One interesting feature of the federal judiciary is that Article III judges enjoy lifetime tenure, a unique privilege not shared by members of the federal executive or legislative branches. In addition, judges who serve the requisite years can retire at full salary, guaranteed for life. Yet, the overwhelming majority of judges elect to remain on the bench for, effectively, their entire lives, first as active judges, then as senior judges. Despite the steady increase of both active and senior judges over the past century, little is known about the factors that motivate individuals to become and remain federal judges, even in the absence of financial incentives. Drawing from statistical data provided by the Federal Judicial Center and responses from a fall 2003 survey sent to all senior circuit and district federal court judges, this article describes how institutional and political developments, as well as the onset of aging, influence the capacity in which judges preside on, but not their commitment to, the federal bench. These findings provide insight into the political economy of the federal judiciary, as well as how individuals generally contribute to their respective professions as they grow older.

Judging is what I do; it is what I am.

A senior federal district court judge, explaining why he elected to take senior status rather than retire from the bench.

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I. INTRODUCTION

Imagine a firm that requires its employees, prior to joining, to receive postgraduate education and spend many years apprenticing at other firms. After a lengthy interview process, most employees join the firm in their late 40s or early 50s. Everyone is paid the same salary, regardless of seniority or performance. Their jobs, by most accounts interesting and important, require them to work long hours. The firm also restricts their outside activities and associations, lest any of them reflect poorly on the firm. The compensation, while decent, is below what they could earn elsewhere. There is, however, one attractive perquisite: after working a certain period—typically 10 to 15 years—employees are guaranteed their salary for their remainder of their lives, even if they leave the firm. Nearly all employees choose to remain, albeit on a part-time basis, until they are physically unable to do so or literally die on the job. What kind of firm attracts high-quality applicants and inspires such loyalty?

The firm described above is the federal judiciary and its employees are Article III judges. Prior to joining the bench, judges have distinguished themselves professionally, typically at a state judiciary, a large law firm, a state or federal prosecutor’s office, in government, or in legal academia. Some of them, and often the most qualified nominees, endure a grueling and, at times, demeaning Senate confirmation process, waiting several months or even years before receiving their commission. Upon joining the bench, judges are effectively barred from practicing law or earning outside income and must resign from most professional and social affiliations to avoid potential conflicts of interest. The salary of federal judges, uniformly set at each level of the judiciary (district, circuit, Supreme Court), represents a pay cut for many, and far less than what their clerks often earn their first year at a

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1For example, the Hon. William A. Fletcher (Ninth Circuit) endured a three-year nomination process. He was first nominated on Apr. 25, 1995, but did not receive a vote by the Senate. He was renominated on Jan. 7, 1997, and received confirmation on Oct. 8, 1998. See Denis Steven Rutkus, Judicial Nomination Statistics: U.S. District and Circuit Courts, 1977–2002 (2003).

2See, e.g., Chris Hedges, Public Lives: Ex-Judge vs. the Government’s Law-Free Zone, N.Y. Times, Feb. 6, 2004, at B1 (quoting John Gibbons, former Chief Judge of the Third Circuit Court of Appeals, on the financial strain on him and his family when he joined the federal judiciary: “The first year I was on the bench my salary was less than what I paid the previous year in taxes. There were two years on the bench when my college tuition bills were $48,000 and I was earning $60,000”).
law firm.\(^3\) In addition, circuit and district judges face a steadily increasing caseload that outpaces the labor and resources to administer it.\(^4\) Although these conditions compel a few judges to quit the bench after a few years, most remain until they vest in their pension.

When federal judges vest in their pension, they effectively have three employment alternatives: remain on active status, retire from the bench, or take senior status. Each alternative is qualitatively different.\(^5\) From an economist’s perspective, it may appear puzzling that pension-eligible judges opt to remain on the bench in any capacity. Labor economics dictates that wages are the primary determinant for an individual’s willingness to work. But these older judges, as Judge Richard Posner has pointed out, “are working for nothing.”\(^6\) And yet, most pension-eligible judges choose to remain on the bench as senior judges.

Senior judges today are an integral part of the federal judiciary. Since the inception of senior status in 1919, they have steadily grown as a percentage of Article III judges presiding on the bench. Whereas senior judges comprised less than 10 percent of the federal bench in the first 20 years of its inception in 1919, that figure grew to nearly 40 percent in 2002. This growth, not surprisingly, is fueled by the percentage of older judges opting for senior status. Since 1984, over 80 percent of all federal judges have taken senior status.\(^7\)

What accounts for this expansion? Wealth maximization theory cannot provide an answer, since there is no real financial incentive for a pension-

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\(^3\)See Public Hearings of the National Commission on the Public Service: A Time of Crisis and Opportunity (Brookings Institution, 2002) (comment by Justice Stephen Breyer describing the “gap” in income between private-sector attorneys and federal judges, pointing out that his own law clerks will earn more than the justices in their first year).

\(^4\)See Chief Justice William H. Rehnquist, 2002 Year-End Report on the Federal Judiciary (describing the burgeoning caseload demands placed on federal judges). At the same time, the caseload (e.g., cases granted certiorari) for the Supreme Court has steadily decreased since the mid-1980s. See Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments tbl. XX (2003) (showing the annual caseload of the Supreme Court).

\(^5\)See discussion in Section IV, infra.


\(^7\)These statistics come from the empirical analysis of data provided by the Administrative Office of the U.S. Courts, discussed in Section III, infra.
eligible judge to remain on the bench. Part of the explanation might be found in the political process. The emergence of senior judges has coincided with an increased politicization of the federal judiciary. The judicial confirmation process has steadily lengthened over the years: in the 1920s, vacancies were typically filled within four months; during the 2000s, vacancies took an average of 20 months to fill, with much of this delay attributable to ideological differences between the president and senators of the opposing party. Over this same time, the federal judicial caseload has steadily increased, prompting Chief Justice Rehnquist to repeatedly ask Congress to fill existing vacancies in a timelier manner and to create additional judgeships, measures that Congress has been loath to accommodate. As a result, the federal judiciary often experiences a labor shortage on both the supply and, some argue, the demand side. From an administrative viewpoint, senior judges address these labor concerns by creating judicial vacancies while allowing continuing service from existing judges. Assuming that the president and Senate appoint a successor before the senior judge retires, a judge taking senior status effectively expands the case-adjudication capacity of his or her judgeship and, collectively, the federal judiciary. Nevertheless, identifying the correlation between the growth of senior judges and contention in judicial politics does not explain how, if at all, these phenomena relate. More importantly, it tells us little about why senior judges, unlike their counterparts in most other professions, are willing to work essentially for free.

This study of federal judicial tenure warrants closer examination because little is known about it. The balance of active and senior judges varies widely by district and circuit and cannot consistently be explained by indicators such as political ideology or number of vacancies. Also, while

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8See, e.g., Neil A. Lewis, Bitter Senators Divided Anew on Judgeships, N.Y. Times, Nov. 14, 2003, at A1 (describing how Democratic senators have delayed confirmation of some of President Bush’s judicial nominees due to differences on judicial philosophy).


10See Public Hearings of the National Commission on the Public Service, A Time of Crisis and Opportunity (Brookings Institution, 2002), available at <http://www.brook.edu/dybodocroot/transcripts/20020715.htm> (quoting Chief Justice Rehnquist, who claimed, “[o]ur judges will not continue to represent the diverse face of America if only the well-to-do or the mediocre are willing to become judges”).
they remain Article III judges, senior judges have rights and responsibilities that differ from those of active judges. For example, senior judges in many districts or circuits can—and do—opt out of certain types of cases and routinely preside on other districts or circuits, something not normally afforded to active judges. Conversely, they are precluded from participating in institutional matters such as internal governance or en banc decisions. Given that senior judges face different incentives and constraints than active judges, they cannot accurately be described in the same vein as active judges.

This article is intended to shed light on this growing segment of the federal judiciary. There is surprisingly little scholarship on the subject, with much of it anecdotal. Although judicial scholars have examined the differential effects of other demographic segments of the judiciary—freshman and chief judges, for example—only recently have they turned their attention to senior judges. Because the study of these judges remains fallow, several questions remain unanswered. Why do older federal judges routinely choose senior status? How do they perceive their role on the federal judiciary? What effect, if any, do senior judges have on their junior brothers and sisters, the nomination process, and judicial decision making generally?

This article presents a comprehensive quantitative and qualitative study of federal judicial tenure, drawing from original empirical and survey research. This article draws its findings from two sources. The first source comes from biographical and caseload data provided by the Administrative Office of the U.S. Courts. The second source is a survey sent in the fall of 2003 to every sitting senior judge on the circuit and district courts. Their responses provide insight into their decisions to opt for senior status and their perceived differences from their years on active status. The survey also provides a helpful comparison with the individual judge data, providing observations of how stated preferences (survey) comport with revealed preferences (employment data).

The main finding of the article is that most federal judges step down from active status shortly after qualifying for their pension, but choose to remain on the bench as senior judges. Their decision to take senior status appears to be driven in part by institutional concerns of creating a vacancy to allow the president and Congress to appoint a successor, but also individual concerns of easing their workload and increasing their after-tax compensation. Yet, senior judges remain on the bench, even in a limited working capacity, because of a mix of institutional and individual factors. These older judges feel a continuing responsibility to help the court address its expand-
ing caseload, but at the same time truly appear to enjoy their jobs, even if it means effectively working for free. Thus, this finding provides an interesting response to Richard Posner’s article, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does).” Posner may be correct in his assertion, but if so, there must be something about being a federal judge that distinguishes it from the jobs of most everyone else.

The structure of the article is as follows. Section II briefly reviews the existing scholarship on federal judicial tenure, including senior federal judges. Section III provides a brief description of the quantitative and qualitative research used throughout the article. Section IV describes the creation of the judicial pension system in 1869 and senior status in 1919, and their subsequent evolution. Section V discusses the current working environment of federal judges. By drawing on both the empirical data and survey responses from senior judges themselves, this section analyzes judges’ motivations—stated and revealed—for serving on the bench in this capacity. Section VI discusses the broader implications of these findings, both for the judiciary and for other professions that are comprised, in part, of an aging population.

