

**IT'S SO HARD TO SAY GOODBYE:
WHY ARTICLE III JUDGES LEAVE (OR DON'T)**

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CIRCUIT JUDGE

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ABSTRACT

Thurgood Marshall famously stated: “I was appointed to a life term, and I intend to serve it.”¹ Justice Marshall’s sentiment is in lockstep with the expressed intent of the Founding Fathers, who embedded the concept of life tenure for Article III judges into the Constitution at the time of its adoption. This paper explores the extent to which Article III judges in this era echo the sentiment expressed by Justice Marshall, and the reasons some Article III judges have elected not to serve a life term. The paper also examines whether Article III judges have gravitated toward careers in the legal academy, a prospect that has been the topic of considerable public discussion within the last ten years, and whether their decisions to leave are driven by economic concerns.

This thesis reports the results of interviews of forty-eight Article III judges divided into three clusters. Cluster One (“Baby Judges”) is composed of judges

¹David Atkinson, *Leaving the Bench: Supreme Court Justices at the End* (Lawrence, KS: University Press of Kansas, 1999), at 158.

who have been Article III judges for fewer than five years. Cluster Two (“Sustainers”) is composed of judges who are within five years of qualifying for Senior Status or having qualified for Senior Status.² Cluster Three (“The Departed”) is composed of judges who have relinquished their Article III status and departed the ranks of the judiciary. Through the reported experiences and opinions of these Article III judges, this paper seeks to explore the evolution of life tenure for Article III judges and to explore the relationship among departing Article III judges, the legal academy, and judicial compensation.

²I borrow the term “Sustainers” from my days in Junior League. Sustainers were those members who were too old to be considered “junior” but too young to be put completely out to pasture.

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I. Introduction

Article III, Section 1 of the United States Constitution provides in relevant part:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior . . .

It is universally agreed that the text providing that judges appointed under this article “shall hold their offices during good behavior,” bestows lifetime tenure upon Article III judges.³

The Founding Fathers considered life tenure to be a vital component of the national judiciary. In their *Federalist Papers*, both James Madison and Alexander Hamilton extolled the virtues of life tenure for federal judges. Hamilton described life tenure as “an excellent barrier to the encroachments and oppressions of the [legislative] body.”⁴ Hamilton also considered life tenure to be “the best expedient which can be devised in any government to secure a steady, upright, and impartial

³Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 Cath. L. Rev. 841, 859 (2011) (“Article III judges have enjoyed life tenure without mandatory retirement since the time of the Constitution’s adoption.”).

⁴*Id.* at 860 (quoting *THE FEDERALIST*, No. 78 at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

administration of the laws.⁵ It was widely believed during the formative years of our system of government that life tenure for national judges was vital to the independence of the judiciary, the integrity of the judiciary, and the impartiality of the judiciary. Conventional wisdom was that these essential attributes of a national judiciary could not be attained if the judicial appointments were temporary. Even then, the sentiment existed that anything short of life tenure “would undermine the government’s ability to appoint the most qualified judges, given the sacrifice involved in leaving profitable law practices for the bench.”⁶

Few would dispute that appointment to the federal bench is the pinnacle of the legal profession.⁷ Particularly impressive is the denominated “psychic income” that accompanies appointment as an Article III judge, including instant credibility, respect and gravitas.⁸ Thus far, it would appear that appointment as an Article III

⁵*Id.*; *Jackson*, *supra* note 2, at 971.

⁶*Id.*

⁷Albert Yoon, *Love’s Labor’s Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, 91 Cal. L. Rev. 1029, 1031-31 (July, 2003); *Federal Judicial Pay Erosion: A Report on the Need For Reform*, ABA/FBA (Feb. 2001) at 12 (recognizing that describing service as an Article III Judge “has long been regarded as the pinnacle of success and prestige in the profession”).

⁸Kristen A. Holt, *Justice for Judges: The Roadblocks on the Path to Judicial Compensation Reform*, 55 Cath. U.L. Rev. 513, 519 (Winter, 2006); *Federal Judicial Pay Erosion* at 12 (giving examples of “psychic income” as the

(continued...)

judge with the accompanying lifetime tenure, prestige and other “psychic income” would be a dream come true. And for many Article III judges, it is a dream come true.⁹ Nevertheless, in recent years Article III judges have increasingly elected to relinquish their Article III commissions, along with their lifetime tenure as federal judges.¹⁰ It was widely believed that law salaries prompted the exodus of Article III judges.¹¹ There was also considerable speculation that judges were increasingly leaving the bench to enter the legal academy.¹²

Not everyone agrees that the compensation of federal judges is causing an

⁸(...continued)
opportunity to engage in interesting, exciting and challenging work”, “the satisfaction of serving the public,” and “rendering public service in a highly visible and respected role”).

⁹Yoon, *supra* note 7.

¹⁰Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, 12 No. 4 Prof. Law 1, 3-4 (Fall, 2000).

¹¹*Id.*, p. 4.

¹²This speculation may have been triggered by the appointment of several high-profile former federal judges to law school deanships. *See, e.g.*, Robert Wilonsky, *U.S. District Judge Furgeson Is Named Dean of UNT’s Downtown Dallas Law School*, Dallas Observer, Jan. 11, 2012; Peter Lattman, *Duke Law School Selects Judge David Levi as Dean*, Wall Street Journal Law Blog, Jan. 3, 2007.

exodus.¹³ For example, Yeon has suggested that judges benefit from increasing non-monetary perks. However, even Yoon acknowledges the sentiments expressed by various Supreme Court justices criticizing the relatively low pay of the federal judiciary.¹⁴

This paper explores, among other things, whether the pay structure is a motivating factor for those judges who have made the difficult decision to give up their life-tenured federal judgeships. Employing a modified longitudinal approach, I examined the views of life tenure held by Baby Judges, Sustainers and The Departed to determine whether compensation was a motivating factor in their career decisions. I also explored the extent to which the legal academy is the preferred career choice for judges leaving the bench.

As previously noted, the Baby Judges cluster (Cluster One) is composed of judges who have been Article III judges for fewer than five years. I selected five years because that is the time frame that is loosely agreed upon as the learning curve for Article III judges.

The Sustainers cluster (Cluster Two) is composed of judges who are within

¹³Yoon, *supra* note 7, at 1055-56.

¹⁴*Id.* at 1035-36; Lynne Marek, *Pay Hikes for U.S. Judges Challenged*, Nat'l Law Journal, Jan. 7, 2008.

five years of qualifying for Senior Status or having qualified for Senior Status. I selected this time frame because that is the time frame selected by the Administrative Office of the Courts (based on my personal experience) to target judges for training on career plans post-senior status.

The Departed Cluster (Cluster Three) is self-explanatory. I selected sixteen judges from a list provided by the Administrative Office of the Courts, or judges whose pending retirements were publicly disseminated.

Interviews of forty-eight Article III judges from throughout the country reveal a complicated interrelationship between Article III judges and their compensation. Even those judges who ultimately relinquished their lifetime tenures due to financial considerations described doing so mostly with extreme reluctance, considerable anguish and lingering regret.

The interviews did not reveal that Article III judges are clamoring to enter the ranks of the legal academy. Although some judges expressed interest in the academy (mainly as professors rather than deans), the most popular successive career for former judges as reflected in the interviews was private arbitration/mediation (five of sixteen). In a trend seemingly unique to California, four federal judges left to become appellate judges for the state court.

Overall, the interviews were enlightening, revealing and intriguing. In sum,

based on responses received, this paper reflects financial considerations as an important factor, but not the only factor contributing to federal judges' relinquishment of Article III status. The responses also revealed that the judges who elected to enter the academy were mainly responding to a unique opportunity rather than to a general desire to join the academy under any circumstances.

II. History Of The Pay Structure For Article III Judges

A brief examination of the pay structure for Article III judges will be useful in placing the contents of this paper into context. As an initial matter, it is important to note that, in addition to conferring lifetime tenure upon federal judges, Article III of the Constitution provides that judges of the “supreme and inferior [federal] courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” Implementation of this text has proven to be complicated and contentious.

The genesis of the current pay schedule for Article III judges is the Postal Revenue and Federal Salary Act of 1967. That statutory scheme included the creation of a Commission on Executive, Legislative and Judicial Salaries.¹⁵ The Commission is now composed of eleven members from the private sector,

¹⁵2 U.S.C. § 351 (1967). The commission is now known as the Citizens' Commission on Public Service and Compensation. *Id.* (2015).

allocated in the following manner:

- 2 members appointed by the President;
- 1 member appointed by the President *pro tem* of the Senate, as recommended by the majority and minority Senate leaders;
- 1 member appointed by the Speaker of the House of Representatives;
- 2 members appointed by the Chief Justice of the Supreme Court; and
- 5 members appointed by the Administrator of General Services.¹⁶

In *United States v. Will*, 101 S. Ct. 471, 475 (1980), the United States Supreme Court explained that the Federal Salary Act provided for the quadrennial review of executive, legislative and judicial salaries. This review was designed to examine and compare the salaries of executives, legislators and judges to the General Schedule (GS) salary schedule applicable to most other federal employees.¹⁷ The Commission was to meet every four years to prepare salary recommendations for submission to the President. The President forwarded his succeeding recommendation to Congress. Absent express Congressional objection, the President's recommendation was to take effect.¹⁸

¹⁶2 U.S.C. § 352.

¹⁷*Id.*

¹⁸Holt, *supra* note 8 at 523 n.51.

To augment the Federal Pay Act, in 1975 Congress passed the Executive Salary Cost-of-Living Adjustment Act to adjust for inflation.¹⁹ However, in those years when Congress rejected its own cost-of-living adjustments, the adjustments for top executives and federal judges were also rejected.²⁰

In 1978, thirteen federal district court judges filed an action against the United States, contending that the rejection of cost-of-living adjustments violated the Compensation Clause of Article III, which prohibits the diminishment of the salaries of Article III judges.²¹ Of the four years at issue, the Supreme Court determined that the Compensation Clause was violated in two of the four years.²² The Court predicated its ruling on a determination of when the cost-of-living increases vested. If the increases vested, *i.e.*, were implemented, before the legislation rejecting the increase was passed and signed by the President, the Compensation Clause was violated.²³ On the other hand, if the increase was not implemented before the legislation was passed and signed by the President, the

¹⁹*Id.* at 523; P.L. 94-82 (August 9, 1975).

²⁰*Id.*, *Will* 101 S. Ct. at 475-77.

²¹*Will*, 101 S. Ct. at 483-84; U.S. Const., Art. III.

²²*Will*, 101 S. Ct. at 486-88.

²³*Id.* at 485-88.

Compensation Clause was not violated.²⁴ This unstable state of affairs continued until 1989, when a sea change in judicial compensation occurred, enactment of the Ethics Reform Act.²⁵

The Ethics Reform Act included a provision granting a 25 percent pay raise to Article III judges.²⁶ However, in return Article III judges were prohibited from receiving any honoraria for participating in law-related activities such as seminars and law school moot court competitions.²⁷ Finally, the Act limited compensation for teaching by active judges to roughly \$20,000 annually.²⁸ To many observers, Article III judges lost significant earning power as a result of passage of the Ethics Reform Act. As noted by one writer, for example, in the last year before the Ethics Reform Act took effect, one Supreme Court justice earned \$37,000.00 in honoraria alone.²⁹

²⁴*Id.*

²⁵Holt, *supra* note 8 at 525 (“The Ethics Act significantly altered the boundaries of judicial compensation.”).

²⁶*See*, Ethics Reform Act of 1989, PL 101-194, § 703(a)(3) (Nov. 30, 1989).

²⁷*Id.* at § 501(b).

²⁸*Id.* at §§ 502, 804; Rotunda, *supra* n.10 at 5.

²⁹Rotunda, *supra* n.10 at 6 n.38; *Beers v. United States*, 696 F.3d 1174, 1182 (Fed. Cir. 2012) (reporting that a significant number of federal judges earned
(continued...)

To make matters worse, the cost-of-living adjustments included in the Ethics Reform Act were not applied to judicial salaries as expected. The most vexing reason for this development, in the eyes of many judges, was the linkage between Congressional salaries and judicial pay. In the words of one reporter: “The linkage of district judges’ and Congressional salaries means that judges pay the price when members of Congress discern that it would be politically unpopular to raise their own pay.”³⁰

Frustrated by this state of affairs, a group of federal judges filed an action in Washington, D.C. asserting that the denial of the cost-of-living increases provided for in the Ethics Reform Act violated the Compensation Clause.³¹ In its ruling, the district court distinguished the Supreme Court’s decision in *Will*, finding that the cost-of-living adjustments in the Ethics Reform Act vested immediately and occurred automatically, without further action by Congress or the President.³² Because judges did not receive cost-of-living adjustments in certain years that

²⁹(...continued)
outside income ranging between \$16,000-\$39,000).

³⁰Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, New York Times, Jan. 1, 2007.

³¹*Williams v. United States*, 48 F. Supp. 2d 52, 65 (D.D.C. 1999).

³²*Id.* at 64.

there were adjustments for GS employees, the district court found a violation of the Compensation Clause.³³

On appeal, the Federal Circuit reversed the district court's ruling in favor of the judges, rejecting the district court's reasoning that the cost-of-living adjustments in the Ethics Reform Act vested immediately and automatically.³⁴ Rather than distinguishing the Supreme Court's decision in *Will* as the district court did, the Federal Circuit reverted to the reasoning in *Will*, concluding that each cost-of-living adjustment vested on the first day of the applicable fiscal year.³⁵ Therefore, if Congress passed legislation blocking the cost-of-living increase before the first day of the applicable fiscal year,³⁶ the increase had failed to vest.

Most recently, yet a third group of federal judges sought relief in federal court for denial of cost-of-living increases. In *Beer v. United States*, federal judges once again argued that withholding of the salary adjustments in the Ethics Reform Act violated the Compensation Clause.³⁷ Surprisingly, the Federal Circuit reversed

³³*Id.* at 65.

³⁴*Williams v. United States*, 240 F.3d 1019, 1023, 1032 (Fed. Cir. 2001).

³⁵*Id.* at 1031.

