as “[a]ny advantage, profit, or gain received as a result of one’s employment or one’s holding of office”).

³⁷⁵ The most relevant precedent is *United States v. Hartwell*, in which the Supreme Court explained that “[a]n office is a public station, or employment” that “embraces the ideas of tenure, duration, emolument, and duties.” 73 U.S. (6 Wall.) 385, 393 (1867). The case turned on whether a clerk in the office of the assistant treasurer of the United States was an “officer . . . charged with the safe-keeping of the public moneys of the United States” within the meaning of a criminal statute. *Id.* at 392. The Court held that the clerk

By extension, all Article III judicial offices entail some judicial duties. Article III, Section 1 explicitly ties judicial salaries to the performance of duties by guaranteeing that federal judges “shall . . . receive *for their Services*, a Compensation, which shall not be diminished during their Continuance in Office.”³⁷⁶ Moreover, Article III refers to judicial officers as “[j]udges,”³⁷⁷ and the term judge had common-law significance at the time of the Founding. At a minimum, a judge was an officer with the “basic, almost tautological, power . . . to adjudicate disputes that come before the court to which he is assigned.”³⁷⁸ As the government argued in *Booth v. United States*, “The duty of performing judicial functions is an integral part of the office of judge.”³⁷⁹

Active judges are obligated by statute to perform judicial duties. Every Supreme Court Justice, circuit court judge, and district court judge must regularly sit as part of a permanent court, which by statute must regularly hold sessions.³⁸⁰ If judges in regular active service re-

was indeed an “officer” under the statute based on an examination of his duties, which were “continuing and permanent,” rather than “occasional or temporary.” *Id.* at 393. In doing so, the Court implicitly rejected the defense’s argument that “[n]o specific duties are imposed upon the clerk; he gives no bond to the government; he is merely a subordinate and assistant to the officer, and performs such service as he directs.” *Id.* at 390–91 (argument of H.W. Paine and R.M. Morse). The case is less helpful than it appears because it construes a *statutory* definition of “officer,” rather than the *constitutional* definition, and the Court deliberately construed the term broadly to comport with Congress’s purpose in enacting the criminal statute.

John O’Connor has argued, based on *Hartwell*, that federal appointments can be situated “on a continuum, with each position having its own degree of office-likeness.” John F. O’Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 *HOFSTRA L. REV.* 89, 109 (1995). According to Professor O’Connor, a position “characterized by substantial tenure, duration, emoluments and duties” is a quintessential office, a position with none of those qualities is a quintessential non-office, and a position possessing some but not all of them falls somewhere in between and should be judged based on “the totality of its own attributes.” *Id.* We do not necessarily quarrel with this descriptive account of *Hartwell*, but we would add that for constitutional purposes, no position is an office if it involves no duties. Even a position that is strong on the other three factors—say, a huge annual payment, guaranteed indefinitely and defeasible only for misbehavior—would be only an emolument, and not an office, if it did not entail any duties.

³⁷⁶ U.S. CONST. art. III, § 1 (emphasis added).

³⁷⁷ *Id.*

³⁷⁸ Stras & Scott, *supra* note 18, at 1414; see also 1 *BACON*, *supra* note 224, at 555 (noting that all judges must “exercise [their authority] in a legal Manner, and hold their Courts in their proper Persons for they cannot act by Deputy, nor any way transfer their Power to another” (footnote omitted)).

³⁷⁹ Brief for the United States at 5, *Booth v. United States*, 291 U.S. 339 (1934) (Nos. 656, 657). It is possible that some purely administrative duties might be so closely tied to the administration of justice that a senior judge might satisfy the constitutional duties required of a judge. One prominent example would be serving as the director of the Federal Judicial Center, a position currently filled by Judge Barbara Rothstein of the Western District of Washington. See *Judge Barbara Rothstein Selected to Head Federal Judicial Center*, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), Mar. 2003, <http://www.uscourts.gov/ttb/mar03ttb/judge.html>.