II. EXISTING SCHOLARSHIP ON FEDERAL JUDICIAL TENURE

Although the study of the federal judiciary has a rich tradition, the existing scholarship on the subject of judicial tenure is surprisingly sparse. Historically, much of the attention to the federal judiciary has been directed at the Supreme Court, first at the confirmation process and later on judicial deci-
sion making. In recent years, judicial scholars have examined judicial turnover: the decision by judges to vacate their seats to allow the president and Senate to choose their successors. The initial studies—largely descriptive in nature—described circumstances motivating individual judges to leave the bench.

Judicial scholars subsequently turned their attention to district and circuit courts. These studies, more empirical in scope, examined causal factors influencing judges’ decisions to vacate their seats. They found that, unlike Supreme Court Justices, district and circuit court judges were influenced by political environment and pension qualification in their deci-

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15See Squire, Politics and Personal Factors in Retirement from the United States Supreme Court, 10 Pol. Behav. 180 (1988) (concluding that justices typically remained on the Court long after they had qualified for their pensions, and their decisions to leave were health related); see also See Christopher J.W. Zorn & Steven R. Van Winkle, A Competing Risks Model of Supreme Court Vacancies, 1789–1992, 22 Pol. Behav. 145 (2000); Timothy M. Hagle, Strategic Retirements: A Political Model of Turnover on the United States Supreme Court, 15 Pol. Behav. 25 (1993).

16See Deborah J. Barrow & Gary Zuk, An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987, 52 J. Pol. Sci. 457, 466–67 (1990) (concluding that the political affiliation of the president and the controlling party of the Senate had a small but statistically significant effect on judicial turnover).

sions to step down from active status. Another series of studies analyzed the conditions fostering expansion of the federal judiciary, finding that partisan alignment among the House, Senate, and president was a dominant factor explaining growth in both the district and circuit courts.

Judicial scholars have recently explored the effect of group dynamics on individual behavior in circuit courts. In particular, they have analyzed how variations in these dynamics influence the substance of judicial decisions as well as the likelihood of individual judges’ willingness to dissent or to write separately. They have directed their attention thus far at newly appointed federal judges and chief judges, concluding that both subgroups were more attuned to institutional norms regarding dissents and concurrences. Recent empirical work on published opinion writing has included senior judges, concluding that they do not appear more likely to dissent than active judges.

To date, there have been three articles on the topic of senior federal judges. The first, written by Wilfred Feinberg in 1990, is entitled, “Senior Judges: A National Resource.” As the title suggests, the article is largely an

Albert H. Yoon, The End of the Rainbow: Understanding Judicial Turnover Among Federal Judges, 8 Amer. L. & Econ. Rev. __ (forthcoming in 2006) (concluding that judicial pensions are the primary explanation for judicial vacancies and that political factors are nonsignificant).


acclamation of senior judges. Drawing from his experience as Chief Judge of the Second Circuit Court of Appeals, Feinberg dispels claims that senior judges serve an insignificant or ceremonial function on the bench, and instead describes them as “the jewels in the crown of the judiciary.”23 Their contribution, he notes, was particularly helpful in light of the “inevitable delays in the political process of selecting a new judge.”24 In 2000, Kelly Baker used statistical analyses to determine that politics, as well as age, motivate older judges and that senior status provides an attractive option for federal judges for personal as well as political reasons.25 Most recently, in 2004, Richard Boylan studied the effect that the federal sentencing guidelines had on federal judges’ decisions to take senior status.26 Analyzing the period from 1969 to 2000, Boylan finds that while the sentencing guidelines motivated district judges to take senior status earlier,27 political factors did not.28

While advancing our understanding of senior judges, these latter studies present methodological limitations.29 Baker’s aggregated longitudinal analysis cannot account for changes in individual and institutional characteristics30 from one period to the next, leading to selection bias and

23See Wilfred Feinberg, Senior Judges: A National Resource, 56 Brooklyn L. Rev. 409, 418 (1990). Drawing from statistics from the late 1980s, Feinberg noted that senior judges participated in 13 percent of trials and 14 percent of appeals. Id. at 412.

24Id. at 413.


26Richard T. Boylan, Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?, 33 J. Legal Stud. 231 (2004). The passage of the sentencing guidelines in the late 1980s drew the ire of many federal judges by reducing the range of sentences for particular felony offenses, thereby transferring much of the sentencing authority from judges to prosecutors. Id. at 235.

27The sentencing guidelines did not meaningfully affect when circuit judges took senior status. Id. at 235.

28Id. at 251.

29For a discussion of other limitations of the Zuk and Barrow study, see Spriggs & Wahlbeck, supra note 17, at 577–78.

30Judges’ years of service, the relative political affiliation between the judge and the sitting president, and caseload—to name a few—all vary over time.
inaccurate estimates. Her study also overlooks institutional factors that occur within courts, such as other judicial vacancies or the political composition of the court, which also likely bias her results.31 Boylan’s article, while comprehensive, looks at a relatively short and recent period, and therefore cannot provide a broader historical account of senior judges. In addition, the study uses time-series data of a single group, and therefore is vulnerable to the criticism that the observed changes in judges’ behavior may be due not to a change in the law, but rather reflect a broader secular trend or an altogether different phenomenon.32 More significantly, even before 1969, judges were gradually but steadily waiting shorter periods before taking senior status.33 Although this finding does not refute Boylan’s findings, it does strongly suggest a competing hypothesis to explain recent trends in senior status.

In addition to the econometric limitations, none of the existing judicial scholarship explores descriptively when and why federal judges take senior status. Although economists have written extensively on factors, including pensions, that motivate individuals to terminate employment across different professions,34 the unique institutional features of the federal judiciary make the study of senior judges worth a separate study. The decision by which judges choose—and remain on—senior status is likely a result of several factors: pensions, politics, and civic responsibility, to name a few.

31 Judges’ well-documented concerns about the political ideology of their successors may not be independent, but rather a function of the political composition of their respective court as a whole. For example, judges may be less inclined to elect senior status or retirement if they believe that their departure would affect the political balance of the court.

32 Because the sentencing guidelines were national in scope, the study does not provide a control group (e.g., judges who were unaffected by the sentencing guidelines) to more rigorously measure its effect.

33 This finding was drawn using the autobiographical data provided by the Administrative Office of the U.S. Courts. See Section III, infra.

In addition, we know almost nothing about the implications of senior judges on the federal judiciary as an institution. The purpose of this article is to extend our scope of inquiry and, by doing so, enhance our understanding of the federal judiciary, and to provide insight into how older individuals contribute to their respective professions.

III. SOURCES OF DATA

This article draws on two sources for its analysis. The first is individual-level data, provided by the Federal Judicial Center (FJC), a division of the Administrative Office. The FJC collects information on every Article III judge from 1789—when the federal judiciary was established—to the present. The data set provides biographical and demographic information for each judge, including the relevant dates of their tenure on the federal bench. In its initial format, I use this data to analyze what effect, if any, the creation of a pension in 1869 and senior status in 1919 have had on the judicial nomination and confirmation process. To analyze factors that may influence a judge’s decisions regarding the election of senior status or retirement, I expand the data where the unit of analysis shifts from an individual judge to an individual judgeship-year. Each year that each judge serves on active or senior status counts as a single observation.35 Expanding the data accounts for secular and individual-level changes from year to year, in particular any factors that influence when judges change their employment status. The data in this format includes factors identified by the previous studies (e.g., political affiliation of sitting president and the judge), as well as additional institutional and political variables.

I also use the Administrative Office’s Federal Court Management Statistics, which provides statistics on number of cases that each district and circuit hears annually, for the period 1980–2002. Although the Administrative Office does not release caseload statistics for senior district judges, it does provide such information for senior circuit judges. These data provides a comparison, by circuit, of active and senior judges, reporting the number of active and senior judges presiding on each circuit and their relative contributions to the circuit’s caseload.

35For example, a judge who served 10 years records 10 observations.
The second source was a survey sent to every sitting senior district and circuit court judge in the fall of 2003.\textsuperscript{36} I decided to limit the survey to senior judges after determining—through a pilot survey—that active judges were much less willing to respond to the survey.\textsuperscript{37} The survey asked open-ended questions regarding their motivations for electing to take senior status when they did, their perceived institutional norms regarding senior status in their district/circuit, their current caseload, and their perceptions of the federal bench from the viewpoint of being a senior judge.\textsuperscript{38} To encourage a greater response rate, I promised to preserve anonymity in their responses and kept the survey brief. The response rate for each group exceeded 50 percent: 49 out of 94 senior circuit judges responded, as did 175 out of 332 senior district judges. The findings from the survey are included in Section VI.

IV. Judicial Pensions and Senior Status: A Brief History

Under Article II of the U.S. Constitution, the president and the Senate jointly select Article III judges.\textsuperscript{39} Upon their appointment, federal judges are guaranteed a nondecreasing salary and lifetime tenure,\textsuperscript{40} removed from the

\textsuperscript{36}The list of senior judges (and respective judicial addresses) was generously generated by the judicial clerkship office at Northwestern University School of Law for the fall of 2003.

\textsuperscript{37}The lower response rate is likely because active judges, relative to the senior judges, feel greater constraints about commenting on their position.

\textsuperscript{38}The survey omitted relevant questions that I wanted to ask of the senior judges but, upon reflection and consultation with colleagues, decided against asking in the effort to avoid individual judges taking offense at the question and declining to respond to the survey altogether.

\textsuperscript{39}The relevant provision states:

[The President] shall have power, by and with the advice and consent of the Senate . . . shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

U.S. Const., art. II, § 1.

\textsuperscript{40}Federal judges “shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” U.S. Const., art. III, § 1.
bench only through impeachment by the House of Representatives and conviction by the Senate. While on the bench, however, judges are prohibited from practicing outside law, earning honorarium, and generating most other forms of outside income. Perhaps because of these restrictions, and because many judges forgo higher earnings to join the bench, Congress has enacted measures to provide financial security for older judges as well as the means to remain on the court as long as they wish.