³⁶*Id.*

³⁷696 F.3d 1174, 1178-79 (Fed. Cir. 2012).

its decision in *Williams*, agreeing with the federal judges that they were entitled to the cost-of-living adjustments in the Ethics Reform Act.³⁸ The Federal Circuit concluded that the Compensation Clause “protects not only judicial compensation that has already taken effect but also reasonable expectations of maintenance of that compensation level.”³⁹ Although the Compensation Clause does not itself require cost-of-living adjustments, the coupling of promised cost-of-living adjustments and limitations on outside income “triggered the expectation-related protections of the Compensation Clause for all sitting judges.⁴⁰ When the Supreme Court declined to review the Federal Circuit’s ruling, the decision of the Federal Circuit became final, awarding the long-awaited cost-of-living adjustments to the federal judiciary.⁴¹

But was the *Beer* victory too little, too late? As early as 1986, Chief Justice Rehnquist was expressing dissatisfaction with the pay for Article III judges.⁴² In

³⁸*Id.* at 1184-85.

³⁹*Id.* at 1184.

⁴⁰*Id.* at 1184-85.

⁴¹*United States v. Beer*, 133 S. Ct. 1997 (2013).

⁴²Yoon, *supra* n.7 at 1035.

fact, he raised the issue in each of his Year-End Reports from 1997 on.⁴³ Chief Justice Rehnquist expressed the view that inadequate compensation compelled federal judges to leave judicial service for more lucrative opportunities.⁴⁴ He urged Congress to increase salaries for federal judges to maintain the quality of the federal bench.⁴⁵

Chief Justice Roberts continued Chief Justice Rehnquist's practice of urging Congress to increase compensation for federal judges. In his first year-end report, Chief Justice Roberts made his point emphatically: "If Congress gave judges a raise of 30 percent tomorrow, judges would—after adjusting for inflation—be making what judges made in 1969."⁴⁶

Chief Justice Roberts elected to raise his concerns regarding lagging judicial pay as the sole topic of his second year-end report.⁴⁷ Chief Justice Roberts noted that his predecessor, Chief Justice Rehnquist, "had spoken out on the issue of

⁴³*Id.* at 1035.

⁴⁴*Id.*

⁴⁵*Id.*

⁴⁶Holt, *supra* n.8 at 513.

⁴⁷Greenhouse, *supra* n.30.

judicial pay for 20 years.”⁴⁸

Chief Justice Roberts described the failure of Congress to enact judicial pay raises as a “constitutional crisis that puts the future of the federal courts in jeopardy,” and “threatens to undermine the strength and independence of the federal judiciary.”⁴⁹

Referencing the “dramatic erosion of judicial compensation,” Chief Justice Roberts declared that “it was clear that the time is ripe for our nation’s judges to receive a substantial salary increase.”⁵⁰

Justice Breyer added his voice to the chorus of those calling for a pay raise for federal judges in his testimony before the National Commission on Public Service.⁵¹

Justice Breyer began his remarks by informing the Commission “that something has gone seriously wrong with the judicial compensation system that the

⁴⁸*Id.*

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹Statement of Justice Stephen G. Breyer Before the National Commission on the Public Service, July 15, 2002, available at [http://www.SupremeCourt.gov/public info/speeches/ncps_project.pdf](http://www.SupremeCourt.gov/public%20info/speeches/ncps_project.pdf) (last visited February 29, 2016).

Constitution's Framers foresaw.⁵² Justice Breyer pointed out that the framers of the Constitution understood that judicial independence and adequate compensation go hand-in-hand.⁵³ To emphasize his point regarding the erosion of judicial salaries, Justice Breyer, a former law professor,⁵⁴ compared past and present salaries of federal judges and professionals in the legal academy.⁵⁵ Justice Breyer first compared the salaries of a district court judge, professor and law school dean in 1969. At that time, the respective salaries were \$40,000 for a district court judge, \$28,000 for "top professors" and \$33,000 for a law school dean.⁵⁶

Thirty years later, the salary differential was completely reversed. While the salary for a district court judge had risen to \$150,000, the salary for senior law professors was approximately \$250,000, and the salary for law school deans was approximately \$325,000.⁵⁷ Justice Breyer described this salary gap between

⁵²*Id.* at 1.

⁵³*Id.* at 2.

⁵⁴Greenhouse, *supra* n.30.

⁵⁵Statement of Justice Stephen G. Breyer at 4.

⁵⁶*Id.*

⁵⁷*Id.* and Appendix, Chart Five.

federal judges and professionals in the academy as a “chasm.”⁵⁸

It was perhaps this comparison by Justice Breyer that prompted the chatter about federal judges relinquishing their Article III status to enter the ranks of the legal academy. However, federal judges were assuming the role of law school dean long before Justice Breyer’s statement.

III. Federal Judges Transitioning to the Academy

While there are a number of Article III judges who have made the transition from the judiciary to the academy, to set the context it might be helpful to discuss a few of the earliest/most prominent examples.

One of the earliest instances of a federal judge assuming the deanship of a law school involved Judge J.C. Hutcheson, a district court judge for the southern district of Texas.⁵⁹ Judge Hutcheson graduated as valedictorian of his law school class at the University of Texas in 1900.⁶⁰ He was described as a “martinet and an old-time southern hot-head.”⁶¹ He engaged in the practice of law “with a forthright

⁵⁸*Id.* at 4.

⁵⁹Federal Judicial Center, *Biographical Directory of Federal Judges*, available at <http://www.fjc.gov/public/home.nsf/hisj> (last visited Jan. 6, 2016).

⁶⁰Roger K. Newman, *The Yale Biographical Dictionary of American Law* (New Haven and London, Yale University Press 2009, at 280-81.

⁶¹*Id.* at 280.

and unconventional outlook shaped by a quick, combative and confident personality.”⁶² In 1917, Hutcheson threw his hat into the ring for a federal judgeship.⁶³ He was successful in his quest, being nominated by Judge Woodrow Wilson on March 29, 1918 and confirmed eight days later (oh for the good old days!).⁶⁴ Judge Hutcheson presided over the busiest federal judicial district with a single judge.⁶⁵ However, the most remarkable part of Judge Hutcheson’s history is that he served as the first dean of South Texas Law School while sitting as an active judge.⁶⁶ It does not appear that any law or regulation prohibited Judge Hutcheson’s simultaneous service as a federal judge and law school dean.⁶⁷

⁶²*Id.*

⁶³*Id.* at 281.

⁶⁴Biographical Directory of Federal Judges, *supra* n.59.

⁶⁵Newman, *supra* note 60 at 281.

⁶⁶*Id.*

⁶⁷An analogous circumstance, involving a different district court judge, confirms the lack of any official restraint on the outside employment of then-sitting federal judges. In 1920, Judge Kenesaw Mountain Landis was appointed the first commissioner of major league baseball. Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 Minn. L. Rev. 1914, 1921-22 (June, 2010). Much like Judge Hutcheson, Judge Landis was described as a “hard-hitting, no-nonsense, call-them-as-you-see-them” judge. *Id.* at 1921. Apparently, it was thought that an individual of Judge Landis’ temperament could successfully “combat gambling and bribery influences that

(continued...)

Judge Hutcheson served in the dual capacities of federal district court judge/law school dean from 1923-1931.⁶⁸ The end of Judge Hutcheson's deanship coincided with his ascension to the Fifth Circuit Court of Appeals to fill a newly created seat.⁶⁹

In the same era, the first African-American federal judge, William H. Hastie, resigned his judgeship to become dean of Howard Law School.⁷⁰ Judge Hastie was

⁶⁷(...continued)
many thought were corrupting the national pastime. *Id.* at 1922. Judge Landis demonstrated his commitment to purging baseball of corruption by instituting a lifetime ban of the eight members of the Chicago White Sox baseball team who were accused of rigging the 1919 World Series. *Id.* Judge Landis was undeterred by the fact that the eight had been acquitted of all criminal charges. *Id.*

Although the general public lauded Judge Landis for his dedication to restoring the integrity of America's sport, the nation's attorneys were not as sanguine. Judge Landis was roundly criticized "for tarnishing the image of the judiciary by retaining his federal judgeship while serving as Commissioner." *Id.* at 1923. However, his critics could point to no law, rule or regulation that prohibited Judge Landis from simultaneously serving as a federal judge and baseball commissioner. *Id.* As the United States Attorney General explained: "There seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as arbitrator or commissioner." *Id.*

⁶⁸*Biographical Directory of Federal Judges, supra*, n. 59; *Rosenblatt's Dean's Database*, available at [http://www.law.mc.edu/deans/school/profile.php?univ=South + Texas + College + of + Law](http://www.law.mc.edu/deans/school/profile.php?univ=South+Texas+College+of+Law) (last visited Jan. 6, 2016).

⁶⁹*Biographical Directory of Federal Judges, supra* n. 59.

⁷⁰*Yale Biographical Dictionary of Federal Judges, supra* n. 60 at 256-57.

appointed by President Franklin Roosevelt in 1937 to the federal district court in the Virgin Islands.⁷¹ However, the judgeship in the Virgin Islands was not established under Article III.⁷² As Judge Hastie explained in his oral history, when he was appointed to the district court judgeship in the Virgin Islands, the tenure was a four-year term.⁷³ Judge Hastie “never thought in terms of making a career in the Virgin Islands.”⁷⁴ Rather, he was more interested in pursuing a career “on the mainland.”⁷⁵ Nevertheless, he would have served out his four-year term had he not been offered the deanship of Howard University Law School in 1939.⁷⁶ Judge Hastie commented that he had always had an interest in teaching, and had previously taught at Howard University Law School.⁷⁷ So, perhaps inevitably, he

⁷¹*Id.*

⁷²*Id.*

⁷³Jerry N. Hess, *Oral History Interview With Judge William H. Hastie*, Jan. 5, 1972 at 2, available at <http://www.trumanlibrary.org/oralhist/hastie.htm> (last visited Jan. 6, 2016).

⁷⁴*Id.* at 3.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

returned to Howard University Law School as its dean from 1939-46.⁷⁸

The most remarkable consequence of Judge Hastie's assumption of the deanship at Howard University Law School was his pivotal role in assembling and training a cadre of attorneys to systematically dismantle the invidious system of segregation in this country.⁷⁹ Included among that cadre of attorneys was future Supreme Court Justice Thurgood Marshall.⁸⁰ The culmination of the efforts of these dedicated civil rights attorneys was the momentous decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).⁸¹ It is safe to say that this federal judge turned dean impacted society and the legal system in an unforgettable way.

Of more recent vintage, Judge David Levi, an Article III judge in the Eastern District of California, resigned his Article III commission to become the dean of Duke University Law School in 2007.⁸² Some three years after making the transition from federal judge to law school dean, Dean Levi penned an essay

⁷⁸*Id.*

⁷⁹Spottswood W. Robinson, III, *In Memoriam: William H. Hastie*, U. Pa. L. Rev. 8-12 (Nov. 1976).

⁸⁰*Id.* at 9.

⁸¹*Id.* at 11.

⁸²Wall Street Journal Law Blog, *supra* n. 12.

reflecting upon his transition.⁸³

Two points made by Dean Levi in his essay are particularly pertinent. The first was that a career shift from judgeship to deanship “may have seemed surprising.”⁸⁴ As Dean Levi noted, many in the legal community would be surprised that a federal judge would relinquish the “prestige, importance and security” associated with an Article III judicial appointment.⁸⁵ This comment harkens back to the “psychic income” that accompanies an Article III judgeship.⁸⁶ As Dean Levi remarked, “[a]pparently ‘Judge’ trumps ‘Dean’ even within the law school.”⁸⁷

The second pertinent point was Dean Levi’s observation that the “low pay suffered by federal judges” renders them susceptible to favorable financial terms

⁸³David F. Levi, *From Judge to Dean: Reflections on the Bench and the Academy*, La. Law Rev., Vol. 70, No. 3, Spring 2010.

⁸⁴*Id.* at 913.

⁸⁵*Id.*

⁸⁶Holt, *supra* n.8; *see also* William Alsup, *Training the Next Generation: Do it! Get Out There-Be An Advocate*, Assn’n. of Bus. Trial Lawyers Rept., Northern Calif., Vol. 24 No. 2 (Fall 2015) (“Since the 1940s, opinion polls in the United States have consistently shown that our federal courts rank very high on the public confidence scale . . .”).

⁸⁷Levi, *supra* n.83 at 913.

dangled by state or international courts.⁸⁸ Dean Levi’s observation dovetails with the national conversation addressing judicial pay, and is consistent with a phenomenon in California where federal district court judges are relinquishing their Article III commissions to assume judgeships on the state appellate court, as reflected in several of the reported interviews.

The stories of these interesting judges reinforce the premise that it is not a new phenomenon that Article III judges are relinquishing life tenure. The challenge is to ascertain what is prompting these relinquishments and determine whether there is cause for concern.

IV. Motivation

In addition to judges who relinquish life tenure before becoming eligible for full retirement, Article III judges approaching the age of sixty-five, the age when most judges are eligible for senior status, must decide whether to continue in active status, take senior status⁸⁹ or leave Article III service altogether (full retirement).

⁸⁸*Id.* at 915.

⁸⁹Generally, senior status is a semi-retirement from the federal bench with a reduced caseload and “continued office space and secretarial and law clerk support.” Honorable Frederic Bloc, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 Cornell L. Rev., 533, 539-40 (2007). “It is at once apparent that the federal judicial system would be enormously burdened if the senior judges were to retire rather than continue to

(continued...)

This decision is a very serious matter to the Administrative Office of the [Federal] Courts, as evidenced by the annual planning seminar offered to Article III judges approaching eligibility for senior status. As the national conversation has continued to swirl around the lack of pay raises for Article III judges, the exodus of Article III judges, and the lure of the academy, I became more and more curious about why an Article III judge would elect to relinquish lifetime tenure, whether financial considerations were driving factors, and whether the academy was the natural destination. Through my interviews, I aimed to get an inkling of some of the factors that explain the behavior of Article III judges contemplating continued lifetime tenure.

More broadly, I thought it important to gather information about what factors prompt judges to consider leaving the bench, whether they have a particular interest in academia, and the extent to which money or some other factor(s) are influencing their decisions.

Most court watchers agree that an Article III judgeship comes with a prestige

⁸⁹(...continued)
serve, even though there is little economic incentive to do.” *Id.*; see also Milton J. Valencia, “Senior Status” Lets Federal Judges Keep Working For Free, Boston Globe, Dec. 12, 2014.

and mystique that “is hard to match elsewhere.”⁹⁰ As one professor described it: “[Article III judges are] held in high regard by the bench and the bar. It’s the closest thing to god you can be in legal circles. The power is immense.”⁹¹ (How’s that for psychic income?).

