



# Senior Judges of the Federal Courts

*Their Choices and  
the Consequences*

BY JUDGE ROYAL FURGESON

**FEDERAL COURTS RESOLVE A MINISCULE NUMBER OF THE CASES FILED ACROSS THE UNITED STATES. STATE COURTS DISPOSE OF THE VAST MAJORITY.**

Under such circumstances, it might seem out of proportion to devote an article to federal court senior judges, who compose such a tiny part of the nation's judiciary.<sup>1</sup> Yet, there are some reasons to do so.

For one thing, the work of the federal courts is essential to the proper functioning of the federal government, which makes attention to federal judges an important concern. For another, there are trends afoot in the federal judiciary regarding senior judges that may have substantial future impact on how the federal courts meet their obligations to America's justice system.

With this rationale, my purpose here is to discuss the choices that federal judges confront when they become

is excellent. And there are no elections. For one trained in law, it is difficult to imagine a better opportunity.

Judges eligible for retirement who remain on the bench, either in active status or as a senior judge, remain subject to limits on outside-earned income, though the restriction on teaching income is lifted for senior judges. As before, they cannot practice law.

Judges who retire are no longer subject to such limits, however. They can retire, receive their current salary as an annuity for the rest of their lives, and make more money by returning to practice or taking other employment. The only financial deterrent to full retirement is that senior judges continue to receive Cost of Living Adjustments while retiree compensation is fixed. But in recent years, that has not been much of a deterrent to full retirement, since COLAs have been circumscribed.

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eligible for senior status, and depending on the choice, the consequences that flow therefrom. Much of this article is informed by another recent article on the subject, hereinafter referred to as the Burbank article.<sup>2</sup>

**RETIRE OR TAKE SENIOR STATUS?**

Before retiring or taking senior status, a federal judge must be at least 65 years old and meet the Rule of 80, which means the combination of a judge's age and years of service must be 80.

When federal judges become eligible and retire, they receive an annuity equal to their salary at retirement. Today, that amount is \$174,000 for district judges and \$184,500 for circuit judges. While retirement at full pay is a special benefit that few people share, most federal judges do not choose the opportunity, according to the Burbank article.<sup>3</sup>

Instead, historically, they have chosen senior status. There are clear reasons why. The work is important, challenging, and interesting. The caseload can be reduced, although many senior judges continue to carry full loads. One's colleagues are exceptional and helpful. Staff support

Before an active or senior federal judge can receive a COLA in any given year, Congress must authorize it. In the past 20 years, Congress has, from time to time, either not authorized a COLA or has authorized a COLA at a percentage smaller than the COLA given to other federal employees. As a consequence, judicial salaries have stagnated. For example, if a federal judge appointed in 1992 were given the same COLAs received by other federal employees between 1992 and 2011, the judge's yearly salary would now be significantly higher. Instead, today's actual pay is 14 percent behind inflation.<sup>4</sup>

The fact that Congress has not provided COLAs has been the subject of a lawsuit brought by individual federal judges,<sup>5</sup> complaining that because Congress promised COLAs in the Ethics Reform Act of 1989, its failure to do so thereafter violated the U.S. Constitution's Compensation Clause.<sup>6</sup> The federal circuit agreed, and the case is now on remand and also subject to appeal.

How this suit concludes remains to be determined. Nevertheless, the federal circuit's en banc decision that Congress has wrongfully denied COLAs to federal judges has generated a class action suit on behalf of all federal

judges in the nation.<sup>7</sup> No matter what happens in this litigation, the issue of COLA entitlements will remain with the federal courts forever, since Congress can always pass prospective legislation on the subject.

Uncertainty about COLAs will impact the future decisions of federal judges about whether to choose senior status over retirement. If a judge is still healthy and engaged and wishes to build some added financial security for the judge's spouse or partner, children, and/or grandchildren, the likelihood of retirement increases, because the judge can return to practice or be available as an arbitrator, mediator, or private judge. As expectations for COLAs decline, one substantial incentive for staying on the bench also declines. While the Burbank article does not show a large exodus from the federal bench at present, it is only reasonable to assume that, with prospects for COLAs diminishing, financial pressures on federal judges will increase. Where the tipping point lies is uncertain.<sup>8</sup>

The lack of COLAs would not be so influential in a judge's decision if all federal judges lived in communities with modest cost structures. That is not the case, of course. It costs substantially more, for example, to live in New York City than in Del Rio, Texas. For federal judges residing in high-expense cities, the ability to withstand the effects of stagnant salaries lessens with every passing year.

