Article

The Old Hand Problem

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INTRODUCTION

After a federal judge is confirmed, they are in active service and, thanks to Article III, can remain in active service for life.[1] Still, most judges decline this invitation. Instead, active judges often, after they reach retirement age, go "senior," thereby creating a vacancy on their court for the sitting President to fill. Senior judges typically take fewer matters than an active judge, but they still hear, review, and decide cases. In any particular case, their vote counts as much as any other judge's. And they often serve alongside their replacements, whom they may even have a hand in selecting. These features are particular to the Judiciary. No other position within our federal system affords such an arrangement: i.e., a promise and guarantee of direct, continued influence on shaping the law even after retirement.

Yet despite the unique nature of senior status, many law students and even some lawyers probably do not know what senior status is or how it works. At most, we might imagine that senior judges hang around for a few years, as mentors to their more junior colleagues and caretakers to the Judiciary, just like an old hand on a ranch. The available scholarship generally coopts this view. Every five years or so, a judge pens a piece discussing what a senior judge does, because "it would be helpful to set the record straight regarding senior judges, about whom the public—and even lawyers—appear to know little."[2]

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1. U.S. CONST. art. III, § 1.

2. Hon. Wilfred Feinberg, *Senior Judges: A National Resource*, 56 BROOK. L. REV. 409, 409 (1990); *see also* Hon. Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 533 (2007) ("I interviewed a third-year law student . . . who, upon learning that I was a senior judge . . . , did not have a clue as to the differences between active and senior judges other than their perceived relative antiquity."); Hon. Ruggero J. Aldisert, *A Nonagenarian Discusses Life As A Senior Circuit Judge*, 14 J. APP. PRAC. & PROCESS 183, 183 (2013) ("[T]he literature is somewhat

More trenchantly, a handful of articles have examined why and when judges go senior. The consensus, as summarized by the work of Stephen Burbank, Judge S. Jay Plager, and Gregory Ablavsky, is that judges take senior status because of nonpartisan reasons: to create another seat on the court to handle rising caseloads, or because of financial incentives, or simply because they want to take a step back.[3] Under this conventional understanding, any theory of "strategic partisan behavior is dwarfed by other factors as a causal influence on the decisions federal judges make."[4]

But that understanding is not quite right. In fact, judges eligible to take senior status are today—more than ever before—deciding to do so in a politically strategic manner. Republican

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sparse [when it comes to senior judges] . . . . At law schools . . . both faculty and student law review editors don't truck with what they consider the Geritol set.").

3. Stephen B. Burbank, Hon. S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PENN. L. REV. 1, 70–71 (2012) (noting that judges sought senior status because they wanted to "help [ease] the court['s caseload] by creating a vacancy"; to "retire soon," with "senior status" as a "useful transition"; and to benefit from certain federal, state, and local tax advantages); *see also id.* at 47 ("Our data on when judges assume senior status do not support the assertion . . . that most senior-eligible judges . . . hang on until their replacement will be selected by a president they prefer politically. Nor is it supported by the best of the prior research that focuses on strategic partisan retirement.") (internal quotation marks and footnote omitted); *see also id.* at 37 nn.151–55 (citing and summarizing prior research); Richard L. Vining, Jr., *Judicial Departures and the Introduction of Qualified Retirement, 1892–1953*, 30 JUST. SYS. J. 139, 139 (2009) [hereinafter Vining, *Judicial Departures*] (asserting that "personal and institutional factors were more influential than political considerations" in judicial retirements); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111, 118 (2013) ("Recent work . . . has uncovered little evidence of timing effects."); Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1243 (2021) ("Part of why a good number of judges have elected to take senior status is that the statutory scheme provides considerable financial advantages for doing so."); Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pensions, or Power?*, 30 QUINNIPIAC L. REV. 131, 139 (2011) (acknowledging there exists a "clear consensus regarding the powerful effect of pension eligibility on retirement decisions" of federal district and circuit courts); Richard L. Vining, Jr., *Politics, Pragmatism, and Departures from the U.S. Courts of Appeals, 1954–2004*, 90 SOC. SCI. Q. 834, 837–42 (2009) [hereinafter Vining, *Politics, Pragmatism, and Departures*] (pointing to financial incentives and pension options); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 455 (2007) (discussing mentorship roles of senior judges).

4. Burbank et al., *supra* note 3, at 37.

appointees are only going senior when a Republican President is in office, and Democratic appointees are only going senior when a Democratic President is in office.

To prove this point, I created a novel dataset to measure senior status behavior. Previous studies, like those of Burbank, Plager, and Ablavsky, relied on self-reported surveys to study behavior. Such a reliance suffers a critical shortcoming: survey respondents—as anyone who has ever taken a survey would tell you—tend to overreport socially desirable behavior and underreport undesirable behavior.[5] I eschew such an approach. Instead, my dataset seeks to measure *actual* retirement behavior and *actual* timing of senior status decisions. I examined every senior status decision since 1919, when the senior judgeship was created—an endeavor not previously undertaken.

This dataset yields some startling results. For much of history, the decision to go senior was not all that partisan. Even as recently as the Clinton administration, more than half of the judges who took senior status had originally been appointed by a Republican President. But that calculus has shifted. Under George W. Bush, over 70% of federal judges seeking senior status were originally appointed by a Republican President. During the Trump administration, that increased to over 80%.[6] In about two years of the Biden administration, the number runs 65% the other way—the percentage of judges taking senior status who were appointed by a Democratic President.

These percentages represent a meaningful paradigm change. As I show, non-political alternative explanations—such as judicial capacity and caseloads, the financial benefits of going senior, and the presence of cross-party appointments—simply cannot sufficiently explain recent trends. The data also suggests that Republican-appointed judges have acted in a significantly more politically strategic manner than their Democratic-appointed counterparts. That finding contradicts an idea, put forth by Josh Blackman, that judges are only just now taking senior status to benefit President Biden and the Democratic Party.[7]

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5. Derek L. Phillips & Kevin J. Clancy, *Some Effects of "Social Desirability" in Survey Studies*, 77 AM. J. SOC. 921, 923 (1972); *accord* Roger Tourangeau & Ting Yan, *Sensitive Questions in Surveys*, 133 PSYCH. BULL. 859, 859–60 (2007).

6. *See infra* Part II.A.

7. *See* Josh Blackman, *Which Ninth Circuit Judges Were Waiting for a Democratic President to Take Senior Status?*, VOLOKH CONSPIRACY (Nov. 30, 2020), https://reason.com/volokh/2020/11/30/which-ninth-circuit-judges-were

This conjecture is not borne out by the data. True: both sides may be playing the game of strategic retirement. But also true: one side—the Republican Party—is *much* better at playing the game than the other. During the Trump administration, for instance, almost a hundred more Republican-appointed judges sought senior status than their Democrat counterparts—an absolute difference accounting for more than ten percent of the Judiciary.[8] At any rate, the percentage swings we have witnessed are significant for both parties and are historically unprecedented.[9]

I call this politically strategic behavior the "old hand" problem, in a nod to the dead hand problem. The dead hand problem asks why laws drafted several hundred years ago continue to bind us today.[10] It has been described as the "truly fundamental question of constitutional law"[11] and the "first question for constitutional theory."[12] But if we believe our laws should be shaped by today's generation rather than yesterday's, it is not the dead hand problem we should be worried about. It is the old hand problem.

That is because senior judges, while technically retired, continue to control law and policy for this generation *and* for future generations. An eligible senior judge can (1) ensure that the sitting President appoints an ideologically compatible replacement, while still (2) remaining on the bench to issue precedential decisions—thus making concrete and real the same specters associated with the dead hand problem.

Most vividly, just this past summer President Biden and Senate minority leader Mitch McConnell negotiated a deal so that Judge Karen Kaye Caldwell, a George W. Bush nominee, would take senior status to allow for the appointment of Chad Meredith, a Republican anti-abortion advocate.[13] This deal was

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-waiting-for-a-democratic-president-to-take-senior-status [https://perma.cc/98WY-GCXW].

8. *See infra* Part II.A.

9. *See infra* Part II.A.

10. Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 608–26 (2008); Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L.J. ONLINE 1, 3 (2020).

11. Michael J. Gerhardt, *The End of Theory*, 96 NW. U. L. REV. 283, 284 (2001) (reviewing JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001)).

12. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998).

13. *See* Mark Joseph Stern, *The Biden-McConnell Deal to Make an Anti-Abortion Advocate a Federal Judge Is Still On*, SLATE (July 1, 2022), https://

scuttled only because of objections from Kentucky's junior Senator Rand Paul.[14] Outside this particular event, in the last four years, judges from the Fourth and Seventh Circuits, as well as the Northern District of New York, have announced their intention to go senior, only to later rescind that decision.[15] Their reason? Because they learned who would be nominated to fill their vacancy—and were displeased by the proposed replacement.[16]

Even if not every judge is so transparent about their attempts to shape the Judiciary, there are still several unwelcome consequences with politically strategic senior status decision-making. I focus on three: *court-packing*, *court-picking*, and *court-stacking*.

First, so much ink has been spilled on court-packing the Supreme Court—pro, con, and otherwise.[17] But through senior status decisions, court-packing in a polarizing and partisan manner is *already* happening within the federal appellate courts. Five judges from the Sixth Circuit went senior during President

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slate.com/news-and-politics/2022/07/biden-mcconnell-chad-meredith-abortion-kentucky-judge.html [https://perma.cc/4P7K-Y732].

14. Manu Raju, *Rand Paul Blames McConnell Over Biden's Decision to Pull Back on Conservative Judge*, CNN (July 18, 2022), https://www.cnn.com/2022/07/18/politics/rand-paul-mitch-mcconnell-judge/index.html [https://perma.cc/9JCW-8KC9].

15. *See* Chris Dickerson, *King Steps Back from Moving to Senior Status, Might Have Been Unhappy with Retirement Plan*, W. VA. REC. (Nov. 30, 2021), https://wvrecord.com/stories/613723024-king-steps-back-from-moving-to-senior-status-might-have-been-unhappy-with-replacement-plan [https://perma.cc/4P44-G6TN] (discussing decision to rescind senior status by Fourth Circuit Judge Robert King); Eliana Johnson, *Why Pence Spiked a Trump Judge*, POLITICO (July 12, 2019), https://www.politico.com/story/2019/07/12/mike-pence-kanne-judge-trump-1411915 [https://perma.cc/ND2B-KG66] (discussing decision to rescind senior status decision by Seventh Circuit Judge Michael Kanne, because if his proposed replacement was "not going to be named, then I'm not going to take senior status"); Nate Raymond, *N.Y. Federal Judge Who Rescinded Retirement Still Won't Step Down*, REUTERS (Aug. 10, 2022), https://www.reuters.com/legal/government/ny-federal-judge-who-rescinded-retirement-still-wont-step-down-2022-08-10 [https://perma.cc/PX7W-2DNF] (discussing Northern District of New York Judge David Hurd's choice to rescind his senior status announcement after he learned who his replacement would be).

16. *See* sources cited *supra* note 15.

17. *See, e.g.*, Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 BUFF. L. REV. 1519 (2020); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019); Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016).

Trump's term, all appointed originally by a Republican.[18] All five judges, now senior, continue to hear cases—as do the five active judges who were appointed to replace them. These senior judgeship decisions have effectively doubled the representation of Republican appointees on the Sixth Circuit. They vote on cases, as do their successors. As I show, such court-packing is happening on other circuits as well.[19]

Second, on *court-picking*, a senior district judge can, unlike their active counterparts, dictate what types of cases they want to hear and what they do not want to hear—e.g., many senior district judges decline to hear pro se, habeas, or capital cases.[20] By opting out of such cases, senior judges have a disproportionate say in resolving the most consequential, high-profile matters in the political conversation. Senior district judges were thus responsible for decisions on the Trump travel ban, the Deferred Action for Childhood Arrivals program, and border wall funding.[21] Senior district judges are also, alongside active district judges, the only group who participate in magistrate judge selection.[22] No one from the Legislative and Executive Branches has any formal voice in these matters. Allowing senior district judges to select magistrate judges—essentially, permitting them to choose their colleagues—is yet another form of court-picking.

Finally, as to *court-stacking*, both senior circuit and district judges often sit on other courts by designation, a practice known as "visiting" a court. Visiting happens because some courts in some geographies have particularly acute resource shortages.[23] Since senior judges typically carry a lighter caseload, they have more availability than their active judge counterparts to visit. There is evidence suggesting that, when selecting who gets to visit, chief judges prioritize political ideology, thereby giving an

18. *See infra* Part I.D.

19. *See infra* Part IV.A.

20. *See, e.g.*, Block, *supra* note 2, at 540–41 ("What is different in the [Eastern District of New York] is a shift in the nature of the senior judges' work; they can decide that they no longer wish to preside over certain types of cases. For example, many [Eastern District of New York] senior judges stop handling pro se litigation.").

21. *See infra* Part IV.B.

22. 28 U.S.C. § 631(a); *see also* Block, *supra* note 2, at 543 ("[T]he senior judge participates fully in all aspects of the court's work, having an equal voice in all board-of-judges meetings and the selection process for the district's magistrate judges.").

23. Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 107 (2019).

ideologically oriented senior judge yet another opportunity to shape the law.[24]

This Article aims to shine a light on the old hand problem, by describing what it is and how it came to be, grappling with what it means, and hazarding some possible solutions. Part I provides a brief history of the senior judgeship.[25] Part II traces the rise of the old hand problem. As I show, for much of the twentieth century, most judges did not elect a strategic partisan retirement.[26] But this trend started to change with President George W. Bush. And it has only gotten worse with time.[27] Part III addresses why the old hand problem did not appear earlier and why it is manifesting now. Part IV discusses why we should be troubled by the old hand problem—how *court-packing*, *court-picking*, and *court-stacking* are, in fact, already impacting judicial legitimacy. Part V considers potential solutions to the old hand problem. I reject here Marin Levy's proposal that senior judges be given *more* responsibilities and *more* influence.[28] This proposal is an open invitation to encourage judges to go senior, exacerbating the worst aspects of the old hand problem. Another popular suggestion is to impose term limits,[29] but such a proposal runs into constitutional constraints. The most promising (and realistic) possibilities are incremental: changing eligibility requirements, cabining discretion to pass on certain cases, and the like. Such reforms are however just a starting point. My aim is not necessarily to solve the old hand problem, but to shine a light on what it is, why it matters, and why we need to do something about it.

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24. *See* Jeffrey Budziak, *The Strategic Designation of Visiting Judges in the U.S. Courts of Appeals*, 36 JUST. SYS. J. 233, 248 (2015); *see also infra* Part IV.C. (cataloging additional sources and support).

25. *See, e.g.*, H.R. REP. NO. 65-573, at 6 (1918) ("It is believed that the enactment of this provision [allowing federal judges to take senior status instead of resigning] will lead to further efficiency of the Federal courts without adding anything whatever in the way of expense for the additional services.").

26. *See, e.g.*, *infra* Part I.B. & Part I.C.; *accord* Burbank et al., *supra* note 3, at 37.

27. *See infra* Part II.A.

28. Levy, *supra* note 3, at 1251–60 (discussing how "to make senior status more attractive").

29. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 772, 775 (2006).

I. AN OVERVIEW OF THE SENIOR JUDGE

This first Part provides an overview of the senior judgeship. I situate the senior judge in the federal system and briefly discuss the privileges senior judges enjoy. I also canvass the existing literature, focusing on what it says about why and when federal judges go senior.

A. A BRIEF HISTORY OF THE SENIOR JUDGESHIP

The senior judge is a relatively recent invention. From the founding until the Civil War, the "exit" options available for a sitting federal judge were to resign without compensation or to die on the bench.[30] Only then could the President nominate a replacement. That was not unintentional. In *The Federalist Papers*, Alexander Hamilton explicitly argued against providing for judicial retirement.[31] As he put it, "[t]he deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it"[32]—in other words, judges would die before they became senile. Besides, as Hamilton added, the new nation could ill-afford to pay retirement benefits.[33]

By the mid-nineteenth century, though, Hamilton's view was under strain. With caseloads exploding after the Civil War, older judges were physically and cognitively unable to keep up.[34] One Supreme Court justice had to literally be lifted onto and off of the bench.[35] The Judiciary Act of 1869 provided the first formal retirement option, in which "[j]udges who reached the age of seventy and [who] had served for at least ten years could now retire from office on a pension equal to their salary at the time of retirement."[36] Following passage of this legislation, federal judges could now finally retire with benefits, rather than having to choose between resigning without pay or dying on the bench. For purposes of this Article, I refer to this option as "full retirement."

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30. Burbank et al., *supra* note 3, at 7.

31. THE FEDERALIST NO. 79, at 474–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

32. *Id.* at 474.

33. *Id.* at 474–75 (advising against a retirement age because "fortunes are not affluent, and pensions not expedient").

34. Burbank et al., *supra* note 3, at 7.

35. *Id.*

36. *Id.* (summarizing Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45).

Fifty more years would pass before Congress created a fourth option—what we know today as senior status. Under legislation enacted in 1919, senior judges would receive the same retirement benefits as a fully retired judge, but could continue to serve in the Judiciary in a reduced capacity "as a valuable resource for handling the increased workload of the federal courts."[37] At the time, Congress celebrated this move as a creative way to address rising case volumes.[38] As one Congressman put it, these judges could give "the benefit of [their] services without any additional expense to the Government," since they would receive the same pension if they fully retired and did nothing.[39]

Since 1919, Congress has changed the senior judgeship three times: in 1954, 1984, and 1989.[40] Legislation from 1954 allowed judges to take senior status at age sixty-five with fifteen years of service.[41] The requirement for full retirement—seventy years old and ten years of service—remained unchanged.

In 1984, Congress created the Rule of 80, allowing judges to either take senior status or to fully retire starting at age sixty-five, so long as their age and years on the bench combined to at least eighty.[42] Finally, in 1989, Congress modified the senior judgeship to make it more financially attractive.[43] Under 28 U.S.C. § 371, a judge who fully retires will "receive an annuity equal to the salary he was receiving at the time he retired."[44] This annuity amount cannot increase over time.[45] On the other hand, a senior judge will "continue to receive the salary of the office" so long as they carry an annual caseload greater than what "an average judge in active service would perform in three months."[46]

B. THE CURRENT FRAMEWORK

Judges today who satisfy the Rule of 80 can thus choose between four options: (1) resigning without pay, (2) full retirement,

37. *Id.* at 8.
38. *Id.*
39. *Id.*
40. *Id.* at 11.
41. *Id.* at 10.
42. *Id.*
43. 28 U.S.C. § 371.
44. 28 U.S.C. § 371(a).
45. *Id.*
46. 28 U.S.C. § 371(b)(1), (e)(1)(A).

(3) going senior, or (4) remaining in active service. For somewhat obvious reasons, the first option—resignation without pay or benefits—is one almost no one chooses.

When distinguishing between full retirement and senior status, the financial incentives tip towards going senior. Senior judges who take at least a twenty-five percent caseload receive a salary that increases whenever Congress changes the salary or adjusts the cost of living for active judges.[47] Fully retired judges receive no such benefit.[48] So long as a judge is willing to do a fraction of the work they were doing as an active judge, there is generally no financial reason to retire and leave the bench entirely.

When comparing senior status against active service, the differences are subtle. Unlike judges who have left the bench entirely, both active and senior judges review, hear, and decide cases. Both issue precedential opinions. Both are paid on the same salary scale. Both have chambers, staff, and law clerks.[49] A senior judge who keeps a full caseload and employs a full set of clerks and court staff would therefore act in name and likeness like an active judge.

Financial reasons, in fact, marginally favor going senior rather than remaining active. Under federal law, the income that senior judges receive is not subject to Social Security and Medicare taxes.[50] "[S]ome state[s] and local[ities]" also "treat senior status as retirement for purposes of exemption from or reduction of income, wage, and similar taxes."[51] The salary of active judges, on the other hand, remains subject to all pertinent taxes.[52] Finally, active judges can receive only fifteen percent of their salary in outside teaching income;[53] senior judges are not held to any such limitation.[54]

There is one oft noted (and, I think, overplayed) difference between active and senior service: senior circuit judges cannot

47. Levy, *supra* note 3, at 1243.

48. 28 U.S.C. § 371(a).

