THE ETHICS OF "SUCCESSION PLANNING" ON THE FEDERAL JUDICIARY

ROBERT LUTHER III*

Thomas Jefferson allegedly said that the problem with life tenure for federal judges is that "Few die, none resign."[1] Given that quote, he'd surely be surprised at the volume of federal judicial retirements—and the level of public interest in them—over the last few years. This Essay identifies four of the main issues raised about the ethics of "succession planning" on the federal judiciary. But first, some background on judicial retirements.

An Article III federal judge can leave the bench outright by retiring or may choose to stay on the bench with a reduced caseload as a senior judge by electing to continue serving in "senior status."[2] A judge is eligible to retire with benefits or "go senior" once they satisfy the "Rule of Eighty," which means the judge has attained sixty-five years of age with fifteen years of service.[3] Or, for every year older the judge gets beyond sixty-five, one less year of service is required so long as there is a minimum of ten years.[4] So, a judge can retire at age seventy, with ten years of service, and so on.

To effect a retirement or to assume senior status, the judge must submit a letter to the President in care of the Counsel to the President.[5] At least by tradition, judges copy the Chief Justice, the Chief Judge of the court on which they sit, the Administrative Office of the Courts (for benefits purposes), and the judge's two home-state Senators.[6]

---

* Of Counsel, Jones Day; Adjunct Professor of Law, George Mason University Antonin Scalia Law School. From 2017–18, Mr. Luther served as Associate Counsel to the President of the United States, where his principal responsibility was co-managing the White House's judicial selection process. Remarks substantially similar to these were delivered on November 12, 2022, at The Federalist Society's National Lawyers Convention in Washington, D.C., on a panel entitled "The Judge's Role in Choosing a Successor." The author thanks his co-panelists Josh Blackman, Mike Fragoso, David Lat, and moderator, Judge Stephen A. Vaden, for sharpening his thoughts on these issues.

[1] Though a mere paraphrase, the spurious quotation has long been attributed to Thomas Jefferson. *See* Letter from Thomas Jefferson to the New Haven Merchants (July 12, 1801), *in* 34 THE PAPERS OF THOMAS JEFFERSON: 1 MAY TO 31 JULY 1801, at 556 (Barbara B. Oberg et al. eds., 2007) ("[I]f a due participation of office is a matter of right, how are vacancies to be obtained? [T]hose by death are few. [B]y resignation none."); *see also* 10 THE WORLD'S BEST ORATIONS: FROM THE EARLIEST PERIOD TO THE PRESENT TIME 3945 (David J. Brewer ed., 1901) (attributing the phrase "Few die, none resign" to a letter penned by Thomas Jefferson in 1801).

[2] 28 U.S.C. § 294(b) ("Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake . . . .").

[3] 28 U.S.C. §§ 371(a), (c).

[4] 28 U.S.C. § 371(c).

[5] *See* Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 536 (2007).

[6] *See, e.g.*, Letter from Victoria A. Roberts, U.S. District Judge, to President Joseph R. Biden, Jr. (Jan. 20, 2021), https://perma.cc/R88F-HAS6; Letter from William Alsup, U.S. District Judge, to President Joseph R. Biden, Jr. (Jan. 21, 2021), https://perma.cc/TLW9-JADW.

The letters usually say something along the lines of: "Please be advised that having satisfied the requirements of 28 U.S.C. § 371, I shall retire from regular active service on [date], but I intend to continue performing substantial judicial duties as a senior judge."[7] Senior status also provides substantial benefits to judges: not only can they continue to serve with a reduced workload, but they receive increased cost-of-living benefits[8] and can exercise considerable discretion in their caseloads. For example, Senior District Judges can stop hearing entire classes of cases such as civil, criminal, patent, or ERISA.[9] However, senior status also limits judicial power within the courts. Senior Circuit Judges lose their panel seniority, cannot preside on panels, and lose the ability to sit en banc—unless they sat on the underlying panel.[10] Practically speaking, that means fewer opportunities to author the kinds of opinions that make news.