A. Judicial Pensions: The Act of 1869

In 1869, Congress enacted a judicial pension for Article III judges. Upon achieving age 70 and 10 years of judicial service, judges were now entitled to draw their then-existing salary for the remainder of their lives. Prior to that time, judges received compensation only for as long as they remained on the bench. Congress appeared motivated by a desire to take care of judges, who, unlike most politically appointed federal employees, had committed a lifetime of public service. Others, however, appeared more concerned that older judges would remain on the bench primarily to draw their salary, to the detriment of the federal judiciary. One judge critically described the prepension period where “some [judges] have continued to hold their offices for some time after the ravages of time had so far wasted

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41See, e.g., Nixon v. United States, 938 F.2d 239, 240 (D.C. Cir. 1991), aff’d, 506 U.S. 224 (1993) (describing how federal judge continued to draw his salary even after being criminally prosecuted for bribery and perjury and sentenced to prison).


43The relevant statute refers to the lifetime compensation as an annuity. See 28 U.S.C. § 371. For the sake of descriptive clarity, this article refers to the annuity as a pension, which comports with the general concept of a pension (compensation paid to an employee after retirement).

44See Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 44, 45, providing the basis for § 260 of the Judicial Code (discussing judicial pensions).

45A member of Congress argued on behalf of judicial pensions: “Make it so that the United States judge can be assured that for all time, in sickness and in health, with a clear mind serving the country, or when his mind has been worn out in that service, he and his family shall not be in want so far as it depends upon his services.” Congressional Globe—41st Congress, 1st Sess. (Appendix), Mar. 29, 1869 (statement by Rep. B.F. Butler (D-Mass)).
the tissues of their minds and bodies that they were no longer capable of properly administering the duties of their office.”46

Pursuant to the 1869 Act, judges, once vested, were entitled to receive the pension irrespective of individual wealth acquired either before or after joining the bench. And, because the compensation was a pension—not salary—retired judges were exempt from federal, and in many cases, state taxes.47 Retired judges could pursue employment and investment opportunities in the public or private sector without affecting their entitlement to the pension. One exacting feature of the judicial pension, however, was its all-or-nothing structure. Judges could not partially vest in the pension. A judge who left the bench even one year short of vesting for his or her pension would receive nothing, regardless of years of service.48

Table 1 reports for the decade before and after the pension’s enactment the median retirement age and years of service for all judges, and the median years of service for judges after the age of 70.

It is important to note that the size of the federal judiciary at the time was fairly small: fewer than 100 judges between 1859–1878. “Outlier” judges distort the averages, in particular individual judges who left after only a few years or after an inordinate number of years.49 For these reasons,


47See 28 U.S.C. §§ 3301, 3121 (stating judicial compensation for senior and retired judges is exempt from certain federal taxation, such as Old Age, Survivors, and Disability Insurance and Medicare); Darryl Van Duch, Senior Judge Ranks Close Vacancy Gap; Vital Factor, Nat’l L.J., July 22, 1996, at A1 (stating that “many states with an income tax exempt such income”).

48Many public and private pensions, by contrast, allow employees incremental stages of vesting, based on age and years of service. The judicial pension is also distinguishable from executive and legislative pensions. The president receives a lifetime pension pegged at the current salary of a secretary of the cabinet, as well as other benefits, such as free office space and staff, postage, and Secret Service protection. See Michael Nelson, Congressional Quarterly’s Guide to the Presidency (1996) (describing, in part, the pension benefits for former presidents). Members of Congress receive a full pension (for an amount less than their existing salary) based on their age and years of service: full pension on reaching one of the following: 62 years of age with five years of service; 50 years or older with 20 years of service; or 25 years of service at any age. Those who do not qualify under these criteria may still qualify for a reduced pension or leave their contributions behind and receive a deferred pension later. See 5 U.S.C. §§ 8413, 8414 (2003).

49For example, Thomas Boyton of the Southern District of Florida in 1870 left the bench at the age of 32, with 38 years remaining before qualifying for a pension. One judge in the prepension period, Willard Hall of the Delaware District Court, remained active on the bench until he was 87 years old.
it is most instructive to look at changes in median, rather than average, ages.

As Table 1 illustrates, the pension system did not have an effect on the median retirement age of active judges. For both periods, the median age was 63. Pensions did have, however, a strong effect on median years of active service. Prior to the creation of judicial pensions, the median judge served 18 years; after the enactment of pensions, that figure dropped to 10 years. What explains this sharp reduction? The answer lies in a greater rate of retirement among judges older than 70 years old. Before 1869, the median number of years served after the age of 70 was seven, revealing that most judges were staying on long after the age of 70, when many of their counterparts on the practicing bar had retired. After 1869, the median figure dropped to two years.

Table 2 shows that judicial tenure trends were stable over the succeeding decades (1879–1918) after the enactment of pensions. The median age at retirement and years of service for all judges remained fairly constant, as did the years of service for judges after the age of 70. All this occurred while the federal judiciary nearly doubled in size, growing from 72 to 136 judges. The small increase in median age could be explained in part by longer life expectancy over this period, while the corresponding small decrease in median years of service reflected that judges were routinely quitting the bench shortly after qualifying for their pension, rather than remaining.

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Table 1: Effect of 1869 Law Creating Judicial Pension Article III Judges

<table>
<thead>
<tr>
<th>Period</th>
<th>1859–1868</th>
<th>1869–1878</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Age at Retirement (all judges)</td>
<td>63</td>
<td>63</td>
</tr>
<tr>
<td></td>
<td>(41)</td>
<td>(34)</td>
</tr>
<tr>
<td>Median Years of Active Service (all judges)</td>
<td>18</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(41)</td>
<td>(34)</td>
</tr>
<tr>
<td>Median Years of Active Service After Age 70</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>(15)</td>
<td>(6)</td>
</tr>
</tbody>
</table>

Note: Number in parentheses correspond to number of observations.

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50See Posner, supra note 6, at 396–97 (Appendix, tbl. A.3, Number of sitting federal judges, 1789–1995).
Tables 1 and 2, read together, offer evidence that the pension system accomplished its intended effect of encouraging more judges to remain on the bench until they vested in their pension, but to leave shortly thereafter, knowing that they were financially secure.

B. Senior Status: The Act of 1919

In 1919, Congress allowed older judges who had vested in their pension an alternative between active status and retirement: senior status.\(^{51}\) Congress felt that many judges who had vested in their pension needed an alternative between working full time and quitting the bench. Some pension-eligible judges, explained one senator in support of the legislation, “have felt entirely able to do nearly full work, but not quite full work, and they have hesitated about resigning, because they felt, though entitled to full compensation after resigning, that they wanted to do something; that they wanted to serve.”\(^{52}\)

The significance of the Act was both individual and institutional. First, it allowed older judges to continue to hear and decide cases, albeit typically on a reduced basis. Second, it enabled the president and the Senate to appoint a full-time successor, as though the judge had retired. Moreover,

\(^{51}\)See Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157.

\(^{52}\)Congressional Record—Senate, Jan. 17, 1919, at 1586 (statement by Senator Hoke Smith (D-GA)).
Congress eventually structured senior status so as to eliminate any disincentive for opting for it. To protect against conflicts of interest, senior judges were still prohibited from earning income outside the bench. They did, however, receive the same favorable tax treatment as retired judges and, like their fellow judges on active status, were eligible for any subsequent judicial pay raises given by Congress.53 Table 3 summarizes the distinctions among active, senior, and retired status.

From a financial perspective, senior status appears preferable to active status, particularly when factoring in the additional favorable tax treatment. A judge’s preference between senior status and retirement depends on how much he or she values leisure, and on how great is the desire to pursue non-judicial employment (e.g., law firm practice, arbitration, consulting), which would augment annual compensation.

From a judicial perspective, however, the alternatives are less clear. Senior judges enjoy discretion not afforded to active judges with respect to the number of cases they adjudicate, the substantive types of cases (e.g., excluding habeas corpus cases) they are asked to adjudicate, and the months during the year they preside on the bench. Conversely, senior judges are pre-

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cluded from participating in court governance, including the selection of magistrate judges (district court) and en banc decisions (circuit court).

Of course, retirement is the most attractive option for judges desiring to work someplace else. That most eligible judges opt for senior status over remaining on active status is consistent with the hypothesis that judges, like most people, prefer more money to less. By choosing senior status over retirement, however, judges reveal that their objectives extend beyond maximizing their wealth, and suggest that they value something about the job beyond compensation.

One might hypothesize that creating senior status would have little effect on judicial tenure, at least with respect to active status. The pension system, enacted 50 years earlier, provided a strong incentive for older judges to retire shortly after vesting. Because the primary feature of senior status was that it allowed older judges who had qualified in their pension the additional option of semi-retirement, one might expect that most judges would choose to leave rather than remain and maintain a full caseload.

The results from Table 4, which looks at the 64 judges who ended active status by retiring before and after the 1919 Act, run counter to this hypothesis.

The median age of retirement decreased by four years after senior status was enacted for judges, corresponding to a three-year decrease in median years of active service. Somewhat surprisingly, however, the median number of years judges served on active status after the age of 70 increased by one year.

<table>
<thead>
<tr>
<th>Period</th>
<th>1909–1918</th>
<th>1919–1928</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Age at Retirement (all judges)</td>
<td>68</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>(79)</td>
<td>(75)</td>
</tr>
<tr>
<td>Median Years of Active Service (all judges)</td>
<td>16</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>(79)</td>
<td>(75)</td>
</tr>
<tr>
<td>Median Years of Active Service After Age 70</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>(34)</td>
<td>(29)</td>
</tr>
</tbody>
</table>

Note: Number in parentheses correspond to number of observations.
How does one explain these downward trends in judicial retirement? The answer lies in looking at the 20 judges who chose to transition from active status to senior status before retirement. Table 5 compares this group to their counterparts for the period before senior status, 1909–1918, where all judges ended active status by retirement.

The median age increased by four years and the median years of active service increased by three years the amount of time spent on senior status, with the median tenure being only two years. Looking at Tables 4 and 5 together, the observed age and tenure decreases for judges moving from active status to retirement were accompanied by increases on these dimensions for judges moving from active status to senior status. Although some pension-eligible judges retired rather than remain active judges, others were interested in continuing to decide cases and would rather work full time (active status) than retire. With the introduction of senior status, they had a more appealing option—to remain on the bench but at a reduced caseload. Thus, like the enactment of judicial pensions 50 years earlier, senior status appeared to accomplish its intended effect. It is interesting to note that roughly a quarter of federal judges took advantage of senior status in the decade following its enactment. Although a sizeable fraction, the long-term trends show that senior status would increase dramatically in popularity.