³⁸⁰ See 28 U.S.C. §§ 1 (defining the composition of the Supreme Court), 2 (requiring that the Supreme Court hold an annual term of court), 43(b) (providing that each circuit

fuse or fail to perform judicial work, they may be impeached for their dereliction of duty, a fact made painfully clear to Judge West Humphreys of the District of Tennessee in 1862.³⁸¹ To be sure, Judge Humphreys's impeachment had significant political overtones, as he had privately advocated in favor of the Southern rebellion during the Civil War, while still nominally serving as a federal judge.³⁸² Nonetheless, Article Five of his Articles of Impeachment singled out his unlawful failure to perform judicial duties, as required by law, as an independent cause for his removal.³⁸³ That precedent has special legal force because of Congress's unique constitutional power to decide questions of impeachment.³⁸⁴

In contrast, once judges assume senior status, they are never under any obligation to perform judicial duties again. Under § 294, the chief judge or judicial council of their home circuit and the Chief Justice of the United States may designate and assign senior judges to perform only such judicial duties as they are "willing" to undertake.³⁸⁵ Although failure to carry an adequate caseload may preclude certification under § 371(e), the only consequence of decertification is that the judge no longer receives extraordinary salary increases.³⁸⁶ That meager incentive, however, does not amount to an affirmative "duty" to perform judicial work. Certainly, no senior judge could be impeached for nonfeasance in office, as federal law contemplates that an "unwilling" senior judge may remain idle indefinitely.³⁸⁷

In *Booth v. United States*, the Supreme Court proposed a response to this objection.³⁸⁸ Whether or not senior judges formally violate the text of the Constitution, one might conclude that senior judges pose

court shall consist of the circuit judges in regular active service), § 46(a) ("Circuit judges shall sit on the court and its panels in such order and at such times as the court directs."), § 48(a) (requiring that the courts of appeals "hold regular sessions" at specified locations), 132(b) (providing that each district court shall consist of the district judges in regular active service), § 139 (2000) (directing each district court to determine "by the rules or orders of the court" the times for "regular sessions of the district court").

³⁸¹ See CONG. GLOBE, 37th Cong., 2d Sess. 2942-53 (1862).

³⁸² See Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TULANE L. REV. 611, 627 (1987).

³⁸³ See CONG. GLOBE, *supra* note 381, at 2950.

³⁸⁴ See U.S. CONST. art. I, § 2, cl. 5 (granting the House of Representatives "the sole Power of Impeachment"), § 3, cl. 6 (granting the Senate "the sole Power to try all Impeachments"). Indeed, the Supreme Court has held that challenges to impeachment procedures are nonjusticiable political questions. See *Nixon v. United States*, 506 U.S. 224, 236-38 (1993).

³⁸⁵ 28 U.S.C. § 294(c), (d) (2000).

³⁸⁶ See *supra* notes 70-71 and accompanying text.

³⁸⁷ 28 U.S.C. § 294 (a)-(d).

³⁸⁸ See *Booth v. United States*, 291 U.S. 339, 350-51 (1934).

no risk to the deeper constitutional values that animate Article III.³⁸⁹ After all, as a practical matter, most judges continue to perform judicial duties even after electing senior status.³⁹⁰ Further, some scholars have argued that the tenure and salary protections were principally designed to preserve the independence of judges *in the act of judging*.³⁹¹ By definition, then, one could argue that the underlying structural values of Article III are not harmed by a judge who is engaging in entirely nonjudicial duties. According to this functional defense of the bureaucratic senior judge, an outlier senior judge who performs no judicial duties raises only formal concerns.

Again, however, the functional approach takes too narrow of a view of the values that animate Article III. The tenure and salary protections were designed to protect judges in their capacity as judges, to be sure, but conversely they were designed to protect judges only, not other government officials. The Founding generation repeatedly rejected the idea that life tenure should extend to anyone other than judges, in their judicial capacity, concluding, for example, that the President must have the power to remove nonjudicial officers at will because the contrary interpretation would grant to all officers the protections reserved for Article III judges.³⁹² The bureaucratic senior judge offends Article III by effectively extending its protections to non-

³⁸⁹ As we have noted, this approach is consonant with the “flexible” or “functional” approach to Article III that the Court’s decision in *Schor* exemplified. See *supra* notes 168–172 and accompanying text.

³⁹⁰ See *supra* notes 130–31 and accompanying text.

³⁹¹ See, e.g., Gordon Bermant & Russell R. Wheeler, *Federal Judges & the Judicial Branch: Their Independence and Accountability*, 46 *MERCER L. REV.* 835, 839 (1995); Joseph J. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 *SAN DIEGO L. REV.* 997, 999–1000 (2004).

³⁹² See Letter from James Madison to Thomas Jefferson (June 30, 1789), *reprinted in* 4 *THE FOUNDERS’ CONSTITUTION*, at 104 (Philip B. Kurland & Ralph Lerner eds., 1987). In a June 1789 letter describing the Senate debate over the “very interesting constitutional question—by what authority removals from office were to be made,” James Madison summarized one suggested construction. *Id.* It was first “advanced,” according to Madison, that “no removal could be made but by way of impeachment.” *Id.* The idea was roundly rejected: “To this it was objected that it gave to every officer, down to tide waiters and tax gatherers, the tenure of good behavior.” *Id.* To the Founding generation, the strong protection of tenure during good behavior seemed manifestly inappropriate for nonjudicial officers.