49. Levy, *supra* note 3, at 1243.

50. Federal law treats, for tax purposes, this income akin to the annuity that judges receive when they retire without further service. *See* 26 U.S.C. § 3121(i)(5).

51. Burbank et al., *supra* note 3, at 33.

52. *See generally* 26 U.S.C. § 3101 (providing the basic structure of wage tax for all employees in the United States generally).

53. 5 U.S.C. app. § 501(a)(1).

54. *Id.* § 501(a)(2).

participate in en banc hearings, unless they were part of the original panel that heard the case.[55] But that distinction makes no difference to a district judge, since district courts do not go en banc.[56] And even for circuit judges, the limitation affects a vanishing fraction of cases. Just 0.19% of decisions go en banc.[57] From 2020 to 2021, eleven of the twelve geographic circuits heard fewer than five en banc cases; no circuit heard more than seven.[58] Outside of these few cases, a senior circuit judge enjoys the same privileges and responsibilities to that of an active circuit judge.

C. SHORTCOMINGS OF THE EXISTING LITERATURE

Given this framework, which allows judges to decide when and how to retire, have judges *always* gone senior in a politically strategic manner? Not according to the scholarship. The existing literature into circuit and district court decision-making says that judges do not primarily engage in politically motivated retirement decisions.[59]

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55. 28 U.S.C. § 46(c).

56. As Marin Levy has chronicled, courts also differ somewhat in the roles and responsibilities afforded senior judges. *See* Levy, *supra* note 3, at 1245–51. Some courts allow senior judges to vote on changes to court rules, others do not. *Id.* at 1247–48. When a panel is convened for oral argument, senior judges are allowed to sit at the center as a presiding judge in some courts, while they must sit one seat over in others. *Id.* at 1248. When opinions are issued, some courts place the senior judge's name first, others place the name of the oldest active judge on the panel. *Id.* at 1249. While these distinctions might superficially diminish the prestige of being a senior judge, they are—as Levy herself acknowledges—likely not something that most people "think about." *Id.* at 1248. And, in terms of their actual legal significance, they make no difference in the authority a senior judge wields over the cases before him or her.

57. Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 608 (2020).

58. *Table B-10: U.S. Courts of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2021*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2021.pdf [https://perma.cc/2979-GTJ8].

59. *See, e.g.*, Burbank et al., *supra* note 3, at 37 ("Recent studies have persuaded us that, to the extent statistically-based empirical research can tell, strategic partisan behavior is dwarfed by other factors as a causal influence on the decisions federal judges make that create a vacancy."); Peretti & Rozzi, *supra* note 3, at 139 (stating that there exists a "clear consensus regarding the powerful effect of pension eligibility on retirement decisions" from federal district and circuit courts); Vining, *Politics, Pragmatism, and Departures*, *supra* note 3, at 837–39 (pointing to financial incentives and pension options); Vining, *Judicial Departures*, *supra* note 3, at 139 (arguing that "personal and

But that conclusion is worth revisiting. To start, many studies were published more than twenty years ago[60]—which would not (as I explain) account for the explosive growth in senior judgeships and politically strategic senior judgeship decision-making.[61] Some do not distinguish between senior status and full retirement.[62] And even the most comprehensive analysis suffers flaws that leave ample room for disagreement on corresponding conclusions.

In 2010, Stephen Burbank, Judge S. Jay Plager, and Gregory Ablavsky distributed a survey to more than 400 federal senior judges.[63] This survey sought to understand why and when individuals took senior status.[64] Respondents were asked to rank factors such as health and family concerns, the opportunity to visit other courts, or the prospect of federal and state tax advantages.[65] The response rate was robust, yielding valuable insights into how senior judges think.[66] Later published as *Leaving the Bench, 1790–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, this work remains pioneering, innovative, and important.

That said, their research provides a snapshot from the past—2009—that, like other studies, fails to fully account for the recent rise in politically strategic senior status decisions. More importantly, the study's methodology and its resulting conclusions do not necessarily line up.

In terms of survey design, Burbank, Plager, and Ablavsky did not even include "political" considerations as a standard choice for why a judge might take senior status.[67] The questionnaire only provided a comment box for judges wishing to list "other influences."[68] Eleven individuals elected to provide additional information.[69]

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institutional factors were more influential than political considerations" in judicial retirements) (emphasis omitted).

60. Burbank et al., *supra* note 3, at 36 n.150 (describing studies published in 1995 and 2000).

61. *See, e.g.*, Peretti & Rozzi, *supra* note 3, at 139–40.

62. Choi et al., *supra* note 3, at 118–19 (2013) ("[P]rior work does little to distinguish resignation and senior status . . . .").

63. Burbank et al., *supra* note 3, at 42.

64. *Id.*

65. *Id.* at 45.

66. *See id.* at 42 (noting an effective response rate of 77.9%).

67. *Id.* at 45.

68. *Id.* at 47.

69. *Id.*

In one response, a circuit judge wrote that "*most* senior-eligible judges (not all) hang on until their replacement will be selected by a president they prefer politically."[70] "[S]ix [total] respondents indicated a desire to benefit a President of the same party as the President who appointed them by creating a vacancy."[71] In other words, several respondents *explicitly* gave political considerations as the reason behind their decision to take senior status.

Still, despite these individual reports, Burbank, Plager, and Ablavsky concluded that the data "do not support" the norm of "strategic partisan retirement."[72] Why? Because according to them, 311 out of 317 judges who returned surveys did not say that politics played a role in their decision to go senior.[73]

That conclusion goes against the grain of anyone who has ever taken a survey. True: only six judges specifically stated that they considered political circumstances when deciding to take senior status. Yet still: 311 out of 317 judges said nothing at all. That result reflects the background norm that very few respondents to *any* survey *ever* fill out the comment box.[74] Treating all respondents as the denominator diminishes the sub-group of participants who took the time to leave a response.

And remember: among only those who left comments, a *majority* (six of eleven) affirmatively shared, without prompting, that politics played a role in their decision calculus.[75] One even stated that political considerations likely affected "most" senior-eligible judges.[76]

It is worth considering this frankness in context. After all, many of us share a foundational commitment that federal judges are supposed to be independent, impartial arbiters to cases and

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70. *Id.* (emphasis added).

71. *Id.*

72. *Id.*

73. *Id.* at 47 (stating that only six survey respondents indicated a desire to enable a President from their preferred political party to appoint their successor); *id.* at 42 (stating that respondents returned 317 usable surveys).

74. *See* Tom Decorte, Aili Malm, Sharon R. Sznitman, Pekka Hakkarainen, Monica J. Barratt, Gary R. Potter, Bernd Werse, Gerrit Kamphausen, Simon Lenton & Vibeke Asmussen Frank, *The Challenges and Benefits of Analyzing Feedback Comments in Surveys: Lessons From a Cross-National Online Survey of Small-Scale Cannabis Growers*, 12 METHODOLOGICAL INNOVATIONS 1, 4 (2019) (12.2% of respondents in the United States leave comments when given the opportunity).

75. Burbank et al., *supra* note 3, at 47.

76. *Id.*

controversies.[77] Chief Justice John Roberts has gone on record to say that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges."[78] What we have (or so we are told) is an "independent judiciary" that does its "level best to do equal right to those appearing before them."[79] Then-Seventh Circuit Judge Amy Barrett echoed this sentiment.[80] These statements reflect an overriding embrace of judicial independence, creating a clear social desirability bias. In psychology, such a bias describes a tendency among survey respondents to "deny socially undesirable traits or qualities and to admit to socially desirable ones."[81] It can result in "over-reporting [of] what is perceived as 'good behavior' or under-reporting [of] undesirable behavior."[82] The sort of "good behavior" at issue is easy to grasp: that "it is the law—and not the personal politics of individual judges—that controls judicial decision making."[83]

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77. *E.g.*, *Statement on the Rule of Law and an Independent Judiciary*, FED. BAR ASS'N (Feb. 19, 2020), https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/statement-on-the-rule-of-law-and-an-independent-judiciary [https://perma.cc/33VT-FVCU] ("Respect for the rule of law and the preservation of an independent judiciary are among the most important principles upon which our Republic was founded.").

78. Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks "Obama Judge"*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html [https://perma.cc/4C2M-FYH6].

79. *Id.*

80. Jess Bravin, *No Obama or Trump Judges Here, Appointees of Both Declare*, WALL ST. J., (Sept. 15, 2019) https://www.wsj.com/articles/judges-say-they-arent-extensions-of-presidents-who-appointed-them-11568566598 [https://perma.cc/9RU6-QWE6] ("'The chief justice, I think, articulated what members of the judiciary feel,' Judge Barrett said of his comments to Mr. Trump. 'The chief justice responded and pushed back and said, "You know, we don't have Obama judges."'").

81. Phillips & Clancy, *supra* note 5, at 923; *accord* Tourangeau & Yan, *supra* note 5, at 859–60.

82. Jamillah B. Williams, *Accountability as a Debiasing Strategy: Testing the Effect of Racial Diversity in Employment Committees*, 103 IOWA L. REV. 1593, 1627 (2018).

83. Frank B. Cross, *Decisionmaking in the U.S. Circuit Court of Appeals*, 91 CALIF. L. REV. 1457, 1466 (2003) (statement of D.C. Circuit Judge Harry T. Edwards); *accord id.* (collecting statements from Judge Priscilla Wald and Judge Jon Newman). This social desirability bias is both reflected in and reinforced by the Code of Conduct for United States Judges, which prescribes ethical rules and standards for federal judges. These rules include that (1) a "Judge Should Uphold the Integrity and Independence of the Judiciary"; (2) a "Judge Should Avoid Impropriety"; (3) a "Judge Should Perform the Duties of the Office Fairly"; (4) a judge's extrajudicial activities must be "Consistent With the

Under such circumstances, the respondents from Burbank, Plager, and Ablavsky's survey who, in fact, acknowledged political considerations in their own senior status calculations were remarkably candid. These respondents could have, just like their three hundred peers, embraced the social desirability bias by doing nothing. But they explicitly eschewed that approach, and chose instead to spotlight politically motivated decision-making.

Also worth noting: the highest standard response, in Burbank, Plager, and Ablavsky's survey, for why a judge sought to go senior was "want[ing] to help the court by creating a vacancy."[84] That is a facially neutral reason, sure. But it is also a reason that fully tracks with an individual making a politically strategic senior status decision.[85] One can both take senior status to create a judicial opening *and* time that senior status decision so that the judicial opening is filled by an ideologically similar nominee.

In sum, Burbank, Plager, and Ablavsky's work—though laudable and pathbreaking—cannot be taken as the final word. Survey design (leaving political considerations off as a standard response) and the social desirability bias (reinforcing the distinction between law and politics) cloud its ultimate conclusions.

Obligations of Judicial Office"; and (5) a "Judge Should Refrain from Political Activity." *Code of Conduct for United States Judges*, U.S. CTS., (Mar. 12, 2019) https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/SGQ8-CJMW]. The Code of Conduct thus reflects the norm of bifurcating law from politics.

84. Burbank et al., *supra* note 3, at 45. Of note, standard responses also included "the ability to be selective about my case load" and "the opportunity to sit with other courts," *id.*, both of which—as detailed below, see *infra* Part IV—are in fact manifestations of the old hand problem. Other standard responses include federal, state, and local tax advantages, family concerns, and health concerns.

85. James Pfander made a similar point in a contemporaneous review of Burbank, Plager, and Ablavsky's article. *See* James E. Pfander, *Why Judges Leave the Bench*, JOTWELL (Nov. 19, 2012), https://courtslaw.jotwell.com/why-judges-leave-the-bench [https://perma.cc/JU2B-H8WU] (reviewing Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, And Their Consequences*, 161 U. PENN. L. REV. 1, 37 (2012)) ("[A] self-interested judge may describe her decisions in public-regarding terms that seek to preserve her good opinion of herself. . . . Of course, it may be that one would find political machinations lurking behind reported desires to increase the court's judge power."). As Pfander notes, the Burbank, Plager, and Ablavsky method is, at the least, "[m]essy." *Id.*

D. CASE STUDIES OF THE SIXTH AND NINTH CIRCUITS

Burbank, Plager, and Ablavsky's conclusions are especially at odds with actual senior status decisions from recent years. Consider the Sixth Circuit. Comprising Michigan, Ohio, Kentucky, and Tennessee, the court is—by dint of its geography—almost guaranteed to see significant voting rights challenges every election cycle.[86] It has also heard its fair share of other high-profile cases: *Obergefell v. Hodges*, *Grutter v. Bollinger*, and *Schuette v. Coalition to Defend Affirmative Action* all came to the Supreme Court by way of the Sixth Circuit.[87]

For court watchers, then, recent senior status decisions of judges run at cross currents to the Burbank, Plager, and Ablavsky thesis. Under President Biden, two Sixth Circuit judges have taken senior status—Helene White and Bernice Bouie Donald—both of whom were originally nominated by Democratic Presidents.[88] During the Trump administration, five judges sought senior status.[89] All five were appointed by Republican

86. *See* Memphis A. Philip Randolph Inst. v. Hargett, 978 F.3d 378 (6th Cir. 2020) (absentee ballots); Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) (voter registration); Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012) (early voting).

87. Grutter v. Bollinger, 539 U.S. 306, 321 (2003); Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291, 300 (2014); Obergefell v. Hodges, 576 U.S. 644, 656 (2015).

88. *See White, Helene N.*, FED. JUD. CTR. https://www.fjc.gov/history/judges/white-helene-n [https://perma.cc/WQJ2-Y5YM] (noting that Judge White assumed senior status on June 13, 2022); Pamela A. McLean, *Two Judges Confirmed to 6 Circuit in Deal Between White House and Dems*, NAT'L L.J. (June 25, 2008), https://www.law.com/nationallawjournal/almID/1202422522506 [https://perma.cc/TRF6-BK8N] (explaining that Judge White was originally nominated by President Clinton, but was not confirmed, and that President Bush later renominated her as a compromise with Michigan Democrats); *Donald, Bernice Bouie*, FED. JUD. CTR., https://www.fjc.gov/history/judges/donald-bernice-bouie [https://perma.cc/9BJ8-R9FL] (noting that Judge Bouie was nominated by President Obama and assumed senior status on September 27, 2022).

Another Democratic appointee, Judge R. Guy Cole, has announced his intention to take senior status upon the confirmation of his successor. *Cole, Ransey Guy, Jr.*, FED. JUD. CTR. https://www.fjc.gov/history/judges/cole-ransey-guy-jr [https://perma.cc/3M9K-X6G7] (noting that Judge Cole was nominated by President Clinton); Nate Raymond, *Biden Gets Three Seats to Fill on 4th, 6th Circuits as Judges Take Senior Status*, REUTERS (Dec. 14, 2021) https://www.reuters.com/legal/government/biden-gets-three-seats-fill-4th-6th-circuits-judges-take-senior-status-2021-12-14 [https://perma.cc/CV4U-MQTQ].

89. *Rogers, John M.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/rogers-john-m [https://perma.cc/NPT4-J9SF] (noting that Judge Rogers was

Presidents.[90] And under President Obama, two judges went senior—both Clinton appointees.[91]

One needs to go back more than two decades, to the retirement of Judge Gilbert Merritt, to find even a single cross-party retirement in the Sixth Circuit.[92] Judge Merritt was appointed by President Carter, and sought senior status in 2001, the first year of President George W. Bush's tenure.[93] For the last twenty-one years, then, *every single* Sixth Circuit judge went senior when the party that appointed him or her took the White House. As I discuss more below, this pattern of decision-making amounts to partisan court packing.[94] What was once an ideologically balanced Sixth Circuit has now become a stronghold for Republican appointees, with about seventy percent of the judges (both active and senior) having been appointed by a Republican President.

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nominated by President George W. Bush and assumed senior status on May 5, 2018); *Batchelder, Alice Moore*, FED. JUD. CTR., https://www.fjc.gov/history/judges/batchelder-alice-moore [https://perma.cc/T3YB-5MZN] (noting that Judge Batchelder was nominated by President George H.W. Bush and assumed senior status on March 7, 2019); *Boggs, Danny Julian*, FED. JUD. CTR., https://www.fjc.gov/history/judges/boggs-danny-julian [https://perma.cc/W4AY-ZTQ2] (noting that Judge Boggs was appointed by President Reagan and assumed senior status on February 28, 2017); *Cook, Deborah L.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/cook-deborah-l [https://perma.cc/F9M7-75VM] (noting that Judge Cook was nominated by President George W. Bush and assumed senior status on March 6, 2019), *McKeague, David William*, FED. JUD. CTR., https://www.fjc.gov/history/judges/mckeague-david-william [https://perma.cc/4AFZ-KK57] (noting that Judge McKeague was nominated by President George W. Bush and assumed senior status on November 1, 2017).

90. *See* sources cited *supra* note 89.

91. *Daughtrey, Martha Craig*, FED. JUD. CTR., https://www.fjc.gov/history/judges/daughtrey-martha-craig [https://perma.cc/U4KL-V7CX] (noting that Judge Daughtrey was nominated by President Clinton and assumed senior status on January 1, 2009); *Gilman, Ronald Lee*, FED. JUD. CTR., https://www.fjc.gov/history/judges/gilman-ronald-lee [https://perma.cc/TV76-Y4DV] (noting that Judge Gilman was nominated by President Clinton and assumed senior status on November 21, 2010).

92. *See Biographical Directory of Article III Federal Judges: Export*, FED. JUD. CTR., https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export [https://perma.cc/L8FM-U2DP].

93. *Gibbons, Julia Smith*, FED. JUD. CTR., https://www.fjc.gov/history/judges/gibbons-julia-smith [https://perma.cc/295S-7P6Q] (nominee to replace Judge Gilbert Merritt).

94. *See infra* Part IV.A; *see also Merritt, Gilbert Stroud, Jr.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/merritt-gilbert-stroud-jr [https://perma.cc/MC4P-HUQQ].

Such swings are not unique to one court. In November 2020, several judges on the Ninth Circuit—another court no stranger to high-profile cases—stated that they had "postponed retirement plans rather than give President Trump the opportunity to name more conservatives to the nation's powerful appeals courts."[95] Although these judges spoke anonymously, it is not hard to figure out who they might have been. Seven then-active Ninth Circuit judges have announced their decisions to take senior status.[96] All were originally appointed by a Democratic President.[97] Several other circuit courts reflect the same trend seen in the Sixth and Ninth Circuits.[98]

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95. Maura Dolan, *Some Federal Judges Plan to Retire When Trump Exits. Will Biden Be Able to Replace Them?*, L.A. TIMES (Nov. 30, 2020), https://www.latimes.com/california/story/2020-11-30/federal-judges-retirement-trump-biden [https://perma.cc/AC6V-YN6E].

96. Andrew Kragie, *Biden Gets 1st Opening on 9th Circ. Thanks to Judge Graber*, LAW360 (Feb. 16, 2021), https://www.law360.com/articles/1355484/biden-gets-1st-opening-on-9th-circ-thanks-to-judge-graber [https://perma.cc/YQ9U-3KHA] (discussing senior status decision by Judge Susan Graber, who was appointed by President Clinton); Andrew Kragie, *Biden Gets 2nd Opening on 9th Circ. Thanks to Judge Berzon*, LAW360 (Apr. 7, 2021), https://www.law360.com/pulse/articles/1372996/biden-gets-2nd-opening-on-9th-circ-thanks-to-judge-berzon [https://perma.cc/3NC6-M4ZQ] (discussing senior status decision by Judge Marsha Berzon, who was appointed by President Clinton); Andrew Kragie, *Judge Paez Gives Biden 3rd Opening on 9th Circ.*, LAW360 (May 11, 2021), https://www.law360.com/articles/1383378 [https://perma.cc/955V-2VAD] (discussing senior status decision by Judge Richard Paez, who was appointed by President Clinton); Andrew Kragie, *Judge Fletcher Makes Way For 4th Biden Vacancy on 9th Circ.*, LAW360 (May 18, 2021), https://www.law360.com/articles/1385843 [https://perma.cc/33TF-J547] (discussing senior status decision by Judge William Fletcher, who was appointed by President Clinton); Nate Raymond, *9th Circuit's Thomas to Take Senior Status, Giving Biden New Vacancy*, REUTERS (Mar. 29, 2022), https://www.reuters.com/legal/government/9th-circuits-thomas-take-senior-status-giving-biden-new-vacancy-2022-03-29 [https://perma.cc/5RRL-Q8V6] (discussing senior status decisions by Judges Sidney Thomas, Margaret McKeown, and Andrew Hurwitz, all Obama or Clinton appointees).