Congress has kept the pension system largely intact over the years, with minor modifications. Beginning in 1939, judges who ended active status for

Table 5: Effect of 1919 Law Creating Senior Status, Article III Judges Electing to End Active Status by Senior Status

<table>
<thead>
<tr>
<th>Period</th>
<th>1909–1918</th>
<th>1919–1928</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Age at Retirement (all judges)</td>
<td>68 (79)</td>
<td>64 (20)</td>
</tr>
<tr>
<td>Median Years of Active Service (all judges)</td>
<td>16 (79)</td>
<td>13 (20)</td>
</tr>
<tr>
<td>Median Years of Active Service After Age 70</td>
<td>2 (34)</td>
<td>2 (20)</td>
</tr>
</tbody>
</table>

Note: Number in parentheses correspond to number of observations.
reasons of disability were also eligible for senior status.54 In 1954, Congress expanded the eligibility requirements to also include judges reaching 65 years of age and 15 years of judicial service;55 this amendment worked to the particular benefit of judges who had joined the bench at a relatively young age and, for that fact alone, had to remain on the bench for a longer period to qualify for the pension. Congress again amended the qualification requirements in 1984 to allow a sliding scale of age and service requirements for judges between the ages of 65 and 70.56 Known as the Rule of 80, judges who reach a minimum age of 65 and minimum service of 10 years are entitled to a pension, provided that their age and years of service total 80. Table 6 outlines the creation of the federal pension system and its subsequent modifications.

Table 6: Qualifying for Judicial Pension under 28 U.S.C. § 371

<table>
<thead>
<tr>
<th>Minimum Requirements at Time of Creation Vacancy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age (years)</td>
</tr>
<tr>
<td>------------</td>
</tr>
<tr>
<td>Pre–1869</td>
</tr>
<tr>
<td>1869–1953</td>
</tr>
<tr>
<td>1954–1983</td>
</tr>
<tr>
<td>or</td>
</tr>
<tr>
<td>70</td>
</tr>
<tr>
<td>1984–present</td>
</tr>
<tr>
<td>(1) judge’s age and years of service must total at least 80;</td>
</tr>
<tr>
<td>(2) judge must be at least 65 years old at time of vacancy; and</td>
</tr>
<tr>
<td>(3) judge must have served at least 10 years at time of vacancy.</td>
</tr>
<tr>
<td>70</td>
</tr>
<tr>
<td>69</td>
</tr>
<tr>
<td>68</td>
</tr>
<tr>
<td>67</td>
</tr>
<tr>
<td>66</td>
</tr>
<tr>
<td>65</td>
</tr>
</tbody>
</table>

---

54Judges are also allowed to take senior status prior to qualifying for their pension if permanently disabled. See 28 U.S.C. § 372(a) (based on Act of Aug. 5, 1939, ch. 433, 53 Stat. 1204–05).


Today, to satisfy annual certification requirements to remain on the bench, senior judges are required to carry a minimum of a 25 percent active caseload each year. In 1996, Congress somewhat relaxed this condition, allowing senior judges to satisfy this requirement by combining the time they devoted to judicial and administrative work, and allowing judges falling below the minimum in any given year to recompense their court in subsequent years.57

C. The Emergence of Senior Status

The popularity of senior status among older judges was a gradual but steady process. For the first 15 years of its existence, senior status attracted roughly 5 percent of the federal judiciary. During the 1930s and 1940s, the percentage gradually increased to roughly 12 percent. The popularity of the position grew with each subsequent decade: in 2000, senior judges comprised 37 percent of all presiding judges. Figure 1 captures the ratios between active and senior judges over time.

The rate of growth in the number of senior judges outpaced the growth in authorized judgeships, even as the number of authorized judgeships grew by a factor of five between 1920 and 2000. These aggregate trends, as illustrated in Figures 2A and 2B, were nearly identical between district and circuit courts.

Table 7 documents how the increase in the number of senior judges was fueled not merely by an increase in the number of federal judges as the federal judiciary expanded, but by the percentage of judges who opted for senior status once they became eligible. Since 1984, over 80 percent of judges conclude active status by taking senior status.

There are two possible explanations for this increased participation in senior status. The first is longer life expectancy, through improving health, medical, and wealth standards. For example, the anticipated life expectancy of a 50-year-old judge in 1919 was 72 years, whereas by 2000 the figure had increased to 80 years.58 The other explanation is that over time, older judges preferred to remain on the bench on a limited basis rather than


D. The Contribution of Senior Judges to the Federal Judiciary

Assessing the contribution of senior judges to the federal judiciary is a challenging task. First, there are not many data: the Administrative Office of the U.S. Courts releases statistics of active and senior judges dating back only to 1980. These statistics are only at the aggregate level, which is unfortunate because while active judges within each court are expected to contribute equally—both in number and types of cases—senior judges vary widely in their contributions.\(^\text{59}\) One district court judge, in his survey response, was

\(^{59}\)In addition, the Federal Courts Improvement Act of 1996, which allows senior judges to satisfy their certification requirements by performing administrative (rather than judicial) tasks, makes it more difficult to assess senior judge contributions. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 301, 110 Stat. 3847, 3851.
critical of how the annual statistics credited all cases heard by the senior district judges to the active judges within that district. Moreover, the Administrative Office releases statistics relating to senior judges for only circuit, not district, courts. For these reasons, most of the following analysis will focus on senior circuit judges. Because the survey asked senior district judges about their caseload from the most recent term, however, I include their responses below.
Circuit courts have steadily decided more appeals over the past 20 years. In 1980, circuit judges collectively disposed of 32,618 appeals, but by 2002 that number had risen to 84,238 appeals. Active judges, not surprisingly, have decided the majority of these appeals, but senior judges in recent years have heard an increasing proportion. To illustrate: in 1980, active judges decided 80 percent of the appeals, senior judges decided 9 percent, and visiting judges \(^60\) decided the remaining 11 percent. In 2002, active judges adjudicated 77 percent of the appeals; senior judges 17 percent; and visiting judges only 6 percent. Although one cannot determine the causal factors from the aggregate statistics, it is clear that the decrease in the overall reliance on visiting judges corresponds with an increased reliance on senior judges within the circuit. Figure 3 shows the increase in total appeals by active and senior circuit judges since 1980.

Figure 3 is a bit deceptive: while the gross difference in caseload between active and senior judges has increased between 1980 and 2002, the rate of growth for senior judges is nearly double that of active judges over this period, reflecting a convergence between the two groups.

The average individual contribution, shown in Figure 4, of senior and active judges tells a slightly different story. The average annual caseload for active judges doubled from 230 in 1980 to 467 in 2002, approximately the same rate of growth as for senior judges: 71 in 1980 to 155 in 2002.

Figures 3 and 4, read together, confirm that—at least for the circuit courts—the number of senior judges has increased relative to active

\(^60\)Visiting judges are federal judges from other jurisdictions who sit by designation on a three-judge panel. In some cases, they are district judges from within the circuit, but also may include circuit judges from other circuits.

Table 7: How Judges End Active Status by Pension Regime (1919–2002)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Senior Status</td>
<td>36%</td>
<td>72%</td>
<td>84%</td>
</tr>
<tr>
<td></td>
<td>(123)</td>
<td>(478)</td>
<td>(588)</td>
</tr>
<tr>
<td>Retirement</td>
<td>64%</td>
<td>28%</td>
<td>16%</td>
</tr>
<tr>
<td></td>
<td>(222)</td>
<td>(184)</td>
<td>(111)</td>
</tr>
</tbody>
</table>

Note: The pension regimes correspond to slight modifications in the eligibility requirements for senior status. Number in parentheses corresponds to number of observations.
Figure 3: Aggregate annual cases terminated on the merits, U.S. circuit courts (1980–2002).

Figure 4: Average annual caseload, U.S. circuit courts (1980–2002).
judges, resulting in a greater percentage of cases being adjudicated by senior judges.

Circuit courts’ growing reliance on senior judges to adjudicate cases reflects a secular trend, but it is important to note that circuits dramatically vary from one another. These variations also reflect distributional shifts over time, as illustrated by Figure 5. In 1982, the distribution was skewed toward limited involvement by senior judges: nine of the 12 circuits relied on senior judges to adjudicate 10 percent or less of their appeals. In 1992, the distribution was more normal: senior judges in eight circuits adjudicated between 10 and 20 percent of the appeals. By 2002, the distribution looked more bimodal: a third of the circuits relied on senior judges for 10 percent or fewer of appeals, half relying on them for 20 or more percent.

The variation in the number of senior judges within each circuit accounts for much of this trend.

As illustrated by Table 8, some circuits have a greater need for senior judges to hear appeals, based on the number of vacancies of authorized (active) judgeships.

The Sixth Circuit in 2002, for example, had more senior judges (12) than it did active judges (8), due to multiple retirements and delays in the judicial confirmation process. The D.C. Circuit had four of their 12 authorized judgeships vacant in 2002, while two of the judges who had stepped down from active status remained on senior status. Vacancies alone, however, were not a consistent predictor for the number of senior judges: the Seventh Circuit in 2002 had no judicial vacancies, yet still had four senior judges.

How do all of these figures translate into individual judges’ adjudication of cases? Based on the number of active and senior circuit judges and their respective caseloads, the average senior circuit judge in 2002 handled a caseload equivalent to 33 percent of that of an active senior judge. The average per capita contribution measure remained generally constant, with most years between 1980 and 2002 falling within a few percentage points on

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61 This year was chosen, in part, because it was the first year that the Eleventh Circuit was in existence.

62 The delay in hearings was attributed to Sen. Carl Levin (D-Mi), who was unhappy with the way Clinton judicial nominees were treated by the Republican-led Senate Judiciary Committee. See Jeffrey Hadden, Politics Holds Justice Hostage: Partisan Haggling Creates Vacancies in Federal Courts Judicial Vacancies, Detroit News, Nov. 25, 2001, at A15.
Figure 5: Senior circuit judges’ aggregate contribution to circuit caseload (1982, 1992, 2002).
either side. As one might expect, there was considerable variation across circuits, both within and across years. 