It might be argued that the President should be able to remove a senior judge from his or her bureaucratic duties—for instance, to remove Chief Justice Burger from service on the Bicentennial Commission—without violating Article III so long as a judge is not terminated from his or her senior judgeship. That argument proves too much, however, because it would demonstrate that a bureaucratic senior judge either enters into a different office upon electing senior status or at least holds two different offices simultaneously. In either case, reappointment would be required. See, e.g., *Appointments to the Commission on the Bicentennial of the Constitution*, 8 *Op. Off. Legal Counsel* 200, 203 (1984) (characterizing Chief Justice Burger as holding two separate appointments: one as a member of the Bicentennial Commission, an executive appointment, and the other as a Supreme Court Justice, a judicial appointment).

judicial officers. A mere administrator, or bureaucratic senior judge, should be removable at will by the President (or governor of a state, as the case may be), not insulated by the strongest form of tenure protection.

A bureaucratic senior judge not only fails to perform duties on his home court, but also refuses to perform any judicial duties at all. If the term “judge” is to have any meaning, it must exclude the bureaucratic senior judge, who more closely resembles an executive officer.

2. *The Itinerant Senior Judge*

Now imagine a senior judge who continues to perform judicial duties, but refuses to work on the court to which he was originally appointed. Perhaps he has grown bored, plans to move to a different part of the country, or strongly prefers a different level of the judicial hierarchy. Whatever his reasons, he has decided to split permanently and completely from his original court. We call this hypothetical judge the “itinerant senior judge.”

Federal law authorizes senior judges to become itinerant. Under § 294(c), the chief judge or judicial council of the circuit to which a senior judge was originally appointed may designate and assign him to perform only such judicial duties within the circuit as he is “willing” to undertake.³⁹³ Although there is no guarantee that the Chief Justice of the United States will place senior judges on the roster, or designate and assign them to perform judicial duties on other circuits under § 294(d),³⁹⁴ senior judges have considerable leverage. They may refuse to perform work on their home court, forcing the Chief Justice either to assign them elsewhere or to forego their services entirely. Given the crushing caseload on many courts around the country, the Chief Justice has a strong incentive to grant the request. We do not know of any senior judges who have put the Chief Justice to quite so stark a choice, although some senior judges have come close by spending most of their time away from their home court.³⁹⁵

Moreover, in the case of Supreme Court Justices, federal law flatly prohibits them from serving on their original court after they assume senior status. Under § 294(a), a senior Chief Justice or Associate Justice “may be designated and assigned by the Chief Justice”—presumably the *new* Chief Justice, not the *old* Chief Justice who nominally “retains the office”—“to perform such judicial duties in any circuit,

³⁹³ See 28 U.S.C. § 294(c) (2000).

³⁹⁴ See *id.* § 294(d).

³⁹⁵ See *supra* notes 108–09 and accompanying text (describing the caseload of senior district court judge William Schwarzer of the Northern District of California).

including those of a circuit justice, as he is willing to undertake.”³⁹⁶ No provision allows for the designation and assignment of senior Justices to sit on the Supreme Court. By implication, their only option is to sit by designation on a lower court, or not at all.

Sitting by designation on other courts from time to time poses no constitutional problem. In a previous article, we argued that the office of a judge involves certain essential powers and duties, including the obligation “to adjudicate disputes that come before the court to which [the judge] is assigned.”³⁹⁷ Consistent with that requirement, we concluded that “Congress may *add* to the responsibilities of an office, subject only to the requirement of germaneness,” but that “Congress may not *subtract* from the responsibilities of an office in a way that deprives officers of the essential powers and duties of the office.”³⁹⁸ We therefore defended the constitutionality of circuit riding and sitting by designation, both of which merely add germane duties to a judicial office without depriving the officeholder of the right to exercise the essential powers of the office.³⁹⁹ For the same reasons, the statutes permitting senior judges occasionally to sit by designation on other courts are also constitutional.

The objection to the itinerant senior judge begins from the premise that the President, with the consent of the Senate, originally appointed the judge to serve on a particular court, not to serve as a free-floating judge of the lower courts.⁴⁰⁰ Even when sitting by designation, “judges retain the titles appurtenant to their permanent appointments, and are generally memorialized in published opinions as ‘sitting by designation’ on the court to which they have been temporarily assigned.”⁴⁰¹ In making a judicial appointment to a particular court, the President and Senate unquestionably take into account, among other factors, the nominee’s geographic roots, the proposed level of the judicial hierarchy, and the present ideological balance of the court.⁴⁰² Thus, by serving in a different geographic region, at a higher or lower level of the judicial hierarchy, and on courts with an

³⁹⁶ 28 U.S.C. § 294(a).