I. MAY A JUDGE APPROPRIATELY CONDITION HER RETIREMENT UPON THE WHITE HOUSE'S NAMING OF HER PREFERRED SUCCESSOR?

Legal commentator and founder of *Above the Law,* David Lat, wrote in the *Wall Street Journal*: "For a judge to condition his retirement on the appointment of a particular successor is inappropriate. Canon 5 of the Code of Conduct for U.S. Judges requires federal judges to 'refrain from political activity,' and selecting judicial nominees, a task the Constitution assigns to elected officials, is inherently political."[11]

Lat is correct that judicial ethics prohibit judges from conditioning their retirement on the appointment of a particular successor. However, that conclusion is best grounded in Canon 2B, which prohibits lending the prestige of the judicial office to advance the private interests of others, not Canon 5 where Lat finds it.[12] By subscribing to Canon 5 as authority for this view of judicial succession, Lat imposes an overly restrictive construction on its requirement that judges refrain from political activity. If, as he argues, "selecting judicial nominees . . . is inherently political"—and thus prohibited—then judges can't participate in *any* dimension of the replacement process without violating Canon 5. But abstention is neither legally required nor practical.

Legally speaking, "[t]he Commentary to Canon 2B expressly provides that judges 'may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.'"[13] This commentary authorizes judges to play a passive, responsive role in the appointment process: "A judge, if asked, may recommend

---

[7] *See supra* note 6.

[8] 28 U.S.C. §§ 371(b)(1), 461.

[9] *See* Block, *supra* note 5, at 540.

[10] *See, e.g.*, 2d Cir. IOP 35.1 (En Banc Proceedings).

[11] Laurie Lin & David Lat, Opinion, *Federal Courts Aren't Royal Ones*, WALL ST. J. (Dec. 8, 2021), https://perma.cc/U7PJ-C4VF.

[12] *See* JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA CIRCUIT, *In re Charge of Judicial Misconduct or Disability*, No. 21-90051, at 7–8 (2022) (Katsas, J., dissenting) (observing that "Canon 2B prohibits judges from lending the prestige of their office to advance the interests of private parties—as a sitting judge would if actively involved in recommending some judicial candidates over others."); *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 2B (JUD. CONF. OF THE U.S. 2019) [hereinafter JUDICIAL CANON 2B].

[13] Committee on Codes of Conduct, Advisory Opinion No. 59: Providing Recommendations or Evaluations of Nominees for Judicial, Executive, or Legislative Branch Appointments (2019) *reprinted in* 2B GUIDE TO JUDICIARY POLICY ch. 2, at 78 (2019).

and evaluate judicial nominees based on the judge's insight and experience . . . . judges may—when requested to do so—provide recommendations of persons to be considered for judicial office."[14]

Practically speaking, judges should be permitted to provide recommendations if asked by the nominating authority, so that the White House can make the best and most-informed decision possible.[15] When I served as Associate Counsel to the President of the United States, co-managing the White House's judicial selection process, some members of the media criticized our consideration of specific recommendations from certain people or groups. But we considered recommendations from anyone with intelligent things to say. We probably looked at thousands of resumes and conducted hundreds of interviews. We accepted applications from the general public. There were two dozen people at the White House and at the Department of Justice involved in this process; we were not hard to find.

Because our picks were based exclusively on merit insofar as the politics would permit,[16] we consulted a lot of people, including judges. And, of course, the American Bar Association talks to judges about potential nominees during its vetting process.[17] If Lat is correct that a judge sharing her views on a prospective nominee is prohibited political activity, then people involved in this process—and the public—will lose out on a lot of meaningful information.

Frankly, Canon 5's ban on political activity does not seem to apply to judicial retirements at all. That Canon prohibits judges from holding office in a political organization, making speeches for or publicly endorsing political candidates, and soliciting money for or spending it on political candidates.[18] None of these activities are in the same vein as providing requested input on prospective judicial nominees. Rather, a judge explicitly conditioning her judicial seat on a particular successor—or a judge serving on a Commission that forces the President to nominate a judicial candidate—is improper under Canon 2B—which prohibits lending the prestige of the judicial office to advance the private interests of others.[19] Because obviously, if a judge conditions her retirement on the installation of a specific successor, she uses her judicial office to advance that successor's interests.