97. *See* sources cited *supra* note 96.

98. *See, e.g.*, Nate Raymond, *2nd Circuit's Carney to Take Senior Status, Creating New Vacancy for Biden*, REUTERS (Nov. 5, 2021), https://www.reuters.com/legal/litigation/2nd-circuits-carney-take-senior-status-creating-new-vacancy-biden-2021-11-05 [https://perma.cc/XH9G-RDNN] (describing senior status decisions of three Second Circuit judges, appointed by Presidents Clinton and Obama); Nate Raymond, *Biden Gets Three Seats to Fill on 4th and 6th Circuits as Judges Take Senior Status*, REUTERS (Dec. 14, 2021), https://www.reuters.com/legal/government/biden-gets-three-seats-fill-4th-6th-circuits-judges-take-senior-status-2021-12-14 [https://perma.cc/CV4U-MQTQ] (describing senior status decisions from Fourth Circuit).

II. IDENTIFYING THE OLD HAND PROBLEM

How can this actual behavior be reconciled with the view, of Burbank, Plager, and Ablavsky, that the data "do[es] not support" the norm of "strategic partisan retirement"?[99]

As a starting point, surveys like the one from Burbank, Plager, and Ablavsky are not—as I have argued—necessarily the best reflection of actual motivations. Questionnaires are at best an "imperfect guide[], because judges 'cannot be expected to . . . report [their true motivations] with undiluted candor.'"[100] Just because a respondent does not explicitly identify political considerations does not mean that political considerations are absent from their decision calculus. And "even a sincere belief in judicial fealty to the legal model is not conclusive evidence of that model's power, since people may be unaware of their true motivations."[101]

The more appropriate measure, then, is not what someone *says*, but what they *do*. Social scientists characterize this dichotomy as a difference between stated and revealed preference. Stated preferences are often "determined by . . . surveys that ask people" to give their subjective valuation of a particular choice, such as "how much they would be willing to pay for a benefit."[102] In contrast, "[r]evealed preferences are available when people have been faced with an opportunity to" make a choice, with the researcher later "simply observ[ing] which option they chose."[103] "When they are available, revealed preferences are typically preferred to stated preferences . . . ."[104] That is because "revealed preference data are based on actual decisions, where market participants enjoy or suffer the consequences of their decisions. This is not generally the case for respondents in stated preference surveys, where respondents . . . may be inclined to bias their responses for one reason or another."[105] For these reasons, it is

99. Burbank et al., *supra* note 3, at 47.

100. Cross, *supra* note 83, at 1466.

101. *Id.*

102. John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1613 (2013).

103. *Id.*

104. *Id.*

105. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS 24 (2003), https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf [https://perma.cc/4D2A-ATAJ].

crucial to focus on the revealed, not stated, retirement practices of members of the Judiciary.

A. THE MODEL AND ITS FINDINGS

To measure revealed preferences, I relied on the Directory of Article III Federal Judges, maintained by the Federal Judicial Center. This directory is updated daily and includes information on every individual who has served as an Article III judge; all data in this Article is up-to-date through July 2022.[106] I have focused on senior status decisions of federal circuit and district court judges, excluding judges and Justices from the Court of International Trade, the Court of Federal Claims, the Supreme Court, and other courts. I limited the dataset for three reasons.

First, unlike a specialty court, circuit and district courts are courts of general jurisdiction. Most federal disputes for most parties begin and end in these courts. Moreover, unlike the Supreme Court, whose docket is generally discretionary,[107] circuit and district court jurisdiction is mandatory.[108]

Second, circuit and district judges continue to shape the law in their particular jurisdiction after going senior, thus allowing the old hand problem to manifest. That is something not afforded to courts such as the Supreme Court. A retired Justice does not get to continue to rule on cases or motions before the Supreme Court.[109]

Third, circuit and district judges represent most Article III judges. There are currently only twenty-five authorized judgeships for the Court of International Trade and Court of Federal Claims, and nine authorized Justices on the Supreme Court, compared to about 850 authorized circuit and district

106. *Biographical Directory of Article III Federal Judges: Export*, *supra* note 92.

107. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1244 (2012) ("Congress [has] passed legislation . . . remov[ing] virtually all of the Court's mandatory jurisdiction, leaving Justices free to select the cases they wish[] to hear.").

108. Xiao Wang, *In Defense of (Circuit) Court-Packing*, 119 MICH. L. REV. ONLINE 32, 33 (2020).

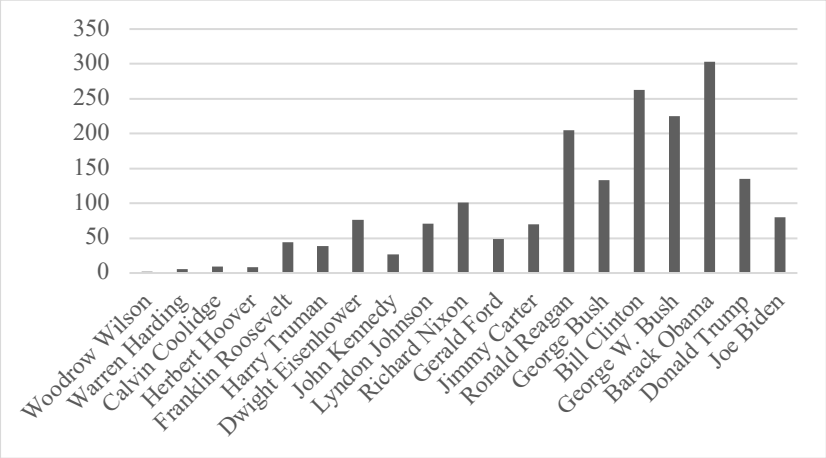
109. Although retired Justices can, and often do, still sit on lower courts. *See, e.g.*, Steven A. Meyerowitz, *1st Circuit, in Decision by Justice Souter, Rejects Claim for Uninsured Motorist Benefits*, LAW.COM (Feb. 25, 2019), https://www.law.com/insurance-coverage-law-center/2019/02/25/1st-circuit-in-decision-by-justice-souter-rejects-claim-for-uninsured-motorist-benefits [https://perma.cc/R86G-EJKG].

judgeships.[110] If there is an old hand problem, it should be readily apparent from data drawn from the latter two groups.

Using this information, I first calculated the number of judges going senior in each Presidency since 1919, when senior status was introduced. To normalize for single-term Presidencies or Presidencies cut short for another reason (death, resignation, and so on), I also calculated the average annual senior status decisions during a Presidency.

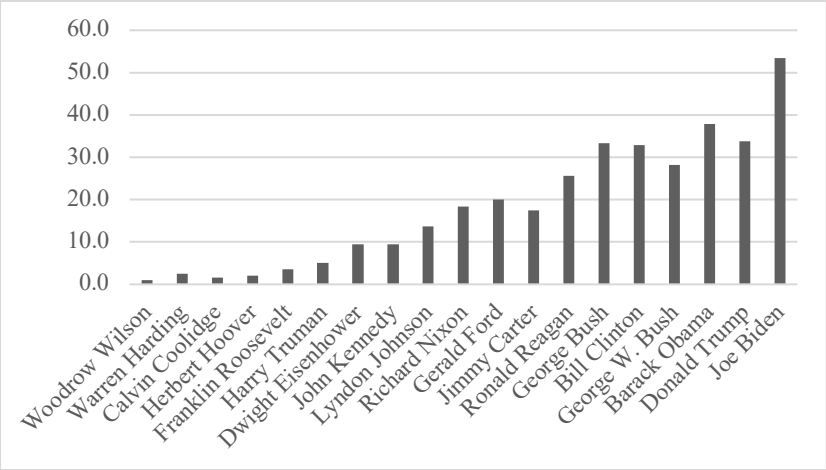
The results are reproduced in Figures 1 and 2 below.

Figure 1: Total No. of Circuit and District Judges Taking Senior Status



110. *Authorized Judgeships*, U.S. CTS. 8, https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/3KC4-GFCT] (noting nine active authorized judgeships for the Court of International Trade and sixteen for the Court of Federal Claims, as of 2021); *see also* BARRY J. MCMILLION, CONG. RSCH. SERV., R45899, RECENT RECOMMENDATIONS BY THE JUDICIAL CONFERENCE FOR NEW U.S. CIRCUIT AND DISTRICT COURT JUDGESHIPS: OVERVIEW AND ANALYSIS 4 (2019), https://sgp.fas.org/crs/misc/R45899.pdf [https://perma.cc/2JTE-UETV] (tracing evolution of judgeships).

Figure 2: Average No. of Circuit and District Judges Taking Senior Status Per Year



These figures reflect the steady, dramatic growth in judges electing to take senior status. Very few judges went senior in the first half of the twentieth century. In the first fifty years after Congress created the option (1919 to 1969), 282 judges took senior status. More than 300 judges alone took senior status during Barack Obama's single Presidency. If President Biden is re-elected and if current trends continue, there would be more than 500 active judges taking senior status during his Presidency.

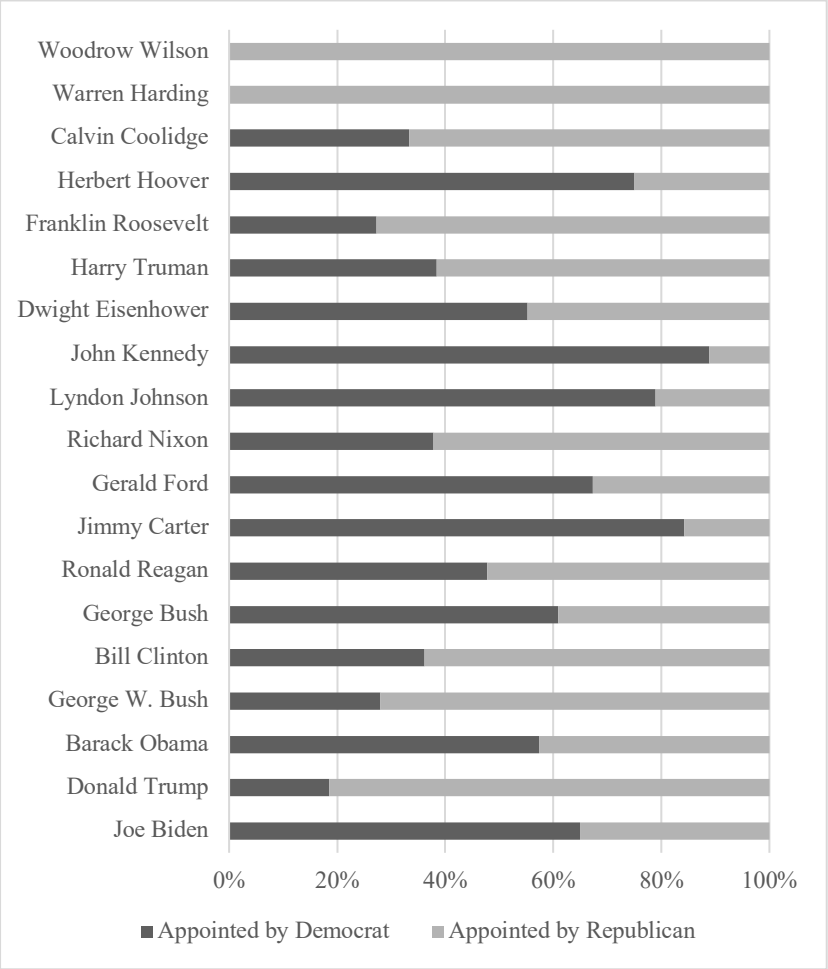
1. The Effect of Political Party on Senior Status Decisions

After calculating the number of judges going senior, I separated the data a step further, to identify the political party of the President who originally appointed a judge taking senior status. That information is reflected below, in Figure 3, which provides an accounting of the total numbers, and in Figure 4, which provides a percentage breakdown.

Figure 3: Political Party of Appointing President for District and Circuit Judges Taking Senior Status, by Total Number

		Judges Electing to Go Senior		
President	**President's Party**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**	**Total**
Woodrow Wilson	Democrat	0	2	2
Warren Harding	Republican	0	6	6
Calvin Coolidge	Republican	3	6	9
Herbert Hoover	Republican	6	2	8
Franklin Roosevelt	Democrat	12	32	44
Harry Truman	Democrat	15	24	39
Dwight Eisenhower	Republican	42	34	76
John Kennedy	Democrat	24	3	27
Lyndon Johnson	Democrat	56	15	71
Richard Nixon	Republican	39	64	101
Gerald Ford	Republican	33	16	49
Jimmy Carter	Democrat	59	11	70
Ronald Reagan	Republican	98	107	205
George Bush	Republican	81	52	133
Bill Clinton	Democrat	95	168	263
George W. Bush	Republican	63	162	225
Barack Obama	Democrat	174	129	303
Donald Trump	Republican	25	110	135
Joseph Biden	Democrat	52	28	80

Figure 4: Political Party of Appointing President for District and Circuit Judges Taking Senior Status, by Percentage



These charts make clear that there has, at least historically, not been a strong partisan swing on the timing of senior status decisions. More Republican-appointed federal judges took senior status than their Democratic-appointed counterparts during the Roosevelt and Truman administrations. The opposite happened in the Eisenhower and Ford administrations. If strategic behavior was happening, it is not plainly evident during these time periods.

There are of course exceptions. During the Kennedy, Johnson, and Carter administrations, there was a palpable shift in

favor of more Democratic appointees taking senior status. I discuss later a possible explanation—Senate makeup—for this shift. But for now, such shifts are somewhat offset by their small absolute numbers. Only twenty-seven judges total sought senior status during the entire Kennedy Presidency. That is, as a point of reference, about a third of the number of judges who took senior status in *less than one year* of the Biden Presidency.

In any event, even if one were to accept that politically motivated retirements took place in the Kennedy, Johnson, and Carter Presidencies, that trend did not last. Under George Bush, *more* Democratic-appointed federal judges took senior status than their Republican counterparts, and under Bill Clinton, the opposite happened.

The purpose of this discussion is three-fold. First, I hope to dispel the idea that judges have *always* used senior status to advance political ends. The old hand problem has not been a permanent part of our judicial fabric. Rather, for long stretches of the past century, judges took senior status in a seemingly nonpartisan manner. Those appointed by a Republican did not necessarily time their senior status decision to coincide with a Republican in the White House, and vice versa.

But second, that backdrop contrasts sharply against what has taken place in the past two decades, particularly among Republican administrations. Here, the data show a significant shift under George W. Bush. More than seventy percent of those seeking senior status during his Presidency had originally been appointed by a Republican President. As a matter of absolute numbers, almost one hundred more Republican-appointed federal judges chose senior status, as compared to their Democratic counterparts—an absolute difference never previously seen in history. After George W. Bush, the Obama Presidency also witnessed a swing, albeit more tempered. About eighty more judges opted to take senior status during his administration (303) than that of George W. Bush (225). But, of this set, only about forty-five more Democratic-appointed federal judges chose senior status than their Republican-appointed counterparts.

Such moderation did not last. Under Donald Trump, twenty-five Democratic-appointed federal judges opted to take senior status, against 110 Republican-appointed federal judges. That means eighty-one percent of senior status decisions under Trump were made by federal judges originally appointed by a Republican President. Although several years remain of the Biden Presidency, it has also witnessed an uptick from the

Obama administration. Around sixty-five percent of those judges who have gone senior under President Biden were appointed by a Democratic President (the number stood at about fifty-seven percent for President Obama).

Third, these numbers rebut the suggestion made by Josh Blackman that judges have started taking senior status now to benefit the Democratic Party—i.e., that this strategic behavior manifested only recently, to provide President Biden an opportunity to shape the Judiciary.[111] That suggestion was somewhat echoed in the Biden Supreme Court Commission's final report, where a witness testified that, when it comes to judicial nominations, "the belief, held by both parties, [is] that 'the other side plays dirty and will manipulate the rules to its own advantage,' conferring on the party in power 'a significant incentive to violate the current norms when it has the chance.'"[112] True, some of this behavior *is* happening on both sides. But it has been happening for some time, and more importantly, is far more pronounced among Republican appointees.

As I explain below,[113] this difference between Democratic and Republican administrations may be due to the (relatively) diminished role of liberal advocacy organizations. Historically, conservative organizations, such as the Federalist Society, have prioritized judicial nominations far more than their liberal counterparts.[114] That though may be changing, with the rise of groups like Demand Justice.[115] Yet as of now, the ultimate effect of such advocacy remains unclear.

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111. *See* Blackman, *supra* note 7.

112. *Final Report: Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE, https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf [https://perma.cc/ZMC8-CR97].

113. *See infra* Part III.A.

114. *See About Us*, FEDERALIST SOC'Y, https://fedsoc.org/about-us [https://perma.cc/XUU5-GMWS] (describing the Federalist Society as "a group of conservatives and libertarians dedicated to reforming the current legal order," and claiming that it does not "sponsor or endorse nominees and candidates for public service"). *But see* Caroline Fredrickson & Eric J. Segall, Opinion, *Trump Judges or Federalist Society Judges? Try Both*, N.Y. TIMES (May 20, 2020), https://www.nytimes.com/2020/05/20/opinion/trump-judges-federalist-society.html [https://perma.cc/AA2P-LUJ5] ("[The Federalist Society] is a powerful and partisan organization that plays a large role in selecting federal judges who will then reliably rule for Republican Party and conservative interests . . . .").

115. *See Reform the Supreme Court*, DEMAND JUSTICE, https://demandjustice.org/priorities/supreme-court-reform [https://perma.cc/4X3V-KG9B] (advocating for expanding the number of Supreme Court Justices

2. Front-Half and Back-Half Clustering

To analyze these findings further, I looked at senior status decisions by individual year. My hypothesis was that, if judges were making strategic senior status decisions, their choices might reflect *front-half* and *back-half* clustering.

By *front-half* clustering, I mean evidence of politically strategic decision-making in the first year or two of a President's term. As an example, a Republican-appointed judge who becomes eligible for senior status during a Democratic Presidency might wait to go senior until after the next presidential election, if a Republican wins the Presidency. This clustering would generally occur at the beginning of a presidential term, to ensure that a newly nominated active judge can pass through the nomination process. Confirmations take time—under George W. Bush, for instance, the average circuit judge confirmation took almost a year, and the average district judge confirmation took about seven months.[116]

The counter-point to front-half clustering is *back-half clustering*, which would happen when a President from the opposing party is re-elected. The reasoning is that, although an active judge might wait out part of a presidential term to exercise a politically strategic retirement, they might not be willing—or able—to wait another four years after a President from the opposing party is re-elected.

Figure 5 tests these hypotheses. For readability, this Figure examines only annual data from 1980 onward. The Appendix includes a full listing of all years dating to 1919.

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because, "[w]ith a 6-3 Republican supermajority, the Supreme Court is too biased in favor of special interests and Republican politicians.").

116. BARRY J. MCMILLION, CONG. RSCH. SERV., R43316, LENGTH OF TIME FROM NOMINATION TO CONFIRMATION FOR U.S. CIRCUIT AND DISTRICT COURT NOMINEES: OVERVIEW AND POLICY OPTIONS TO SHORTEN THE PROCESS 4–5 (2013), https://crsreports.congress.gov/product/pdf/R/R43316/3 [https://perma.cc/QG76-Q4C3].