³⁹⁷ Stras & Scott, *supra* note 18, at 1414.

³⁹⁸ *Id.* at 1415.

³⁹⁹ *See id.* at 1415–18.

⁴⁰⁰ *See* Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. Off. Legal Counsel 538, 540 (1980) (“[A] judge’s commission includes the name of the district or circuit in which he is intended to serve, and his appointment and confirmation are predicated on the expectation that he will in fact be serving in that district or circuit.”).

⁴⁰¹ *Id.*

⁴⁰² *See, e.g.,* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 690–91 (2005) (discussing the political considerations influencing the selection of federal judges); *see also* History of Appointments to the Supreme Court, 4B Op. Off. Legal Counsel 457, 461–67 (1980) (highlighting the importance of geography, political and legal philosophy, and other factors in the selection of Supreme Court Justices).

entirely different (and perhaps delicate) ideological balance, the itinerant senior judge may upset every aspect of the original appointment calculus.⁴⁰³ In Appointments Clause terms, the itinerant senior judge may end up performing duties so unexpected that they are nongermane to the original office.⁴⁰⁴

One potential response to this objection is that the germaneness standard does not turn on the *location* of the duties performed, but on the *nature* of the duties, as compared with the duties of the original office.⁴⁰⁵ The Supreme Court appeared to adopt this approach in *Weiss*, discussing germaneness at length without any mention of whether the new duties took place in a new location.⁴⁰⁶ Instead, the Court focused on the relevance of the new duties to the original office.⁴⁰⁷ It was sufficient, according to the Court, that military officers already possessed the power to perform duties that were judicial in character.⁴⁰⁸

Although this response has a plausible basis in the case law, it only partially addresses the objection. Sitting by designation certainly

⁴⁰³ See Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. Off. Legal Counsel 538, 541 (1980) (stating that a transfer option for federal judges would “go against a tradition of regionalism in the selection of district judges that, if not constitutionally required, has about it an aura of constitutional respectability that should be disturbed only for compelling reasons”).

⁴⁰⁴ See 4B Op. Off. Legal Counsel at 541 (addressing an Appointments Clause objection by asking whether a judge’s new functions “were within the contemplation of those who were in the first place responsible for their appointment and confirmation”); *supra* notes 305–311 and accompanying text (describing the germaneness standard for Appointments Clause challenges). One could answer this objection by relying on the single-office or compound-appointment responses. If active and senior statuses represent two stages of a single office, then by definition, none of the additional duties associated with senior status, including the option of serving exclusively on other courts, was unexpected, and there may be no Appointments Clause problem. See *supra* Part III.A.4.a. On the other hand, if active and senior statuses represent different offices, then the President and Senate arguably knew at the time of appointment that every active judge might one day have the opportunity to elect senior status, and thus appointed the judge to both offices simultaneously. See *supra* note 354 and accompanying text (describing the compound-appointment response). As noted above, however, both of these responses have serious conceptual problems. See *supra* notes 344–352, 356–358 and accompanying text.

⁴⁰⁵ See Stras & Scott, *supra* note 18, at 1412 (“Because this germaneness analysis appears to turn on the *character* of the assigned duties, it would take something jarring—along the lines of the nonjudicial business assigned to the courts in *Heyburn’s Case*—to qualify.”) (footnote omitted).

⁴⁰⁶ See *Weiss v. United States*, 510 U.S. 163, 174–76 (1994).

⁴⁰⁷ See *id.* at 175–76 (comparing the statutory powers of military officers with the statutory powers of a military judge with no discussion of any change in location or reassignment associated with the new duties). It is possible, of course, that the methodology in *Weiss* depended upon the particular facts of that case rather than generally applicable Appointments Clause principles. The President and Senate might well pay less attention to the geographic location and initial assignment of a military officer, both because military officers frequently change locations and assignments and because the average military officer wields less power than the average Article III judge.