Although the data prevents identification of variation in caseload across individual senior circuit judges, the survey allows a snapshot of individual caseloads of senior district court judges. Senior district judges appear to be carrying a proportionally heavier caseload than their counterparts on the circuit court. Of the responses, the reported average caseload was 63 percent. The distribution, illustrated by Figure 6, is (weakly) bimodal, with 35 percent of senior judges responding that they heard between a 26 to 50 percent active caseload, and 31 percent responding that they heard a caseload above 75 percent. A surprisingly high percentage (23 percent) reported still hearing a full caseload.

As with the circuit courts, there is considerable variation in the number of senior judges across districts, as based on a sample of district courts in 2000.

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63Unfortunately, given the nature of the data, it is not possible to identify variation in caseload across individual senior circuit judges.

64The survey was sent out to 332 senior federal district judges, of who 183 (55 percent) returned the survey. Of this subgroup, 158 surveys responded to this question.
Variation on the district court is not fully explained by judicial vacancies. The Northern District of Oklahoma, for example, has a high percentage of both senior judges and judicial vacancies. Conversely, the Southern District of New York has nearly the same number of senior judges as it does active judges, even though there are no vacancies. And, unlike its circuit

**Table 9:** Variation in Presence of Senior and Active Judges, Sample of U.S. District Courts (2000)

<table>
<thead>
<tr>
<th>Court</th>
<th>Senior Judges</th>
<th>Active Judges</th>
<th>Authorized Judgeships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama, S.D.</td>
<td>5</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Arizona</td>
<td>8</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>California, N.D.</td>
<td>7</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>10</td>
<td>13</td>
<td>15</td>
</tr>
<tr>
<td>Florida, S.D.</td>
<td>8</td>
<td>16</td>
<td>17</td>
</tr>
<tr>
<td>Georgia, N.D.</td>
<td>6</td>
<td>11</td>
<td>11</td>
</tr>
<tr>
<td>Illinois, S.D.</td>
<td>3</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>New York, S.D.</td>
<td>23</td>
<td>28</td>
<td>28</td>
</tr>
<tr>
<td>Ohio, N.D.</td>
<td>7</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>Oklahoma, N.D.</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Pennsylvania, W.D.</td>
<td>7</td>
<td>7</td>
<td>10</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Texas, N.D.</td>
<td>5</td>
<td>11</td>
<td>12</td>
</tr>
</tbody>
</table>

**Figure 6:** Percent active caseload adjudication, senior district court judge survey response (2004).

Survey question: Senior district judges were asked, “What percentage of a full caseload (cases heard by active judges in your district) do you preside over annually?”

Variation on the district court is not fully explained by judicial vacancies. The Northern District of Oklahoma, for example, has a high percentage of both senior judges and judicial vacancies. Conversely, the Southern District of New York has nearly the same number of senior judges as it does active judges, even though there are no vacancies. And, unlike its circuit
counterpart, the District of Columbia District Court had several of its elder judges opt for senior status.

One must be cautious, of course, about drawing strong inferences from these summary statistics. Many factors, individual and institutional, contribute to any individual judge taking senior status. Although the number of judicial vacancies taken alone is not a good predictor of the number of senior judges, they, in conjunction these other factors, may influence when judges take senior status and ultimately leave the bench. For example, many senior judges who responded to the survey perceived a burgeoning caseload within their court, even when all authorized judgeships were filled.

Nevertheless, the difference in caseload adjudication between circuit and district judges is considerable, with district judges hearing on average a one-third greater caseload. There are two possible explanations: one institutional and the other individual. The institutional explanation is that the nature of appellate jurisdiction makes it easier to control workload. Because cases are placed on the calendar well in advance and oral argument routinely takes only one day, senior circuit judges can more easily anticipate not merely how long they will work, but also when. By contrast, the nature of trial work is less predictable, the indeterminacy of which may compel senior judges to actually work more than they might otherwise. The individual explanation is that circuit and district judges are different in their inner composition, which motivates the latter group to decide to work more than the former, even during senior status.65

V. The Political Economy of Older Federal Judges

A. Trends in Judicial Status

As discussed in Section IV, when judges become eligible for their pension, they are confronted with three employment alternatives: remain on active status, retire, or take senior status. The threshold question is whether there

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65One must view the district court results with some caution since they represent judges who returned the responses, a potentially nonrandom sample. The judges returning the responses were on average 75 years of age, a statistically significant difference of 2.5 years younger than the judges not responding to the survey. But there was no statistically significant difference between the two groups on other characteristics, such as gender, ethnicity, years of active service, and age when taking senior status.
are observable trends when pension-eligible judges decide to change their employment status. Figure 7 provides a graphical representation of the time duration before judges make decisions involving senior status. In each part of the figure, the lighter line represents the number of pension-eligible judges on the bench for that given unit of time (as shown on the right-side y-axis); the darker line represents the percentage of judges who decide to change their employment status in that given period, either by taking senior status or retiring (as shown on the left-side y-axis in each figure). The non-shaded regions represent 95 percent of the total number of observations, meaning that the shaded regions, notwithstanding the higher rates of transition, account for only 5 percent of the total observations. The figure combines district and circuit courts, but the trends are similar for each level.

Figure 7A shows the transition of pension-eligible judges from active status to senior status. The percent taking senior status in their first year of eligibility is 35 percent, and the total number of judges electing this option (446) represents over 40 percent of judges taking senior status across all years of eligibility. Over 60 percent of pension-eligible judges take senior status in their first or second year of eligibility, and 80 percent in the first five years. Of course, a small fraction of judges remain on active status for several years after qualifying for senior status.66

After judges elect to take senior status, the retirement rate (as shown in Figure 7B) is fairly low for the first 15 years, and then slowly increases. It is important to remember that the graph represents judges at a minimum of 65 years old, and the increase in retirement rates corresponds to judges typically in their 80s or older. For this reason, a likely explanation for the retirement rate among senior judges would be issues of health.

Finally, Figure 7C combines Figure 7A and Figure 7B to show the retirement rate of all pension-eligible judges, regardless of whether they first elect to take senior status. Although nearly all judges opt for senior status shortly after vesting in their pension, almost all remain on the bench in some capacity until shortly before death. This provides direct counterevidence to the claims that federal judges are leaving the bench in greater numbers.67 Table

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66For example, Judge Joseph Woodrough of the U.S. Court of Appeals–Eighth Circuit took senior status in 1961 at the age of 88.

Figure 7: Changes in judicial status for pension-eligible federal judges.

A

Active Status to Senior Status
All District and Circuit Judges (1919–2002)

B

Senior Status to Retirement
All District and Circuit Judges (1919–2002)

C

Active Status to Retirement
All District and Circuit Judges (1919–2002)
10 reports senior judges’ mortality rates after retirement. When senior judges at both the circuit and district level finally retire, the overwhelming percentage die within a year of doing so.

The causality between death and retirement is difficult to identify; however, it is clear that senior judges take the concept of lifetime tenure seriously. As one respondent of the survey wrote, “I will die while on senior status—if still competent.”

Because the preceding figures show only the temporal relationship between pension qualification and senior status or retirement rates, they leave unanswered what effect other factors, for example, political, may have on judges’ employment decisions. Senior district judges were asked whether political factors influenced their decision to take senior status. As with the other questions in the survey, this question was open ended and did not refer specifically to the president or Senate, or the broader political environment.

The large majority of respondents, as shown in Table 11, responded in the negative. Most judges simply responded, “No,” while a few took umbrage at the notion that a member of the federal judiciary would be politically motivated in any sense. A few noted that they had an opportunity to leave during a “favorable political environment” but decided against doing so. For

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68The causal relationship between death and retirement is something that labor economists have explored. See Alex Mas, The Effect of Retirement on Death Among Federal Judges (unpublished manuscript, 2004).

Table 10: Mortality Trends for Senior Judge

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Senior Status</td>
<td>Retirement</td>
</tr>
<tr>
<td>Died Within 1 Year</td>
<td>4%</td>
<td>93%</td>
</tr>
<tr>
<td>Lived Beyond 1 Year</td>
<td>96%</td>
<td>7%</td>
</tr>
</tbody>
</table>

Note: Number in parentheses corresponds to number of observations.
those who cited a political influence, a few judges responded candidly. “I
wanted my replacement to be appointed by President [George W.] Bush,”
wrote one senior judge. Most, however, were demure in their response. One
respondent replied, “I don’t recall any political factors that influenced my
decision, although if President Reagan, Bush I or Bush II had been in office
I am sure I would have deferred assuming senior status.” Political influences,
another respondent wrote, were “[v]ery little, but coincidentally the Presi-
dent at the time happened to be of my party affiliation and this made the
decision easier.”

Other judges noted political factors other than the nomination of their
successor, namely, the seemingly increased institutional battles waged
between the Senate and the federal judiciary. One responded, while
acknowledging his desire to have his successor be appointed by a “president
of the same party,” that he was primarily motivated by the “antipathy Con-
gress exhibits towards federal judges in everything from sentencing to
repeated denials of a pay increase.” Another respondent dryly wrote: “If you
consider the animosity of Congress toward the judiciary as a political factor,
it had great influence.”

To more rigorously test for the effect of political, as well as institutional
and demographic, factors on senior status, I constructed a series of discrete
duration models that include these factors in addition to pension qualifica-
tion. The results, reported in Table A1 of the Appendix, show that individ-
ual, institutional, and political factors have a consistently small and, in nearly
every instance, statistically nonsignificant effect on each of the competing
risks regressions. This is true for both the circuit and district level. Stated
more simply, the strongest predictor for when a judge takes senior status
is to look at the year in which he or she becomes eligible, and the best
predictor for when a senior judge retires from the bench is to look at the
year in which he or she dies. All other factors are, by comparison, not
significant.
B. The Politics of Senior Status and Retirement

Given the perceived increased politicization of the judicial confirmation process, one question that arises is whether senior judges have any effect on the selection of their successors. As the number of senior judges grows, so too does the number of judicial vacancies. Figure 8 shows that the convergence in the number of active and senior circuit judges has in recent years been hastened by the number of unfilled vacancies.

The question that naturally emerges is whether the decision by a judge to opt for senior status over retirement (or vice versa) somehow affects the confirmation process.