This paper explores why this immense psychic income may not be enough for some Article III judges.

V. Methodology

I began my inquiry by asking all of the judges what their mindset was regarding life tenure upon being appointed as an Article III judge, *i.e.*, whether it was their intent to remain an Article Three judge for the balance of their professional career. Then, for the Baby Judges and Sustainers, I inquired generally what future considerations might cause them to re-think their commitment to lifetime tenure, including on-the-job frustrations. I subsequently inquired about the extent to which financial considerations might impact their decision to relinquish life tenure, including the amount of money, if any, that would tempt them to leave.

⁹⁰Pete Brush, *NY’s Rookie Federal Judges Could Face Job-Hopping Pressure*, Law 360, available at <http://www.law360.com/articles/396505/ny-s-rookie-federal-judges-could-face-job-hoppi> . . . (last visited Feb. 12, 2016).

⁹¹*Id.*

In exploring their interest in the academy, I expressly inquired whether the judges would be interested in the academy as a professor and as a dean. As a follow-up question to the Sustainers because at least two of their number had actively sought to leave the ranks of the judiciary, I inquired about what career opportunities could entice them into leaving the judiciary.

The questions for The Departed focused on the reason/s for the decision to relinquish Article III status and how important financial considerations were to that decision. I asked The Departed whether they had any regrets about the decision, whether they would make the same decision again, and whether they miss being a federal judge. I also inquired about whether they miss the prestige associated with being a federal judge.

I elected to use a qualitative method of investigation because this method is particularly suited to a situation where a level of trust and rapport has already been established, and particular information is being sought. Interviewing my colleagues intersected neatly with the need for open-ended questions, and follow-up discussion depending on the various responses received.

I selected the forty-eight judges I interviewed largely from a pool of judges with whom I had attended seminars or served with as a committee member or court colleague. Approximately five of the interviewees were referred by mutual

acquaintances.

Once I compiled a list of approximately seventy-five names, I either emailed or telephoned the individual judges to explain my interest in interviewing them for my thesis. I interviewed the first forty-eight judges who responded.

Of the forty-eight judges, thirty-five were district court judges and thirteen were appellate judges. I did not use random sampling or try to equalize district court judges and appellate judges because I was not attempting to perform a statistical study. I was more interested in gathering some fundamental impressions regarding Article III judges generally. I recognize that this methodology is not fully representative. Nevertheless, I believe that I was able to garner some useful information.

With the exception of one face-to-face interview, I interviewed each judge over the telephone. The interviews were semi-structured in that I had a pre-determined list of questions that I wanted to address. However, I asked the questions in an open-ended way and followed up with additional questions depending on the individual responses. I assured each of the interviewees that the interviews would be completely anonymous, and that identifying information would be kept to a minimum in the study. This assurance was very important to the interviewees. One interviewee even called after the interview to reaffirm that

no one would be able to determine her/his identity because s/he had divulged matters that were not known to his colleagues. With the exception of noting that several district court judges in California have gone to the California appellate court, I adhered strictly to my assurance to provide no identifying information. I made an exception for the California phenomenon because it was a unique circumstance, and the California judges had no objection.

I also recognize that one limitation of using interviews is that the interviewer is only able to gather the information the responder is willing to provide, and that information may not be fully accurate. Nevertheless, I felt confident that due to our shared experiences, I had an excellent connection with the judges I interviewed, and that I was able to elicit accurate information. With these acknowledged limitations, I proceed.

I readily confess that I am far from being a trained interviewer. I also acknowledge that the number of individuals I interviewed (48) is relatively small. Nevertheless, I am convinced that my interviews with the judges who graciously agreed to speak with me will shed some light on the behavior of Article III judges making decisions regarding their personal career choices.

I elected to interview Article III judges from all over the United States rather than from any one Circuit. Again, I assured each individual that the information

gathered would not be reported in such a way that any individual judge could be identified. That assurance was extremely important to many of the judges, especially those who are on the brink of going from a Sustainer to one of The Departed.

I arrived at the “cluster” idea by happenstance. The very first judge I interviewed (one of The Departed) informed me that when s/he⁹² was first sworn in as an Article III judge, s/he saw himself as an Article III judge for life. S/he put it this way: “If anyone had asked me when I was first appointed as an Article III judge, I would’ve said that I would die on the bench.”⁹³

That comment piqued my curiosity regarding whether all, or virtually all, Article III judges shared that sentiment upon appointment to the bench, and if so, how The Departed go from that sentiment to relinquishing their Article III status. I also developed some curiosity regarding the evolution of the decision-making process. At what point in their careers do Article III judges typically begin to consider becoming one of the Departed? I became convinced that the Sustainers were the most likely group to provide valuable insight on that question. Finally, it was my hope that the Departed would candidly discuss why they left.

⁹²I use this format so as not to reveal the gender of the interviewee.

⁹³Telephone Interview with Departed Judge A, November 16, 2015.

When defining categories in any endeavor, line drawing is unavoidable. I have no doubt that someone doing a similar project could draw the lines elsewhere. Nevertheless, the clusters I selected appeared most logical to me because they represent the natural career progression for Article III judges. In addition, Baby Judges are only exposed to the full complexity of judicial responsibilities once they have served for a period of time. It appeared rational to me that the contrast, if any, between the responses of fairly new Article III judges and their more senior counterparts would provide useful and interesting information regarding the relative benefits and burden of life tenure over time.

Finally, in view of the extensive and continued debate regarding the pay of Article III judges, I concluded that interviewing judges who have actually resigned their Article III commissions might inform us whether there is a common denominator among those judges that suggests a festering retention problem that should be addressed.

I must say that I enjoyed discussing these questions with my colleagues and their responses gave me considerable food for thought as I approach the age of eligibility for senior status. I was also gratified by the number of my subjects who considered this a fascinating topic and asked for a copy of the thesis upon completion. With that said, I present the results of my interviews.

VI. Cluster One - Baby Judges

A. Initial Commitment to Life Tenure

With this group of judges, who have been Article III judges for fewer than five years, I wanted to explore how deeply they were committed to the lifetime tenure that comes with being an Article III judge. As described by The Departed judge referenced above, the Baby Judges expressed an almost unanimous intent to remain Article III judges for the balance of their professional careers. The one thing that stood out in the responses from the Baby Judges when asked about their commitment to life tenure was how much they loved being federal judges. One Baby Judge described her/his position as a “great job” that s/he was “thrilled” to have.⁹⁴ Another described the work as “challenging” and fulfilling.⁹⁵ A third Baby Judge put it this way:

It’s very comfortable to realize one can stay in a job and become as good as you can be without being afraid of losing your job if someone disagrees with you.⁹⁶

A Baby Judge who had previously been a state court judge stated that s/he

⁹⁴Telephone Interview with Baby Judge A, February 12, 2016.

⁹⁵Telephone Interview with Baby Judge B, January 20, 2016.

⁹⁶Telephone Interview with Baby Judge C, November 17, 2016.

“love[d] being a federal judge compared to being a state court judge.”⁹⁷ S/he explained that the “work coming in the door is unlike anything else you can do anywhere else. Everyday there are ten new questions and one-third of the questions I never thought of before.”⁹⁸ S/he described the Article III judgeship as “the essence of being a judge. The elective concerns disappear and more resources are available [such as elbow law clerks].”⁹⁹

Another Baby Judge was similarly effusive, expressing “love” for the “best job s/he ever had.”¹⁰⁰ She described the job as an “intellectually satisfying position.”¹⁰¹

In the same vein, a different Baby Judge professed “absolute love” for the job, with “every day [being] new and fresh.”¹⁰²

One Baby Judge reported that s/he was asked this exact question by the Senate Judiciary Committee because s/he was so young when s/he was appointed

⁹⁷Telephone Interview with Baby Judge D, November 28, 2015.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰Telephone Interview with Baby Judge E, December 29, 2015.

¹⁰¹*Id.*

¹⁰²Telephone Interview with Baby Judge F, December 29, 2015.

to the bench that s/he would have to serve more than twenty years before s/he could take senior status. S/he responded to the Judiciary Committee that all the federal judges s/he had observed appeared to love what they do, and s/he had no doubt that s/he would complete her tenure. Upon taking the bench, her/his expectations were confirmed. S/he “loves the intellectual process of what Article III judges do.”¹⁰³ S/he expounded that there is “so much to learn and so much work” that s/he had not “thought beyond doing this job she loves.”¹⁰⁴

The attraction of Article III status for one Baby Judge was “the ability to do what’s right as opposed to being an advocate.”¹⁰⁵ This Baby Judge “absolutely loves what s/he does,” “is happy to get up every morning,” and was “born to do this job.”¹⁰⁶

Of the sixteen, there was only one Baby Judge who hedged somewhat on the commitment to lifetime tenure. That Baby Judge described sitting down with an accountant to determine if s/he and the family could be comfortable on the salary of a federal judge. This Baby Judge had envisioned her/himself engaging in the

¹⁰³Telephone Interview with Baby Judge G, January 4, 2016.

¹⁰⁴*Id.*

¹⁰⁵Telephone Interview with Baby Judge H, January 7, 2016.

¹⁰⁶*Id.*

private practice of law for the balance of her/his professional career. Having “crunched the numbers”¹⁰⁷ with her/his accountant, s/he “believes” s/he can meet the tenure obligations of the Article III appointment.¹⁰⁸ However, in her/his mind, s/he has reserved the option of resigning if financial considerations militate in that direction.

Another Baby Judge had a singular approach. Her/his commitment to lifetime tenure extended only until the age of 65-70. Upon assuming the Article III judgeship, s/he gave herself/himself “permission to leave at 65-70” so that s/he would still “be healthy enough to enjoy retirement.”¹⁰⁹ This Baby Judge expressed the view that s/he wanted to make a conscious decision about leaving the bench, rather than have the decision made by default. S/he voiced the intriguing thought that an Article III judgeship “is such a great job that if you aren’t careful, the job can overwhelm you and you can’t leave.”¹¹⁰

Two of the Baby Judges were relatively older than the other Baby Judges and expressed an even stronger commitment to life tenure. One expressed that s/he

¹⁰⁷Telephone Interview with Baby Judge I, December 29, 2015.

¹⁰⁸*Id.*

¹⁰⁹*Supra* n.94.

¹¹⁰*Id.*

“felt a personal obligation to stick it out.”¹¹¹ The other made the point that s/he “publicly told the Senate Judiciary Committee that [the Article III appointment] was definitely not a stepping stone to something else.”^{112, 113}

CONCLUSION: The Baby Judges expressed “love” for their job as Article III judges and all but two Baby Judges vowed unequivocal commitment (at least initially) to life tenure.

B. Re-thinking Commitment to Life Tenure

Once the Baby Judges had generally confirmed their initial commitment to remaining on the bench for the rest of their professional lives, I wanted to explore what, if any, future considerations might cause them to re-think their commitment to lifetime tenure. Of the ten Baby Judges who had considered this question, five gave the response of health concerns. One Baby Judge put it in these terms: “I want to leave through the front door and not through the back door.”¹¹⁴ By that,

¹¹¹Telephone Interview with Baby Judge J, January 5, 2016.

¹¹²Telephone Interview with Baby Judge K, January 5, 2016.

¹¹³This sentiment is in tune with Justice Rehnquist’s view of Article III tenure. *See Clark, supra* n.3 at n.377 (quoting Justice Rehnquist’s statement that federal judgeships are supposed to be “lifetime careers rather than a stepping stone to some other position”); *id.* (quoting Judge Mikva’s statement that an Article III appointment “is supposed to be the last stop on the road”).

¹¹⁴*Supra* n.94.

s/he meant that s/he wanted to be healthy when s/he left the bench and not work beyond her/his most productive years. S/he recounted how s/he was affected by watching judges come to court on walkers and when they were obviously ill. S/he didn't want that to be her/him in twenty years.

Another Baby Judge has instituted a custom of informing his law clerks to alert her/him if they perceive s/he is losing her/his ability to perform at a high level. S/he is of the view that "as long as you can do the job well, stay as long as you can."¹¹⁵ Because s/he has observed some colleagues in their 80s and even their 90s with physical and cognitive impairments, s/he is taking precautions against staying on the bench past the time when s/he can do the job well.

Three other judges mentioned the health of family members, especially a spouse. As discussed previously, one Baby Judge would consider re-thinking his commitment if unanticipated financial concerns arose. And one Baby Judge mused that "if the feeling of newness ever wears off" and s/he had "one more chance to do something else," s/he might rethink her/his commitment to life tenure.¹¹⁶ However, s/he admitted that it is "hard to know" what s/he "would want to do" after being an

¹¹⁵Telephone Interview with Baby Judge L, November 19, 2015.

¹¹⁶*Supra* n.97.

Article III judge.¹¹⁷

As an additional follow-up question, I queried the Baby Judges regarding whether they could envision any frustrations of the job that might cause them to re-think their commitment to Article III tenure. This excellent follow-up question was suggested by one of the first Baby Judges interviewed in response to my query whether there were any other questions I should pursue. This question focuses more pointedly on job frustrations as opposed to external considerations that might cause Baby Judges to re-think their commitment to Article III tenure.

The responses to this follow-up question varied from “There are no frustrations that would cause me to rethink my commitment. I love the job”¹¹⁸ to “Congressional oversight that interferes with independence.”¹¹⁹ Although a majority of the Baby Judges (ten of sixteen) espoused the former view, two judges offered a different elaboration. One Baby Judge voiced a potential frustration as the limitations of what Article III judges can actually do. S/he lamented that an Article III judge can only decide the issues that are before that judge and cannot change the legal system, or even the judicial system. Over time, that limitation

¹¹⁷*Id.*

¹¹⁸*Id.*

¹¹⁹Telephone Interview with Baby Judge M, December 29, 2015.

might result in a decision to leave the bench after attaining senior status to be “more impactful.”¹²⁰

The one judge who openly acknowledged the importance of financial considerations at the outset, reiterated that although there were no frustrations “at this stage”¹²¹ that would cause her/him to re-think her/his commitment to life tenure if “financial circumstances changed,” s/he would reconsider.¹²² S/he also referenced “job satisfaction, energy and interest” as “important factors” that would influence any decision to reconsider her/his commitment to lifetime tenure.¹²³

CONCLUSION: Absent health concerns for themselves or their spouses, the Baby Judges’ stated commitment to lifetime tenure generally remains firm.