⁴⁰⁸ See *id.*

involves duties that are judicial in character and therefore germane to the original office. On the other hand, part of the objection to itinerant senior judges is that they may wield more influence than the President and Senate originally contemplated.⁴⁰⁹ Consider, for example, a senior district court judge whose caseload consists entirely of appellate work. Although the duties on the appellate court are still judicial in character, the degree of departure from the original office seems much more serious because the new duties make the judge more influential, and therefore more powerful, than before.⁴¹⁰

The itinerant senior judge presents a close constitutional question. Judicial duties on one court are obviously “germane” to judicial service on another court.⁴¹¹ On the other hand, a judge’s commission, and the appointment process generally, “are predicated on the expectation that [the judge] will in fact be serving in that district or circuit.”⁴¹² As the Office of Legal Counsel acknowledged in a 1980 memorandum, the constitutionality of itinerant senior judges is not clear.⁴¹³ At a minimum, such uncertainty warrants an examination of simple ways to resolve the problem.

⁴⁰⁹ A related Appointments Clause question arises when the Attorney General reassigns Assistant Attorneys General (Assistant AGs) from one division to another. Typically, the President nominates and the Senate confirms a new Assistant AG to replace a specific outgoing Assistant AG. They therefore anticipate, for example, that a new appointee will head up a specific division, such as the Office of Legal Counsel. Yet on at least ten occasions, the Attorney General has transferred an Assistant AG from one division to another without reconfirmation. See Reassignment of Assistant Secretary of Labor Without Senate Reconfirmation, Mem. Op. Off. Legal Council (Nov. 2, 1995) (written by Walter Dellinger, Assistant Attorney General), available at <http://www.usdoj.gov/olc/dol.app.25.htm>. The transfer of an Assistant AG from one division to another may dramatically increase the officer’s influence in a manner that senators (subjectively) did not anticipate.

Although this practice has never been challenged, it has never been formally defended on constitutional grounds either. See *id.* (noting that transfers without reconfirmation are “well supported by practice,” at least within the Justice Department, but engaging in no Appointments Clause analysis). Significantly, however, federal law does not differentiate between the various divisions managed by Assistant AGs. Instead, Congress has simply provided for a fixed number of Assistant AGs “who shall assist the Attorney General in the performance of his duties.” 28 U.S.C. § 506 (2000). The Senate can hardly complain about a shift from one division to another because, according to the statute, Assistant AGs have no required or even assigned subject matter for the performance of their duties.

⁴¹⁰ In contrast, additional duties that make an officer *less* powerful might pose a lesser Appointments Clause problem. The now defunct practice of circuit riding, which forced Supreme Court Justices to perform work on the lower courts (and perhaps encouraged greater judicial humility in the process), is an excellent example. See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. (forthcoming 2007) (calling for the renewal of circuit riding for Supreme Court Justices). Senior Supreme Court Justices, who wield considerably less power when sitting by designation on the lower courts than they did in active status, are another example.

⁴¹¹ See Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. Off. Legal Council 538, 540 (1980).

⁴¹² *Id.*

⁴¹³ See *id.* at 541.

We have now presented four constitutional objections to the statutory scheme regulating senior judges. Even if there are cogent answers to some of them, Congress and other institutional actors should take simple steps to remove any lingering constitutional doubt. Indeed, they can do so without sacrificing any of the considerable benefits that senior judges confer on the federal Judiciary. Accordingly, we now turn our attention to saving senior judges.

IV

SAVING SENIOR JUDGES

It should be apparent by now that we have no policy objection to senior judges. To the contrary, senior judges make an enormous and invaluable contribution to the work of the federal Judiciary. We have even endorsed a more generous retirement package for senior Supreme Court Justices and have proposed ways to make their work more rewarding, as a means of encouraging more timely retirement.⁴¹⁴ Our objections are targeted at the statutes defining senior status, not with the policy objectives underlying them.

Fortunately, saving senior judges need not involve radical change, and three institutional actors can play a role. First, Congress could resolve the constitutional questions by making a few straightforward changes to the statutes that govern senior status. Second, the Judicial Conference might also address some of the constitutional objections by exercising its rulemaking authority. Finally, as a last resort, courts could acknowledge the constitutional defects of the statutory scheme, but sever the most problematic provisions. We address these possible solutions to each of the constitutional objections in turn.

A. Saving Senior Judges from the Article III Objection

The Article III objection to senior judges derives from the language of § 294(e), which provides that “[n]o retired Justice or judge shall perform judicial duties except when designated and assigned.”⁴¹⁵ Thus, the ability of senior judges to perform judicial duties depends upon the designation and assignment decisions of the chief judge or judicial council of their home circuit or the Chief Justice of the United States. Consequently, senior judges face the constant threat of constructive removal from office.⁴¹⁶ For senior judges of lower courts, the statute provides that designation and assignment turn on a judge’s ability to perform judicial work, but it is not clear that the relevant decision makers are in fact constrained by that standard.⁴¹⁷

⁴¹⁴ See Stras & Scott, *supra* note 18, at 1455–66.