Table 12 suggests that senior status appears to affect the confirmation process for both circuit and district judges. The patterns for the circuit court show that the length of vacancy is slightly shorter when the vacancy is created by senior status, as well as the time between the vacancy opening and the nomination. The actual confirmation process, after the president formally submits the nomination to the Senate, is actually shorter when the vacancy is created by retirement. Each of these differences was statistically significant. By comparison, district court vacancies created by senior status take an average of three months longer to fill than vacancies created by retirement:
two months longer to nominate a candidate\textsuperscript{69} and one month longer in the confirmation process. But, unlike the circuit court figures, only the difference in the duration of confirmation was statistically significant.

As it turns out, the differences between active and senior judges, for both levels, merely reflect a time trend. The process of finding a successor once a judicial vacancy arises is taking longer now than it did before, but there is no statistically significant difference in whether the predecessor ended active status by taking senior status or retiring. The aggregate numbers are misleading because most judges today take senior status, whereas in earlier years most judges simply retired.

To more rigorously test for the effect of taking senior status, controlling for political, institutional, demographic, and temporal factors, I ran a series of ordinary least squares (OLS) regressions. The results, reported in Table A2 of the Appendix, show that after controlling for year, the effects of creating the vacancy by senior status—versus retirement—are small and not statistically significant for district court judges; for circuit judges, the effects

\textsuperscript{69} Most nominations are filled by the first nomination, but a considerable minority of them requires multiple nominations before one is confirmed.
are larger, but also not statistically significant. The differences in duration between vacancies created by senior status versus retirement were never particularly great. Rather, the disparity between the two reflects that in the first part of the 20th century, judges did not typically opt for senior status, while judges in recent years typically do. In short, the means by which older judges make a transition from active tenure—senior status or retirement—does not affect the confirmation process of their successors.

C. Understanding Judicial Tenure from the Perspective of Senior Judges

The empirical data show that judges take senior status shortly after becoming eligible, offering evidence that they prefer senior status to at least active status. But one of the most interesting, and as yet unexplored, aspects about senior federal judges is their decision to take senior status in the first place. Since pension-eligible judges are at least 65 years of age and have no real financial incentive to remain on the bench, why do they not choose to leave the bench altogether? Alternatively, if they really do enjoy being on the bench, why do they choose senior status, and thereby relinquish participation in issues of court governance? These questions cannot be adequately addressed by looking at the preceding biographical and caseload data; they are better addressed through the qualitative approach of a survey.

To date, there have been few surveys of federal judges, in large part because federal judges have been loath to comment on their institution in any nonformal proceeding. I sent out a short survey to all sitting senior circuit and district judges in the fall of 2003. To encourage response, I intentionally asked only a few questions on the survey and promised to keep all responses anonymous. But I also kept the questions open ended so as to promote candid responses.

Table 13 provides the aggregate demographic information for the survey responses from district and circuit court judges. The response rate for each court level was slightly greater than 50 percent. It is important to note that the responses that follow do not nec-

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essarily reflect the view of all senior federal judges, merely those who completed the survey.

Of the respondents, the aggregate demographic profile was similar across both groups. The average age of the senior judge respondent was 76 for circuit judges and 75 for district judges. Judges on both courts took senior status at roughly the same age (67 for circuit judges; 68 for district judges). As one might expect, women and minority senior judges comprised a small percentage of respondents, since the majority of judges fitting this profile were appointed in recent years and as such are not yet eligible for senior status. Lastly, consistent with the tables in the preceding section showing the tenure longevity of senior judges, the average judge has been on senior status since the mid-1990s.

Federal judges have a lifetime appointment and have sole discretion over when and whether to take senior status or retire; however, some judicial scholars have claimed that the expansion in senior status can be readily explained by judges adhering to institutional norms that encourages them to take senior status at their earliest opportunity. Hence, this was the first question that senior judges were asked, the responses of which are reported in Table 14.

Senior circuit and district judges differed greatly in their responses: most senior circuit judges did not perceive an institutional norm of taking senior status, while most district judges did. A few judges at each level expressed uncertainty. It is interesting to note that responses varied within individual circuits and districts on this point, meaning that judges within the same jurisdiction had different views on the same question.
1. Choosing Senior Status Over Active Status

The survey first asked, *Why did you take senior status rather than remain on active status?* The vast majority of judges provided a single explanation, with the remainder typically giving a second, and in a few cases, a third explanation.\(^72\) Although the survey was open ended, most of the responses were common across judges at both the circuit and district level, allowing for both individual and group analysis.

Figure 9A shows that most senior circuit judges reported choosing senior status over remaining on active status for one of three reasons: (1) to create a vacancy; (2) to allow more time for travel or hobbies; or (3) to work less than they did when they were active. These three reasons received the same percentage of responses: 22 percent. Judges expressed their concern about the growing caseloads on their circuits and believed, as one judge put it, that their circuit “needed the additional help.” A few circuit judges expressed their desire to slow down in their older years, while some judges expressed frustration with trying to stay on top of their burgeoning caseload as an active judge as a motivating factor. Taking senior status, as one judge reported, allowed “more time for reflection on the cases undertaken, less frustration in trying to keep up and more peace of mind.” Financial incentives, garnering 10 percent, were the next largest single reason for circuit judges choosing senior status over active status. They noted that taking senior status would allow them to begin collecting Social Security, while gaining exemption from certain taxes such as Federal Insurance Compensation Act (FICA).

\(^{72}\)In compiling the responses, each explanation was given equal weight, meaning that a judge who gave two explanations counted as two explanations.
Figure 9: Reason for taking senior status rather than remaining on active status.

Circuit judges also gave a scattering of other reasons for leaving the bench, ranging from teaching at a law school full time, traveling to other circuits, or working on special courts or foreign tribunals. One judge, however, felt compelled to step down from active status because of concerns over his ability to adjudicate certain cases. As he put it, “[I left active status
because of] my age and my questioning my ability to judge complicated multi-issues appeals.” A few judges explicitly cited politics as the motivating factor. One judge took senior status because the president and members of the Senate had intimated to [the judge] that doing so was the only way for another nominee to gain confirmation on the circuit. After this judge took senior status, that nominee gained confirmation. Another judge had grown weary of shifting judicial ideology on his circuit: “Given the ‘philosophical’ bent of [my] Circuit, I no longer felt I could make a difference. After twenty years . . . it was time to go.” Seven percent of respondents left this question blank.73

District judges gave slightly different responses to the same question, shown in Figure 9B. The most commonly cited motivation was to create a judicial vacancy (29 percent). Although most simply implied that they were concerned with adding a new member to the court, one district judge noted that his motivation was more strategic. By taking senior status while still chief judge of the district, he enabled a respected colleague to succeed him. Had the chief judge further delayed his decision, his colleague would have been too old to be eligible to become chief judge.

Compared to circuit judges, a higher percentage of district judges cited financial motivations (25 percent). One senior district judge admitted, “I [took senior status] purely for the money.” Another judge simply wrote “$.” A few respondents noted no longer having to pay state income or Social Security taxes, with more than one judge noting that taking senior status resulted in a tax savings of more than $20,000 annually. A considerable percentage also expressed their desire to work less (16 percent), or have more time for travel or hobbies (12 percent). Miscellaneous or other reasons accounted for 16 percent of the responses, while 2 percent of the returned surveys had this question blank.

In the other category, at least a few respondents communicated that they exercised their right as senior judges to excuse themselves from certain cases, such as habeas corpus, pro se, or death penalty, while being able to specialize in others, such as Social Security or ERISA cases. Like their colleagues on the circuit, one judge found that senior status allowed him to “give deserving cases more time,” while another similarly noted that senior

73The relatively high nonresponse rate of this and other survey questions is most likely attributable to the respondents failing to see them. These questions appeared on the second side of the two-sided survey form and a handful of judges left this side blank.
status was “[c]onsiderably less demanding in all respects,” and found the “[p]ressure much more manageable!” Another judge noted that since taking senior status, he “no longer read briefs at night.” Other district judges viewed senior status as an opportunity to visit other districts and circuits outside their own jurisdiction.

A few judges acknowledged that senior status precluded their continued involvement in administrative judicial matters, but considered it a fair tradeoff for a lower workload. At least one judge noted that the very reason he took senior status was to escape administrative duties. Other judges cited personal concerns, such as flagging health or a desire to spend more time with their spouse or family. Consistent with Boylan’s findings, at least two district judges took senior status in part because of their dislike of the federal sentencing guidelines.

2. Choosing Senior Status Over Retirement

The responses above come, perhaps, as no surprise, and merely reflect that judges prefer senior status over active status with respect to time, money, and flexibility. With this in mind, a more interesting question was then asked, Why did you take senior status rather than retire? (Figure 10A).

Over 30 percent of senior circuit judges responded that they liked being a judge and wanted to keep doing it. This answer is by no means inconsistent with their desire to work less when asked why they stepped down from active status. As one circuit judge wrote, “I still wanted to judge, but at my pace.” Another judge expressed his affinity for the bench in even stronger terms: “I love the work and hope to continue until my mind or heart goes.” Many were specifically drawn to the intellectual stimulation of the job. One circuit judge wrote: “The job is a great one. As Bork said of being on the Supreme Court, ‘an intellectual feast.’ ”

The next most common response by circuit judges was their desire to help their respective courts (25 percent). Many of the responses reflect that judges were motivated by the remedial concern of providing a helping hand in adjudicating cases, but others spoke of a broader civic duty as well. One circuit judge replied, “I like being part of the institution, and continuing to make a contribution to my country.” Most of the responses with multiple explanations cited both their love of the work and their desire to help the

74See text accompanying note 37, Section III, supra.
court. One respondent wrote, “I enjoy what I am doing and feel that I am contributing to our justice system and our country.” Another respondent expressed his affinity for “being part of the institution.”

Several judges responded that senior status afforded them a way to maintain structure in their lives and to keep active. Some judges expressed this desire in almost puritanical terms—“to continue a lifelong habit of productive work,” as one judge wrote. Another judge wrote: “Retirement is tan-
tamount to vegetating. I wanted to keep my brain active.” Other judges took a more light-hearted approach: “I didn’t want to go cold turkey,” one judge wrote. Another judge simply wrote, “I have no hobbies.”

Some of the respondents expressed a reluctance to seek work outside the judiciary. One judge had declined multiple offers to join prestigious law practices because he felt his experience as a federal judge was “too valuable to waste.” Another thought he was simply “too old to return to the practice of law.” Another judge eschewed private practice because he “disapprove[d] of retired judges appearing in court” from his days as an active judge.