Figure 5: Political Party of Appointing President for District and Circuit Judges Taking Senior Status, by Year

	No. of Judges Electing to Go Senior	
Year / President	Originally Appointed by Democrat	Originally Appointed by Republican
Ronald Reagan	98	107
1981	20	8
1982	20	8
1983	10	9
1984	8	19
1985	10	16
1986	17	16
1987	3	15
1988	8	12
1989	2	4
George Bush	81	52
1989	12	11
1990	13	11
1991	27	15
1992	29	15
Bill Clinton	95	168
1993	14	9
1994	20	18
1995	22	7
1996	16	38
1997	4	27
1998	10	21
1999	4	19
2000	4	29
2001	1	0
George W. Bush	63	162
2001	7	28
2002	4	19
2003	6	24
2004	5	17
2005	12	15
2006	6	26
2007	5	18
2008	17	12

	No. of Judges Electing to Go Senior	
Year / President	Originally Appointed by Democrat	Originally Appointed by Republican
2009	1	3
Barack Obama	174	129
2009	31	13
2010	21	8
2011	30	10
2012	21	14
2013	21	29
2014	20	12
2015	11	21
2016	18	22
2017	1	0
Donald Trump	25	110
2017	9	33
2018	12	35
2019	4	27
2020	0	15
Joseph Biden	52	28
2021	36	19
2022	16	9

There does not appear to have been much front or back-half clustering in the Reagan or H.W. Bush administrations. More Democratic-appointed judges took senior status at the beginning of the Reagan administration than their Republican-appointed counterparts, and there is no discernible pattern of either front or back-half clustering under George H.W. Bush.

But front and back-half clustering appears to have started to take place under President Clinton. Though the aggregate number of retirements during his Presidency does not necessarily evidence politically strategic behavior—ninety-five Democratic appointees went senior, against 168 Republican appointees—the distribution of those retirements offers a more nuanced view. Of Democratic-appointed federal judges taking senior status, a majority (fifty-four out of ninety-five) decided to do so in the first two years of his first and second terms—which is what one would expect from front-half clustering. Of Republican-appointed federal judges, a majority took senior status

during the first three years of Clinton's second term (eighty-six out of 168)—that shows back-half clustering.

These trends were magnified under George W. Bush. During the first year of that administration, twenty-eight Republican-appointed federal judges took senior status, against just seven Democratic-appointed federal judges. In fact, of the sixty-three Democratic-appointed federal judges taking senior status, two-thirds (forty-one) did so during George W. Bush's second term, a possible indication that these judges could not "wait it out" any further. Clustering continued under President Barack Obama: in the first year of his first term, thirty-one Democratic-appointed federal judges elected for senior status, a then-record.

The clustering story also holds true for Presidents Trump and Biden. In the first two years of the Trump administration, sixty-eight Republican-appointed federal judges sought senior status, the highest ever for a two-year period. In the first year of the Biden administration, thirty-six circuit and district judges, appointed by a Democratic President, sought senior status. That is the highest number in history, eclipsing the high-water mark of thirty-one, previously set by President Obama only a few years earlier.

The gravamen of this discussion is to show that, for much of history, senior status decisions were not a product of politically strategic decision-making. That began to change under Clinton, became abundantly apparent under W. Bush, and has only gotten more pronounced with time.

B. THE IMPACT OF SENATE CONTROL

I have focused so far on whether judges make strategic senior status calculations based on party control of the White House. But the confirmation process also requires consent from the Senate. Thus, an alternative angle (though one consistent with politically strategic behavior) would examine whether judges are more willing to seek senior status when the party that originally appointed them also exercises Senate control. Such behavior would in theory manifest by showing an increase in politically strategic retirements when Senate control switches parties. A judge eligible for senior status would wait until the Senate changes hands, so that a "new" Senate could confirm an ideologically sympathetic replacement.

But modelling such effects is complicated by several factors. First, Senators can only approve or veto a particular candidate. They cannot put forward replacements, which diminishes their

ability to control the agenda and signal what sort of nominee might take the place of a judge contemplating senior status. Because of this more cabined role, the Senate has historically confirmed the President's circuit and district court nominees absent compelling reasons to the contrary. That said, Presidents have traditionally consulted the Senate—usually the home state Senator—when selecting a nominee, through the blue slip process. Under this process, "[a]fter a President selects a nominee for a U.S. circuit or district court judgeship, the chairman [of the Senate Judiciary Committee] sends a blue-colored form to the Senators representing the home state of the nominee. The form seeks the home state Senators' assessment of the nominee."[117] When the blue slip is returned with a positive response, confirmation is all but assured.[118] From 1977 to 2008, the Senate confirmed 1513 federal circuit and district judges, out of 1885 total nominees—an 80.3% confirmation rate.[119] Many Congressional sessions witnessed even higher confirmation rates, such as 96.8% and 96.2%.[120]

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117. BARRY J. MCMILLION, CONG. RSCH. SERV., R44975, THE BLUE SLIP PROCESS FOR U.S. CIRCUIT AND DISTRICT COURT NOMINATIONS: FREQUENTLY ASKED QUESTIONS 1 (2017), http://sgp.fas.org/crs/misc/R44975.pdf [https://perma.cc/WLR7-GSQP].

118. *Id.* at Summary ("If a home state Senator has no objection to a nominee, the blue slip is returned to the chairman with a positive response. If, however, a home state Senator objects to a nominee, the blue slip is either withheld or returned with a negative response."); *id.* at 1 ("[Until very recently,] it ha[d] . . . been relatively rare . . . for the full Senate to confirm judicial nominees who did not have the support of both of their home state Senators."); *see also* Glenn Kessler, *Schumer's Claim That "Blue Slips" Were a "Longstanding Requirement" for Judicial Nominees*, WASH. POST (Apr. 5, 2019), https://www.washingtonpost.com/politics/2019/04/05/schumers-claim-that-blue-slips-were-longstanding-requirement-judicial-nominees [https://perma.cc/8CCN-6MUW] (noting that between 1936 and 1989, only five judicial nominees were confirmed despite receiving a negative blue slip from a home-state Senator); Mitchel A. Sollenberger, *The Blue Slip: A Theory of Unified and Divided Government, 1979–2009*, 37 CONGRESS & THE PRESIDENCY 125, 138 (2010) (discussing influence of home state Senators on judges' confirmations); *id.* at 140 ("[T]he Senate expects genuine good faith consultation . . . with home state Senators before a judicial nomination is made, and the administration's failure to consult in genuine good faith with both home state Senators itself is grounds for a Senator's return of a negative blue slip.") (ellipses in original).

119. BARRY J. MCMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2020, at 7–8, (2021), https://crsreports.congress.gov/product/pdf/R/R45622 [https://perma.cc/QFB5-6UXX].

120. *Id.* at 7.

Second, while the White House speaks with one voice, the Senate speaks with (up to) one hundred voices. As anyone following the political pulse knows, in a divided Senate, just one Senator—even one identifying with the party occupying the White House—can re-write or derail an agenda.[121] A Senate majority leader must deal with heterogeneity in ways that a President does not.

Third, for much of the past century, control of the Senate was uncontested. From 1919 to 1933, the Senate was under Republican control. That alignment flipped with Franklin Roosevelt's entrance into the White House, and Democrats retained a largely unbroken majority of the Senate from 1933 to 1980, with the very brief exception of four years when Republicans held a slim majority.[122] Given this extended period of one-party rule, it is hard to imagine an active judge deciding to time their senior status decision based on the prospect of the Senate changing hands.

Finally, judicial appointments have historically been subject to the filibuster. Under that rule, for much of the twentieth century, the vote of two-thirds of all Senators was needed to invoke cloture.[123] In 1975, this numerical requirement was revised downward to a three-fifths majority.[124] It was not dropped altogether for judicial nominees until November 2013, when then-Senate majority leader Harry Reid invoked the "nuclear option"

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121. *See, e.g.*, Emily Cochrane & Michael D. Shear, *Biden Tries to Salvage Domestic Policy Bill After Rift with Manchin*, N.Y. TIMES (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/us/politics/build-back-better-schumer-manchin.html [https://perma.cc/P6HV-M6T5] (describing how Senator Manchin, a Democrat, torpedoed Democratic President Biden's agenda in an evenly divided Senate).

122. Republicans held the slimmest of majorities. The 83rd Congress, from 1953 to 1955, began with forty-eight Republicans, forty-seven Democrats, and one Independent. Because of deaths, resignations, and other events, by the end of the Congressional term, the Senate comprised forty-six Republicans, forty-seven Democrats, one Independent, and one vacancy. *Membership Changes of 83rd Congress (1953–1955)*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Membership_Changes_83.htm [https://perma.cc/7X26-N8S2]. The 80th Congress, from 1947 to 1949, included fifty-one Republicans and forty-five Democrats. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/WM54-C2XE].

123. *See About Filibusters and Cloture: Historical Overview*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm [https://perma.cc/78V9-Y2W4] (reporting Senate's adoption of cloture rule in 1917).

124. *Id.*

to confirm President Obama's nominees to the D.C. Circuit.[125] Consequently, before 2013, even if a party held majority control of the Senate, a judge contemplating senior status might not have been assured of an ideologically similar replacement because their party did not hold a filibuster-proof majority. And as a historical matter, very few Congresses have been filibuster-proof. Besides the Franklin Roosevelt Presidency, which witnessed an unprecedented era of single-party control, the only filibuster-proof majorities were for the Democratic Party, between 1963 and 1967, and 1975 and 1979.[126]

How might these conditions affect efforts to analyze Senate control? To start, from 1919 (when the senior judgeship was created) until 2013 (when the nuclear option was invoked), the focus should not be on whether the Senate changed majority control.[127] Instead, one might look at when a party went from having a simple majority to a filibuster-proof majority. That would signal to a judge contemplating senior status that their replacement would more than likely be confirmed. This rubric changed in 2013, after the decision to go nuclear: any change to majority Senate control from that point onward would affect senior status decision-making, whether or not a filibuster-proof majority existed.

I tested these hypotheses in Figure 6 below. Again, for readability, this Figure examines only years after 1945 when the Senate changed majority control or shifted from a simple majority to a filibuster-proof majority. I have highlighted when simple majority control shifted from one party to the next in light gray, and when a filibuster-proof majority existed in dark gray. The Appendix includes a full listing of all years dating back to 1919.

125. *See, e.g.*, Burgess Everett & Seung Min Kim, *Senate Goes for "Nuclear Option"*, POLITICO, https://www.politico.com/story/2013/11/harry-reid-nuclear-option-100199 [https://perma.cc/LUM8-7Z9P] (reporting Senate's approval of rules change that eliminated use of filibuster on all presidential nominees except those to United States Supreme Court).

126. *See Party Division*, *supra* note 122 (noting Democrats held sixty-six seats from 1963 until 1965, sixty-eight seats from 1965 until 1967, and sixty-one seats from 1975 until 1979).

127. *See* Burbank et al., *supra* note 3, at 8 (describing creation of senior status); Everett & Kim, *supra* note 125 (reporting invocation of nuclear option).

Figure 6: Senate Control for District and Circuit Judges Taking Senior Status, by Year

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1946	Democrat	0	4
1947	Republican	5	4
1949	Republican	3	3
1950	Democrat	2	2
1952	Democrat	2	1
1953	Republican	3	3
1955	Republican	3	3
1956	Democrat	5	5
1963	Democrat	7	1
1964	Democrat	9	0
1965	Democrat	18	3
1966	Democrat	15	3
1967	Democrat	6	6
1975	Democrat	11	5
1976	Democrat	16	8
1977	Democrat	14	5
1978	Democrat	11	0
1979	Democrat	21	4
1980	Democrat	13	1
1981	Republican	20	10
1986	Republican	17	16
1987	Democrat	3	15
1994	Democrat	20	18
1995	Republican	22	7

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
2000	Republican	4	29
2001	Democrat	8	28
2002	Democrat	4	19
2003	Republican	6	24
2006	Republican	6	26
2007	Democrat	5	18
2014	Democrat	20	12
2015	Republican	11	21
2020	Republican	0	15
2021	Democrat	36	19

The data supports the theory. Pre-2013, changes in majority Senate control, highlighted in light gray, do not reflect a corresponding change in politically strategic decision-making. There was no discernible uptick in such decision-making when the Senate changed hands in the 1940s, 1950s, 1980s, 1990s, or 2000s.

In fact, more Democratic-appointed judges took senior status in 1981 and 1995 than in the immediately preceding year, even after the Senate shifted to Republican control. From 1986 to 1987, after majority control of the Senate went from Republican to Democratic control, *fewer* Democratic-appointed judges took senior status (the number of Republican-appointed judges taking senior status remained the same). Similarly, in the early 2000s, although Senate control seesawed, retirement patterns did not change. Each year, significantly more Republican-appointed judges sought senior status than their Democratic-appointed counterparts.

A different story emerges when examining the rows in dark gray, when a party held a filibuster-proof majority. Between 1963 and 1967, of the sixty-eight judges who sought senior status, fifty-five—or eighty-one percent—had been appointed by a Democratic President. Between 1975 and 1979, of the ninety-five

judges who sought senior status, seventy-three—or seventy-seven percent—had been appointed by a Democratic President.

Not coincidentally, these eras coincided with the Kennedy, Johnson, and Carter administrations, the same administrations where the data shows a partisan shift in favor of more Democratic appointees taking senior status. These circumstances compounded one another. When the same party occupied the White House *and* held a filibuster-proof Senate majority, more politically strategic senior status decision-making was likely to occur.

Still, much of this discussion is now in the rearview after Senator Reid's decision to go nuclear. That move allows the Senate to confirm judicial nominees through a simple majority, rather than needing sixty (or more) votes.[128] This significant rule change did not go unnoticed. The very same day Senate Democrats invoked the nuclear option, then-Senate minority leader Mitch McConnell declared that "[t]he solution to this problem is at the ballot box. We look forward to having a great election on [sic] 2014."[129]

Following Republican victories in the 2014 election, Senator McConnell carried through on his promise. As reported above, from 1977 to 2008, the Senate confirmed the President's judicial nominees at an 84.2% rate. Although this rate was lower in times of divided government,[130] in no Congressional term was it ever below fifty percent. That changed in 2014. The McConnell-led Senate confirmed just 28.6% of President Obama's judicial nominees from 2015 through 2016.[131] Only twenty district and circuit judges were confirmed,[132] and "[n]one of the seven circuit [judge] nominees that Obama submitted in 2015 or 2016 was confirmed."[133] Senator McConnell refused to compromise even when members of his own party urged a vote on certain nominees.[134]

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128. Everett & Kim, *supra* note 125.

129. *Id.*

130. MCMILLION, s*upra* note 119, at 7–8.

131. *Id.*

132. Seung Min Kim, *McConnell's Historic Judge Blockade*, POLITICO (July 14, 2016), https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455 [https://perma.cc/Q8PS-NRP7].

133. Russell Wheeler, *Senate Obstructionism Handed a Raft of Judicial Vacancies to Trump—What Has He Done with Them?*, BROOKINGS INST. (June 4, 2018), https://www.brookings.edu/blog/fixgov/2018/06/04/senate-obstructionism-handed-judicial-vacancies-to-trump [https://perma.cc/2TMR-F8A5].

134. Kim, *supra* note 132 (reporting that McConnell remained "noncommittal to [Senator Orrin] Hatch," who requested a confirmation vote for a judge for the District of Utah.).

His stance centralized the Senate's power, reduced the influence of the blue slip and home-state Senators, and antagonized the relationship between the President and Senate in the nomination process.

Whether 2014 is an outlier or a harbinger remains unclear. There has only been one subsequent change in Senate control—in 2020—but that change coincided with a change in White House control, making it difficult to parse whether the post-nuclear-option Senate will consistently exercise an independent effect on the old hand problem.

There are worthwhile points on both sides of the debate. On the one hand, Senator McConnell's actions may have been a temporary, though significant, departure from the norm. As has been well documented, Senator McConnell has all but staked his legacy on judicial nominations.[135] On the other hand, it is possible Senate leadership from both parties will see advantages to centralizing power.[136] The Senate's cooperation with President Biden has helped usher in new judges at an exceptional pace; whether that pace continues or stalls completely after a change in Senate control could help determine whether the Senate has become a stronger, if not necessarily coequal, voice to the White House in the judicial nominations process.[137]

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135. *See, e.g.*, Sahil Kapur, *With a Final Push on Judges, McConnell Will Cement a Lasting Legacy for Trump*, NBC NEWS (Dec. 14, 2020), https://www.nbcnews.com/politics/congress/final-push-judges-mcconnell-will-cement-lasting-legacy-trump-n1250950 [https://perma.cc/F3TC-WFP4] (explaining lasting implications of Senator McConnell's "push to transform the judiciary"); Priyanka Boghani, *How McConnell's Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, PBS: FRONTLINE (Oct. 16, 2020), https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges [https://perma.cc/VHR2-785F] (illustrating that Senator McConnell "s[aw] the shifting judiciary as a signature accomplishment").

136. *See* Marianne Levine, *Senate Dems Take a Page from GOP in Judicial Nominee Battles*, POLITICO (Feb. 17, 2021), https://www.politico.com/news/2021/02/17/court-nominees-democrats-469500 [https://perma.cc/Q5KQ-4AT3] (reporting that Senate Judiciary Chairman Dick Durbin, a Democrat, announced that he would "make no change to the so-called 'blue slip' process that Republicans changed in 2017").

137. Seung Min Kim & Ann E. Marimow, *Biden Has Installed a Significant Number of Judges from Diverse Backgrounds—Now Comes the Hard Part*, WASH. POST (Dec. 19, 2021), https://www.washingtonpost.com/politics/2021/12/19/biden-judges [https://perma.cc/G5SH-6UHB] (noting that, under the first year of President Biden's administration, the Senate had confirmed more judges than under any President in four decades).

It will, in short, take more time before a clear picture emerges. For purposes of this Article, a presidential model will predominate discussions of the old hand problem. The data is significantly more supportive of such a model: there are multiple presidential election cycles that show the old hand problem, while possibly only one election that evinces an independent Senate role. And there is more inherent stability and predictability to a presidential control model. When an active judge seeks senior status, they will have a clear signal of which party controls the White House and who might replace that judge.

C. RULING OUT ALTERNATIVE EXPLANATIONS

No theory—no matter how robust—should be accepted for the old hand problem without looking into possible alternative and non-partisan explanations. I focus on three here: (1) whether senior status decision-making can be explained by increases in judicial caseloads; (2) whether it can be tied to financial incentives; and (3) whether there has been a large number of cross-party judicial appointments. As I show, such circumstances might help explain why more judges have taken senior status over time—i.e., a story about aggregate volume. But they do not tell us why judges are making their senior status decisions in a politically strategic manner—i.e., why the old hand problem is happening.

1. Capacity-Based Arguments

Congress created the senior judge to address rising caseloads.[138] Instead of authorizing more *active* judgeships to handle these increases, senior status would encourage existing judges to stay on the bench. That original motivation remains a refrain, especially over the past several decades. As I have previously noted, Congress has not authorized *any* new circuit judgeships in more than thirty years.[139] That inaction has "create[ed] a concomitant deficit in judicial resources at the appellate level."[140] Likewise, while Congress increased the number of authorized

138. *Cf.* Burbank et al., *supra* note 3, at 8 (explaining that, as one Congressman stated, judges given senior states could give "the benefit of [their] services without any additional expense to the Government").

139. MCMILLION, *supra* note 110, at 3 ("The number of circuit court judgeships increased to 179 in 1990 . . . and has remained at that number to the present day.").

140. *See infra* Part I.B. & Part I.C.

district court judgeships from 571 to 645 in 1990,[141] that number has only marginally increased in the years since.[142] There are 663 permanent district court judgeships today.[143] This failure to grow the number of active federal judges has significantly hampered the administration of justice,[144] creating a demand for judicial resources that often outpaces the supply of active judgeships.[145]

The senior judgeship, in this telling, helps fill that void: "When a judge takes senior status, there is an immediate vacancy even though the judge continues to work."[146] After this vacancy is filled, and assuming the senior judge continues to work half-time, "the court enjoys in that judgeship a 50 percent increase in judgepower."[147] This circumstance has made the senior judge at times "critical to the [modern day] federal Judiciary."[148] As David Stras and Ryan Scott have observed, "[t]heir service ameliorates the problems of expanding caseloads and persistent judicial vacancies in the federal courts."[149] "Without senior judges, some . . . courts would face a disastrous build-up of backlogs, severe problems administering justice in a timely fashion, or even a total breakdown in the trial of civil cases."[150]

In other words, one alternative explanation behind the rise of judges taking senior status is concerns over judicial capacity and caseloads. If caseloads have gone up, more senior judges

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141. MCMILLION, *supra* note 110, at 4.