⁴¹⁵ 28 U.S.C. § 294(e) (2000).

⁴¹⁶ See *supra* notes 78–82 and accompanying text.

⁴¹⁷ See *supra* notes 216–21 and accompanying text.

Congress could resolve this constitutional problem by amending § 294(e) to ensure that senior judges may not be permanently prevented from judging. For example, Congress might add the following proviso: “[E]xcept that a retired justice or judge willing to perform judicial duties may be refused designation and assignment only on a temporary basis.”⁴¹⁸ The Judicial Conference could accomplish the same result by exercising its power to “make necessary and appropriate orders in the exercise of its authority.”⁴¹⁹ It could cabin the discretion of the relevant decision makers by defining the statutory phrase “willing and able” with specific, objective criteria. It could also preclude the possibility of constructive removal by specifying that any refusal to designate and assign a senior judge must be temporary, nonconsecutive, and of a definite duration.

If forced to address the issue in litigation, courts could preserve the statutory scheme but resolve the Article III objection in two ways. First, a court could invoke the constitutional avoidance canon. To reduce the discretion of the relevant decision makers, a court could construe “the willing and able” language of § 294 as providing an objective constraint in designation and assignment decisions. To eliminate the threat of constructive removal from office, a court could also read into the statute an implied guarantee that senior judges may not be indefinitely blocked from performing judicial duties. Although interpreting the phrase “willing and able” to incorporate an objective standard is consistent with the text, the latter addition to the statute lacks textual support because the statute contains no temporal limitation, express or implied. Nonetheless, from time to time, courts have construed statutes in far more questionable ways to avoid reaching constitutional issues.⁴²⁰

⁴¹⁸ The judicial discipline statute already contains an analogous limitation: “Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.” 28 U.S.C. § 354(a)(3)(A) (Supp. III 2003). Had that language been in place in the late 1960s, it might have prevented the Judicial Council of the Tenth Circuit from imposing an order that indefinitely blocked Judge Chandler from hearing cases. *See* *Chandler v. Judicial Council of Tenth Circuit of the U.S.*, 398 U.S. 74, 78 (1970).

⁴¹⁹ 28 U.S.C. § 331 (2000). The Judicial Conference also enjoys the power to review, modify, and abrogate rules promulgated by the courts under their general rule-making authority. *See id.* (citing *id.* § 2071). The judicial council of each circuit also has a statutory power to “make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.” *Id.* § 332(d)(1).

⁴²⁰ *See, e.g.*, *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452–55, 465–67 (1989) (avoiding an Appointments Clause challenge by holding that the American Bar Association, which provides ratings for judicial candidates, was not “utilized by the President” for purposes of the Federal Advisory Committee Act). *But see id.* at 469–74 (Kennedy, J., concurring) (criticizing the majority for “disregard[ing] the unambiguous language” of the statute and arguing that the Court should have decided the constitutional challenge).

Second, a court could concede the constitutional defect but save the statutory scheme by severing the home court designation and assignment provisions from § 294(c).⁴²¹ As a result, senior judges would always have the right to perform judicial duties on their home court without having to obtain permission from another Article III officer.⁴²² By severing that provision, courts would resolve the constitutional problem while remaining as faithful as possible to Congress's intent.⁴²³

B. Saving Senior Judges from the Appointments Clause Objection

The Appointments Clause objection to senior judges derives from Congress's addition of nongermane duties to the office of senior judge.⁴²⁴ On the assumption that Congress would prefer to leave all of the duties presently assigned to senior judges in place, the most straightforward method of resolving the constitutional problem would be reappointment. Rather than allowing judges to elect senior status automatically upon satisfaction of the age and service requirements of § 371(c), Congress could require nomination and confirmation to the separate office of senior judge.

It is difficult to predict whether reappointment would threaten judicial independence. Reappointment of senior judges might become a perfunctory task. Today, Congress allows the transition to take place as a matter of course, and neither supporters nor detractors of a particular judge would have much incentive to block reappointment.⁴²⁵ On the other hand, few predicted decades ago that today's

⁴²¹ Technically, a court would also have to invalidate those portions of §§ 294(b) and 294(e) that prevent senior judges from performing work on their home court without being designated and assigned. See 28 U.S.C § 294(b), (e) (2000).

⁴²² Severing those provisions would solve the problem as to all senior judges except senior Supreme Court Justices, who are prohibited from performing work on their originally assigned court. See *id.* § 294(a). To preserve the tenure of senior justices, a court would have to sever § 294(a) to the extent that it prohibits senior justices from serving on the lower courts without designation and assignment by the Chief Justice of the United States.