Like their counterparts on the circuit, senior district judges also cited their enjoyment of being a judge as the primary motivation for remaining on senior status rather than retire. Figure 10B reveals that 38 percent of responses fell under this category. For many, they had always loved being a federal judge. By allowing a reduced caseload with discretion over the types of cases they heard, senior status provided an ideal balance between work and leisure. One judge wrote, “I love my job. Nothing I am doing ‘on the outside’ can compare with the challenge, the interest, and the learning I enjoy on the bench. . . . I am able to devote my work on cases [which are] interesting to me without handling cases I do not prefer to handle.” Another judge replied that he found his many years on the bench worked in his favor. “Experience counts!” he remarked, also noting that “[a]ttorneys seem more deferential because of my age and maybe experience.”

The ability to opt out of certain types of cases was clearly an incentive for some district judges. “After 33 years, I think I am entitled to deal with cases with lawyers and not put up with the fools who bring pro se cases,” wrote one district judge. Another responded that he enjoyed being selective in the cases he heard: “no ‘pro se’s,’ habeas, or patent cases.” By contrast, one respondent proudly noted, “I accept the draw on all cases no matter the characteristics of them.”

Again, like senior circuit judges, many senior district judges (20 percent) remained on the court because of their commitment to public service. One judge noted his satisfaction in “relieving my colleagues of a back-breaking caseload,” a sentiment echoed by others. Another district judge had planned on retirement, but replied that “9/11 changed my plans from retirement to a desire to continue to serve my country.” Some pointed to a moral obligation to remain on the bench, one noting that after qualifying for senior status after only 10 years of service—the minimum years of service under the Rule of 80—“I felt I owed some additional years in service to justify my retirement.”
A fair number cited that senior status allowed them to remain busy. One senior judge stated he would remain on the bench for as long as he received feedback that he was an effective jurist.

Every three years, the Clerk, at my request, sends a letter to all of the attorneys who have been in front of me in the last three years, asking 20 questions. The survey is anonymous, the lawyers don’t sign it and it is returned to the Clerk’s office with instructions that I will not see it, but only the composite. As long as those responses are positive, and I can assist, I will do so.

As with senior circuit judges, some senior district judges expressed their reluctance to join the ranks of the retired. Many took a light-hearted approach, intimating that they did not know what they would do with all the free time. One judge wrote that he remained on the bench because of his “[w]ife’s antipathy to my quitting outright and being underfoot,” while another commented, “[w]hat else would I do if I wasn’t a judge? I don’t play golf.” Another judge planned on retiring, but was convinced to remain on the bench by his judicial secretary and clerk—and his wife. Similarly, another respondent wrote, “I still have my marbles—too young to quit—my wife wants me out of the house.”

District judges also articulated their reservations about entering (or reentering) private practice. Some felt they were too old to make the transition, while others felt doing so would appear unseemly. A senior judge in the South wrote how he “did not want to prostitute my Article III background for dollars with the firm.”

4. Job Satisfaction

The survey did not explicitly ask senior judges about their level of happiness on the bench, but most judges revealed this over the course of their responses. In so doing, they compared senior status to their tenure as active judges as a baseline comparison, rather than what they would be doing had they retired from the bench. The general sentiment of the respondents on both the circuit and district court was one of greater job satisfaction. For many judges, senior status provided them with the ideal balance of work and leisure. One district judge spoke fondly of being able to begin his workday a bit later in the day, while another appreciated “hav[ing] the liberty of taking time out of the courthouse for personal and family activities to a greater extent than would be possible if subject to the same constraints as are active judges.” For some judges, senior status was something they had
long anticipated. One respondent wrote: “When I came on the bench in [the fall of] 1981, I was of the view that senior status was one of the substantial benefits available with the position.”

A few respondents, however, found senior status a disillusioning experience. This was particularly true of judges who had been on senior status for several years. One circuit judge expressed ambivalence over his decision to take senior status rather than accept an offer to join a law firm, a more lucrative option: “in light of the economy and developments in federal government, it may have been a mistake,” he lamented. One senior district judge regretted turning down offers to join a private firm, calling his decision to take senior status “a financial mistake.” One of the younger senior judges replied that in light of his reservations about senior status, he was currently considering offers for “private practice, arbitration, and mediation.”

Generally, most of the critical comments about senior status came from district judges. A few found being a senior judge was isolating. This is perhaps because senior district judges, by virtue of being removed from administrative matters, are effectively removed from the primary formal interaction with their colleagues on the court. Senior circuit judges, by comparison, continue to hear cases on panel (and in some circuits are allowed to sit en banc if they were on the original panel on appeal).

Others felt that as senior judges they were no longer afforded the same treatment as active judges. One district judge complained of being relegated to smaller chambers. Another district judge reported that senior judges were “very much left ‘out of the loop’ by active judges.” Other respondents suggested that that the differences between active and senior judges were more pervasive. “Active judges do not treat senior judges with due respect,” wrote one judge. Another judge lamented that the federal judiciary had changed for the worse: “Although I was formerly Chief Judge, younger active judges do not listen to my views on administrative matters. The collegiality is not the same.”

But overall, most judges, even those expressing criticism or ambivalence, were satisfied with their decision to become a senior judge. They valued something about the position, independent of the recompense. After all, the pension system already provided them with lifetime compensation. For some, it was continuing to be a part of an important institution. For even more, it was the sheer joy of being a federal judge. “I have a deep and abiding regard and love for the federal judiciary and wish to serve as long as possi-
ble,” wrote one judge. “There is nothing I’d rather do than continue to judge,” commented another. One judge simply wrote: “Best job in the country.”

VI. ARE FEDERAL JUDGES LIKE EVERYONE ELSE?

The preceding empirical and qualitative analysis shows that older federal judges closely coordinate their decision to end active tenure on qualifying for their pension. At the same time, almost all of them choose to remain on the bench on senior status rather than merely “take the money and run.” Nearly all who do become senior judges remain on the bench for as long as they physically are able, motivated—as the survey responses suggest—by a deeply rooted affinity for the federal bench and a continuing sense of public service.

These findings advance our understanding not merely of senior judges, but of federal judges generally. Federal judges are deeply committed to public service. Admittedly, judges, unlike the president and members of Congress, enjoy lifetime tenure and do not have to worry about removal from their positions. Like their counterparts in the other branches, judges have ample opportunities to make more money in the private sector, yet nearly all of them choose to remain. Although one might argue that younger judges remain merely to qualify for their pension, one cannot easily explain why they choose to remain after they vest. This phenomenon of working well into the latter stages of one’s life raises broader issues of working, aging, and retirement.

Comparing federal judges to other workers is a challenging task. First, the employment patterns of older workers are difficult to discern. Some studies show that older workers are often encouraged or induced to retire, even before the age of 65.75 Both the public and private sectors have contributed to trends in earlier retirement: the private sector through economic restructuring or early retirement, the public sector through pension and Social Security. Conversely, other reports document how many older workers

75See Barbara Crossette, Ideas & Trends: Great Expectations; The Retirement Mentality vs. Reality, N.Y. Times, Aug. 15, 1999, Sec. 4 (describing the trend toward earlier retirement among the working population).
choose work over retirement. In many cases, workers accept retirement packages or pensions offered to them by their employers, only to return to the labor force working for a different employer. Some were motivated by restlessness; others by concerns that their pensions would prove inadequate. Labor economists use the term “bridge jobs” to describe the transition between an older individual’s primary employment and permanent withdrawal from the labor market. According to the Employee Benefit Research Institute, 28 percent of retirees in 2003 were employed in a bridge job. Some employers have actively sought to hire older workers, citing that they are loyal, responsible, and eligible for Medicare—thereby eliminating the need for company-paid health coverage.

When comparing senior judges to other similarly highly-skilled individuals, patterns emerge suggesting that the latter, like the former, are interested in remaining on the job. A recent study by Orley Ashenfelter and David Card examined the effect of mandatory retirement on university professors.

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76To address the financial demands imposed by a aging population with increasingly longer life expectancy, governments in both the United States and elsewhere are increasing the age before individuals vest in pensions or social programs designed for the older population. See Hamilton, infra note 78.

77See Martha McNeil Hamilton, Embarking on a Second Act; More Older Workers Are Skipping Retirement to Try New Careers, Wash. Post, Apr. 19, 2003, at D12 (discussing the trend of older Americans to continue working after traditional retirement age).

78See Constance L. Hays, Out of the Firehouse, Into a Richer Retirement; Pension Quirk Leads to Exodus, and Some Regrets, N.Y. Times, Feb. 19, 2003, at Sec. B, p. 1 (describing how middle-aged firefighters were induced by lucrative pensions to take early retirement, only to seek employment afterward).

79See Hamilton, supra note 78; cf. Leslie Wayne, Turmoil at Worldcom: Retirement Money: Irate at Scandals and Big Losses, Pension Funds Are Going to Court, N.Y. Times, June 28, 2002, at Sec. B, p.1 (describing how pension funds heavily invested in corporations such as Worldcom have suffered tremendous losses).


81Id.; a copy of the study can be found at <http://www.ebri.org>.

82See Julie Flaherty, Earning It: A Company Where Retirement Is a Dirty Word, N.Y. Times, Dec. 18, 1997, at Sec. 3, p. 1 (describing the Vita Needle Company, where the average age of the 35 employees was 73 years old).
Due to a special exemption from the 1986 Age Discrimination in Employment Act, universities could require, until 1994, their professors to retire at age 70. Once the exemption had expired, the retirement rate of professors aged 70 and 71 dropped by two-thirds, suggesting that many professors preferred remaining a full faculty member rather than becoming emeritus. This is particularly true of professors at elite research universities.

Workers in other high-skilled professions subject to a mandatory retirement have sought to increase the retirement age. Older airline pilots, for example, have tried—without success—to raise the retirement age from 60 to 65 years of age. Similarly, state judges in New York have sought—also without success—to raise the mandatory retirement age from 70 to 76 years of age.