142. *Id.* (revealing plateauing of number of district court judgeships that began in 1990).

143. *Id.* This number excludes ten temporary district court judgeships.

144. *See infra* Part III.A.

145. *See* Steven G. Calabresi & Shams Hirji, Proposed Judgeship Bill 1 (Northwestern Univ. Pritzker Sch. of L., Pub. L. & Legal Theory Series, No. 17-24, 2017), https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf [https://perma.cc/E4QF-5ZX4] ("Over the past twenty-five years, the caseloads of federal district and circuit courts have grown to unprecedented levels such that it is widely acknowledged that they are now experiencing a crisis in volume.") (internal quotation marks omitted); Roger J. Miner, *"Dealing with the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee Revisite*d, 57 N.Y. L. SCH. L. REV. 518–19 (2012–2013) (describing an "appellate caseload explosion" and a "crisis in volume" of appellate caseloads); *infra* Part III.A.

146. Feinberg, *supra* note 2, at 411.

147. *Id.* at 412.

148. Stras & Scott, *supra* note 3, at 455.

149. *Id.*

150. *Id.* (alterations and internal quotation marks omitted).

would mean more judges overall to manage and handle cases. But this explanation only goes so far.

First, even if judges were acting to provide more judicial resources and alleviate caseloads, that fails to explain why they have taken senior status in a politically strategic manner. Caseloads cannot explain why more than eighty percent of judges that took senior status under Trump were originally appointed by a Republican, and sixty-five percent of the judges that have gone senior under Biden were originally appointed by a Democrat. Nor can they explain why such politically motivated behavior has emerged in dramatic fashion over the past two decades.

But *second*, capacity does not even *necessarily* tell the whole story as a matter of volume, setting aside questions of strategic decision-making. According to Patricia Moore, from 1986 to 2013, district court civil caseloads increased by nine percent.[151] But the average number of federal judges taking senior status during what was largely the same period increased by almost fifty percent, from 25.6 judges per year during the Reagan administration to 37.9 judges per year during the Obama administration.[152] Circuit court caseloads tell a similar story. In recent decades, total case filings in circuit courts (excluding the Federal Circuit), have decreased on an annual basis, from 68,473 in 2005 to 48,486 in 2019, the latest year for which data is available.[153] But the number of judges taking senior status has consistently increased.

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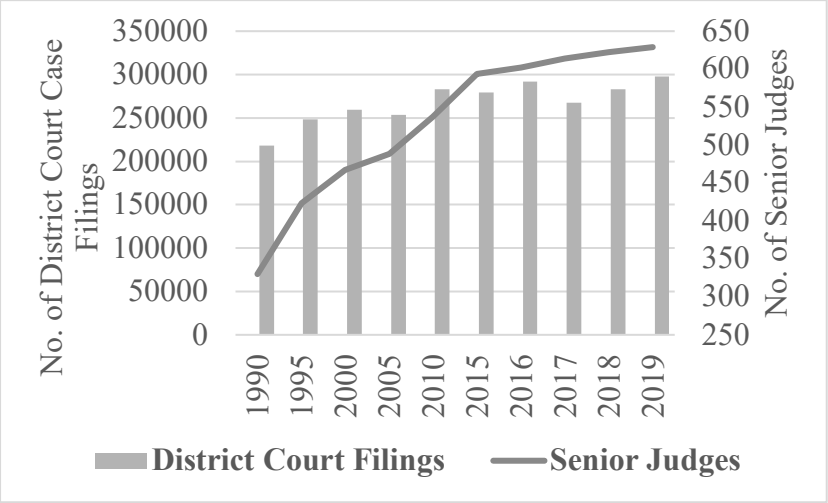
151. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1181.

152. *See* Figure 2, *supra.*

153. *See Table 2.1: U.S. Court of Appeals—Cases Filed, Terminated, and Pending (Summary)*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jff_2.1_0930.2019.pdf [https://perma.cc/TJ8Q-DWMR]. There is no single explanation behind this decrease in filings. Some of it is likely driven by legislation, such as the Prison Litigation Reform Act (enacted in 1995) and REAL ID (enacted in 2005), which seeks to curb filings from prisoner and immigrant plaintiffs. *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/T2Z8-5365] (observing that "the rate of civil rights filings in federal court immediately dropped following the passage of the Prison Litigation Reform Act"); MARGARET MIKYUNG LEE, CONG. RSCH. SERV., RL33410, IMMIGRATION LITIGATION REFORM 1 (2006), https://trac.syr.edu/immigration/library/P582.pdf [https://perma.cc/328V-P9E9] ("[T]he REAL ID Act restricted habeas review and certain other non-direct judicial review . . . .").

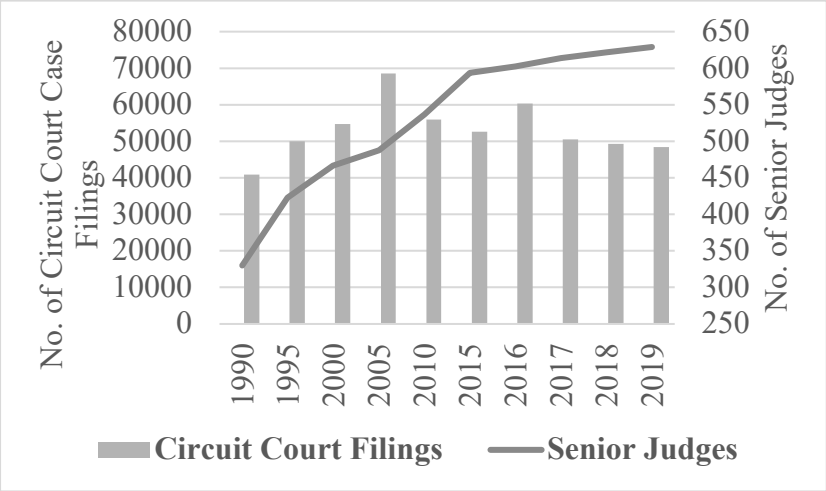
To help illustrate these trends, Figures 7 and 8[154] compare case filings at the district and circuit court levels, respectively, against the total number of senior judges. Among district courts, growth rates were more or less equal from 1990 to 2010. But in the last ten years, far more judges are taking senior status and continuing to hear cases than the rate of increase in district court filings. The trend is mirrored in circuit court filings. While filings have fallen in the past fifteen years, the number of senior judges has increased.

Figure 7: District Court Case Filings vs. No. of Senior Judges



154. For the number of senior judges, see *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges [https://perma.cc/U789-4KRN]. For circuit court caseloads, see *Table 2.1*, *supra* note 153. For district court caseloads, see *Table 4.2: U.S. District Courts—Civil Cases Filed, by District*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jff_4.2_0930.2020.pdf [https://perma.cc/7HNS-V5WD].

Figure 8: Circuit Court Case Filings vs. No. of Senior Judges



To be clear, these numbers are not necessarily perfect comparators. Some cases are no doubt more complex than others, and not all senior judges take a consistent workload over time (many reduce their caseload with age). Nor should these figures be taken to mean that there is some surfeit of judicial resources. Many courts, particularly in certain areas of the country, *do* need outside help.[155] My claim is more modest—the rate of senior judgeship decisions has, at least recently, far outpaced the rate of caseloads, meaning that caseloads cannot be the sole driver of the behavior we have witnessed.

2. Financial Incentives

Financial incentives could be another potential explanation for decisions to go senior. By making the option more financially attractive, the theory goes, an active judge might be encouraged to take senior status whenever they become eligible.

But just like caseloads, financial incentives cannot explain why, in the past two decades, so many judges take senior status only when the current President shares the same political valence as the President who appointed that judge to the bench. Economic conditions might tell a story about volume, but they

155. *See* Minor, *supra* note 145, at 533 ("District court judges from the same circuit and district, and circuit judges from other circuits, are called upon to assist the courts of appeals that are more seriously burdened by their caseloads.").

cannot tell a story regarding a politically strategic pattern of retirements.

On volume, the appropriate frame would require examining senior status decisions before and after 1954, 1984, and 1989—the three times Congress has made substantial revisions to eligibility and benefits. In 1954, Congress lowered the eligible age for senior status to sixty-five (assuming the judge had served for fifteen or more years) but kept it at seventy years old for full retirement.[156] In 1984, Congress codified the Rule of 80, allowing judges to take senior status or fully retire when the sum of their age and years of service exceeded eighty.[157] Finally, in 1989, Congress made senior status more financially attractive, by ensuring that senior judges would receive the benefit of any salary increases afforded active judges.[158] Figure 9 documents the average number of judges taking senior status in the five years before and after each change.

Figure 9: Five-Year Average of Number of Judges Taking Senior Status

	1950–54	**1955–59**	**1980–84**	**1985–89**	**1990–94**	**2016–20**
Number of Judges	6.0	10.6	23.6	25.2	34.2	35.2

In the years immediately preceding 1954, only about six judges per year sought senior status. That nearly doubled in the five years after 1954, when Congress lowered the eligible age for senior status from seventy to sixty-five.

The trend surrounding the 1984 legislative change is less pronounced: about twenty-four judges per year took senior status beforehand, and about twenty-five judges per year sought senior status afterward. This result makes sense. All Congress did in 1984 was equalize the conditions for full retirement and senior status. It did not make senior status easier or tougher to obtain, nor did it make it more economically lucrative.

In 1989, though, Congress enacted legislation to ensure that senior judges would recoup the benefit of salary increases afforded to active judges—while those fully retired would receive

156. Levy, *supra* note 3, at 1242.

157. Burbank et al., *supra* note 3, at 10.

158. *Id.* at 11.

no such benefit.[159] Making senior status more financially attractive noticeably increased senior status decisions: twenty-five judges per year went senior in the five years before the 1989 change; thirty-four judges per year went senior afterward. These financial incentives have not materially changed in the years since 1989,[160] and the rate of judges seeking senior status has not either: the five-year average, from 2016 to 2020, was around thirty-five judges per year.

Still, as noted above, although the legislative backdrop might explain the number of judges seeking senior status in any year, it does not explain the rise in politically strategic retirements. In the first full year after Congress's 1989 change, twenty-four active judges sought senior status: thirteen appointed by a Democratic President, eleven by a Republican President. President George H.W. Bush named their replacements. In 2019, a similar number—thirty-one active judges—sought senior status. But only four of these thirty-one had been appointed by a Democratic President. In sum, with a few exceptions, roughly the same number of judges are going senior now as compared to thirty years ago, but the degree of politically strategic decision-making has increased significantly.

3. Cross-Party Appointments

Finally, although not necessarily an alternative explanation, one factor that would undercut a politically strategic model is a high number of cross-party appointments. This type of appointment happens when a judge is appointed to one court—e.g., federal district court—by a President from one party, and then appointed to another court—e.g., federal circuit court—by a President from the opposing party. Justice Sonia Sotomayor is the classic example of such an appointment. She was nominated to the Southern District of New York by President George H.W. Bush, to the Second Circuit by President Bill Clinton, and to the Supreme Court by President Barack Obama.[161]

If a large share of judicial appointments were cross-party, the data would be harder to reconcile. Although I have sought to measure politically strategic behavior based on the presidential party of *first* appointment, a case could be made that, for cross-party appointments, the measure should be based on the

159. *Id.*

160. *Id.*

161. *Sotomayor, Sonia*, FED. JUD. CTR., https://www.fjc.gov/history/judges/sotomayor-sonia [https://perma.cc/Y8JA-GRYH].

presidential party of the *last* appointment. For Justice Sotomayor, that would be President Barack Obama, not President George H.W. Bush.

Fortunately, the number of cross-party appointments is incredibly low. It always has been and, if anything, is decreasing. Since the introduction of senior status in 1919, only forty-one federal judges have been the product of cross-party appointments.[162] The numbers are presented in Figure 10 below.

Figure 10: Cross-Party Judicial Appointments

President	**Number of Cross-Party Appointments (District and Circuit Judges)**
Woodrow Wilson[163]	0
Warren Harding	0
Calvin Coolidge	2
Herbert Hoover	4
Franklin Roosevelt	6
Harry Truman	4
Dwight Eisenhower	6
John Kennedy	0
Lyndon Johnson	3
Richard Nixon	3
Gerald Ford	0
Ronald Reagan	1
George H.W. Bush	1
Bill Clinton	6
George W. Bush	1
Barack Obama	2
Donald Trump	0
Joseph Biden	2

Other than a very minor bump (to six) during President Clinton's two terms, the last seven presidencies have featured

162. This data is from Directory of Article III Federal Judges, which I subsequently modeled and examined. *Biographical Directory of Article III Federal Judges: Export*, *supra* note 92.

163. Figure 10 only shows cross party appointments after the 1919 creation of the senior judgeship. President Wilson did have a single cross-party appointment during his term, for a judge nominated and confirmed in 1916.

two or fewer cross-party appointments—with President Trump's term featuring none. To put this in perspective, a year into the Biden presidency, more judges took senior status (sixty) than the number of cross-party appointments in the past hundred years (forty-one).[164] Just like caseloads and financial incentives, cross-party appointments cannot explain away the old hand problem. Judges today are, put simply, exercising their senior status decisions in a politically strategic manner, consistent with the party of the President that first appointed them.

III. CAUSES OF THE OLD HAND PROBLEM

If the old hand problem exists, a logical follow-up is to ask how it came to be. One response is to point to the general rise of partisanship. The political playing field has undeniably become more divided: "the Republican and Democratic [Congressional] caucuses have become increasingly homogenous and distant from each other."[165] That circumstance has resulted in the collapse of the "median" Senator, a previously key figure in the selection and confirmation of federal judges, replaced instead by more pro-partisan elements.[166] Moreover, lightning-rod events, such as the failed nomination of Robert Bork, may have pulled back the curtain on judicial ideology to the public, exacerbating polarization.[167] As I outline below, politics certainly is one cause of the old hand problem. But demographic changes and legislative inaction have also created an unprecedented opportunity for politically strategic decision-making to manifest. These factors cause, reinforce, and augment one another.

A. POLITICAL POLARIZATION

In 2003, to test various decision-making models at the circuit court level, Frank Cross analyzed over 17,000 circuit court

164. *See* Figure 10 (totaling forty-one cross party appointments since 1919).

165. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1693 (2015).

166. *See* Richard L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261, 264 (2019) ("Until recently . . . [t]he preferences of the median [S]enator of the majority party . . . mattered a great deal for confirmation of federal judges.").

167. David Russell, *Politicization in the Federal Judiciary and Its Effect on the Federal Judicial Function*, 2018 N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM 21, 23–24 (describing the failed Bork nomination as a precipitating event in politicization of federal judiciary).

opinions issued between 1928 and 1992.[168] Cross specifically examined four theories of decision-making: "the legal model (according to which judges decide only through neutral application of the law cited in their opinions), the political model (according to which judges decide based on their personal ideological preferences), the strategic model (according to which judges decide in order to minimize responses from other institutions that may directly or indirectly reverse their conclusions), and the litigant-driven model (according to which the choices of litigants primarily dictates published judicial decisions)."[169]

Cross concluded based on his review that "judicial duty, or the legal model, is the most powerful determinant" for decision-making, and "generally explains more than do judicial preferences or the political model."[170] Although "[b]oth legal and ideological variables appear to play a role in predicting judicial decisions," legal variables tended—for circuit court decisions between 1928 and 1992—to carry the most weight.[171]

But subsequent analysis has suggested a change in outlook. In a 2004 study, Cass Sunstein, David Schkade, and Lisa Ellman picked up where Cross had left off, by examining nearly 5,000 circuit court decisions from 1995 to 2004 (Cross looked at decisions from 1928 to 1992).[172] Unlike Cross, Sunstein and his co-authors found strong evidence of ideological voting: "in most of the areas investigated . . . the political party of the appointing president is a fairly good predictor of how individual judges will vote."[173] The authors also found "evidence within the federal judiciary of 'group polarization,' by which like-minded people move toward a more extreme position in the same direction as their predeliberation views."[174] The authors confirmed this analysis in

168. Cross, *supra* note 83, at 1498, 1501.

169. *Id.* at 1460.

170. *Id.* at 1515.

171. *Id.* at 1461. Neither of the other two models—the strategic or the litigant model—appeared to be significant.

172. Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 311 (2004).

173. *Id.* at 305.

174. *Id.* at 308.

a follow-up review two years later.[175] Studies of district court decisions have yielded similar results.[176]

The shift between the conclusions drawn by Cross and Sunstein, Schkade, and Ellman is strongly correlated with the rise of advocacy organizations such as the Federalist Society. Founded in the 1980s, the Federalist Society has long-touted as part of its core mission its pipeline of potential federal judicial nominees.[177] According to Nancy Scherer and Banks Miller, judicial nominees began listing membership in the Federalist Society in 1990.[178] These nominees, who tended to be more ideologically driven than their predecessors, did not immediately alter the shape of the Judiciary and, more importantly, could not immediately take senior status—they needed to serve at least ten to fifteen years to be eligible to go senior.

In other words, *if* Federalist Society judges were more ideologically oriented, and *if* that ideological commitment extended to senior status decisions, the data should start showing a rise in politically strategic retirements for the Republican Party beginning in 2001, about a decade after judicial nominees began listing their Federalist Society membership. That is exactly what happened. During George W. Bush's tenure, out of the 225 judges who sought senior status, seventy-two percent had been appointed by a Republican, compared to only twenty-eight percent by a Democrat. That trend, of course, only continued in even more dramatic fashion under President Trump.

On the other hand, the diminished role of advocacy organizations might help explain the smaller partisan swing witnessed

175. CASS R. SUNSTEIN, DAVID SCHKADE, LISA MICHELLE ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? 9–10 (2006).

176. In a study of 90,000 federal district court decisions from 1934 to 2008, Marc Sennewald, Kenneth Manning, and Robert Carp observed that there was "little differentiation between Republican judges and Democratic judges" in terms of polarization from 1934 through 1966. Marc A. Sennewald, Kenneth L. Manning & Robert A. Carp, *The Polarization of the Judiciary*, 23 PARTY POL. 657, 660 (2015). However, beginning in the late 1960s, "Democratic district court judges [were] more liberal than Republican judges by a margin of 10.2 percentage points." *Id.*

177. *E.g.*, Nancy Scherer & Banks Miller, *The Federalist Society's Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 376 (2009) ("If the trend started by Bush (43)—making Society members the majority of appointments to the highest levels of the federal judicial hierarchy—continues with future Republican presidents, the Federalist Society will arguably have gone a long way in realizing its original goal to change the way we, as Americans, interpret the Constitution.").

178. *Id.* at 367.

under President Obama. The liberal American Constitution Society ("ACS") was not formed until 2001 and, until very recently, refrained from express efforts at judicial selection.[179] That position is shifting. Part of the ACS website is now dedicated to tracking judicial nominations, and includes a "Path to the Bench" Initiative to "identify[] talented progressive lawyers at every stage in their careers and giv[e] them the support necessary to obtain influential legal positions at the state and federal level."[180] Other organizations have also made judicial nominations a key part of their organizing platform.[181]

These initiatives may be increasing the prevalence of strategic retirements under Democratic Presidents to be on par with the numbers seen under George W. Bush and Donald Trump. While fifty-seven percent of judges choosing senior status under President Obama were appointed by a Democrat, that number has risen to sixty-five percent[182] under President Biden, and could rise even further.

B. DEMOGRAPHIC FACTORS AND CHANGES

These political trends have been augmented by two demographic conditions: (1) increases in life expectancy and (2) the appointment of ever-younger judges.