C. The Lure of Filthy Lucre¹²⁴

Article III judges are extremely cognizant of the financial sacrifices that come with life as a federal employee. Personally, every October I mourn the

¹²⁰*Supra* n.103.

¹²¹*Supra* n.107.

¹²²*Id.*

¹²³*Id.*

¹²⁴1 Timothy 3:3.

longevity check I received from my previous employer, which by now would have been tens of thousands of dollars each year. As a result, I thought it fruitful to explore the topic of the lure of increased financial compensation with the Baby Judges, who were appointed in the midst of the national conversation regarding the underpayment of federal judges.

As it happens, the Baby Judges were fairly equally divided between those coming from a public sector background and those coming from a private sector background. Generally, those coming from the public sector had opted early in their professional careers to pursue public service rather than more lucrative careers in the private sector. Consequently, their transition into the pay of an Article III judge did not include the financial sacrifice made by those who transitioned from private practice into the public sector. One Baby Judge described taking a “huge paycut” to become an Article III judge.¹²⁵ Another Baby Judge described making the “decision to take a significant reduction”¹²⁶ and that s/he was prepared to live with that reduction “for the rest of [her/his] professional

¹²⁵Telephone Interview with Baby Judge N, December 29, 2015.

¹²⁶*Supra* n.103.

life.”¹²⁷ A third Baby Judge agreed, remarking that s/he “took a gigantic pay cut to become a judge.”¹²⁸ In the final analysis, the Baby Judges who entered into Article III status from the private sector expressed contentment with the financial sacrifices made. One Baby Judge struck the balance in this manner:

In private practice, I was making a lot of money, with the opportunity to make tons more. But the work was not that satisfying. Here [as an Article III judge], there is less money, but the work is infinitely more satisfying.¹²⁹

From their responses, one surmises that the Baby Judges who were in private practice conserved a considerable portion of their substantial earnings to fuel future public service opportunities. One Baby Judge reported that her/his years in private practice “alleviated any financial considerations.”¹³⁰ S/he “did well in private practice and saved a bunch of money so [s/he is] financially free.”¹³¹ Another related that s/he initially engaged in the private practice of law due to the press of outstanding student loans. S/he ended up staying for eighteen years, but always had a public service career in mind. A third Baby Judge described her/his

¹²⁷*Id.*

¹²⁸Telephone Interview with Baby Judge O, December 29, 2015.

¹²⁹*Supra* n.125.

¹³⁰*Supra* n.112.

¹³¹*Id.*

seventeen-year tenure as a private practitioner enabling her/him to build a “nest egg”¹³² bestowing “financial flexibility.”¹³³ That flexibility in turn gave her/him the comfort of not having to “try to parlay [the Article III judgeship] into something more.”¹³⁴

As a follow-up, I inquired whether there was any amount of money that would tempt them to relinquish their Article III status. Based on their responses, the Baby Judges largely would not be tempted by any amount of money to relinquish their Article III status. As noted previously, those who were previously in private practice had amassed sufficient wealth that financial considerations were largely irrelevant in their career decisionmaking. And those in the public sector had long ago decided, if possible, financial considerations would not drive their career choices.

One Baby Judge put it this way: “If someone told me for a million dollars I could be a partner at a firm, the answer would be no.”¹³⁵

Another judge was not so sure. S/he thought if a million-dollar offer were

¹³²*Supra* n.102.

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Supra* n. 100.

on the table one would “have to at least consider it.”¹³⁶ S/he mused that s/he couldn’t really see her/himself going back into the courtroom as a lawyer because “the practice of law is such a tough business now.”¹³⁷ But if the offer included the opportunity to function essentially as a super-mentor helping younger lawyers, that might be an attractive proposition.

In the alternative, two Baby Judges would be tempted to relinquish their Article III status if offered the position of Attorney General of the United States. A fourth Baby Judge remarked that “one day mediation could be tempting.”¹³⁸ A fifth Baby Judge disagreed, stating emphatically that “there was nothing else s/he would rather be doing,” including arbitration.¹³⁹ Indeed, after serving as an Article III judge, this Baby Judge asserted that nothing else “appealed to her/him.”¹⁴⁰

CONCLUSION: The overwhelming majority of the Baby Judges (fifteen of sixteen) articulated that no amount of money would tempt them to relinquish their Article III status. With one exception, the judges’ responses indicate that at this

¹³⁶*Supra* n.111.

¹³⁷*Id.*

¹³⁸*Supra* n.128.

¹³⁹*Supra* n.125.

¹⁴⁰*Id.*

point in their career, they have made peace with the financial concessions that come with accepting a position in the public sector.

D. The Lure of the Academy

By and large, Baby Judges are not particularly inclined to enter the academy in lieu of continued service as an Article III judge. One Baby Judge taught in a law school for two years after graduating from law school, and was adamant about not returning to that environment. Although s/he “enjoyed interacting with the students and the classroom time,” s/he did not enjoy writing law review articles.¹⁴¹

Six of the Baby Judges had previously served as adjunct professors. One is still serving as an adjunct professor and one has started teaching at a law school since her/his appointment as an Article III judge.

One Baby Judge offered a particularly thoughtful observation regarding why judges should be more active in the academy, and why the academy should seek more involvement from judges. S/he mentioned reading the recently published *Divergent Paths: The Academy and the Judiciary* by Judge Richard Posner.¹⁴² Her/his takeaway from this publication is that there is far too little interaction

¹⁴¹*Supra* n.96.

¹⁴²Richard A. Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge, MA: Harvard University Press, 2016).

between federal judges and the academy. From her/his perspective, the academy should function less in the theoretical realm and embrace more practical applications of the law in order to be of more pragmatic assistance to judges. The academy should also be more proactive in designing and providing training for judges. In turn, federal judges should do a better job of articulating to the academy the needs of the federal judiciary, and how the academy can meet those needs.

This Baby Judge served as an adjunct professor prior to taking the bench. S/he was contemplating a return to the academy once s/he was acclimated to his responsibilities on the court. The thought of helping to shape the minds of burgeoning lawyers was extremely appealing to this Baby Judge and most of the others.

With the exception of two Baby Judges, who related that they had not given “a great deal of thought” to becoming members of the academy, the other Baby Judges reported an inclination to look favorably upon the idea of becoming members of the academy, so long as they were not required to relinquish their Article III status to do so.¹⁴³

One of the judges who had not consciously considered becoming a member of the academy described her/himself as “not particularly suited” for the

¹⁴³*Supra* nn.94, 105.

academy.¹⁴⁴ This Baby Judge described perceiving the academy as a more theoretical endeavor. In contrast s/he described her/himself as embodying “a more practical bent.”¹⁴⁵ Ironically, this Baby Judge may be just the type of professor most needed in the academy—one who brings “a more practical bent” to the largely theoretical orientation of many law schools.

Another Baby Judge who had taught “individual classes episodically” and one semester at a law school was lukewarm about the prospect of re-entering the academy.¹⁴⁶ S/he has concluded that it is “unlikely” that s/he would pursue a professorship.¹⁴⁷ S/he did not see her/himself as “suited to be a professor,” describing the position as “too quiet” for her/his taste.¹⁴⁸ More attractive to this Baby Judge would be an opportunity to “guide advocacy or help advance litigation practice,” perhaps in the American Inns of Court or a similar organization.¹⁴⁹

The responses of other Baby Judges revealed a much stronger inclination

¹⁴⁴*Supra* n.94.

¹⁴⁵*Id.*

¹⁴⁶*Supra* n.97.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

toward the academy, at least as adjunct faculty. One Baby Judge stated: “I always taught in law schools and thought about going full-time *before* getting the Article III appointment.”¹⁵⁰ Another Baby Judge “practiced and taught law school for thirty years and still teach.”¹⁵¹ A third of the fourteen who responded favorably noted that s/he visits one law school “regularly” and another “occasionally.”¹⁵² S/he envisioned her/himself more as a “guest lecturer” than participating as a law professor in a more formalized sense.¹⁵³

One of the Baby Judges who came from private practice revealed that s/he always had a “dream” to teach but could not “realize” that dream due to the press of business as a practicing attorney.¹⁵⁴ S/he is now teaching legal writing, “loves the adjunct position” and is “fulfilling two dreams at once.”¹⁵⁵ Another Baby Judge who came to the bench from private practice taught for three years as an

¹⁵⁰*Supra* n.111.

¹⁵¹*Supra* n. 112.

¹⁵²Telephone Interview with Baby Judge P, December 5, 2015.

¹⁵³*Id.*

¹⁵⁴*Supra* n.102.

¹⁵⁵*Id.*

adjunct professor “and could see her/himself doing adjunct again.”¹⁵⁶ A third Baby Judge who was in private practice considered teaching and views it as “an opportunity to serve.”¹⁵⁷ A fourth Baby Judge from the private practice arena reported that s/he had “no real desire to teach” while s/he was a private practitioner.¹⁵⁸ As a federal judge, s/he is somewhat more interested in teaching at a law school. However, s/he is concerned that the caseload and work requirements of a federal judge will not leave sufficient time to prepare a curriculum and lesson plans. In other words, this judge desires to be an excellent judge and an equally excellent professor. S/he would not want his/her duties as a judge to compromise the quality of her/his work as a professor. Neither would s/he want her/his obligations as a professor to make her/him a less effective judge.

On balance, the Baby Judges relayed a positive view of the academy, and most were extremely receptive to the idea of entering the academy as professors, although none would be willing to relinquish her/his Article III status to do so. As one Baby Judge explained, teaching as an adjunct is preferable to teaching full-time because full-time professors are more involved in academic research than in

¹⁵⁶*Supra* n.125.

¹⁵⁷*Supra* n.103.

¹⁵⁸*Supra* n.107.

teaching. However, the Baby Judges were not nearly as sanguine in their attitude toward assuming a leadership position in the academy.

To a person, the Baby Judges eschewed any possibility of relinquishing their Article III status to assume the position of dean at a law school. One of the Baby Judges, who previously served on a search committee for a deanship vacancy, stated emphatically her/his lack of interest in being the dean of a law school. Her/his initial reaction: “The politicking and fundraising are not at all appealing.”¹⁵⁹ The Baby Judge then provided a laundry list of negatives that dissuade her/him from considering a deanship:

- Fundraising
- Worrying About Rankings
- Faculty Issues
- Resistance To Non-Academic As Leader
- Administrative Responsibilities That Take One Away From The Law.

Another Baby Judge revealed that s/he had been approached to take a position as dean of a law school before becoming a judge. S/he declined the opportunity because s/he had no interest in the position. Being dean of a law

¹⁵⁹*Supra* n.111.

school was not attractive to this Baby Judge because s/he perceived the position as one of almost full-time fundraising. S/he lamented that “the days when the law school dean was the distinguished head of a faculty are gone.”¹⁶⁰

Another Baby Judge agreed that the idea of functioning as a dean would not be tempting to her/him. S/he reported that “most deans say they miss contact with students.”¹⁶¹

A third Baby Judge remarked that it had “never occurred to her/him” to consider a deanship.¹⁶² S/he could imagine the job would entail “a lot of satisfaction” but also “parts s/he wouldn’t like.”¹⁶³ S/he envisioned that “faculty conflicts would be unpleasant” and that s/he “would probably be a good fundraiser, but wouldn’t like it.”¹⁶⁴ In short, this Baby Judge “would not enjoy the management aspects” of being a dean.¹⁶⁵

A fourth Baby Judge explained her/his lack of “inclination” toward a

¹⁶⁰*Supra* n.112.

¹⁶¹*Supra* n.115.

¹⁶²*Supra* n.97.

¹⁶³*Id.*

¹⁶⁴*Id.*

¹⁶⁵*Id.*

deanship by pointing out the obvious: there is more security in a life-tenured Article III appointment than in a deanship.¹⁶⁶

A fifth Baby Judge lumped together the positions of full-time professor and dean, relating that s/he doesn't "want to worry about publishing, tenure or fundraising."¹⁶⁷

A sixth Baby Judge reported that s/he has friends who are deans and those friends confided that they did not enjoy being deans as much as they thought they would due to the administrative and fundraising components of the deanship, which are "no fun."¹⁶⁸ Her/his friends missed the "classroom and teaching part" of being associated with a law school.¹⁶⁹ The Baby Judge agreed that the "classroom and teaching part" is what the Baby Judge would like to do.¹⁷⁰

A seventh judge echoed this sentiment. S/he "would enjoy teaching but [has] no interest in raising money or in political issues."¹⁷¹

¹⁶⁶*Supra* n.105.

¹⁶⁷*Supra* n.102.

¹⁶⁸*Supra* n.125.

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹*Supra* n.95.

CONCLUSION: Baby Judges left no doubt from their responses that although they have an interest in sharing their knowledge with students, they are not willing to relinquish their Article III status to do so. They unequivocally renounced any interest in joining the ranks of law school deans.

In summary, at this early stage of their judicial careers, Baby Judges express deep commitment to the concept of life tenure. According to the Baby Judges, they generally did not view themselves as tempted by money to relinquish their Article III tenure. As a group, they did not identify any pressing job frustration that might cause them to reconsider their commitment to life tenure. They spoke favorably of becoming participants in the academy, although not to the point of relinquishing their life tenure. To a person, they stated no interest in a law school deanship.

VII. Cluster Two - Sustainers

I readily confess that this was the group of judges whose responses I was most eager to compile, but not only because this is the group of judges to which I belong. I was eager to examine how, if at all, years of service on the bench changes the outlook of federal judges. I was curious whether the love for the job expressed by the Baby Judges continued, or whether the judges became a little more jaded over time. I was also intrigued by whether the commitment to life

tenure had waned, whether financial concerns were more pressing, and whether there was a greater or lesser inclination toward entering the academy.

The one thing that was apparent when interviewing the Sustainers was that they had given a great deal of thought to Article III tenure and the benefits and burdens that accompany that status. Although most of them agreed with the sentiment expressed by the Baby Judges of their commitment at the time of appointment to Article III life tenure, their continued commitment was not as firm. In fact, two Sustainers were extremely close to joining both the ranks of The Departed and of the legal academy as deans of major law schools.