⁴²³ See *United States v. Booker*, 543 U.S. 220, 246 (2005) (noting that “[w]e answer the remedial question by looking to legislative intent” and asking “what ‘Congress would have intended’ in light of the Court’s constitutional holding” (quoting *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion))).

⁴²⁴ See *supra* notes 331–40 and accompanying text.

⁴²⁵ Supporters presumably would wish to reward a capable judge for long years of service. In most cases, detractors would eagerly support reappointment as well, encouraged by the possibility that the judge would take on a reduced workload or cease judging entirely upon assuming senior status. The alternative, after all, is that the judge has every right to continue in regular active service.

One potential scenario presents an exception: If the outgoing judge shares the same ideological view as the current President, detractors may view the successor as extending the influence of the outgoing judge, especially when his potential replacement is young.

judicial appointees, especially those to the circuit courts, would linger in the Senate Judiciary Committee for years and perhaps never receive a floor vote.

To the extent that reappointment does not become a routine matter, we acknowledge that the process could have two unfortunate consequences. First, toward the end of their careers, active judges may cater to the wishes of the majority party in Congress to smooth their path toward reconfirmation, which could damage judicial independence. Second, the prospect of a difficult reappointment might encourage aging judges to remain in active status rather than endure another confirmation battle, which could lead to a greater number of mentally and physically infirm judges carrying a full caseload.

Therefore, the better method of dealing with the Appointments Clause problem is for Congress to change the statutory scheme such that active and senior judges hold a single office. That solution would require Congress to take two steps: (1) resolving the counting anomaly by clarifying the composition of the federal courts, and (2) shrinking the job-description gap between active and senior judges. Most importantly, Congress or the Judicial Conference⁴²⁶ could prohibit senior judges from performing exclusively nonjudicial work, which is nongermane to the office of a federal judge.⁴²⁷

The courts have few options for addressing the Appointments Clause objection other than declaring senior judges unconstitutional and forcing Congress to act. The courts could conceivably flout the statutory scheme and hold, *ipse dixit*, that senior judges occupy the same office as active judges, notwithstanding the counting anomaly, the job description anomaly, and the ability to perform exclusively nongermane duties. Although that construction would be incorrect, for the reasons we have discussed,⁴²⁸ some courts might find it preferable as a way of avoiding the difficult constitutional issues that we have raised.

We do not dismiss this criticism out of hand, but it is unlikely that the reappointment decision would become as politically charged as the initial appointment to judicial vacancies. After all, permitting an aging judge to elect senior status in no way ensures that Congress will confirm the proposed successor. Many of President George W. Bush's nominees to the federal circuit courts have been stuck in the Senate Judiciary Committee for years. See, e.g., Charles Babington, *Alito Visits Senators to Thank Them for Support*, BUFF. NEWS, Jan. 26, 2006, at A5 (describing Brett Kavanaugh's second nomination), available at 2006 WLNR 1571742 (Westlaw); David Eggert, *GOP Pushes for Vote on Judge*, GRAND RAPIDS PRESS, July 11, 2005, at B4, available at 2005 WLNR 10971209 (discussing Henry Saad and William Myers's nomination process).

⁴²⁶ See 28 U.S.C. § 371(e)(2) (2000) ("Determinations of work performed under [§ 371(e)(1)] shall be made pursuant to rules promulgated by the Judicial Conference. . . .").

⁴²⁷ As an added benefit, the prohibition on the performance of exclusively nonjudicial duties would resolve the individualized objection to the bureaucratic senior judge.

⁴²⁸ See *supra* Part I.C.

C. Saving Senior Judges from the Individualized Objections

The individualized constitutional objection to the bureaucratic senior judge is even easier to resolve because it arises almost entirely out of § 371(e)(1)(D), which authorizes senior judges to remain eligible for salary increases by performing duties *exclusively* “for a Federal or State governmental entity.”⁴²⁹ By defining the office in a manner that permits senior judges to perform no judicial work at all, Congress contravenes the constitutional definition of a judge and effectively extends the Constitution’s tenure and salary protections to nonjudicial officers.⁴³⁰ Thus, Congress should repeal § 371(e)(1)(D).