First, when the senior judgeship was created in 1919, average life expectancy was 54.7 years old—significantly lower than the minimum age necessary (seventy) to be eligible for senior status.[183] Even in 1954, when Congress began allowing sixty-five-year-old judges to take senior status,[184] average life expectancy—69.6 years old[185]—was barely above this new eligibility threshold. The Judiciary was also almost exclusively male at the

179. *See* Evan Mandery, *Why There's No Liberal Federalist Society*, POLITICO (Jan. 23, 2019), https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033 [https://perma.cc/8HLZ-LL7G].

180. *Path to the Bench Initiative*, AM. CONST. SOC'Y, https://www.acslaw.org/projects/the-path-to-the-bench [https://perma.cc/PWZ7-S8JL].

181. *See, e.g.*, *Is Your Senator Following President Biden's Request?*, DEMAND JUSTICE (Sept. 9, 2021), https://demandjustice.org/bidens-vision-for-the-courts [https://perma.cc/AY7F-SGM4].

182. *Federal Judges on Senior Status*, BALLOTPEDIA https://ballotpedia.org/Federal_judges_on_senior_status [https://perma.cc/U4LJ-TY8S].

183. Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2017*, 68 CDC NAT'L VITAL STAT. REP. 1, 48 (June 24, 2019), https://www.cdc.gov/nchs/data/nvsr/nvsr68/nvsr68_07-508.pdf [https://perma.cc/G7KS-99RB].

184. *Federal Judges on Senior Status*, *supra* note 182.

185. Arias & Xu, *supra* note 183.

time,[186] and average male life expectancy was even lower: 66.7 years old.[187] But by 1984, when the Rule of 80 was established,[188] life expectancy had risen to 74.7 years.[189] That number has continued to increase, to 78.6 years as of 2017.[190]

Complementing this increase in life expectancy has been the relative youthfulness of judicial nominees. Much has been written about the young age of judicial appointees under President Trump, including by the White House itself.[191] But as shown in Figure 11,[192] charting the average age at nomination for circuit

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186. The first female district judge was appointed in 1949. *Women's History Month*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/womens-history-month#:~:text=Burnita%20Shelton%20Matthews%20was%20the,1949%20by%20President%20Harry%20S [https://perma.cc/FR6M-WEBG]. Women remain underrepresented: "[t]oday, about one-third of active judges are women who serve as U.S. Court of Appeals judges, U.S. District Court judges, U.S. Magistrate judges, and U.S. Bankruptcy Court judges." *Id.*

187. Arias & Xu, *supra* note 183, at 47.

188. *Federal Judges on Senior Status*, *supra* note 182.

189. Arias & Xu, *supra* note 183, at 47.

190. *Id.* at 46. U.S. life expectancy has since dropped to 76.1 years, largely due to the COVID-19 pandemic. Kate Sheridan, *U.S. Life Expectancy Drops Sharply, the Second Consecutive Decline*, STAT (Aug. 31, 2022) https://www.statnews.com/2022/08/31/u-s-life-expectancy-drops-sharply-the-second-consecutive-decline [https://perma.cc/4W35-MRU2].

191. *See, e.g.*, Zoe Tillman, *President Trump Just Put His Youngest-Ever Judge on a Federal Court*, BUZZFEED NEWS (Mar. 5, 2019), https://www.buzzfeednews.com/article/zoetillman/donald-trump-youngest-judge-allison-rushing [https://perma.cc/385D-MKKZ]; *President Donald J. Trump is Appointing a Historic Number of Federal Judges to Uphold Our Constitution as Written*, WHITE HOUSE FACT SHEETS (Nov. 6, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-appointing-historic-number-federal-judges-uphold-constitution-written [https://perma.cc/K72A-225N].

192. This data is from the Directory of Article III Federal Judges, which I subsequently modeled and examined. *See Biographical Directory of Article III Federal Judges: Export*, *supra* note 92. This dataset forms the empirical support behind two separate articles. *See* Micah Schwartzman, *Not Getting Any Younger*, SLATE (May 26, 2011), https://slate.com/news-and-politics/2011/05/president-obama-s-penchant-for-older-judges-scuttled-goodwin-liu.html [https://perma.cc/KC7T-MBEA]; Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden.*, WASH. POST (Feb. 16, 2021), https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age [https://perma.cc/U93D-E7L6].

court judges, the trend towards younger judges has been going on for some time.[193]

Figure 11: Average Age of Confirmed Circuit Court Judges at Nomination

President	Age
Woodrow Wilson	52.7
Warren Harding	60.0
Calvin Coolidge	55.9
Herbert Hoover	56.8
Franklin Roosevelt	53.5
Harry Truman	55.8
Dwight Eisenhower	56.3
John Kennedy	54.4
Lyndon Johnson	52.6
Richard Nixon	54.5
Gerald Ford	51.6
Jimmy Carter	52.6
Ronald Reagan	50.4
George H.W. Bush	49.5
Bill Clinton	52.0
George W. Bush	50.5
Barack Obama	52.4
Donald Trump	47.4

When senior status was introduced, the median age at nomination for a circuit judge was nearly sixty years old. That number has steadily decreased, particularly during Republican administrations, reaching to the low fifties under President George W. Bush, and dipping all the way to 47.4 under President Trump.[194] The story is somewhat less clear for Democratic administrations: age at nomination has more or less held steady at around 52.5 years old for several decades.[195] Still, 52.5 is a

193. The trendline for the age of federal district court judges is similar, although within a narrower band.

194. Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS INST. (Jan. 28, 2020), https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities [https://perma.cc/96DJ-8TNY].

195. This has been written about this extensively, as well as its corresponding effects on the Judiciary. *See supra* note 192; *see also* David Fontana & Micah

notable decrease from the age of nominees under Presidents Truman (55.8) and Kennedy (54.4), a sign that, for both parties, nominees are generally getting younger.

As shown in Figure 12, these twin circumstances—longer lifespans, younger judges—have led to a striking finding: Although life expectancy has *increased*, the average age for judges taking senior status has *decreased*. From 1919 to 1968, the average active judge was over seventy years old (sometimes several years over) when they sought senior status. Since 1968, however, the average age has been below seventy years old, with a continued downward drift.

Figure 12: Average Age of Judge at Time of Senior Status

President	**Age**
Woodrow Wilson	78.0
Warren Harding	73.3
Calvin Coolidge	71.9
Herbert Hoover	70.9
Franklin Roosevelt	72.4
Harry Truman	73.9
Dwight Eisenhower	74.4
John Kennedy	74.0
Lyndon Johnson	72.2
Richard Nixon	69.5
Gerald Ford	70.0
Jimmy Carter	68.4
Ronald Reagan	68.6
George H.W. Bush	68.3
Bill Clinton	68.0
George W. Bush	68.3
Barack Obama	68.0
Donald Trump	69.9

Schwartzman, *Old World*, NEW REPUBLIC (July 16, 2009), https://newrepublic.com/article/62573/old-world [https://perma.cc/AER2-5LGC] ("Because Republicans have done a better job than Democrats of nominating young judges, the lower federal courts have had a sustained and substantial conservative presence well beyond the tenure of Republican presidents."); Jonathan N. Katz & Matthew L. Spitzer, *What's Age Got to Do with It? Supreme Court Appointees and the Long Run Location of the Supreme Court Median Justice*, 46 ARIZ. ST. L.J. 41, 41 (2014) ("For approximately the past forty years, Republican Presidents have appointed younger Justices than have Democratic Presidents.").

This finding shows the effect of demographics on the old hand problem in several important and interrelated ways. First, by appointing younger judges to the federal bench, senior status is now available to all who want it. The Rule of 80 requires that a judge serve at least fifteen years if that judge wishes to retire at sixty-five years old.[196] But when a judge joins the bench at fifty or younger, this requirement no longer carries much force. Nearly every judge becomes automatically eligible for senior status when they turn sixty-five, or very soon after.

That leads to a second conclusion. It is now possible for active judges to not only take senior status, but also to *time* their senior status decisions to coincide with politically strategic circumstances. In the past, shorter lifespans and older judges invariably constrained the eligibility window. There were only so many years an active judge could take senior status, and the political stars needed to align for strategic decision-making to occur. But today that window is wider than ever before, providing manifold opportunities for the old hand problem to manifest.

Finally, longer lifespans make it possible for senior judges to stay on and affect the law for years or even decades. Gone are the days when a senior judge might serve a few terms and hear a handful of cases. They can now hear and decide hundreds of matters each year, for many years.

C. LEGISLATIVE ACTION AND INACTION

As a final addendum, Congress has also helped exacerbate the old hand problem. As discussed, lowering the eligible age of senior status (from seventy to sixty-five) and making senior status more financially attractive has created incentives for active judges to go senior.

But in addition, Congress has largely failed to authorize new circuit or district judgeships over the past several decades.[197] That failure has created a culture where active judges are encouraged to stay on in some capacity when they reach retirement age. As one former senior judge has observed, he and his colleagues were "guaranteed their pay for life" and could "simply sit at home and still get paid"—but they still volunteered to "carr[y]

196. *FAQs: Federal Judges*, U.S. CTS., https://www.uscourts.gov/faqs-federal-judges [https://perma.cc/MGH3-2AEQ] ("Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge . . . .").

197. MCMILLION, *supra* note 110, at 4.

a significant portion of the workload of the federal judiciary."[198] This commitment has at times been indispensable to the judicial function.[199]

But as I have chronicled, this narrative no longer holds as much force today, with caseloads plateauing or even decreasing. Yet norms take time to change. Though demand for judicial resources might be ebbing in reality, a perception of that high demand remains among scholars and judges.[200] That perception drives active judges towards senior status, and—given the wide windows of opportunity they now have—allows them to do so in a politically strategic manner.

IV. CONSEQUENCES OF THE OLD HAND PROBLEM

A cynic might say that there is no need to be concerned about the old hand problem, since the problem is a combination of demographic change, legislative behavior, and judicial politicization. There is little that can or should be done about demographic change (it is a good thing people are living longer). Congressional inaction is also nothing out of the ordinary; if anything, it largely typifies our everyday politics today. That leaves politicization. And if the only way to solve the old hand problem is to solve judicial politicization—well, good luck to anyone who wants to try doing that.

There is of course some truth to this view. The old hand problem *is* a product of politicization. But it can also be a major *cause* of politicization, creating a negative feedback loop in three ways: court-packing, court-picking, and court-stacking.

A. COURT-PACKING

Court-packing has long been a third rail when discussing judicial reform. Even after heightened attention to the issue following reports of the potential reversal of *Roe v. Wade*, most Americans continue to oppose efforts to expand the Supreme

198. Feinberg, *supra* note 2, at 412, 415.

199. Stras & Scott, *supra* note 3, at 455.

200. *See, e.g.*, Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1209–11 (2022) (proposing a streamlined model to determine when more judges need to be added to a circuit and concluding that, after application of the model, the Second, Third, Sixth, and Ninth Circuits could request additional judges); Leah Litman, Opinion, *Expand the Lower Courts*, N.Y. TIMES (Oct. 27, 2020), https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html#litman [https://perma.cc/7TCV-TMHE].

Court.[201] As a candidate, Joseph Biden refused to endorse any court-packing legislation.[202] The most he committed to—which he subsequently implemented—was creating a commission to study potential proposals.[203] That is all the Commission did: *study* potential reforms. It did not implement reforms and could not draft legislation, a constrained scope that led one Democratic Senator to refer to it deridingly it as "the faculty lounge."[204] All that said, the Commission did not in its final report even recommend expanding the Supreme Court.[205]

To be sure, the Commission also did not examine whether expanding or packing the lower courts was necessary or advisable.[206] That question was plainly outside of its ambit. But when others have proposed increasing the number of circuit judges for political reasons, they have been met with the same stiff pushback that comes with Supreme Court court-packing. In

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201. James Freeman, *Poll: Voters Don't Like Supreme Court Leak—or Restructuring the Judiciary: A New Mason-Dixon Survey Finds Support for Judicial Tradition*, WALL ST. J. (May 23, 2022), https://www.wsj.com/articles/poll-voters-dont-like-supreme-court-leakor-restructuring-the-judiciary-11653325250? [https://perma.cc/4ANA-TETY].

202. Sarah Mucha & Devan Cole, *Biden Says He's "Not a Fan" of Court-Packing and That He Doesn't Want to Make the Election About the Issue*, CNN (Oct. 14, 2020), https://www.cnn.com/2020/10/13/politics/joe-biden-court-packing-not-a-fan/index.html [https://perma.cc/8RTV-RU63].

203. Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/L4L7-5LSK].

204. *"This Is A Captured Institution"—An Interview with Senator Sheldon Whitehouse*, 5-4 POD, at 0:41:10 (Nov. 9, 2021), https://www.fivefourpod.com/episodes/this-is-a-captured-institution-an-interview-with-senator-sheldon-whitehouse [https://perma.cc/8QBN-GKJL]; *see also* Ian Millhiser, *Biden's Supreme Court Reform Commission Won't Fix Anything*, VOX (Apr. 10, 2021), https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society [https://perma.cc/8NFQ-TN63].

205. *Final Report: Presidential Commission on the Supreme Court of the United States*, *supra* note 112, at 67 ("In recent years, calls to expand the size of the Supreme Court have become a significant part of the debate over the Court and its role in American government. Although there is widespread agreement among legal scholars that Congress has the constitutional authority to expand the Court's size, there is profound disagreement over whether Court expansion at this moment in time would be wise. We do not seek to evaluate or judge the weight of any of these arguments, and the Commission takes no position on the wisdom of expansion."); *see also id.* at 67–111 (discussing court-packing and expansion initiatives).

206. *See generally id.*

2017, Steven Calabresi and Shams Hirji suggested adding between sixty-one and 262 circuit judgeships, in an effort to "undo[] President Barack Obama's judicial legacy."[207] That proposal was roundly criticized as unserious and unduly partisan from both sides of the political aisle.[208]

The same objections, uproar, and concern to traditional court-packing should—but hasn't yet—applied to the old hand problem. After all, when a judge goes senior so that their replacement can be appointed by a President who shares the judge's political commitments, that has the same practical impact as "traditional" court-packing. Had the President, rather than appointing a successor to the senior judge, sought to *formally* expand the number of judgeships to stack the odds in their party's favor, they would have needed to get legislation through Congress. And that sort of effort would—see the reaction to the Calabresi-Hirji proposal[209]—have been met with strong resistance.

The old hand problem offers the President a way to elide these legislative obstacles. Rather than spending political capital, the President can net an extra judgeship through a judge's strategic decision to go senior, remain on the bench, but create a vacancy anyway.

This is not some hypothetical possibility. Court-packing by the old hand problem is already happening. I have previously highlighted the transformation of the Sixth Circuit, and return to it here. Before President Trump, the Sixth Circuit's sixteen authorized judgeships were filled by nine Republican appointees

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207. Calabresi & Hirji, *supra* note 145, at 1, 15, 21.

208. *See* Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing [https://perma.cc/4PKX-RE7A] ("Court packing is a menace to the role of judicial review as a check on the power of political majorities. If either the Republicans (per the Calanresi-Hirji plan) or the Democrats (following Tushnet's ideas) succeed in packing the courts, the opposing party is sure to do exactly the same thing the next time they control the White House and both Houses of Congress."); Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [https://perma.cc/4RPW-CGXD] ("[I]t seems to me that Calabresi and Hirji's proposal is not constitutional in the small-c sense of the term. It departs from long-settled norms and understandings about how American government is conducted.").

209. *See supra* note 208 and accompanying text.

and six Democratic appointees, with one vacancy.[210] There were also seven senior judges hearing cases: four appointed by Republicans, three appointed by Democrats. Although Republican appointments outnumbered their Democratic counterparts, the difference was minor. Most panels featured at least one Democratic appointee, and the presence of mixed-party panels, as others have found, can temper and modulate ideologically driven decision-making.[211]

Under President Trump, five Sixth Circuit judges went senior. All five were replaced during President Trump's term in office. Among active judges, there are now ten Republican and six Democratic appointees, a change that has already affected major decisions by the court.[212] But it has also tilted the breakdown of senior judges. As noted, the five judges who sought senior status under President Trump all continue to hear cases. Their decisions to go senior resulted, in President Trump's term, in ten senior judges appointed by Republicans, and just two appointed by Democrats—turning what was previously a slim edge into an overwhelming margin.

The effect of such court-packing reaches beyond the Sixth Circuit. Much has been written about President Trump's efforts to flip the circuit courts. According to the Senate Republican Policy Committee, near the end of his term, seven circuits had more active Republican than Democratic appointees: the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh.[213] But that figure does not consider senior judgeship numbers, which underscore an even more startling impact.

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210. Judge Helene White, although formally confirmed under President Bush, was in fact initially nominated by President Clinton. Her subsequent confirmation was part of a political deal between the parties. Associated Press, *Impasse Over Michigan Judges Ends*, N.Y. TIMES (Apr. 16, 2008), https://www.nytimes.com/2008/04/16/us/16brfs-IMPASSEOVERM_BRF.html [https://perma.cc/JT6T-VSVU]. In en banc decisions, Judge White generally votes with the other Democratic appointees. *See, e.g.*, Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary v. Regents of Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (joining Judge Cole's opinion finding Michigan's Proposal 2—which would have amended Michigan's constitution to ban affirmative action—unconstitutional).

211. Sunstein et al., *supra* note 172, at 307 (discussing impact of collegiality and responsiveness in moderating and reining in more extreme positions).

212. *See* Wang, *supra* note 108, at 36 (discussing United States v. Christian, 925 F.3d 305 (6th Cir. 2019) (en banc)).

213. *Flipping Circuit Courts*, SENATE REPUBLICAN POL'Y COMM. (Dec. 10, 2019), https://www.rpc.senate.gov/policy-papers/flipping-circuit-courts [https://perma.cc/P7WS-52HM].

Consider the D.C. Circuit. President Obama successfully broke a logjam among nominees to the D.C. Circuit by ending the judicial filibuster.[214] To do so, though, the Democratic Party had to invoke the nuclear option. That decision was undeniably a costly choice. The upshot of going nuclear is that, among active judges, there were six Democratic appointees to four Republican appointees at the end of President Trump's term, on what some consider to be the second most powerful federal court.[215] But among senior judges, the ratios were reversed: five Republican appointees to two Democratic appointees.[216] Thus, by expanding the purview to include senior judges, President Trump was able to "flip" or almost flip other circuits as well—like the D.C. Circuit—so that a litigant might be equally (or more) likely to have their case heard there by a majority Republican-appointed or majority Democrat-appointed panel.

This compositional calculus matters because a three-judge panel is often the last court to hear an individual's case, given the rarity of en banc and Supreme Court review. Moreover, even when en banc review is granted, including for courts that have not formally "flipped," the resulting en banc court might still issue an ideologically-driven adverse decision. Consider, for instance, the Ninth Circuit—a court that continues to have more Democratic than Republican appointees, although President Trump significantly closed the gap by, over his term, appointing ten judges to the court.[217] That court employs a unique en banc process. Rather than convene all of the active judges on the court, the court draws a panel consisting of the chief judge and ten randomly selected active circuit judges.[218] This procedure

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214. *See* Jeffrey Toobin, *The Obama Brief*, NEW YORKER (Oct. 20, 2014), https://www.newyorker.com/magazine/2014/10/27/obama-brief [https://perma.cc/2W5H-TZS8].

215. *See* Aaron L. Nielson, *D.C. Circuit Review—Reviewed: The Second Most Important Court?*, YALE J. ON REGUL. BLOG: NOTICE & COMMENT (Sept. 4, 2015), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson [https://perma.cc/DZ4D-XWNV].

216. *Judges of the D.C. Circuit*, U.S. CT. OF APPEALS FOR THE D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/content/judges [https://perma.cc/5GV6-WKN7].

217. *See* Andrew Wallender & Madison Alder, *Ninth Circuit Conservatives Use Muscle to Signal Supreme Court*, BLOOMBERG L. (Dec. 8, 2021), https://news.bloomberglaw.com/us-law-week/ninth-circuit-conservatives-use-muscle-to-signal-supreme-court [https://perma.cc/8ERN-BMR9].