A. Initial Commitment to Life Tenure

At the outset, the commitment to Article III tenure was stated in less emphatic terms by a few of the Sustainers when compared to the Baby Judges. For purposes of comparison, I start with the most emphatic stated commitments to lifetime tenure and end with the least emphatic stated commitment to lifetime tenure.

For starters, only two of the Sustainers spontaneously expressed “love” for the job, as opposed to nearly all of the Baby Judges. The most effusive Sustainer stated that being an Article III judge is “still intellectually challenging and

fulfilling” and that s/he “simply love[s] the work.”¹⁷² Another described being an Article III judge as “the best job in the world.”¹⁷³ S/he added that “there is so much good you can do for the public in general.”¹⁷⁴ A third Sustainer stated that s/he “likes judge work.”¹⁷⁵

When addressing specifically the commitment to lifetime tenure at the time of their appointment, seven of the Sustainers expounded on their initial commitment to life tenure, six responded without explication, and three expressed less than firm initial commitment.

Of the seven Sustainers who elaborated on their initial commitment to lifetime tenure, the following remarks were made:

- I was thinking that I would end my career as an Article III judge. I looked at it as a lifetime job.¹⁷⁶
- I intended to remain Article III for the balance of my life.¹⁷⁷

¹⁷²Telephone Interview with Sustainer Judge A, January 4, 2016.

¹⁷³Telephone Interview with Sustainer Judge B, January 5, 2016.

¹⁷⁴*Id.*

¹⁷⁵Telephone Interview with Sustainer Judge C, January 5, 2016.

¹⁷⁶Telephone Interview with Sustainer Judge D, January 4, 2016.

¹⁷⁷Telephone Interview with Sustainer Judge E, January 19, 2016.

- When I took the bench, I planned to stay Article III for the duration.¹⁷⁸
- I made that commitment [to lifetime tenure] because I made a huge financial sacrifice to take this job. So with that sacrifice, I'm in for the long haul.¹⁷⁹
- When I came on the bench, I thought I would be on the bench for the rest of my professional life.¹⁸⁰
- I came to the bench with the expectation that I would be taken out in a box. I considered this appointment the ending achievement of my career.¹⁸¹
- I anticipated being Article III for the rest of my career.¹⁸²

As previously noted, six other Sustainers confirmed their initial commitment to lifetime tenure without explication.

The final three Sustainers were a bit more equivocal. The first Sustainer responded: "I don't know if I gave any thought to doing anything other than being an Article III judge."¹⁸³

¹⁷⁸Telephone Interview with Sustainer Judge F, January 4, 2016.

¹⁷⁹Interview with Sustainer Judge G, November 19, 2015.

¹⁸⁰Telephone Interview with Sustainer Judge H, January 5, 2016.

¹⁸¹Telephone Interview with Sustainer Judge I, January 4, 2016.

¹⁸²Telephone Interview with Sustainer Judge J, January 15, 2016.

¹⁸³*Supra* n.173.

The second recalled thinking that life tenure “seemed attractive.”¹⁸⁴ Having been informed “that a big pay raise was on the horizon,” the second Sustainer “figured this was it.”¹⁸⁵

The third Sustainer described being “of two minds” regarding life tenure.¹⁸⁶ In her/his “heart of hearts” s/he “wanted to work as an Article III judge forever—the take me out of the courthouse feeling.”¹⁸⁷ However, a “tiny part of her/himself envisioned doing something else in time.”¹⁸⁸

CONCLUSION: In contrast to Baby Judges, Sustainers on average were not as effusive in their commitment to lifetime tenure.

B. Re-Thinking Commitment to Life Tenure

Responses to this inquiry revealed a divide between the Baby Judges and Sustainers. Whereas only the response of one Baby Judge wavered on her/his continued commitment to life tenure absent serious health or financial concerns, the Sustainers’ responses were not as firm, with two Sustainers going so far as to

¹⁸⁴Telephone Interview with Sustainer Judge K, February 16, 2016.

¹⁸⁵*Id.*

¹⁸⁶*Supra* n.172.

¹⁸⁷*Id.*

¹⁸⁸*Id.*

seek employment in the academy. Although twelve out of sixteen Sustainers expressed their continued commitment to life tenure, a few of those commitments were somewhat equivocal. One Sustainer stated that “as an African-American, there are so few appointed that I don’t feel I have the luxury of saying I don’t want to do it anymore.”¹⁸⁹ Another Sustainer remarked that “if something terrific came up, I might re-think my position [regarding continued commitment to Article III status].”¹⁹⁰ A third Sustainer responded that s/he “still mostly felt” an intention to remain an Article III judge until the end of her/his professional career.¹⁹¹

Although not as prevalent a response as with the Baby Judges, two Sustainers mentioned health concerns as a factor that would cause them to re-think their commitment to life tenure. One Sustainer mentioned that s/he “wants to keep going as long as [s/he] can” until “someone tells [her/him] that [s/he’s] slipping.”¹⁹² S/he added that “hopefully [s/he] has enough people lined up who will tell [her/him].”¹⁹³

¹⁸⁹*Supra* n.182.

¹⁹⁰*Supra* n.184.

¹⁹¹Telephone Interview with Sustainer Judge L, February 11, 2016.

¹⁹²*Supra* n.176.

¹⁹³*Id.*

Another Sustainer related that s/he would re-think her/his commitment to life tenure “if [s/he] felt being there was not helping anyone.”¹⁹⁴ This Sustainer hastened to add that s/he would not want to “totally leave the court.”¹⁹⁵ S/he “likes the relationships [s/he] has built” and “wants to keep the funding for additional chambers,” which might disappear if [s/he] left the court.¹⁹⁶ The court has “been a part of [his/her] life for so long that it would be hard to imagine not being a part of the court.”¹⁹⁷ Moreover, s/he “likes the idea of retaining the title and resources of the court.”¹⁹⁸

One other Sustainer candidly admitted that s/he “sometimes thinks about leaving the bench.”¹⁹⁹ Another Sustainer was even more blunt: S/he is actively considering leaving the bench. This Sustainer recently began to re-think her/his commitment to life tenure and decided that s/he “doesn’t want to leave the best of

¹⁹⁴*Supra* n.178.

¹⁹⁵*Id.*

¹⁹⁶*Id.*

¹⁹⁷*Id.*

¹⁹⁸*Id.*

¹⁹⁹Telephone Interview with Sustainer Judge M, February 11, 2016.

[her/himself] on the bench.”²⁰⁰

The two Sustainers who sought law school deanships gave a similar primary reason for re-thinking their commitment to lifetime tenure: they both felt less challenged by the work. One of the two explained that when s/he first became a judge, s/he averaged sixteen trials per year. Presently, her/his docket has narrowed to almost exclusively drug cases, specifically those involving methamphetamine. Because there is usually not much of a defense in these cases, the Sustainer described them as “slow guilty pleas” with trials lasting only 2-3 days.²⁰¹ This Sustainer concluded that “the work simply is not as interesting as when I first started.”²⁰² In addition, the Sustainer noted that s/he did not have a single civil trial in the last year. The disappointing lack of pay over the years was also a motivating factor for this Sustainer, not so much for her/himself, but for her/his child.

The other Sustainer echoed the perception that the quality of the work had diminished for her/him. After seventeen-plus years, the cases had become “somewhat routine.”²⁰³ This Sustainer expressed the view that s/he was seeing

²⁰⁰*Supra* n.180.

²⁰¹Telephone Interview with Sustainer Judge N, February 12, 2016.

²⁰²*Id.*

²⁰³Telephone Interview with Sustainer Judge O, November 23, 2015.

“fewer challenging cases and might welcome a change.”²⁰⁴

When discussing other job frustrations that might cause them to re-think their commitment to life tenure, one Sustainer mentioned lack of collegiality and two others referred to any regulations that might disadvantage judges, such as courtroom sharing or fewer law clerks. The responses of the Sustainers generally reflected some restlessness, with two of the number actively seeking to leave the ranks of Article III judges.

CONCLUSION: When compared to Baby Judges, Sustainers express a less enthusiastic commitment to Article III life tenure. Even absent specific on-the-job frustrations, a considerable number of Sustainers stated willingness to consider leaving the bench. As discussed, two of the Sustainers had even taken substantial steps toward leaving the bench for the academy. The responses of the Sustainers suggest that, over time, a certain amount of burnout creeps in to erode the psychic income that appeared to buoy the Baby Judges, as reflected in their responses.

C. The Lure of Filthy Lucre

The Sustainers were, on the whole, much more focused on the economic divide between them and their counterparts in the private sector. One Sustainer remarked that s/he left a lucrative law practice to enter public service as a judge.

²⁰⁴*Id.*

S/he recalled that s/he was “still not making as much as [s/he] made twenty-nine years ago.”²⁰⁵ S/he “went from a Mercedes to a Honda and [is] still driving a Honda.”²⁰⁶

Another Sustainer related that s/he had actually delayed seeking a judgeship for a significant period of time for finance reasons. S/he saved money so the “financial transition wouldn’t be so dramatic.”²⁰⁷ Having made that substantial sacrifice, this Sustainer was “now not inclined to let [Article III status] go.” S/he couldn’t “imagine going back into private practice for any amount of money.”²⁰⁸ S/he considered what s/he was “doing now so much more important and consequential” than making money in private practice.²⁰⁹

Seven of the Sustainers minimized the influence of financial considerations on their career decisions when asked what amount of money would tempt them to relinquish their Article III status, although one also responded that it would require “substantially more than \$200,000” for [her/him] to relinquish [her/his] Article III

²⁰⁵*Supra* n.179.

²⁰⁶*Id.*

²⁰⁷*Supra* n.181.

²⁰⁸*Id.*

²⁰⁹*Id.*

status.²¹⁰

One Sustainer explained that s/he was “committed to public service from the beginning.”²¹¹ S/he “knew what [s/he] was getting into from the time s/he left law school.”²¹² This Sustainer remarked that if money had been her/his motivation, s/he “would have gone a different route.”²¹³ Another similarly emphasized that s/he was “not motivated at all by money” and that “no amount of money could tempt [her/him] to relinquish her/his Article III status.”²¹⁴ “Not even a million a year.”²¹⁵ S/he had been in private practice for twenty-five years and was “financially comfortable.”²¹⁶ Like some of the Baby Judges who were in private practice, this Sustainer “had in the back of [her/his] mind that financial resources might enable [her/him] to take an Article III judgeship someday.”²¹⁷

²¹⁰*Supra* n.173.

²¹¹*Supra* n.177.

²¹²*Id.*

²¹³*Id.*

²¹⁴*Supra* n.175.

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷*Id.*

A third Sustainer “didn’t sign on for the pay.”²¹⁸ Her/his “only ambition is to do the job to the best of [her/his] ability” and “nothing could change her/his mind at this point.”²¹⁹

A fourth Sustainer agreed that “money is no issue,”²²⁰ and a fifth reiterated that s/he “didn’t get into the profession for money.”²²¹

A sixth Sustainer remarked that although money was not a concern for her/him, s/he was aware that it was a concern for other of her/his colleagues.

A seventh Sustainer temporized that there are “no money pressures now,” but related that s/he and his/her spouse “handled [college] tuition in some way or other.”²²²

Two of the Sustainers were noncommittal on the topic of financial considerations, including one of the Sustainers who sought a deanship. However, the other Sustainer who sought a deanship candidly acknowledged that the lack of adequate remuneration was a motivating factor in her/his decision to seek

²¹⁸*Supra* n.176.

²¹⁹*Id.*

²²⁰Telephone Interview with Sustainer Judge P, February 11, 2016.

²²¹*Supra* n.178.

²²²*Supra* n. 184.

opportunities outside the judiciary. S/he took a pay cut to become a federal judge and was “disappointed in the lack of pay increases over the years.”²²³

Another Sustainer described teaching at a local law school although it was “kind of a burden,” because s/he “needed the money.”²²⁴ S/he was reluctant to leave the bench for a position in the private sector only because “if a judgeship is perceived as a stepping stone to making money, [the private sector] could be seen as a corrupting influence.”²²⁵ Nevertheless, s/he concedes that s/he is still “a little tempted by money.”²²⁶

Two other Sustainers noted financial considerations as a “factor” that would enter into their decisionmaking process.²²⁷

A fifth Sustainer discussed financial considerations in terms of “lifestyle.”²²⁸ The implication of this terminology seems to be that a more restrained lifestyle comes with Article III pay. Although this Sustainer “didn’t see” her/himself

²²³*Supra* n.201.

²²⁴*Supra* n.199.

²²⁵*Id.*

²²⁶*Id.*

²²⁷*Supra* nn.173, 180.

²²⁸*Supra* n.182.

tempted by money at this point, s/he also mused that “I’m sure there’s some amount out there.”²²⁹

When asked what career opportunity would tempt them, the Sustainers gave varying responses. As discussed earlier, two of the Sustainers were obviously tempted by law school deanships.²³⁰ Two others found mediation an attractive career option, although a different two expressly disavowed any interest in mediation. One of the latter explained that if s/he “wanted to keep judging, [s/he] would do it as an Article III judge rather than in the private sector.”²³¹ S/he gave as examples of possible options running for office or engage in the private practice of law, although s/he “wasn’t thinking of doing either.”²³²

The other of the latter two has been approached by a mediation service but was “not really tempted.”²³³ S/he also has been solicited to run for high public offices because “some see judging as a stepping stone to politics.”²³⁴ If this

²²⁹*Id.*

²³⁰Interest in the academy is discussed more specifically in the next section.

²³¹*Supra* n.220.

²³²*Id.*

²³³*Supra* n.191.

²³⁴*Id.*

Sustainer became a mediator, s/he would mediate cases for no fee, “to help people.”²³⁵

A different Sustainer would be tempted “if something terrific came up” such as “President of Harvard or CEO of a multibillion corporation.”²³⁶ Another “may think about something else after [her/his] term as Chief Judge.”²³⁷

The balance of the Sustainers could not conceive of another career that would tempt them to relinquish their Article III status.

CONCLUSION: Roughly one-third (five of sixteen) of the Sustainers acknowledged that financial considerations might influence their decisions to relinquish their Article III status in favor of a more lucrative position in the private sector. Although one or two of the Sustainers described compiling a nest egg while in private practice to cushion the pay decrease, a majority of the Sustainers (nine of sixteen) expressed willingness to “make do” on the salary of an Article III judge, for now. Two Sustainers were tempted by deanship opportunities and two others consider mediation attractive. Another two are willing to consider different career choices.