---

[14] *Id.* at 79.

[15] *See generally* Robert Luther III, *Two Years of Judicial Selection in the Trump Administration*, 80 U. PITT. L. REV. 775 (2019).

[16] *Id.* at 776.

[17] *See* Frequently Asked Questions, *How Does the Standing Committee Perform Its Evaluations?*, AM. BAR ASS'N, https://perma.cc/6AHA-HLUX (last visited Nov. 20, 2022) ("Following a process that has evolved over more than 60 years and is structured to assure a fair and impartial evaluation, the Standing Committee member assigned to the evaluation reaches out to a broad spectrum of lawyers and judges who may know the nominee and conducts confidential interviews with those who indicate that they are in a position to evaluate the nominee's professional qualifications to serve as a federal judge.").

[18] *See* CODE OF CONDUCT FOR U.S. JUDGES Canon 5 (JUD. CONF. OF THE U.S. 2019) [hereinafter Judicial Canon 5].

[19] *See In re Charge of Judicial Misconduct or Disability*, *supra* note 12, at 10 (Katsas, J., dissenting); *see also* JUDICIAL CANON 2B, *supra* note 12.

II. MAY A JUDGE APPROPRIATELY CONDITION HER RETIREMENT UPON THE CONFIRMATION OF HER SUCCESSOR?

Yes. A conditional retirement letter—one that is conditioned upon *a* successor being named (rather than a *specific* successor being named)—is completely justified based on both pragmatic realities and precedent.

A. Pragmatic Realities

Conditional retirement letters are justified on their face because they prevent the court from being short-staffed until a successor is confirmed by the U.S. Senate and appointed by the President. Because Senior District Judges can choose the types of cases they hear, some stop hearing civil or criminal cases entirely when they assume senior status. If Senior Judges reduce their caseloads without a confirmed successor, District Courts and litigants in districts with few judges may be particularly disadvantaged.

B. Precedent

Judges and Justices appointed by Presidents of both parties have submitted conditional retirement letters for at least a few decades, but the Biden administration has seen more than ever.

Supreme Court Justices appointed by Presidents of both parties have used conditional language in their retirement letters. In 2005, Justice Sandra Day O'Connor submitted her "decision to retire . . . upon the nomination and confirmation of my successor."[20] And this year, Justice Stephen G. Breyer wrote: "I intend this decision to take effect when the Court rises for the summer recess this year (typically late June or early July) assuming that by then my successor has been nominated and confirmed."[21]

Lower-court judges have also used this language. According to *The Vetting Room*, the first recorded lower court retirement letter containing this conditional language was submitted by Judge John L. Coffey of the Seventh Circuit during the early years of the George W. Bush administration, and a few district judges and one circuit judge followed suit.[22]

Since then, more and more judges have used this conditional language. During the Obama administration, at least five district judges submitted conditional retirement letters.[23] In the first two years of the Trump administration, fifteen circuit judges did so.[24] And in the first two years of the Biden administration, twenty circuit judges did the same—exceeding all prior administrations.[25]

---

[20] *See* Letter from Sandra Day O'Connor, Assoc. Justice, U.S. Supreme Court, to President George W. Bush (July 1, 2005), https://perma.cc/J9Q4-JE5X.

[21] *See* Letter from Stephen Breyer, Assoc. Justice, U.S. Supreme Court, to President Joseph R. Biden, Jr. (Jan. 27, 2022), https://perma.cc/9V8E-YVDC.

[22] Harsh Voruganti, *Senior Status Upon Confirmation: The Way of the Future?*, THE VETTING ROOM (Dec. 29, 2020), https://perma.cc/44WU-TZYV.

[23] *Id.*

[24] *Id.*

[25] *See* U.S. COURTS, ARCHIVE OF JUDICIAL VACANCIES, https://perma.cc/FN77-YFDG (last visited Nov. 20, 2022). Additional research is on file with the author.