218. *Ninth Circuit En Banc Procedure Summary*, PUB. INFO. OFF. FOR THE U.S. CTS. FOR THE NINTH CIR. (Feb. 10, 2017), http://cdn.ca9.uscourts.gov/

has, given the court's changes in makeup, already resulted in increasingly partisan en banc decisions, including a decision where the en banc court upheld a "gag rule" preventing health care providers from referring patients to abortion providers.[219] In a seven to four decision, Judges Eric Miller and Kenneth Lee, both appointed by President Trump,[220] comprised the swing votes.[221]

One final note on court-packing. Traditionally, the decision to go senior creates a vacancy, which the President and Senate work together to fill. In the interim, a judge might continue to hear a full docket, to ensure that the senior status announcement does not create a shortage in judicial resources.[222] But the judge is no longer "active" in a formal sense, and they have no official role in selecting their successor.

Yet in the past few years, many judges have skirted this traditional approach, and elected to take a *conditional* retirement. For example, Judge Alice Batchelder, appointed by George H.W. Bush to the Sixth Circuit, announced in 2017 that she would "take senior status when her successor [was] confirmed."[223] But Judge Batchelder did not set a "timetable" for her retirement, signaling her willingness to wait for President Trump "to nominate Batchelder's successor and the Senate . . . to conform [sic] the nomination."[224] Judge Batchelder's successor, Eric Murphy,

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datastore/general/2017/02/10/En_Banc_Summary2.pdf [https://perma.cc/HL3P-Y4JH].

219. California *ex rel.* Becerra v. Azar, 950 F.3d 1067, 1074, 1078 (9th Cir. 2020) (en banc).

220. *Senate Confirms Seattle Attorney Eric D. Miller to Seat on Ninth Circuit Court of Appeals*, PUB. INFO. OFFICE FOR THE U.S. CTS. FOR THE NINTH CIR. (Feb. 27, 2019), https://cdn.ca9.uscourts.gov/datastore/ce9/2019/02/27/Miller_Confirmed.pdf [https://perma.cc/FX3P-V74H]; *Senate Confirms L.A. Attorney Kenneth Kiyul Lee to Seat on Ninth Circuit Court of Appeals*, PUB. INFO. OFFICE FOR THE U.S. CTS. FOR THE NINTH CIR. (May 15, 2019), https://cdn.ca9.uscourts.gov/datastore/ce9/2019/05/16/Lee_Confirmed.pdf [https://perma.cc/2MR5-HTWM].

221. *See Azar*, 950 F.3d at 1074.

222. *E.g.*, Emma Cummings, *Fourth Circuit Judge Assumes Senior Status*, 2018 CUMB. L. REV. ONLINE 1, 2 ("[Judge Shedd] explained that because he has taken senior status, he has the opportunity to take as much or as little of a case load as he chooses.").

223. Eric Heisig, *Longtime 6th Circuit Appeals Judge from Ohio Will Take Senior Status*, CLEVELAND PLAIN DEALER (Sept. 19, 2017), https://www.cleveland.com/court-justice/2017/09/longtime_6th_circuit_appeals_c.html [https://perma.cc/4XH3-GFJH].

224. *Id.*

was not confirmed until two years later.[225] Judge Deborah Cook, also from the Sixth Circuit, likewise sought a conditional retirement, with her successor, Chad Readler, confirmed a year after Judge Cook's announcement.[226] Such retirements have continued apace during the Biden Presidency, with several judges electing the option.[227] These conditional retirements are not binding, and there would have been nothing preventing Judges Batchelder, Cook, or any other judge from backpedaling.

Indeed, four have already done so in the past few years. Judge Michael Kanne, a Reagan appointee on the Seventh Circuit, did so in 2018, when he learned that his former law clerk and then-Indiana Solicitor General Thomas Fisher would not be named his replacement.[228] Likewise, Judge Robert King, a Clinton appointee, announced in August 2021 his plans to take senior status, but rescinded them three months later when President Biden declined to nominate Judge King's preferred replacement.[229]

In 2022, Judge David Hurd of the Northern District of New York "unconditionally withdr[ew] [his] previously expressed intention regarding senior status."[230] President Biden had nominated Jorge Rodriguez to take Judge Hurd's seat. But a day after Rodriguez's nomination, Judge Hurd indicated that he would remain on active status unless his replacement lived in Utica, New York, and sat and heard cases in the Utica federal courthouse.[231]

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225. Sabrina Eaton, *Senate Confirms Ohio's Eric Murphy as a Federal Judge over Objections from Democrats*, CLEVELAND PLAIN DEALER (Mar. 7, 2019), https://www.cleveland.com/open/2019/03/senate-confirms-ohios-eric-murphy-as-a-federal-judge-over-objections-from-democrats.html [https://perma.cc/TQ9V-3LNQ].

226. Eric Heisig, *Trump Nominates Ohio Solicitor, DOJ Official to 6th Circuit Appeals Court*, CLEVELAND PLAIN DEALER (Jan. 7, 2018), https://www.cleveland.com/court-justice/2018/06/trump_nominates_ohio_solicitor.html [https://perma.cc/9F42-BCAB].

227. *See, e.g.*, *Seventh Circuit's David Hamilton to Step Down in 2022*, BLOOMBERG L. (Dec. 2, 2021), https://news.bloomberglaw.com/us-law-week/seventh-circuits-david-hamilton-to-take-senior-status-in-2022 [https://perma.cc/B3PR-R65H].

228. Josh Blackman, *Judges Who Rescind Their Senior Status Announcement Because They Don't Like Their Replacements*, VOLOKH CONSPIRACY (Nov. 28, 2021), https://reason.com/volokh/2021/11/28/judges-who-rescind-their-senior-status-announcement-because-they-dont-like-their-replacements [https://perma.cc/B3PR-R65H].

229. *Id.*

230. Raymond, *supra* note 15.

231. *Id.*

Finally, and perhaps most memorably, Judge Karen Caldwell, a district judge in the Eastern District of Kentucky nominated by George W. Bush, conditioned her taking senior status on the appointment of a conservative replacement.[232] That would have been a tall order, considering that her decision to go senior came in the middle of President Biden's first term. Senator McConnell thus negotiated a deal so that another Republican, Chad Meredith, would fill Judge Caldwell's seat.[233] This deal only fell through after Senator Rand Paul intervened, objecting to the process.[234]

While Judge Kanne's 2018 decision might have seemed like a one-off, the similar paths of Judges King, Caldwell, and Hurd suggest that such behavior may no longer be such an anomaly. Some active judges are doing more than just using their senior status decisions in a politically strategic manner. They are dangling the prospect of senior status to shape and pack courts in *exactly* the way that they want them to look.

B. COURT-PICKING

Talk of conditional retirements also dovetails into concerns around court-picking, another consequence of the old hand problem. Unlike court-packing, whose effects are felt most at the circuit court level, court-picking is most pronounced among district courts.[235] That difference is due to the different nature of these two types of courts. Appellate proceedings are governed by several judges sitting together, and the presence (or absence) of other ideologically oriented judges may act to modulate (or exacerbate) ideological polarization.

But district court judges need not worry about what their colleagues have to say. When a case is on their docket, that judge (senior or not) has near plenary power. Court-picking by the old hand problem happens in two ways: (1) in the types of cases senior district judges choose to hear, and (2) the colleagues they choose to serve alongside.

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232. Stern, *supra* note 13.

233. *Id.*

234. Raju, *supra* note 14.

235. Court-packing also plays a role among district courts, although less prominently than in the makeup of the sort of three-judge panels among the circuit courts.

1. Docket Discretion and Control

On the first point, senior district judges get to opt out of cases they do not want to hear. That is a unique benefit and privilege. Typically, cases within any particular district are assigned randomly, through a process known as "the wheel." On the wheel, every judge has an equal chance of getting the eye-catching matters as they do the quotidian ones. But senior judges can tinker with this selection process by categorically opting out of certain matters.[236] The rationale is that, because a senior judge is volunteering their time, they should be allowed to skip out on cases they particularly do not want to hear. For some senior judges, that might be capital cases, for others it might be pro se Social Security filings.[237]

But whatever any specific judge's preference as to what they do not want to hear, there is a common thread that unifies what most judges—senior or otherwise—*do* want to hear: complex and high-impact civil litigation. By exempting themselves from the "boring" cases, senior judges, as compared to their active judge counterparts, disproportionately review some of the most interesting cases on the federal docket. During the final year of the Trump Presidency, Senior Judge Nicholas Garaufis determined that Chad Wolf was not lawfully serving as the Acting Secretary of Homeland Security and directed the federal government to reinstate the Deferred Action for Childhood Arrivals program.[238]

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236. *Federal Senior Judges Carry a Growing Workload*, SYRACUSE TRAC DATABASE (July 9, 2015), https://trac.syr.edu/tracreports/judge/395/#:~:text=Moreover%2C%20the%20size%20of%20the,24%20percent%20of%20the%20total [https://perma.cc/2CJZ-WJJ3] ("[S]enior judges—providing they meet the basic work requirement—can tailor their workloads in many different ways. Judge John L. Kane Jr. of Colorado, for example, said in a recent interview that he had opted to continue handling his full share of the criminal matters referred to the district, but only 50 percent of the civil cases that came up on his 'wheel.' Judge Kane added that while his status had allowed him to cut back on civil matters and not attend a large number of meetings that he found unnecessary, he had chosen to devote considerable time to assisting his court in handling selected administrative matters such as the coordination of the regulation of government surveillance.").

237. *Id.*; *see also* Block, *supra* note 2, at 540–41 ("What is different in the [Eastern District of New York] is a shift in the nature of the senior judges' work; they can decide that they no longer wish to preside over certain types of cases. For example, many [Eastern District of New York] senior judges stop handling pro se litigation.").

238. Batalla Vidal v. Wolf, No. 16CV4756NGGVMS, 2020 WL 7121849, at *1–2 (E.D.N.Y. Dec. 4, 2020).

Likewise, senior judges issued orders prohibiting the exclusion of transgender individuals from military service,[239] halting the Trump administration's travel ban,[240] and blocking construction funds for a wall on the Southern border.[241] These decisions were lauded by many as the right normative result.[242] But remember that the political winds can change quickly. There are many senior district judges that subscribe to a different set of political values. Given President Biden's express commitment to enact policy by executive order,[243] it is highly likely that court-picking senior district judges will go the other way, enjoining President Biden's core policies.[244]

The impact of this form of court-picking is particularly magnified with the rise of the nationwide injunction. Such injunctions allow a single district judge—senior or not—to "declare a federal statute, regulation, or policy invalid and prevent the Executive Branch from enforcing it anywhere or against anyone."[245] Although there is much debate over whether such injunctions are proper,[246] that debate is, for old hand problem purposes, not germane. So long as these injunctions remain part of the legal

239. Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017).

240. Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

241. El Paso County v. Trump, 407 F. Supp. 3d 655 (W.D. Tex. 2019), *rev'd in part*, 982 F.3d 332 (5th Cir. 2020).

242. *E.g.*, Matt Moore, *Federal Judge Rules That Donald Trump's Second Transgender Ban for the Military Cannot Be Implemented,* GAYTIMES, https://www.gaytimes.co.uk/life/federal-judge-rules-that-donald-trumps-second-transgender-ban-for-the-military-cannot-be-implemented [https://perma.cc/K95S-CPBM] (referencing praise from Lambda Legal and Outserve-SLDN after the district court decision on military service by transgender individuals).

243. Matt Viser, Seung Min Kim & Annie Linskey, *Biden Plans Immediate Flurry of Executive Orders to Reverse Trump Policies*, WASH. POST (Nov. 7, 2020), https://www.washingtonpost.com/politics/biden-first-executive-orders-measures/2020/11/07/9fb9c1d0-210b-11eb-b532-05c751cd5dc2_story.html [https://perma.cc/5DM8-USNE].

244. *See, e.g.*, Order, Nebraska v. Biden, No. 22-3179 (8th Cir. Oct. 21, 2022) (granting a motion for an administrative stay preventing Biden's student loan debt relief program from going into effect).

245. Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68 (2019).

246. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the Nationwide Injunction*, 131 HARV. L. REV. 417 (2017) (criticizing modern practice and proposing a narrower "plaintiff protective" injunction device); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (defending national injunctions that are necessary to provide complete relief to the plaintiffs).

landscape, court-picking becomes an ever-powerful tool for the senior district judge to change a policy nationwide to their liking.

2. Magistrate Judge Selection

There is another, separate form of court-picking at play as well: the selection of magistrate judges. Magistrate judges have played an increasingly valuable role in resolving federal matters. Under the law, they may issue final rulings on non-dispositive matters (such as discovery motions), as well as reports and recommendations on dispositive ones (such as motions to dismiss or motions for summary judgment).[247]

Whereas Congress has largely resisted expanding authorized district court judgeships over the past thirty years, "[t]he number of full-time magistrate judges [has] increased 780 percent, from 61 in 1971 to 537 in 2018."[248] In 2013, magistrate judges disposed of more than 1.4 million federal matters.[249] "[I]t is no exaggeration to say that without the distinguished service of these judicial colleagues, the work of the federal court system would grind nearly to a halt."[250] Across the country, magistrate judges "assist[] district court judges—and sometimes stand[] in their shoes—in managing caseloads, resolving disputes, making law, and choosing winners and losers."[251] Deferential standards of review and norms of collegiality mean that, although district judges are in theory the final word on dispositive matters, magistrate judges are rarely reversed in practice.[252]

When it comes to *who* may serve as a magistrate judge, though, the senior district judge has an outsized voice. The law provides that "[t]he judges of each United States district court . . . shall appoint United States magistrate judges in such numbers and to serve at such locations within [their] judicial

247. *See* FED. R. CIV. P. 72.

248. *Just the Facts: Magistrate Judges Reach the Half Century Mark*, U.S. CTS. (Feb. 20, 2019), https://www.uscourts.gov/news/2019/02/20/just-facts-magistrate-judges-reach-half-century-mark [https://perma.cc/WG9X-KRJN].

249. *Id.*

250. Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 668 (2015).

251. Charlotte S. Alexander, Nathan Dahlberg & Anne M. Tucker, *The Shadow Judiciary*, 39 REV. LITIG. 303, 305 (2020).

252. Philip M. Pro, *United States Magistrate Judges: Present but Unaccounted For*, 16 NEV. L.J. 783, 803 (2016) ("Most [magistrate judges] noted that their rulings on non-dispositive matters were rarely reversed by the assigned district judge, and that reversals on findings and recommendations, with respect to case dispositive matters, also were infrequent . . . .").

districts."[253] In other words, while circuit and district court judges must be appointed by the President and confirmed by the Senate, there is *no* formal role for the other political branches in magistrate judge selection. The only votes that matter are those of the *district* judges on a particular court. A separate federal statute specifies that senior judges may participate in magistrate judge selection if they carry at least a fifty percent caseload.[254]

There are, in short, multiple opportunities for the old hand problem to manifest at the district court level. A district judge taking senior status could, through a strategic retirement, let the President shape the court by appointing an active judge in their place. But in addition, via court-picking, a senior district judge might also take cases and issue orders changing law and policy nationwide. And, shielded from scrutiny, a senior district judge may select their magistrate judge colleagues, who will serve a role functionally indistinguishable to that of a district court judge.

C. COURT-STACKING

Finally, senior judges influence the shape of the law outside their own geography, through court-stacking. Like stacking a deck, court-stacking happens when a chief judge invites, as a visiting judge, someone who advances that chief judge's policy preferences.

Stacking is already happening. A 2012 study analyzing 3,320 cases found "a pattern of chief judge behavior motivated by policy considerations."[255] "[T]he presence of a Democratic majority at the circuit level makes Republican chief judges less likely (and Democratic chief judges more likely) to select a member of their own party to sit by designation."[256] "[T]he reverse is true on Republican-dominated circuits: there, Republican chief judges are more likely (and Democrats less likely) to tap their ideological allies for service on the courts of appeals."[257]

Those findings were repeated in 2015, when Jeffrey Budziak found that "chief judges are motivated primarily by policy goals

253. 28 U.S.C. § 631(a).

254. 28 U.S.C. § 296.

255. Todd C. Pepper, Katherine Vigilante & Christopher Zorn, *Random Chance or Loaded Dice: The Politics of Judicial Designation*, 10 U. N.H. L. REV. 69, 88 (2012).

256. *Id.* at 89.

257. *Id.*

when selecting visiting judges."[258] The D.C. Circuit ceased the use of visitors altogether because, per one former judge, "it was understood that [a former chief judge of the D.C. Circuit] had been 'using liberals'—that is, that he had been deliberately inviting liberal judges to sit and decide cases."[259] "[T]he 'genesis' of not having visitors was 'some concern about circuit law and potential skewing.'"[260]

How does the old hand problem contribute to court-stacking? Two ways. First, there has been a persistent need for visiting judges. Although caseloads across the country may have plateaued, some circuits remain unduly burdened, requiring help from the outside.[261] That assistance alleviates increases in "volume, accumulation, [and] urgency of business."[262] According to Marin Levy, in 2016 and 2017, visiting judges helped decide nearly thirty percent of circuit court cases heard on the merits at oral argument.[263]

Second, senior judges are more than ready to volunteer to visit. Many indeed identify the ability to visit other courts as a primary benefit of going senior.[264] According to a former chief judge of the Third Circuit, "[u]sually" the circuit "contact[s] [other] judges," expressing a need for visitors—but "[s]ometimes after judges go senior, they call up" unprompted.[265] Senior Judge Frederic Block lauded his experience sitting "by designation as a visiting judge on the Court of Appeals for the Ninth Circuit" and floated the idea of "sit[ting] on each of the thirteen circuit courts, something akin to climbing all the forty-six peaks of the Adirondacks."[266]

The data validates this view of senior judge volunteerism. An analysis of appellate court participation found that "[s]enior judges, who have the most flexibility with their workloads, take

258. Budziak, *supra* note 24, at 249.

259. Levy, *supra* note 23, at 67, 107.

260. *Id.* at 108.

261. *Id.* at 104–05.

262. *Id.* at 91.

263. *Id.* at 98; *see also* Colter Paulson, *Understanding the Sixth Circuit: The Role of Visiting Judges*, SIXTH CIR. APP. BLOG (Apr. 20, 2011), https://www.sixthcircuitappellateblog.com/news-and-analysis/understanding-the-sixth-circuit-the-role-of-visiting-judges [https://perma.cc/J9DK-XP7W] (noting that "visiting judges shouldered around 15% of the Sixth Circuit's caseload," which "rose to around 20%" during 2001 to 2007).

264. *See* Burbank, et al., *supra* note 3, at 45.

265. Levy, *supra* note 23, at 108 n. 334.

266. Block, *supra* note 2, at 546.

the great majority of visiting assignments."[267] A report on district courts likewise found a roughly equal number of active and senior judges provided visitor services in 1999 even though, at the time, active judges outnumbered senior judges by two to one.[268]

Just like court-packing and court-picking, court-stacking has already impacted the law in meaningful ways. Senior judges sitting by designation have authored the majority opinion or cast deciding votes in cases of first impression, creating circuit splits on insider trading liability,[269] the mens rea for criminal liability,[270] and the viability of freedom of association claims.[271] And again, just like court-packing and court-picking, court-stacking will likely increase with time, as more judges take senior status in a politically strategic fashion.

V. SOLVING THE OLD HAND PROBLEM

The old hand problem can sometimes manifest itself through dramatic changes to the law, such as when a single senior district judge issues a nationwide injunction. But in many other cases, it works more subtly. Law is generally made incrementally, with decisions forming a coherent precedent over time. A system that reflects and incorporates politically strategic

267. Paulson, *supra* note 263.

268. Jennifer Evans Marsh, *The Use of Visiting Judges in the Federal District Courts: A Guide for Judges & Court Personnel*, FED. JUD. CTR., at v (2003), https://www.fjc.gov/sites/default/files/2012/VisiJud2.pdf [https://perma.cc/BKG2-ZH2B].