²³⁵*Id.*

²³⁶*Supra* n.184.

²³⁷*Supra* n.182.

D. The Lure of the Academy

I will start this section with the two Sustainers with an obvious interest in the Academy, the two who sought deanships. Both had taught in law schools for twenty-five plus years. However, their decisions to seek deanships did not follow parallel courses. One Sustainer started contemplating leaving the bench two to three years before becoming eligible for senior status, after someone on the law school faculty sought her/him out for a deanship position. Although that position did not ultimately culminate in her/his assuming a deanship, the Sustainer is still interested in a position in the academy. S/he is now seeking a visiting professor position for a semester “to see if something clicks.”²³⁸

When I asked whether it was difficult for her/him to decide to consider relinquishing her/his Article III status, the Sustainer responded that s/he “would miss the contemplative nature of the job,” the “conferring with law clerks” and “deciding tough issues.”²³⁹ S/he also counted it as a plus that an Article III judge “can take the time needed to resolve cases and has the luxury to do what is

²³⁸*Supra* n.201.

²³⁹*Id.*

right.”²⁴⁰ Although the Article III position is a “great job,” the Sustainer saw “no need to keep doing it.”²⁴¹ S/he “would like to try something different” and feels that s/he “has another career in [her/him].”²⁴²

The other Sustainer who sought a deanship wanted a position at a particular school, so s/he saw the opportunity as a unique one, and was not looking for the opportunity generally to enter the academy. S/he remarked that it “would have been a pang to leave the bench,” and now that the “unique situation” s/he pursued did not materialize, s/he “will be an Article III judge for the balance of [her/his] professional life.”²⁴³

The views of the other Sustainers, most of whom have taught, varied. They bear discussion individually.

Sustainer No. 1 has previously taught at a law school and sits on a law school board. S/he thinks that “law professors and deans have the best jobs in our

²⁴⁰*Id.*

²⁴¹*Id.*

²⁴²*Id.*

²⁴³*Supra* n.203.

profession.”²⁴⁴ To her/him “these jobs are the best-kept secret in the legal field.”²⁴⁵ S/he noted short work days, sabbaticals, opportunities to teach at other schools and assistants as perks of the academy. S/he added that “colleagues who have entered the academy seem to enjoy it.”²⁴⁶ S/he seriously considered relinquishing her/his Article III status to enter the academy full-time, but changed her/his mind mostly due to the downturn in law school applications. S/he “would not say no” to a deanship and a professorship “would be tempting as well” if offered.²⁴⁷

Sustainer No. 2 taught law school for one year after graduating. S/he “had one feeler for a deanship”²⁴⁸ but was not interested in “fighting with faculty and raising money.”²⁴⁹ A professorship “might be worth it if the right offer” came along because “professors make more than judges” and writing law review articles “appeals to [her/him].”²⁵⁰

Sustainer No. 3 taught law school before becoming a judge and is now an

²⁴⁴*Supra* n.173.

²⁴⁵*Id.*

²⁴⁶*Id.*

²⁴⁷*Id.*

²⁴⁸*Supra* n.184.

²⁴⁹*Id.*

²⁵⁰*Id.*

adjunct professor. S/he has taught for over thirty-five years. This Sustainer has “never seriously considered leaving the bench to teach.”²⁵¹ S/he was approached to apply for a deanship position, but “was adamant about ‘no.’”²⁵² S/he has “no attitude or aptitude for a top tier administrative management position.”²⁵³ S/he has known several deans and has served on two search committees and described the position of dean as “Head of the Complaint Department.”²⁵⁴ Moreover, s/he would “hate asking for money.”²⁵⁵ Short answer: No thanks.

Sustainer No. 4 taught for one year before becoming a judge, and as an adjunct professor while sitting as a judge. S/he is not interested in becoming a full-time member of the academy. To her/him, being a dean is “one of the hardest jobs in the world,” requiring “a lot of energy [s/he] doesn’t have.”²⁵⁶ S/he also noted that s/he would “miss the community of judges, the high-level work environment

²⁵¹*Supra* n.172.

²⁵²*Id.*

²⁵³*Id.*

²⁵⁴*Id.*

²⁵⁵*Id.*

²⁵⁶*Supra* n.199.

and that “the respect of people in the community is nice.”²⁵⁷

Sustainer No. 5 has taught as an adjunct professor for thirty years. S/he does not see the academy as a viable option because “the legal profession is shrinking due to the diminishing number of students.”²⁵⁸ Consequently, “law schools can’t afford to hire judges.”²⁵⁹ S/he sees the academy as an “option gone for now for judges” that “may return in five or six years.”²⁶⁰

Sustainer No. 6 taught for ten years as an adjunct professor while practicing law. S/he has been approached to teach again since becoming a judge and “taught for a couple of years,” but is “too busy with work” to continue.²⁶¹ Although s/he currently has no definite plans to return to teaching, s/he “will teach again at some point.”²⁶² This Sustainer made the point that her/his “principal” focus is her/his “judge work.”²⁶³ S/he explained that s/he is “better suited to be a judge and happier

²⁵⁷*Id.*

²⁵⁸*Supra* n.177.

²⁵⁹*Id.*

²⁶⁰*Id.*

²⁶¹*Supra* n.175.

²⁶²*Id.*

²⁶³*Id.*

than [s/he] would be as a professor.”²⁶⁴

This Sustainer also stated that “law school administration was not really attractive to [her/him]” because the “public service of [her/his] current job is more satisfying.”²⁶⁵

Sustainer No. 7 has taught for thirty-four years, and in the process has “met a lot of deans.”²⁶⁶ S/he taught both before and after becoming a judge. S/he “loves working with students but not full-time.”²⁶⁷ She doesn’t “see her/himself teaching full-time in the near future because s/he feels that s/he is “making a difference as a judge and enjoys working with [her/his] colleagues and attorneys.”²⁶⁸

Sustainer No. 8 has done some law school teaching and could do so again, but is “not interested in a deanship.”²⁶⁹ S/he does not perceive a deanship as “compatible with her/his skill set.”²⁷⁰ S/he is close friends with a dean and from her/his observation “half the dean’s time is spent on fundraising and the other half

²⁶⁴*Id.*

²⁶⁵*Id.*

²⁶⁶*Supra* n.179.

²⁶⁷*Id.*

²⁶⁸*Id.*

²⁶⁹*Supra* n.220.

²⁷⁰*Id.*

on faculty parking.”²⁷¹

Sustainer No. 9 has not taught so far but “could see her/himself teaching as an adjunct professor while keeping [her/his] status as a federal judge.”²⁷² This Sustainer is not at all interested in becoming a dean.

Sustainer No. 10 “would like to teach at a law school if geographically possible.”²⁷³ Unfortunately, this Sustainer’s residence is not located near a law school. In addition, this Sustainer “wouldn’t leave the bench to be a law professor full-time.”²⁷⁴ Although this Sustainer expressed “a desire to associate with kids and give them the benefit of what s/he knows,” s/he is not interested in being a dean.²⁷⁵

Sustainer No. 11 finds teaching “somewhat attractive,” but noted that teaching “might tie [her/him] down more than [s/he] desires.”²⁷⁶ At this point, the Sustainer is “reluctant to commit to anything that “would interfere with time with

²⁷¹*Id.*

²⁷²*Supra* n.107.

²⁷³*Supra* n.191.

²⁷⁴*Id.*

²⁷⁵*Id.*

²⁷⁶*Supra* n.178.

[her/his] family.”²⁷⁷ A deanship is not appealing, even though this Sustainer has undertaken leadership positions in both his/her professional and personal lives. S/he “knows how to do it well, but administration of a law school, including raising money, is not real attractive.”²⁷⁸ This Sustainer “wouldn’t necessarily turn down an offer, but wouldn’t go looking for the opportunity.”²⁷⁹

Sustainer No. 12 “would not want to teach at a law school” and be “committed to weekly classes and grading papers.”²⁸⁰ S/he might consider teaching trial advocacy.

Sustainer No. 13 reflected that one would “have to think about if [the Academy] is something you want to do, especially fundraising.” S/he added that “it’s not always an easy switch.”²⁸¹

Sustainer No. 14 expressed no interest in the Academy.

CONCLUSION: Most of the Sustainers reported some experience teaching in the academy, with several having taught in excess of twenty-five years.

²⁷⁷*Id.*

²⁷⁸*Id.*

²⁷⁹*Id.*

²⁸⁰*Supra* n.105.

²⁸¹*Supra* n.182.

Although two of their number expressed willingness to relinquish their Article III status for a position in the academy and two more reported an inclination to consider making that choice, the other Sustainers responded that they were inclined to retain their Article III status and serve in the academy as adjunct professors.

In summary, at this more advanced stage of their judicial careers, Sustainers expressed a little more restlessness. Two of them reported coming very close to leaving the ranks of the judiciary and several others vocalized discontent with the continued lack of a pay raise for Article III judges. A number of the Sustainers envisioned themselves pursuing other careers, including in the academy and as mediators.

VIII. Cluster Three - The Departed

I anticipated that the responses of this group of judges would provide the most useful information regarding future retention of Article III judges. I especially wanted to explore the actual reasons for their departures, including the degree to which financial considerations played a role, and which careers lured them away from the bench.

A. Initial Commitment to Life Tenure

As earlier discussed, my very first interviewee, one of The Departed, recalled that “if anyone had asked [her/him] when [s/he] was first appointed, [s/he]

would have responded that [s/he] would die on the bench.”²⁸² With two exceptions, other members of The Departed expressed the same sentiment.

One member of this cluster echoed an approach taken by a Baby Judge: S/he gave her/himself permission to retire at age seventy “all along.”²⁸³ Another member recalled that s/he “didn’t think hard about lifetime tenure, but probably assumed [s/he] would stay for the rest of [her/his] professional career.”²⁸⁴

The remaining members of the cluster agreed with the original interviewee. One of The Departed put it this way: “I intended to be Article III for the balance of my career when I took a 50 percent pay cut to go on the bench.”²⁸⁵

Another confirmed that when s/he “went on the bench, [s/he] absolutely intended to stay “for the balance of his/her professional career.”²⁸⁶ S/he described the federal judgeship as the “apex of the legal community,” providing an “opportunity to decide incredibly important issues not only for litigants, but for the

²⁸²*Supra* n.93.

²⁸³Telephone Interview with Departed Judge B, January 12, 2016.

²⁸⁴Telephone Interview with Departed Judge C, January 5, 2016.

²⁸⁵Telephone Interview with Departed Judge D, January 12, 2016.

²⁸⁶Telephone Interview with Departed Judge E, January 21, 2016.

legal system.”²⁸⁷ S/he saw the federal judgeship as a “great opportunity to immerse [her/himself] in the law.”²⁸⁸ S/he described her/himself as “still a judge at [her/his] core.”²⁸⁹ Yet another of The Departed responded that s/he “thought [s/he] would die with her/his robes on.”²⁹⁰ Still another related that “when [s/he] took Article III status, it never crossed [her/his] mind that [s/he] would leave.”²⁹¹ S/he elaborated that s/he “had no intention to do anything other than take senior status and then work in that capacity for the rest of [her/his] career.”²⁹²

A different member of this cluster agreed that s/he “intended to be carried out.”²⁹³

One of The Departed described her/his intent to become a senior judge. S/he conveyed that when s/he was a Baby Judge, “being a senior judge was like being a

²⁸⁷*Id.*

²⁸⁸*Id.*

²⁸⁹*Id.*

²⁹⁰Telephone Interview with Departed Judge F, January 19, 2016.

²⁹¹Telephone Interview with Departed Judge G, January 11, 2016.

²⁹²*Id.*

²⁹³Telephone Interview with Departed Judge H, January 12, 2016.

god.”²⁹⁴ There was a judge’s lunchroom where the junior judges went every day to sit at the feet of the senior judges “and listen to their words of wisdom.”²⁹⁵

The balance of The Departed confirmed their initial commitment to lifetime tenure without further elaboration.

CONCLUSION: As with the Baby Judges and Sustainers, The Departed confirmed their intent when appointed to remain on the bench for life.

B. Continued Commitment to Lifetime Tenure

The approach to this inquiry differed for an obvious reason: The Departed have elected to relinquish their Article III status. Consequently, with this cluster I explored at what point in her/his career the decision was made to leave the bench, and whether s/he feels a loss of prestige post-federal judgeship.

One of the most eye-opening interviews challenged my presumption that this cluster of judges elected to relinquish their Article III tenure. Rather, one of The Departed insisted that s/he “did not give up [her/his] Article III status, but retired to the annuity.”²⁹⁶ S/he lamented that “because of the way the Judicial Act is crafted,

²⁹⁴Telephone Interview with Departed Judge I, January 19, 2016.

²⁹⁵*Id.*

²⁹⁶*Supra* n.293.

Article III judges who retire are not subject to recall.”²⁹⁷ S/he urged that “if Congress would amend the Judicial Act to allow Article III judges to be recalled like magistrate judges and bankruptcy judges, the tide of departing judges would be stemmed.”²⁹⁸ S/he explained that “a simple amendment to Title 28, Chapter 17, to implement the same scheme as provided for magistrate judges and bankruptcy judges would facilitate retention of lifetime tenure.”^{299, 300} This member of The Departed went so far as to write members of Congress urging consideration of legislation to that effect.³⁰¹

This member of The Departed retired shortly after s/he qualified for senior status. She readily acknowledged that her/his retirement “was totally driven by finances.”³⁰² S/he expounded that “reality reared its ugly head.” S/he had “three kids in college at once and two in line for graduate school—one in law and one in

²⁹⁷*Id.*

²⁹⁸*Id.*

²⁹⁹*Id.*

³⁰⁰*See, e.g.,* 28 U.S.C. § 636(h) (allowing for the recall to service of retired magistrate judges).

³⁰¹A copy of one letter sent to Senator Grassley is attached as Appendix 1. According to this member of The Departed, Senator Grassley never responded.