Confronted with the issue in litigation, the courts should declare § 371(e)(1)(D) unconstitutional and sever it from the statute. Alternatively, the Judicial Conference could use its rulemaking power under § 371(e)(2) to construe the terms “administrative duties” and “substantial judicial duties” in § 371(e)(1), for purposes of certifying the workloads of senior judges, as limited to duties directly relating to the administration of justice.⁴³¹ For example, full-time administrative work for the courts would qualify, but full-time work for a state lottery commission would not. So limited, those duties arguably comport with the office of a “judge” of a “court” under Article III. The proposed interpretation by the Judicial Conference probably would produce a narrower statute than Congress anticipated. Yet given the explicit delegation of rulemaking authority to the Judicial Conference, courts would be compelled to give it considerable deference.⁴³²

Eliminating § 371(e)(1)(D) only partially solves the problem, however, because judicial office also carries with it an *obligation* to perform judicial duties.⁴³³ Section 294 imposes no requirement that senior judges perform any judicial work, if they are not “willing” to do so.⁴³⁴ Although it makes sense to allow senior judges to decline some judicial work in recognition of their years of service on the federal bench, the Constitution does not permit Congress to create a judicial office that involves no judicial duties. Again, Congress can solve the problem with a simple proviso stating that no senior judge may refuse to perform judicial work altogether for a period exceeding some reasonable amount of time. By crafting such a provision, Congress could

⁴²⁹ See 28 U.S.C. § 371(e)(1)(D).

⁴³⁰ See *supra* notes 376–79, 392 and accompanying text.

⁴³¹ See *supra* note 426.

⁴³² See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”).

⁴³³ See *supra* notes 376–79 and accompanying text.

⁴³⁴ See 28 U.S.C. §§ 294(a)–(d).

continue to give senior judges substantial flexibility, while simultaneously ensuring that they would fulfill their constitutional obligations to perform some judicial duties.

The individualized objection to the itinerant senior judge might not require much action.⁴³⁵ As we have explained, there are important constitutional concerns about the sufficiency of an appointment when a judge receives a commission to serve on one court but subsequently sits exclusively on other courts, especially courts at a higher level of the judicial hierarchy.⁴³⁶ Congress or the Judicial Conference could resolve that problem by requiring that some minimum percentage of senior judges' work must take place on their home court.

Our objections to senior judges are novel, and they have not been pursued in any litigation. As a result, we realize that there is no immediate crisis over the constitutionality of senior judges. We also realize that lawmakers have other pressing concerns before them. Nonetheless, we outline these proposals for saving senior judges to illustrate that our constitutional objections to senior judges would not require a radical transformation of the federal Judiciary. There are numerous ways that Congress, the Judicial Conference, and the courts may intervene to preserve the crucial work that senior judges perform.

CONCLUSION

Are senior judges unconstitutional? We are reluctant to give a simple yes or no answer. Certainly senior judges do not raise any incurable constitutional objections, so the answer is not an unqualified "yes." Congress remains free to craft a judicial retirement package that, consistent with Article III and the Appointments Clause, permits federal judges to continue their service after reaching an appropriate retirement age. In light of its undeniable benefits, Congress should be commended for creating senior status and the option should be preserved.

Unfortunately, the answer is not an unqualified "no" either. Certain aspects of the statutory scheme governing senior judges are unconstitutional. One objection to senior judges, as presently defined by federal law, is that the "designation and assignment" statute⁴³⁷ makes senior judges vulnerable to constructive removal from office and thereby violates the tenure protection of Article III, Section 1. Another objection is that electing senior status changes the job description of a federal judge by adding new, nongermane duties in violation of the Appointments Clause. Two other constitutional objec-

⁴³⁵ See *supra* notes 411–13 and accompanying text.

⁴³⁶ See *supra* Part III.B.2.

⁴³⁷ 28 U.S.C. § 294(e).

tions depend on the actions of individual senior judges. A bureaucratic senior judge, who performs exclusively administrative work unrelated to the courts, violates Article III by holding the office of a judge but performing no judicial duties. An itinerant senior judge, who sits exclusively by designation on courts other than her home court, may violate the Appointments Clause by acting contrary to the expectations of the President and Senate who selected her for primary service on a particular court. Congress, the Judicial Conference, or the courts can address each of these objections through relatively straightforward actions.

Former Chief Judge James Oakes has called senior judges "a boon and a bargain to the public and to the judiciary,"⁴³⁸ and Chief Judge Deanell Tacha has described the experience of working with senior judges as "uplifting."⁴³⁹ Senior judges have had a remarkable influence on the federal Judiciary, undoubtedly even greater than Congress envisioned when it created the office in 1919. Even the best of policies, however, must conform to constitutional limitations. It is a reflection of our respect for senior judges, and for the constitutional charter for the federal Judiciary, that we hope to make the two compatible.

⁴³⁸ Oakes, *supra* note 60, at 242.

⁴³⁹ Tacha, *supra* note 59, at 651.