269. United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015). The opinion was authored by Senior Judge Jed Rakoff of the Southern District of New York. This decision in fact created a split with Second Circuit precedent in United States v. Newman, 773 F.3d 438 (2d Cir. 2014)—precedent that Judge Rakoff would have otherwise needed to follow in his own court. The Supreme Court resolved the split in favor of the Ninth Circuit's interpretation. Salman v. United States, 580 U.S. 39 (2016). For additional discussion, see Levy, *supra* note 23, at 68–70.

270. United States v. Johnson, 981 F.3d 1171 (11th Cir. 2020) (creating a circuit split with United States v. Triggs, 963 F.3d 710 (7th Cir. 2020)). Senior Judge Richard Tallman of the Ninth Circuit cast the deciding vote.

271. Palardy v. Township of Millburn, 906 F.3d 76 (3d Cir. 2018). The opinion was authored by Senior Judge Eugene Siler of the Sixth Circuit, and acknowledged a split between: (1) the Second, Fourth, Sixth, and Seventh Circuits; (2) the Fifth and Eleventh Circuits; and (3) the Ninth and Tenth Circuits. *Id.* at 82. Like in *Salman*, Judge Siler declined to follow the approach of the Sixth Circuit—his own court—and instead adopted the rule from the Fifth Circuit, despite conceding it was "the minority position." *Id.*

retirements becomes less independent and more politically driven not all at once, but over the long term.

Yet the Judiciary *cannot* simply become another political actor. Unlike the Executive, judges "don't have an army."[272] Unlike the Legislature, judges "don't have any money."[273] Instead, "the only way we get people to do what we say that they should do is because people respect us and respect our fairness."[274] The old hand problem destabilizes this sense of fair play and integrity. Rather than acting on legal considerations, judges decide cases, make retirement choices, and shape the Judiciary under a political gloss. Valuing judicial independence requires taking the old hand problem seriously.

A. REJECTING THE SILVER BULLET

A first step in taking the old hand problem seriously is recognizing that it will not solve itself. Structural incentives encourage political entropy. The old hand problem manifests when a judge takes senior status to line up their policy preferences with the party in power. The strategic retirement allows a sitting President to nominate a judge with similar ideological commitments. But if the party in power benefits from the old hand problem, it has little motivation to use political capital to solve the old hand problem. By attempting to curb the old hand problem, the party deprives itself of an opportunity to pack, pick, and stack the courts in its own favor.[275]

A second step is to recognize that many popular judicial reforms are unlikely to move the ball. Marin Levy, for instance, has called on courts and Congress to lower "existing barriers to 'going senior'" so that "a significant number of vacancies could be created and then filled with new judges."[276] Levy proposes, among other things, giving the senior judge more resources, prestige, and respect. This thesis incorporates pro-partisan and

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272. Doug Stanglin, *Kagan, Sotomayor: Viewing the Supreme Court as Politically Divided Hurts Its Legitimacy*, USA TODAY (Oct. 6, 2018), https://www.usatoday.com/story/news/2018/10/06/kagan-sotomayor-court-could-lose-legitimacy-if-not-seen-impartial/1547361002 [https://perma.cc/7MKE-7BXE].

273. *Id.*

274. *Id.*

275. *Cf.* Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1059 (2020) ("Problems embedded in the democratic process resist change because the problem itself is an obstacle to its solution.").

276. Levy, *supra* note 3, at 1233.

nonpartisan elements: pro-partisan because judicial vacancies provide President Biden an opportunity to shape the courts, and nonpartisan because federal courts face increasingly burdensome caseloads.

Both reasons are unpersuasive. On the pro-partisan rationale, Levy is attempting to marshal the playing field in favor of Democratic appointments over the next four years. But this myopic thinking is what created the tit-for-tat issues behind the old hand problem. Once power changes parties, the shoe will be on the other foot, and the direction of opportunistic retirements will flip. Making it easier for judges to take senior status will only make the old hand problem worse.

Concerns over judicial capacity are a closer call, particularly in the busiest geographies. But the solution—making it easier to go senior—is a roundabout way of addressing the actual issue. The best way to address shortages in judicial capacity is to increase judicial capacity by authorizing more judgeships by, as I discuss below, including a few tweaks to overcome extant political inertia.

Another popular reform is term limits. In 2020, a group of Democratic Congressmen unveiled the Supreme Court Term Limits and Regular Appointments Act, a bill that would limit Justices to nonrenewable eighteen-year terms.[277] President Biden's Supreme Court Commission likewise examined the issue,[278] as have other scholars.[279] As early as 2006, in fact, Steven Calabresi and James Lindgren proposed an eighteen-year term for Supreme Court Justices. That length of time is long enough "to guarantee judicial independence without producing" the undesirable consequences associated with a sclerotic Court: reduced democratic accountability, increased politicization of the nomination and confirmation process, and a rise in "mental decrepitude."[280]

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277. *See* Kalvis Golde, *House Democrats to Introduce New Bill for Supreme Court Term Limits*, SCOTUSBLOG (Sept. 25, 2020), https://www.scotusblog.com/2020/09/house-democrats-to-introduce-new-bill-for-supreme-court-term-limits [https://perma.cc/9ZYP-Z929].

278. *Final Report: Presidential Commission on the Supreme Court of the United States*, *supra* note 112, at 111–51.

279. *E.g.*, *id.* at 146–51 (citing sources); Layne S. Keele, *Why the Judicial Elections Debate Matters Less Than You Think: Retention as the Cornerstone of Independence and Accountability*, 47 AKRON L. REV. 375, 420–23 (2014).

280. Calabresi & Lindgren, *supra* note 29, at 772, 775, 813–19 (2006) ("To resolve the problems of life tenure, we propose . . . that lawmakers pass a

These benefits extend beyond the Supreme Court. Circuit and district courts also, because of the old hand problem, suffer from reduced democratic accountability and greater polarization. In fact, the old hand problem could be more far-reaching in these lower courts because, while Supreme Court Justices cannot serve on the Supreme Court after they retire, senior judges continue to hear cases even after taking senior status. Imposing term limits—and, by extension, effectively cabining senior status—might help curb such problems.

But whenever term limits come up, the common rebuttal is that "life tenure can only be limited by means of a constitutional amendment."[281] That requirement has long meant that term limits are a political dead letter. In an attempt to sidestep Article V, the Supreme Court Term Limits and Regular Appointments Act would require Justices to take senior status at the end of their eighteen-year term, so that they may "continue their service on lower courts."[282] That purportedly "solves" the constitutional question by giving Justices who want to remain in service the option to work on a lower federal court. Many observers remain dubious of the constitutionality of this creative solution.[283] In any event, even if such a move—requiring Justices to take senior status—were constitutionally palatable, it would do nothing for the old hand problem, which manifests *because* senior status is an available option.

Finally, one group, Fix the Court, has suggested a revision to the Judicial Code of Conduct, to "make it clear that a judge's decision to condition his or her retirement or taking of senior status on the nomination of a specific successor is a violation of judicial ethics."[284] Such language is laudable and might catch the

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constitutional amendment pursuant to Article V of the Constitution instituting a system of staggered, eighteen-year term limits for Supreme Court Justices.").

281. *Id.* at 824.

282. Press Release, Rep. Ro Khanna Proposes Supreme Court Term Limits, Appointments Schedule, Without Constitutional Amendment (Sept. 25, 2020), https://khanna.house.gov/media/press-releases/release-rep-ro-khanna-proposes-supreme-court-term-limits-appointments-schedule [https://perma.cc/4BPN-JQAZ].

283. *See* Kathryn Krawczyk, *Progressive Rep. Ro Khanna Introduces Supreme Court Term Limits Bill*, WEEK (Sept. 25, 2020), https://theweek.com/speedreads/939777/progressive-rep-ro-khanna-introduces-supreme-court-term-limits-bill [https://perma.cc/K5TH-9FVN].

284. *Judges Shouldn't Be Picking Their Successors*, FIX THE COURT (July 11, 2022), https://fixthecourt.com/2022/07/judges-shouldnt-picking-successors [https://perma.cc/9YR6-XEGJ].

more obvious cases of court-picking and court-packing, like the conditional retirements (and unretirements) of Judges Caldwell and Hurd. But the old hand problem is not confined to a single or even a handful of glaring cases. Rather, its impact is felt across the Judiciary, and any effort to combat it should have more teeth than a one-line revision to a Code of Conduct.

B. SOME POTENTIAL INCREMENTAL CHANGES

Rather than pursue these more popular proposals, a series of incremental changes might better meaningfully address some of the worst effects of the old hand problem. I focus on four: (1) raising the Rule of 80; (2) making full retirement easier and more attractive; (3) limiting senior judges' ability to choose their dockets; and (4) expanding the number of authorized judgeships.

1. Raising the Rule of 80

First, Congress could enact tighter eligibility requirements by raising the Rule of 80. There is reason to believe such action is sorely overdue. In the past century, changes to eligibility have made senior status *easier* to obtain. Starting in 1919, judges needed to be at least seventy years old before taking senior status.[285] That bar was lowered to sixty-five in 1954, and codified by the Rule of 80 in 1984.[286] But those changes conflict with biological advances, which have significantly *increased* life expectancy. That discrepancy has created the windows of opportunity necessary for judges to take senior status in a politically motivated manner.

Raising eligibility requirements helps close this window. A non-partisan rationale for raising the Rule of 80 can be easily articulated. When Congress created the Rule, people lived far shorter lives. As that reference point moves, it only makes sense for retirement requirements to move in the same direction, not the opposite direction. Adjusting the Rule of 80 upwards, to a Rule of 85 or 90, would not even prevent most judges from taking senior status. Instead, it simply makes it harder to take senior status *in a politically strategic fashion* by narrowing the available window of opportunity.

Tightening these requirements should attract support across parties. After all, politically strategic retirements have occurred under both parties. Raising the Rule of 80 would not even

285. Vining, *Politics, Pragmatism, and Departures*, *supra* note 3, at 837.

286. *Id.*

spell the end of all politicization of the Judiciary—groups can still advocate for ideologically aligned individuals at nomination. Allowing for *some* political bargaining may in fact inure to this proposal's appeal: the nomination process continues to reflect democratic accountability and responsiveness, but the worst knock-on effects of the old hand problem are blunted.

2. Making Full Retirement More Attractive

By the same token, Congress might consider making full retirement more accessible and appealing. As it stands, few judges choose that option. When a judge satisfies the Rule of 80, they can either fully retire or go senior, and senior status carries with it the promise of salary increases that retirement without service does not. If a judge is willing to do at least a quarter of the work that they were doing, it makes little financial sense to retire and leave the bench.

Congress, though, could tinker with these rules. It could lower the eligible age for full retirement to sixty or fifty-five. Or it could sweeten the deal by promising that those who fully retire will still receive salary and pension increases in line with active judges. A politically motivated judge might still choose to time a full retirement to line up with that of a particular presidential party, but that judge would not, under this scenario, continue to issue decisions following retirement.

3. Limiting Docket Discretion

To reduce court-picking, policymakers could cabin a senior judge's discretion to skip out on certain cases. There could be latitude in determining the extent of this constraint—senior judges might be able to pass on capital cases, for example, but not all criminal matters.

To be clear, limiting this discretion would not impact the ability of senior judges to take a reduced workload. Such a judge might still decide to carry half or a quarter of the cases that they heard while an active judge. But they would not be able to self-select out of entire case categories, thereby giving them a disproportionate say in high-impact or high-profile litigation.

4. Increasing the Number of Judgeships

Finally, Congress might consider increasing the number of authorized Article III judgeships. As covered, Congress has failed to authorize any measurable increase over the past thirty years. That failure has forced the Judiciary to stitch together

partial solutions to deal with ever-increasing caseloads: the magistrate judge, the visiting judge, and the senior judge. But each of these solutions is highly imperfect. Magistrate judges are temporary appointments, without the full protections or authority granted by Article III. The visiting judge has been used to promote policy considerations. And the senior judge has, through the old hand problem, led to court-packing, court-picking, and court-stacking.

The need to increase the number of authorized judges has been recognized by both parties.[287] Over the past fifteen years, Republican and Democratic lawmakers have introduced bills to increase the number of federal judgeships.[288] The common denominator, however, is that these bills fall short of the bipartisan support necessary for passage. The party in power might favor increasing the number of judgeships, but the party out of power could see such measures as improperly tilting the playing field.

One proposal, then, is to have Congress enact legislation that provides for (1) a one-time increase, (2) followed by annual, fixed increases. The one-time increase can help level-up the number of authorized federal judgeships to account for increases in caseloads over the past thirty years. The exact number for this one-time increase would be subject to political bargaining, balancing the gains and losses to any particular party.[289]

After this one-time increase, judgeships would increase by a set number annually, perhaps tied to overall population growth or caseload growth.[290] This sort of two-step mechanism allows Congress to address the immediate capacity gap, creates an automatic path to grapple with future capacity increases, and confers greater democratic legitimacy and responsiveness to the Judiciary. Legislation that provides for annual increases creates a norm where both parties might benefit in equal terms: "when my party wins, I get to appoint more judges; and when your party wins, you get to appoint more judges."[291] There is no need to hold

287. *See* Wang, *supra* note 108, at 43 (discussing proposals).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 44. Merritt McAlister has also suggested several methods for adding judges to federal courts, some of which, like my proposal, tie to population changes, while others tie to caseloads and others to particular burdens on courts. *See* McAlister, *supra* note 200, at 1209–15.

the number of authorized judges hostage for another thirty years.

The above proposals serve as only a starting point. Other solutions might include conditioning the appointment of a new judge only when a senior judge takes a sufficiently light caseload (e.g., less than fifty percent of the normal caseload) or mandating that senior status begin only four years after a judge announces their intention to go senior—thereby preventing him or her from knowing the President who will appoint the successor.

CONCLUSION

One of the legal profession's enduring challenges is drawing the line between law and politics. Judicial legitimacy depends on that line. The old hand problem should concern lawyers of any stripe because it threatens to blur this line in not just one way, but several different ways. Acknowledging the old hand problem, recognizing its ramifications, and discussing how to meaningfully mitigate it is critical for the future of our legal system. This Article hopes to start that conversation.

APPENDIX

Figure 5a: Political Party of Appointing President for District and Circuit Judges Taking Senior Status, by Year (Full)

	No. of Judges Electing to Go Senior	
Year / President	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
Woodrow Wilson	0	2
1919	0	2
Warren Harding	0	6
1921	0	3
1922	0	1
1923	0	2
Calvin Coolidge	3	6
1923	0	1
1924	0	1
1925	1	0
1928	2	4
Herbert Hoover	6	2
1929	1	1
1930	2	0
1931	2	1
1932	1	0
Franklin Roosevelt	12	32
1933	1	1
1934	0	1
1935	2	1
1936	2	1
1937	0	3
1938	1	2
1939	3	5
1940	1	6
1941	1	7
1942	0	1
1943	1	3
1945	0	1
Harry Truman	15	24
1945	0	2
1946	0	4
1947	5	4

	No. of Judges Electing to Go Senior	
Year / President	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1948	2	3
1949	3	3
1950	2	2
1951	1	5
1952	2	1
Dwight Eisenhower	42	34
1953	3	3
1954	4	7
1955	3	3
1956	5	5
1957	9	6
1958	8	4
1959	7	3
1960	2	3
1961	1	0
John Kennedy	24	3
1961	15	2
1962	3	0
1963	6	1
Lyndon Johnson	56	15
1963	1	0
1964	9	0
1965	18	3
1966	15	3
1967	6	6
1968	7	3
Richard Nixon	39	64
1969	3	8
1970	5	11
1971	13	21
1972	7	12
1973	7	10
1974	4	2
Gerald Ford	33	16
1974	6	2
1975	11	5

	No. of Judges Electing to Go Senior	
Year / President	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1976	16	8
1977	0	1
Jimmy Carter	59	11
1977	14	4
1978	11	0
1979	21	4
1980	13	1
1981	0	2
Ronald Reagan	98	107
1981	20	8
1982	20	8
1983	10	9
1984	8	19
1985	10	16
1986	17	16
1987	3	15
1988	8	12
1989	2	4
George Bush	81	52
1989	12	11
1990	13	11
1991	27	15
1992	29	15
Bill Clinton	95	168
1993	14	9
1994	20	18
1995	22	7
1996	16	38
1997	4	27
1998	10	21
1999	4	19
2000	4	29
2001	1	0
George W. Bush	63	162
2001	7	28
2002	4	19

	No. of Judges Electing to Go Senior	
Year / President	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
2003	6	24
2004	5	17
2005	12	15
2006	6	26
2007	5	18
2008	17	12
2009	1	3
Barack Obama	174	129
2009	31	13
2010	21	8
2011	30	10
2012	21	14
2013	21	29
2014	20	12
2015	11	21
2016	18	22
2017	1	0
Donald Trump	25	110
2017	9	33
2018	12	35
2019	4	27
2020	0	15
Joseph Biden	52	28
2021	36	19
2022	16	9

Figure 6a: Senate Control for District and Circuit Judges Taking Senior Status, by Year (Full)

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1919	Republican	0	2
1921	Republican	0	3
1922	Republican	0	1
1923	Republican	0	3
1924	Republican	0	1
1925	Republican	1	0
1928	Republican	2	4
1929	Republican	1	1
1930	Republican	2	0
1931	Republican	2	1
1932	Republican	1	0
1933	Democrat	1	1
1934	Democrat	0	1
1935	Democrat	2	1
1936	Democrat	2	1
1937	Democrat	0	3
1938	Democrat	1	2
1939	Democrat	3	5
1940	Democrat	1	6
1941	Democrat	1	7
1942	Democrat	0	1
1943	Democrat	1	3
1945	Democrat	0	1
1945	Democrat	0	2
1946	Democrat	0	4
1947	Republican	5	4
1948	Republican	2	3
1949	Republican	3	3
1950	Democrat	2	2
1951	Democrat	1	5
1952	Democrat	2	1
1953	Republican	3	3

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1954	Republican	4	7
1955	Republican	3	3
1956	Democrat	5	5
1957	Democrat	9	6
1958	Democrat	8	4
1959	Democrat	7	3
1960	Democrat	2	3
1961	Democrat	16	2
1962	Democrat	3	0
1963	Democrat	7	1
1964	Democrat	9	0
1965	Democrat	18	3
1966	Democrat	15	3
1967	Democrat	6	6
1968	Democrat	7	3
1969	Democrat	3	8
1970	Democrat	5	11
1971	Democrat	13	21
1972	Democrat	7	12
1973	Democrat	7	10
1974	Democrat	10	4
1975	Democrat	11	5
1976	Democrat	16	8
1977	Democrat	14	5
1978	Democrat	11	0
1979	Democrat	21	4
1980	Democrat	13	1
1981	Republican	20	10
1982	Republican	20	8
1983	Republican	10	9
1984	Republican	8	19
1985	Republican	10	16
1986	Republican	17	16
1987	Democrat	3	15

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
1988	Democrat	8	12
1989	Democrat	2	4
1989	Democrat	12	11
1990	Democrat	13	11
1991	Democrat	27	15
1992	Democrat	29	15
1993	Democrat	14	9
1994	Democrat	20	18
1995	Republican	22	7
1996	Republican	16	38
1997	Republican	4	27
1998	Republican	10	21
1999	Republican	4	19
2000	Republican	4	29
2001	Democrat	8	28
2002	Democrat	4	19
2003	Republican	6	24
2004	Republican	5	17
2005	Republican	12	15
2006	Republican	6	26
2007	Democrat	5	18
2008	Democrat	17	12
2009	Democrat	32	16
2010	Democrat	21	8
2011	Democrat	30	10
2012	Democrat	21	14
2013	Democrat	21	29
2014	Democrat	20	12
2015	Republican	11	21
2016	Republican	18	22
2017	Republican	10	33
2018	Republican	12	35
2019	Republican	4	27
2020	Republican	0	15

		No. of Judges Electing to Go Senior	
Year	**Senate Control (by Simple Majority)**	**Originally Appointed by Democrat**	**Originally Appointed by Republican**
2021	Democrat	36	19
2022	Democrat	16	9