The similarities of the federal judiciary to other professions suggest that a desire to continue working in one’s latter years is not a distinctive feature of federal judges. Although beyond the scope of this article, this motivation may come in part from older individuals’ desire to maintain structure in their lives, for both professional and personal reasons. Many of the judges in the survey voiced their desire to remain active or maintain a sense of purpose in their lives. The scholarship on retirement supports the view that retired individuals have a lower sense of personal control than do their

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83 Orley Ashenfelter & David Card, Did the Elimination of Mandatory Retirement Affect Faculty Retirement?, 92 Am. Econ. Rev. 957, 976 (2002).

84 See Samuel Weiss, Retirement Rules Gone, the Ivory Tower Goes Gray, N.Y. Times, June 19, 2002, Sec. B, p. 7 (citing the Ashenfelter-Card article, supra note 83, and describing how the retirement rate for older professors is lower at top research universities).

85 The Federal Age Discrimination in Employment Act of 1986 has abolished mandatory retirement for most professions.

86 See Lawrence Zuckerman, Pilots Press to End Forced Retirement at 60, N.Y. Times, May 17, 1998, at Sec. 1, p. 16 (describing the efforts by older pilots to raise the mandatory retirement age).

87 Darice Bailer, Judges Seek to Alter Forced Retirement, N.Y. Times, Nov. 3, 1996, at Sec. 113WC, p. 14 (describing efforts by older state judges to create a commission to increase the mandatory retirement age for state judges). The retirement age remains 70 years of age. For a discussion of each state’s judicial selection process, including mandatory retirement ages, see the American Judicature Society website <http://www.ajs.org/js/>.
counterparts who continue working. A few judges noted that their spouse encouraged them to continue working. Perhaps these judges anticipated that the transition to retirement would adversely affect their relationship with their spouse, something studies have shown often occurs.

Ultimately, one must exercise caution when extending the comparison too far. Federal judges are indeed unique, enjoying lifetime tenure, a guaranteed (and arguably generous) pension, continued influence, and autonomy in decision making. Each of these factors strongly influences judges’ experience on the bench and undoubtedly affects their decision whether to remain as they grow older. Although other professions may share in one of these characteristics, very few—if any—possess all of them and for that reason any comparison to other professions is ultimately bounded. It is impossible, for example, to know how federal judges would behave in the absence of lifetime tenure, pension, or authority. It is likely, however, that their views toward—and their participation in—senior status would be different.

VII. CONCLUSION

In “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does),” Richard Posner argues that the institutional design of the federal judiciary allows judges, when adjudicating cases, to follow their “personal convictions and policy preferences.” The same could be said for federal judges when regarding their employment on the bench. They decide whether to accept the job and, on qualifying for the pension, the terms on which they continue to serve and, ultimately, leave.

This article has focused on the evolution of the federal judiciary and the motivations behind judges’ decision, on appointment, to remain on the

88See, e.g., Catherine E. Ross & Patricia Drentrea, Consequences of Retirement Activities for Distress and the Sense of Personal Control, 39 J. Health & Soc. Behav. 317 (1998) (comparing the psychological states of older individuals based on whether they were retired or working).

89See, e.g., Phyllis Moen, Jungmeen E. Kim & Heather Hofmeister, Couples Work/Retirement Transitions, Gender, and Marital Equality, 64 Soc. Psych. Q. 55 (2001) (finding that the transition to retirement creates marital conflict in the short run, but retirement promotes greater gender equality over the long run).

90See Posner, supra note 6, at 40.
bench. For this reason, it has left unanswered several questions, most notably whether the existing system makes efficient use of limited resources. If the goal is to increase judicial productivity, judges’ strong participation in the judicial pension program suggests that they would remain on the bench on active status even if the qualification requirements were extended a few additional years. Alternatively, holding the current pension system intact, it may be worth examining the efficacy of senior status. Although senior judges are, as Judge Posner states, working for free, they expend considerable resources: judicial chambers, secretaries, judicial clerks, and travel expenses, a considerable expense of upward of $1 million annually. These are largely fixed costs, however, and having a judge perform a reduced caseload may not be cost effective, even if the services are provided “for free.” The findings in this article suggest that these lines of research would be worth pursuing.

APPENDIX: DISCRETE DURATION MODEL OF CHANGES IN JUDICIAL EMPLOYMENT STATUS

Because Figure 5 shows only the relationship between years after pension qualification and senior status or retirement rates, it leaves unanswered what effect other factors—for example, political and demographic—may have on judges’ employment decisions. I do this empirically using a series of discrete duration models that include these factors in addition to the ones already presented. The duration model is an appropriate approach to study judicial turnover rates because we are trying to understand the factors that influence judges to select senior status, and ultimately retire. I am primarily

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91See A. Leo Levin & Michael E. Kunz, Thinking about Judgeships, 44 Am. U. L. Rev. 1627, 1631 (1995) (citing statistics from the mid-1990s stating that the annual recurring cost of a circuit or district judgeship exceed $700,000).

92The classic example is predicting how long a bulb remains lit before burning out or the amount of toxins before a laboratory rat develops symptoms of a disease. For a discussion of the development of these models, see David Roxbee Cox & D. Oakes, Analysis of Survival Data (1984); Oakes Ross L. Prentice & John D. Kalbfleisch, The Statistical Analysis of Failure Time Data (1980). Duration models—sometimes termed hazard models—are an approach developed by biostatisticians and engineers to understand the determinants of how much time elapses before an event occurs. Economists also use this approach to understand, among other things, trends in labor trends, such as when individuals find full-time employment or leave the workforce.
interested in modeling the probability of a judge choosing either senior status or retirement, for which I construct the following probit model.

\[ P(y_i = 1|x_i) = \Phi[X(i, a, c, t)\beta], \]

where \( y_i = 1 \) is the probability that judge \( i \), aged \( a \) and serving on court \( c \), vacates his or her seat before the start of the next calendar year, conditional on having remained on the bench up to age \( a \). The term \( X(i, a, c, t) \) represents a set of observed characteristics of judge \( i \) on court \( c \), \( \beta \) is the coefficient vector, and \( \Phi \) is the cumulative distribution function of the standard normal distribution. More simply stated, the model looks to explain what factors influence judges’ decision to vacate their seats.

The variables of the model fall into four categories: individual, institutional, political, and control variables. The individual factors describe the number of years the judge has served on the bench, either in active or senior status (Years of Federal Judicial Service), and identify the judge’s gender and ethnic origin. The institutional variable—Percentage of Authorized Judgeships Filled in Judge’s Jurisdiction—measures the percentage of authorized judgeships filled for each court in each year.\(^93\) This variable helps identify whether judges consider the effect of their leaving active status on their remaining colleagues, as it relates to workload.\(^94\)

The third category is broadly termed Political Factors, including both judicial and executive politics. President in Office a Democrat measures whether judges generally are more inclined to vacate their seat during Democratic presidential administrations. Democratic Senate Majority measures whether judges are more inclined to vacate during Democratic control of the senate. Democrat-Appointed Judge captures whether the judge was appointed by a Democratic president. The political unity interaction term, Judge and President of Same Political Party, looks at whether judges are more likely to vacate

\(^93\) For example, in 2002, 96 percent (27 out of 28) of the authorized judgeships in the Southern District of New York were filled.

\(^94\) It is unclear, however, what effect, if any, this factor would have. If there are other vacancies already on the district or circuit, an active judge may be less inclined to leave the bench, given that it would likely generate more work for the remaining active judges. Just as plausible, however, a judge with the same institutional concerns might be inclined to leave the bench if he or she were to continue hearing cases as a senior judge, while making way for the addition of another active judge via judicial confirmation; in that case, the caseload per judge would actually decrease. To further complicate matters, a judge’s willingness to create a vacancy may very well be affected by his or her annual caseload.
their seats when a politically like-minded president is in office, a theory supported by the existing scholarship on judicial retirement. The final political variable,  *Percentage of Active Judgeships Filled in Judge’s Jurisdiction Appointed by Democratic President*, measures the percentage of active judges sitting in each court appointed by Democrat presidents.\textsuperscript{95} This variable explores the degree to which judges consider the political balance of their respective court in their decision to give up their seat.\textsuperscript{96} Lastly, I include a series of time dummies to control for the given decade.

\textsuperscript{95}Again using the 2002 Southern District of New York as an example, 81 percent (22 out of 27) of the active judges were appointed by a Democratic president.

\textsuperscript{96}One hypothesis is that judges are disinclined to abdicate their seats if they believe doing so would shift the political balance of their court in an undesirable direction or exacerbate existing political disparities. The significance of this may be smaller for district court judges, who hear cases on an individual basis, but have greater relevance for circuit courts (via three-judge panels and the occasional en banc cases) and the Supreme Court.
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</tr>
<tr>
<td>Appointed by Democratic President</td>
<td>0.0004</td>
<td>0.007</td>
</tr>
<tr>
<td></td>
<td>(0.0004)</td>
<td>(0.007)</td>
</tr>
<tr>
<td>Control for Decade</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>N</td>
<td>10,984</td>
<td>3,309</td>
</tr>
</tbody>
</table>

Note: Coefficients report marginal effects at the mean. Standard errors are in parentheses. Sample is restricted to judges who are eligible for senior status.
Table A2: Parameter Estimates for Departure from Active Status, Judges Qualified for Senior Status (1919–2002)

<table>
<thead>
<tr>
<th>Variable</th>
<th>District Judges</th>
<th>Circuit Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Time Judgeship Remains Unfilled</td>
<td>Time Between Judgeship Vacancy and Nomination</td>
</tr>
<tr>
<td></td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td>Taking Senior Status</td>
<td>-0.053 (0.044)</td>
<td>0.061 (0.043)</td>
</tr>
<tr>
<td>Female</td>
<td>0.170 (0.096)</td>
<td>0.136 (0.092)</td>
</tr>
<tr>
<td>Nonwhite</td>
<td>0.153 (0.096)</td>
<td>0.128 (0.093)</td>
</tr>
<tr>
<td>President from Different Political Party Than Judge</td>
<td>0.024 (0.044)</td>
<td>0.023 (0.043)</td>
</tr>
</tbody>
</table>

Note: Standard errors are in parentheses. The dependent variables, measuring time (1) to fill vacancy, (2) between vacancy and nomination, and (3) between nomination and confirmation, are expressed in terms of year. The coefficient, Taking Senior Status, reports the relative difference compared to the other employment alternative, Retirement.