Thirty-three of President Biden's thirty-seven circuit vacancies—almost 90%—will be Democrat appointees replacing Democrat appointees.[26] Compare this with the Trump administration where only thirty-four of fifty-four circuit vacancies—almost 63%—were Republican appointees replacing Republican appointees.[27] Does the Biden administration's circuit court succession plan—where almost 90% of his circuit nominees will replace Democrat appointees and where more than 50% of those seats were made available because the sitting circuit judge will assume senior status "upon the confirmation of their successor"—raise any ethical issues? I don't think so.

Judges who don't condition their retirement on the appointment of a specific successor do not run afoul of Canon 2B's command against using the judicial office to promote the private interests of that successor. Canon 2B also prevents a judge from "allow[ing] family, social, political, financial, or other relationships to influence judicial conduct or judgment."[28] One may argue that conditional retirement allows political relationships to influence judicial conduct. But as Chief Justice William H. Rehnquist famously said in 2003, it is not inappropriate for a Justice to consider the party or politics of the sitting president when deciding whether to retire because "[d]eciding when to step down from the court is not a judicial act."[29]

III. MAY A JUDGE APPROPRIATELY WITHDRAW HER CONDITIONAL RETIREMENT GENERALLY?

Withdrawal of a conditional retirement letter raises two questions: (1) whether a judge can withdraw her conditional retirement generally and then (2) whether she can do it based on her disapproval of the proposed successor.

The answer to the first question is yes. A 1974 Office of Legal Counsel opinion states that "a resignation to take effect in the future may be withdrawn prior to its effective date . . . ."[30] This OLC opinion was drafted when a federal judge sought to retire due to disability and tendered his retirement letter to the President.[31] Before the President accepted his resignation, the judge received further medical advice that he was not disabled.[32] Accordingly, he sought to withdraw his retirement letter and OLC concluded that he could do so because the withdrawal was communicated before the retirement was accepted.[33]

This was the right result. There are many valid reasons why a judge may change her mind about retirement. One may receive such an incorrect diagnosis, recover from a health issue, or experience changes in family circumstances. While Democrat-appointed circuit judges appear concerned about being replaced during the Biden administration, those judges do not appear widely concerned about who, specifically, replaces them. This suggests that while some judges

[26] *Id.*

[27] *Id.*

[28] *See* JUDICIAL CANON 2B, *supra* note 12.

[29] Walter Dellinger, *Is Justice Kennedy About to Retire? Or is it Justice Thomas?*, SLATE (June 25, 2017), https://perma.cc/JX8U-2KGA.

[30] Memorandum from Robert G. Dixon, Jr., Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to John Duffner, Office of the Deputy Att'y Gen. (May 1, 1974), https://perma.cc/FQE3-FQ3D.

[31] *Id.*

[32] *Id.*

[33] *Id.*; *see also* Goodman v. United States, 424 F.2d 914 (D.C. Cir. 1970).

prefer to retire during a friendly administration, only the smallest percentage of retiring judges make decisions based on the individual who succeeds them.

In fact, these conclusions are supported by the evidence. In the past fifteen years, there have been around 750 Article III judicial appointments.[34] Over that same period, a total of two federal judges have withdrawn their conditional retirement letters.[35] The same number of federal judges have been impeached over this period of time.[36] That's 0.0026%: hardly an epidemic.

One judge withdrew his retirement during the Trump administration.[37] In that case, the judge did so because he thought his successor was wronged when the administration declined to nominate him for political reasons.[38] And it's happened once in the Biden administration, allegedly due to the judge's dissatisfaction with the administration's proposed successor.[39] It almost happened a second time during the Biden administration based on concerns that the successor judge would not have his chambers in the courthouse of the retiring judge, thus depriving that community of judicial representation—but that was apparently a misunderstanding.[40]

IV. MAY A JUDGE APPROPRIATELY WITHDRAW HER CONDITIONAL RETIREMENT BASED ON HER DISAPPROVAL OF THE PROPOSED SUCCESSOR?

So, may a judge appropriately withdraw her conditional retirement based on her disapproval of the proposed successor? Yes, because Canon 2B only prohibits lending the prestige of the judicial office to advance the private interests of others. In other words, while Canon 2B prohibits the judge from conditioning her seat on her favored successor, it doesn't prohibit the judge from rescinding her retirement letter to exercise a veto over her disfavored successor. Indeed, the Judicial Council of the District of Columbia Circuit's *In re Charge of Judicial Misconduct or Disability* opinion implicitly permits a sitting judge to exercise this form of judicial veto.