³⁰²*Supra* n.293.

medicine.”³⁰³ This member of The Departed has “regretted it every day from the day s/he retired.”³⁰⁴ S/he became a mediator with a private mediation service, and compared the experience unfavorably with her/his judgeship, stating that being a mediator “is not the same” as serving as an Article III judge, which s/he described as the “best job in the world.”³⁰⁵

A second member of The Departed who is now a mediator also left no doubt regarding the reason s/he elected to retire when eligible. S/he observed that “no real serious thought has been given by Congress to the money needs of judges.”³⁰⁶ S/he also bemoaned the lack of a “solution to the [pay] linkage problem with Congress.”³⁰⁷ This member of The Departed attributed much of “the problem” to the Ethics Reform Act. In her/his words:

The Ethics Reform Act changed everything. Beforehand [an Article III judge] could make sufficient money as an adjunct or through honoraria. [In the Ethics Reform

³⁰³*Id.*

³⁰⁴*Id.*

³⁰⁵*Id.*

³⁰⁶Telephone Interview with Departed Judge J, January 6, 2016.

³⁰⁷*Id.*

Act], adjunct salary got sliced to practically nothing.³⁰⁸

From the perspective of this member of The Departed, “the exit trend” of Article III judges has been “largely prompted by the Ethics Reform Act and its limitations.”³⁰⁹ S/he added that the “so-called pay raise was not nearly enough to offset the decreased compensation from teaching and honoraria.”³¹⁰

This member of The Departed also expressed frustration with the expansion of federal crimes. S/he explained that federal courts have “turned into criminal courts with no trial of civil cases.”³¹¹ S/he noted that “civil cases are increasingly going to private mediation.”³¹² Ultimately, this member of The Departed described her/himself as motivated “50% financially and 50% by frustration with the federalization of crimes.”³¹³ This member of The Departed concluded that “the morale of the judiciary tanked due to the salary situation and the fact that we

³⁰⁸*Id.*

³⁰⁹*Id.*

³¹⁰*Id.*

³¹¹*Id.*

³¹²*Id.*

³¹³*Id.*

turned into a criminal court.”³¹⁴

This member of The Departed stated that the “psychic income prestige factor was hard to give up but his/her children and grandchildren are more important.”³¹⁵

A third member of The Departed who is a private mediator related that s/he retired for two main reasons: 1) “the failure of Congress to confer a [cost-of-living adjustment year after year]”³¹⁶ and 2) the growth of the mediation industry. This member of The Departed recalled that in twenty-two years, her/his salary increased only \$40,000.00. S/he also noted that when s/he was in private practice, lawyers settled their own cases; there was “no such thing as a mediation firm.”³¹⁷

This member of The Departed explained that when s/he was appointed to the bench, the appointment came with a financial sacrifice because s/he left private practice before “the real explosion of legal salaries commenced.”³¹⁸ Consequently, s/he was not “able to accumulate a nest egg while practicing,” as described by

³¹⁴*Id.*

³¹⁵*Id.*

³¹⁶*Supra* n.291.

³¹⁷*Id.*

³¹⁸*Id.*

several of the Baby Judges and Sustainers.³¹⁹

S/he recalled being recruited by a private mediation service where “many former judges were making a substantial income.”³²⁰ /he described the decision as “enormous,” and after becoming eligible for senior status “took a year or two of thinking about and wrestling with” the offer “before finalizing [his/her] decision” to leave the bench.³²¹

This member of The Departed “can’t believe [s/he’s] gone from the federal bench” and “regret[s] leaving in many ways.”³²² S/he expressed that serving as a private mediator is “not an especially good tradeoff, but [s/he] enjoys the extra income.”³²³ S/he revealed that the mediation field is “competitive,” requiring “market[ing] and glad hand[ing],” which s/he described as “somewhat demeaning.”³²⁴ However, her/his spouse had formerly been the primary financial support for the family. Once her/his spouse retired s/he felt an obligation “to

³¹⁹*Id.*

³²⁰*Id.*

³²¹*Id.*

³²²*Id.*

³²³*Id.*

³²⁴*Id.*

shoulder more of the financial responsibility for the family.”³²⁵ Consequently, s/he would make the same decision “as much as [s/he] regrets not being on the court.”³²⁶ S/he “attend[s] ceremonial court functions and maintain[s] a relationship with some of the judges with whom [s/he] is especially close.”³²⁷ Nevertheless, for this member of The Departed it is “still a strange feeling going into the courthouse and not being an Article III judge.”³²⁸

This member concluded with a “piece of advice to someone considering leaving the bench: Be absolutely sure it’s what you want to do. You can’t go back.”³²⁹

A fourth member of The Departed who is now a private mediator narrated a more circuitous route to retirement. This member of The Departed related that “in the last few years” of his/her active service, s/he was part of the Wellness Committee. In that capacity, s/he observed firsthand “the dilemma of judges who

³²⁵*Id.*

³²⁶*Id.*

³²⁷*Id.*

³²⁸*Id.*

³²⁹*Id.*

stayed too long.”³³⁰ This member of The Departed “didn’t want to risk that [staying too long].”³³¹ Rather s/he “wanted to leave while [s/he] was still at the top of [her/his] game.”³³²

According to this member of The Departed, her/his “legacy and reputation in the legal community are important to [her/him].”³³³ Although “not the driving factor,” this member of The Departed also discussed the “financial consideration” of “helping prepare for [her/his] granddaughter’s college expenses.”³³⁴

When asked about any regrets, this member of The Departed admits that s/he “misses being the funniest person in the room.”^{335, 336}

The fifth member of The Departed who serves as a private mediator has also founded a think tank, teaches at a law school and is Of Counsel with a law firm. S/he revealed that ten to twelve years into her/his tenure, s/he “started to re-

³³⁰*Supra* n.93.

³³¹*Id.*

³³²*Id.*

³³³*Id.*

³³⁴*Id.*

³³⁵*Id.*

³³⁶Janet S. Kole, *Don’t Be Funny: Litigation is no laughing matter to your clients*, *ABA Journal*, November 2015, at 26 (“We eventually realized that anytime a judge tells a joke, everyone has to laugh.”).

think”³³⁷ lifetime tenure. S/he found it a “financial burden to send three boys to college.”³³⁸ S/he considered her/himself to be “just paying bills.”³³⁹

In addition, prior to her/his appointment, s/he had served as an elected official. In that capacity, s/he “enjoyed interaction with people [and] missed that life.”³⁴⁰ S/he also desired to start a think tank and felt that “so many things were pulling [her/him] toward a life outside the bench.”³⁴¹

Although this member of The Departed misses being an Article III judge, s/he does not regret her/his decision. This member of The Departed expressed that an Article III judge “never loses the prestige.”³⁴² S/he explained that s/he will “always have the prestige of being an Article III judge. Everyone knows [s/he] was an Article III judge and [s/he] still gets the utmost respect.”³⁴³

The next four members of The Departed represent a phenomenon unique to federal judges in California—movement from the federal district court bench to the

³³⁷*Supra* n.284.

³³⁸*Id.*

³³⁹*Id.*

³⁴⁰*Id.*

³⁴¹*Id.*

³⁴²*Id.*

³⁴³*Id.*

state appellate bench. As one of the California judges remarked and as observed with judges from other states who were interviewed, the more usual occurrence is movement from the state bench to the federal bench. As another of the California judges put it, the trend to “go from Article III to the state [appellate] court is unique to California.”³⁴⁴

The first of the California judges began to contemplate leaving the federal district court for the California Supreme Court after four to five years on the bench. S/he wanted a “chance to be an appellate judge.”³⁴⁵ S/he noted that a previous Chief Judge of the California Supreme Court had followed the same path from federal district court to the California Supreme Court. This first California judge articulated that the “single most important factor” influencing her/his decision was “the opportunity to work as an appellate judge for the most prestigious state court in the country” and “make law on important issues in the highest state court.”³⁴⁶ It was also important that s/he already had twelve years in the state court system and could retire four years earlier in the state court than in the federal court.

At the time this first California judge made her/his decision, s/he assessed

³⁴⁴Telephone Interview with Departed Judge K, January 19, 2016.

³⁴⁵*Id.*

³⁴⁶*Id.*

her/his “chance to get on the Ninth Circuit as slim.”³⁴⁷ Although “not dispositive,” s/he also considered that the insurance benefits and pay were better in the state system and that a car was provided.³⁴⁸ As for regrets, the first California judge “never looked back.”³⁴⁹

The second California judge decided to relinquish her/his Article III status after eleven years, even though s/he considered the federal judgeship “the most interesting work [s/he] ever had” and “the work in state court not necessarily as interesting.”³⁵⁰ However, due to the “scope and complexity” and volume of work, even though this California judge “liked the work,” s/he “didn’t carve out personal time, ground her/himself down and incurred health problems.”³⁵¹ This California judge is of the view that the judgeship on the state court is a “better fit for [her/his] personality” because “the rhythm of the [state] cases allows you to be more deliberate.”³⁵²

³⁴⁷*Id.*

³⁴⁸*Id.*

³⁴⁹*Id.*

³⁵⁰Telephone Interview with Departed Judge L, January 5, 2016.

³⁵¹*Id.*

³⁵²*Id.*

In retrospect, this California judge has come to realize that s/he could now “do a better job as an Article III judge” including “carv[ing] out personal time.”³⁵³ S/he now understands that “the work doesn’t all have to be done in a day.”³⁵⁴ S/he “could have worked differently and kept the best job [s/he] ever had.”³⁵⁵

Although this California judge does not regret her/his decision, s/he perceives a “difference in status.”³⁵⁶ In her/his perception, “the federal judiciary is the crown jewel and is held in higher esteem.”³⁵⁷ According to this California judge, the “important issues of the day are mostly decided in federal court” and s/he misses that.³⁵⁸

This California judge also remarked that s/he would not have returned to the state court bench if the “finances hadn’t worked out.”³⁵⁹ With the higher salary in the state court and eligibility for a state court pension due to her/his earlier state

³⁵³*Id.*

³⁵⁴*Id.*

³⁵⁵*Id.*

³⁵⁶*Id.*

³⁵⁷*Id.*

³⁵⁸*Id.*

³⁵⁹*Id.*

service, returning to state court “made financial sense.”³⁶⁰ Overall, this California Judge expressed satisfaction with the choice s/he made.

The third California judge began to consider “new challenges and opportunities” after completing her/his stint as Chief Judge and becoming eligible for senior status.³⁶¹ By 2012, the status of senior judges had changed, resulting in the lack of a “critical mass of senior judges.”³⁶² Rather than taking senior status, active judges were leaving the federal bench due to space-sharing requirements and staff reduction. This California judge did not foresee elevation to the Ninth Circuit due to the relative youth of Obama appointees.

On the other hand, the governor of California appeared more receptive to appointing judges in their sixties. This California judge reported that of the people s/he consulted before finalizing her decision, “half thought it was great and the other half thought s/he was crazy.”³⁶³

For this California judge, money was not a consideration, and s/he “felt no

³⁶⁰*Id.*

³⁶¹*Supra* n.294.

³⁶²*Id.*

³⁶³*Id.*

loss of judicial prestige.”³⁶⁴ S/he acknowledged that a “lot of people feel a federal judgeship is more prestigious.”³⁶⁵ S/he countered that “on the other hand, [s/he] went from a trial judge to an appellate judge.”³⁶⁶ In addition, this California judge is on the same court as another former federal judge, which “helps to alleviate any feeling of loss of prestige.”³⁶⁷ This California judge expressed no regrets.

The fourth California judge began to re-think her/his commitment to life tenure after six years, and left two years later. S/he was working seventy hours a week and “felt beleaguered,” but “figured that was [her/his] life.”³⁶⁸

This California judge realized that a change was needed when s/he found her/himself trying to find time to attend the memorial service for her/his mother. S/he asked her/himself, “what does that say about the quality of my life?”³⁶⁹ S/he realized that this was “not a healthy way to live life.”³⁷⁰

³⁶⁴*Id.*

³⁶⁵*Id.*

³⁶⁶*Id.*

³⁶⁷*Id.*

³⁶⁸*Supra* n.178.

³⁶⁹*Id.*

³⁷⁰*Id.*

This California judge has “no regrets.”³⁷¹ As a state appellate judge s/he sees “all law all the time.”³⁷² The work is “as intellectually challenging but without the grind.”³⁷³ There has “not been a day in [her/his] life where [s/he] wanted to be back in federal court.”³⁷⁴

Money was “really not a factor” for this California judge.³⁷⁵ As for prestige, this judge responded: “Prestige is not a factor to my friends and I don’t care what those who don’t know me think.”³⁷⁶

The next three of The Departed left the bench for the academy, two as deans and one as a returning professor.

One of the two deans initially observed that there are not really that many former federal judges in the academy. Her/his experience was that former judges are “mostly” with private mediation services.³⁷⁷ This dean surmised that s/he was sought after as a dean due to her executive-level administrative experience in

³⁷¹*Id.*

³⁷²*Id.*

³⁷³*Id.*

³⁷⁴*Id.*

³⁷⁵*Id.*

³⁷⁶*Id.*

³⁷⁷Telephone Interview with Departed Judge M, January 20, 2016.

higher education prior to becoming a judge. As s/he approached the end of her/his term as Chief Judge, s/he was feeling less challenged by the work. At the same time, s/he was feeling “constrained at times about what [s/he] could say or be involved in.”³⁷⁸ S/he “didn’t want to be a bystander to good works.”³⁷⁹ Nevertheless, s/he “had a terrible time deciding” to leave the bench.³⁸⁰ For her/him, the decision was “wrenching.”³⁸¹

In the final analysis, this dean accepted an offer from a law school that particularly intrigued her/him. S/he made it clear that s/he “wouldn’t go just anywhere.”³⁸² Rather, s/he selected an institution where s/he could provide “payback for the privilege of having been a judge.”³⁸³ But, “financial considerations were also important.”³⁸⁴ This dean has children and expressed the

³⁷⁸*Id.*

³⁷⁹*Id.*

³⁸⁰*Id.*

³⁸¹*Id.*

³⁸²*Id.*

³⁸³*Id.*

³⁸⁴*Id.*

need to put her/his “family well-being in a high-priority position.”³⁸⁵ S/he remarked that “many other judges came on the bench from lucrative law practices” and s/he “didn’t want to leave [her/his] children with their student debt.”³⁸⁶

When asked if s/he had any regrets, this dean reflected that “sometimes [s/he] think[s] it was a really good existence as a judge.”³⁸⁷ S/he considers that s/he “lost prestige but that was not very important to [her/him]” and s/he “still ha[s] a lot of the gravitas.”³⁸⁸ On balance, s/he thinks s/he would make the same decision.