### SENIOR STATUS JUDGES HANDLING MORE CASES

As the Burbank article shows, "Quite consistently since 1970, both the federal district courts and the regional courts of appeals have been required to become involved in ever greater numbers of cases."<sup>9</sup> In addition, the workload of federal judges as opposed to that of federal courts has increased as well. For example, in 1970, the Judicial Conference of the United States had 16 committees. In 2009, it had 25 committees.<sup>10</sup> With this backdrop, it is clear that federal judges have more than enough to do. Yet, because of the congressional reluctance to create new

judgeships, it is also clear that more and more of the work of the federal judiciary is being handled by senior judges, and to an extent that few people have ever envisioned.

In December 2009, district judges on senior status accounted for 21.2 percent of case terminations and 26.8 percent of all trials.<sup>11</sup> "It would require 174 [extra] district judges in regular active service to do the case work performed by judges in senior status in that year."<sup>12</sup> Similarly, for the regional courts of appeals, judges in senior status accounted for 17.8 percent of appeals participation in 2009.<sup>13</sup> "It would require 24 additional circuit judges in regular service to do the case work performed by circuit judges in senior status in 2009."<sup>14</sup> As the Burbank article makes clear, "Without a large corps of judges in senior status the federal judiciary would collapse under the weight of its caseload."<sup>15</sup> Moreover, given that senior judges conducted 26.8 percent of all trials in 2009,<sup>16</sup> "civil trials would move from an endangered species to the verge of extinction,"<sup>17</sup> if senior judges stepped down in large numbers. In addition, senior judges have been the "workhorses of the inter-circuit assignment system," so important "to the efficient resolution of docket crises."<sup>18</sup> Finally, senior judges have the experience and availability sought by the MDL dockets,<sup>19</sup> which is far out of proportion to their numbers.

The fact is, if there were any significant negative change in the number of federal judges taking senior status instead of retiring, the impact on the federal judiciary would be devastating.

### CONCLUSION

My experience has been that federal judges greatly value the opportunity to serve the public as judicial officers. All things being equal, their first choice would be to continue to do so, in almost every instance. The pay issue is now the wild card in the equation, especially in high-cost areas. Salary erosion may compel senior judges who

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are losing ground financially to eventually choose retirement, so that they can return to the private sector to make up for lost economic opportunity. As the margin of difference increases, the probability increases that federal judges will decide to retire rather than assume senior status. **TBJ**

## NOTES

1. There are, of course, three types of federal judges. One type is created by Article III of the U.S. Constitution. The other two types, U.S. bankruptcy judges and U.S. magistrate judges, are Article I judges, created by congressional enactment. While this article concerns Article III judges only, it should not be interpreted to diminish in any way the overriding importance of Article I judges to the federal judicial system. As the author, though, I am most familiar with the Article III landscape, having been a U.S. district judge for 19 years, including service on senior status for the past four years.
2. S. Burbank, S.J. Plager & G. Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences those Choices, and their Consequences*, 161 U. PA. L. REV. \_\_\_ (2012)
3. *Id.* at 68-76.
4. *Id.* at 37.
5. *Beer v. United States*, 671 F.3d 1299, 1308-09 (Fed. Cir. 2012).
6. *Id.* at 24 (slip opinion).
7. *Barker v. United States*, No. 1:12-cv-00826-EJD (Ct. Cl. filed Nov. 30, 2012).
8. Certainly, those in judicial service should not expect salaries commensurate with lawyers in private practice, but it is not unreasonable for judges to expect that their salaries will not be significantly eroded by inflation. An additional problem with deteriorating salaries is that it tends to dissuade able candidates from seeking appointment to the federal bench.

9. Burbank article at 29.
10. *Id.*
11. *Id.* at 115.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 115-16.
16. *Id.* at 116.
17. *Id.* at 117.
18. *Id.*
19. *Id.*



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