One might think that withdrawing the retirement letter based on a proposed successor—effectively exercising a judicial veto—causes a separation of powers problem because the

---

[34] *See* U.S. COURTS, *supra* note 25.

[35] The situation surrounding the conditional retirement of Judge Rudolph T. Randa, formerly of the U.S. District Court for the Eastern District of Wisconsin, arose during the Q&A of this panel. Judge Randa submitted a letter indicating his intention to assume senior status in June 2007 contingent on his successor being appointed prior to President Bush's departure from office. *See* Jack Zemlicka, *Randa, Peterson Staying Put for Now*, FREE REPUBLIC, https://perma.cc/4RMP-D4NL (last visited Nov. 20, 2022). That condition was not met, and in the last week of the Bush administration (January 12, 2009), Judge Randa sent a letter to President Bush stating that he had "decided to remain on active status and carry out the full duties and obligations of the office." *Id.*; *see also* Allison A. Luczak, *A Delicate Balance of Life Tenure and Independence: Conditional Resignations from the Federal Bench,* 93 MARQUETTE L. REV. 309, 310 n.5 (2009). Some may argue that Judge Randa's follow-up letter constituted a "withdrawal." I disagree—Judge Randa's condition was not met, so his conditional retirement expired by its own terms.

[36] FED. JUDICIAL CTR., IMPEACHMENTS OF FEDERAL JUDGES, https://perma.cc/5HQN-M6XQ (last visited Nov. 20, 2022).

[37] *See* Eliana Johnson, *Why Pence Spiked a Trump Judge*, POLITICO (July 12, 2019, 5:03 AM), https://perma.cc/GH9A-QNES. Although this is a widely read article on this incident, it is not completely accurate.

[38] *Id.*

[39] *See* Chris Dickerson, *King Steps Back from Moving to Senior Status, Might Have Been Unhappy with Replacement Plan*, W. VA. RECORD (Nov. 30, 2021), https://perma.cc/KJ8L-SYMD.

[40] *See* Robert Gavin, *Biden Pick for New York Federal Judgeship in Limbo*, TIMES UNION (Aug. 8, 2022), https://perma.cc/L7N9-KF85; Robert Gavin, *Gillibrand's Office Says Biden Pick 'Committed' to Holding Court in Utica*, TIMES UNION (Aug. 8, 2022), https://perma.cc/AMR7-BPCR.

judiciary is encroaching on the President's nomination power. But rescinding a retirement letter for whatever reason—health, family, or dissatisfaction with the successor—does not implicate the separation of powers because withdrawal only frustrates the *timing* of the decision—and the Executive Branch has no authority over the timing of a judicial retirement. Hence, Jefferson's frustration that few judges die or resign.[41]

There have been some suggestions that Congress should act to force more uniformity upon judicial retirements. But I think that any congressionally-imposed restrictions—such as requiring the retirement letter to "announce a fixed and irrevocable retirement date certain"—as Lat suggests in *The Wall Street Journal*[42]—or making resignation letters formally binding—as Professor Richard Re suggests in the *Iowa Law Review Online*[43]—would contradict existing precedent, the aforementioned OLC opinion, decades of practice, and perhaps Article III itself.

Finally, how serious are these concerns about judicial vetoes in light of the Judicial Council of the District of Columbia Circuit's opinion on judicial misconduct?[44] If a sitting federal district judge for the District of Columbia can make the President pick one of his three proposed candidates, it's not clear why a sitting judge can't veto a President's proposed successor. If the Judicial Council of the District of Columbia Circuit believes federal judges have the power to make the President pick future federal judges, it seems perfectly consistent with their opinion for federal judges to occasionally stand in the President's way.

[41] *See supra* note 1.

[42] Lin & Lat, *supra* note 11.

[43] Richard M. Re, *The Peril and Promise of SCOTUS Resignations,* 107 IOWA L. REV. ONLINE 117, 118 (2022).

[44] *See In re Charge of Judicial Misconduct or Disability*, *supra* note 12, at 1.