The second dean changed her/his mind about remaining on the bench when s/he was approached regarding opening an affordable law school. S/he though this concept “had real possibilities.”³⁸⁹ S/he was “not attracted to just starting another law school.”³⁹⁰ S/he “sees the academy as a natural progression for federal

³⁸⁵*Id.*

³⁸⁶*Id.*

³⁸⁷*Id.*

³⁸⁸*Id.*

³⁸⁹Telephone Interview with Departed Judge N, January 19, 2016.

³⁹⁰*Id.*

judges.”³⁹¹ S/he personally “was not interested in going to a big law firm for big bucks.”³⁹² S/he “didn’t want to go back and be somebody partisan.”³⁹³ In her/his opinion, s/he “owed the office more than that” and “didn’t want to cash in on the office.”³⁹⁴

This dean is “glad [s/he] did it” and has no regrets.³⁹⁵ S/he “would make the same decision all over again.”³⁹⁶ S/he considered it the “greatest opportunity in the world to be an Article III judge.”³⁹⁷ S/he “did the best [s/he] could while there” and doesn’t “look back.”³⁹⁸

This dean feels “no sacrifice of prestige.”³⁹⁹ S/he acknowledged that “with

³⁹¹*Id.*

³⁹²*Id.*

³⁹³*Id.*

³⁹⁴*Id.*

³⁹⁵*Id.*

³⁹⁶*Id.*

³⁹⁷*Id.*

³⁹⁸*Id.*

³⁹⁹*Id.*

the appointment to the federal bench you gain instant prestige and credibility.”⁴⁰⁰

However, s/he was “more excited to see if [s/he] could make the system work the way [s/he] envisioned.”⁴⁰¹ As with another of The Departed, this dean lamented that “no one laughs at [her/his] jokes and [s/he] is treated differently, but that’s ok.”^{402, 403}

Finally this dean related that “money was not really an issue” in her/his decision.⁴⁰⁴

The third member of The Departed returned to the academy after five and one-half years on the federal bench. Crime victims’ rights was her/his interest even before s/he became a judge. The singular event that galvanized her/him was participation in an engaging seminar. S/he found her/himself thinking, “this is where I should be.”⁴⁰⁵ S/he was aware that the cases s/he decided were important. However, s/he came to believe that s/he “had unique skills to help crime victims”

⁴⁰⁰*Id.*

⁴⁰¹*Id.*

⁴⁰²*Id.*

⁴⁰³*Supra* n.336.

⁴⁰⁴*Supra* n.389.

⁴⁰⁵Telephone Interview with Departed Judge O, January 20, 2016.

and that “others could do the judicial work.”⁴⁰⁶ In addition to serving as a law-school professor, s/he “now does *pro bono* crime victims’ work around the country.”⁴⁰⁷

The professor gave three reasons for leaving the bench:

1. The opportunity to return to teaching;
2. The opportunity to do *pro bono* advocacy for crime victims; and
3. The lack of a pay raise for judges.

The professor expressed that it was difficult to tell people who had supported her/him for a federal judgeship that s/he was relinquishing her/his position. Indeed, some family members and colleagues “tried to talk [her/him] out of giving up [her/his] Article III commission.”⁴⁰⁸

As for regrets, the professor “occasionally miss[es] staff, clerks, litigation and colleagues but feels [s/he] is in the right place for [her/him].”⁴⁰⁹ Although s/he would make the same decision again, s/he “feel[s] badly that [s/he] only stayed for 5 ½ years” and is “sorry about all the effort to get [her/him] through had to be

⁴⁰⁶*Id.*

⁴⁰⁷*Id.*

⁴⁰⁸*Id.*

⁴⁰⁹*Id.*

repeated” with her/his successor.⁴¹⁰

The professor reflected that there was a loss of prestige, but the tradeoff was more control of her/his personal life. All in all, the loss of prestige was “not a big factor.”⁴¹¹

The remaining four of The Departed left the bench for various other positions. The first of the remaining four left to become chief executive officer of a *pro bono* law firm. S/he simply explained that “reinventing yourself every now and then is a good thing to do.”⁴¹²

The second was recruited to seek an executive-level government office, which s/he twice refused. Finally, her/his spouse convinced her/him that if s/he didn’t take this opportunity, s/he would “always wonder if [s/he] could have made a difference.”⁴¹³

This member of The Departed emphasized that s/he was not at all “dissatisfied with being a judge.”⁴¹⁴ S/he clarified that s/he misses being a judge

⁴¹⁰*Id.*

⁴¹¹*Id.*

⁴¹²Telephone Interview with Departed Judge P, December 14, 2015.

⁴¹³*Supra* n.286.

⁴¹⁴*Id.*

“greatly.”⁴¹⁵ What s/he misses “the most” is the “opportunity to really sit down and think about the law and immerse oneself in legal arguments.”⁴¹⁶ S/he described the decision to leave the bench as “agonizing” and “very personal” because s/he “loved going to the courthouse, hearing arguments and deciding cases.”⁴¹⁷ Nevertheless, while sitting on the bench and deciding cases, s/he was also acutely aware of important “issues in society, particularly the economic turmoil” and thought s/he “could make a difference.”⁴¹⁸

This member of The Departed described talking to a number of people before announcing her/his decision, including her/his colleagues on the bench. Her/his primary aim was to ensure that her/his departure was not construed in any way “as a negative reflection on the bench.”⁴¹⁹ S/he expressed “so much respect for judges and the justice system” that s/he “didn’t want anyone to think” s/he “was using the bench as a stepping stone because [s/he] wasn’t.”⁴²⁰ S/he does not regret

⁴¹⁵*Id.*

⁴¹⁶*Id.*

⁴¹⁷*Id.*

⁴¹⁸*Id.*

⁴¹⁹*Id.*

⁴²⁰*Id.*

making the decision because s/he “feels [s/he] made a difference” and would “probably” make the same decision again.⁴²¹

When asked about the loss of prestige, this member of The Departed responded that s/he “feels [s/he] let people down” and “part of [her/him] feels like [s/he] stepped away from a lifetime commitment.”⁴²² S/he “didn’t want to disappoint people and felt like [s/he] did.”⁴²³

The third of this group of four returned to private practice. S/he explained that s/he began considering leaving the bench nine years before s/he actually left, shortly after becoming eligible. S/he expounded that s/he “chafed under Supreme Court precedent,”⁴²⁴ especially that pertaining to the sentencing guidelines. In addition, in her/his view, the Supreme Court started “becoming the flood itself rather than protection against the flood.”⁴²⁵

This member of The Departed described her/himself as an “activist by

⁴²¹*Id.*

⁴²²*Id.*

⁴²³*Id.*

⁴²⁴*Supra* n.285.

⁴²⁵*Id.*

orientation, having previously practiced as a civil rights lawyer.”⁴²⁶ S/he “felt the need to speak out about certain issues and do something about them.”⁴²⁷ It was important to her/him to actively “participate in problems minorities face rather than sitting as a judge waiting for a particular case to come to you.”⁴²⁸ This member added that “money was also a part of it,” noting that law clerks were making more money after two to three years than the judges for whom they clerked.⁴²⁹

S/he expressed no regrets and concluded that “all in all” s/he had suffered no loss of esteem in the community.⁴³⁰

The final member of The Departed retired to simply enjoy life. S/he stated that s/he no longer “uses [her/his] judge title,” doesn’t “miss the work” and doesn’t “miss going to the courthouse everyday.”⁴³¹

CONCLUSION: Five of The Departed left to join private arbitration/mediation firms. Four California judges relinquished their federal

⁴²⁶*Id.*

⁴²⁷*Id.*

⁴²⁸*Id.*

⁴²⁹*Id.*

⁴³⁰*Id.*

⁴³¹*Supra* n.283.

judgeships for positions on the state appellate courts. Three of The Departed left for the academy. Of the remaining four, one became chief executive officer of a *pro bono* law firm, one pursued a high-level government office, one returned to the private practice of law, and one retired simply to enjoy life.

C. The Lure of Filthy Lucre

As discussed in the previous section, nine of the sixteen members of The Departed attributed their departure, in whole or in part to financial considerations, primarily the year-to-year lack of pay raises.

D. The Lure of the Academy

As discussed in a previous section, two of The Departed relinquished their judgeships for deanships. According to their responses, both accepted unique opportunities and were not necessarily focused on careers in the academy prior to being sought out. A third member of The Departed returned to the academy after five years as an Article III judge.

Of the remaining thirteen members, six expressed no interest in becoming involved with the academy.

Of the five members of The Departed who are presently serving as private mediators, four expressed an interest in the academy. The first reported having done some teaching at the local law school, but didn't see a deanship as "feasible

due to the fact of geography: only one law school here” and s/he was “not inclined to relocate.”⁴³²

The second taught as an adjunct professor while a judge and has continued to teach post-retirement.

The third taught the entire time s/he was a federal judge, from the 1980s. S/he related that “there is nothing more gratifying than interacting with young people.”⁴³³ S/he added that one can’t complain about what the present generation of attorneys is doing “if you had a hand in shaping them.”⁴³⁴ S/he also expressed that law schools “need people from the real world to teach and train the next generation of lawyers.”⁴³⁵ S/he was approached to serve as dean “a couple of times.”⁴³⁶ S/he declined because s/he was “not interested” in “rubber chicken dinners where money is solicited and you name bathrooms after [the donors].”⁴³⁷

The fourth “taught as an adjunct professor for years,” but did not perceive

⁴³²*Supra* n.93.

⁴³³*Supra* n. 306.

⁴³⁴*Id.*

⁴³⁵*Id.*

⁴³⁶*Id.*

⁴³⁷*Id.*

any “real opportunities” for her/him in the academy.⁴³⁸ S/he “wasn’t sure law schools are clamoring for retired judges.”⁴³⁹

The California judges did not respond positively to the notion of entering the academy. Of the two who elaborated, one responded that s/he was “not at all interested in law school.”⁴⁴⁰ S/he added that “legal scholarship didn’t appeal” to her/him and that s/he “didn’t have a feel for it.”⁴⁴¹ The other stated that s/he “likes the didactic aspects of teaching,” but s/he was not sure “whether the publishing aspects would be too esoteric.”⁴⁴²

The member of The Departed who left for an executive-level government office expressed exuberance at the prospect of entering the academy. S/he thinks s/he “has a lot to offer.”⁴⁴³ S/he articulated interest in teaching and in being a dean. S/he enjoys visiting schools, and has visited between two and three hundred of them, from elementary to post-graduate. S/he sees her/himself as a good

⁴³⁸*Supra* n.291.

⁴³⁹*Id.*

⁴⁴⁰*Supra* n.350.

⁴⁴¹*Id.*

⁴⁴²*Supra* n.290.

⁴⁴³*Supra* n.206.

administrator.

CONCLUSION: Among The Departed are five private arbitrators/mediators, four federal judges who became state judges, three members of the academy, one chief executive officer of a *pro bono* firm, an executive-level government official, a private practitioner and a true retiree. Of the sixteen members of The Departed, nine cited financial considerations as a factor in her/his departure.

In summary, the Departed expressed an initial commitment to life tenure, but described increasing frustration, primarily with the lack of adequate compensation. Although three landed in the academy, the largest number of this cluster (five) elected to become private arbitrators/mediators.

X. Implications

Using the words of members from the three clusters, I endeavored to conduct a somewhat longitudinal survey of Article III judges and some of the factors that influence their decisions relating to lifetime tenure. From these responses, I garnered the following implications for life tenure that may warrant further study and/or discussion:

1. To a person, the Article III judges interviewed agreed that it was a unique honor and privilege to serve as an Article III judge.

2. The overwhelming majority of judges interviewed expressed the intent, when initially appointed, to remain an Article III judge for life (41 out of 48).

3. Baby Judges represent a possibly untapped pool of potential adjunct professors, considering their expression of interest in becoming part-time participants in the academy.

4. The less firm commitment to lifetime tenure expressed by the Sustainers could benefit from a more focused examination to determine whether there is a burnout factor that needs to be proactively addressed by the Administrative Office of the Courts.

5. The increasing number of Sustainers who are influenced by financial considerations as compared to Baby Judges (eight compared to one), and who are willing to consider different career choices (seven compared to four) may portend decreased retention rates of judges approaching senior status.

6. The significant number of references by the Sustainers (eight of sixteen) and The Departed (nine of sixteen) to a lack of sufficient pay urges immediate and continuous exploration of the adequacy of pay for Article III judges.

7. The ability of state appellate courts in California to lure away federal

judges with lifetime tenure warrants a comparison of the federal and state systems to determine whether systemic changes are needed to federal appointment/retention policies.

8. Based on the responses of The Departed, private mediation service rather than the academy, is the most attractive career choice for those relinquishing Article III status (five as opposed to three). This potential drain of Article III judges may warrant investigation by the Administrative Office of the Courts.

The interviews conducted in the course of preparing this thesis provided a measure of insight into some of the factors that influence federal judges making life tenure decisions. It is hoped that the information presented spurs further study of this important subject.

Hon. Chuck Grassley
United States Senator
Chairman of the Senate Judiciary Committee
135 Hart Senate Office Building
Washington, DC 20510

Re: Recall of retired U.S. District Court Judges to ease case backlog.

Dear Senator:

As the Wall Street Journal reported today, civil suits are piling up in certain District Courts for want of judges to try them. The sense of the article was that additional judgeships be created as a solution. In response you reasoned that adding, at the cost of \$1 million a year year per judgeship for life terms, judges to cover backlogs “in busier courts without simultaneously reducing the number in courts where there aren't needed is irresponsible.” I agree and write to offer what I think would somewhat if not substantially alleviate the problem.

I suggest you consider seeking legislation to authorize the voluntary recall, as needed, of retired U.S. district court judges to sit temporarily to assist in reducing the backlog. If such legislation were passed it would correct something overlooked in Chapter 17 of Title 28, dealing with the retirement of of U.S. district judges: the benefits that would accrue to our justice system by allowing their recall as needed on a case by case basis in the U.S. District Courts. Since these retired district judges already have lifetime appointments, all that should be needed for their recall eligibility is statutory authorization. This should materially limit the need for the creation of additional judgeships.

As was I, many district judges were compelled to take retirement in order to earn additional money to see to the education of their children. In my case, I had three in college and graduate school at once. Now many of us have pretty much completed that obligation and are anxious to serve. The United States has a great deal invested in our training and experience, and each district chief judge should have the power and discretion to recall us as needed to serve and deal with district court case load back logs.

Very truly yours,

Appendix I