CURBING THE BENCH-TO-PRACTICE PIPELINE

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Most federal judges leave the court at an advanced age and as the capstone of their legal careers. But a new trend of younger judges resigning early from the bench and moving to lucrative positions in private practice has emerged. Additionally, despite reaching retirement age, many retired judges are also jumping to the private sector for final, substantial paydays.

This once discrete worry has turned into a regular occurrence. In my review, nearly 40% of recently outgoing Article III judges moved to private practice.

No rules regulate this practice. Currently, federal judges can take lucrative private sector positions right after leaving the bench. This is not the case for other judicial employees or officials across the federal government. Instead, these public servants—including Members of Congress—must follow a myriad of post-employment rules and restrictions. And state judges and common-law judges in other countries face similar post-employment restrictions.

This Article argues that policymakers—whether in Congress or within the judiciary itself—should appreciate the problems of a bench-to-practice pipeline and consider new rules to regulate judicial post-employment opportunities. In the end, I offer two modest reforms: a brief cooling-off period before federal judges enter private practice and new limits on using judicial titles and honorifics after leaving the bench.

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Introduction

Imagine this. A Supreme Court justice announces their retirement at the end of the Court's term. The next day, they join a prestigious Washington, D.C. firm with a booming appellate practice. Their first case? A thorny constitutional question scheduled for oral argument in the Fall before their former colleagues on First Street. Today, there are no laws or guidelines that would restrict the practice. In contrast, under Supreme Court Rule 7, the justice's law clerk would have to wait two years before doing the same.[1]

Judgeships are often seen as the pinnacle of a legal career. And when judges—especially federal judges—retire, they often stay on as senior judges or have some emeritus role elsewhere—teaching, mediating, or advising. Yet it's also increasingly common for Article III judges to return to private practice. Of the 142 judges who have resigned or retired in recent years, fifty-six (nearly 40%) have moved to private practice for some period following their judicial service.

1. *See* Sup. Ct. R. 7.

What's striking is when younger federal judges resign, prematurely leave the bench, give up a potential judicial pension, and return to private practice in the prime of their legal careers. For instance, from 2003 to 2013, 50% (eleven out of twenty-two) of Article III judges who resigned left for private practice. Most of the other half joined academia or took other government positions. To compare, from 2014 to 2023, more than 80% (nine out of eleven) of judges who resigned did so to enter private practice.

It does not require much creativity to imagine the conflicts of interest—both real and perceived—that this pipeline creates. Imagine the circuit court judge leaving the bench one day and the next arguing a motion before a district judge they just overruled. Or the unease when a former judge, who previously ruled on the interpretation of a key environmental statute, is hired by a corporate law firm to craft arguments that exploit loopholes in that same statute. Or the perception of bias when a former judge, just weeks after leaving the bench, is hired by a major law firm and argues before a panel of judges who were once trusted and close colleagues. Or the headlines when a sitting judge, days before announcing their resignation to join a prestigious law firm, issues a ruling in a high-profile case that provides a legal advantage to one of the firm's major clients.

Key legal figures have already sounded the alarm of a bench-to-practice pipeline. Chief Justice William Rehnquist warned about federal judges using their role as "a stepping stone to a lucrative private practice."[2] His successor, Chief Justice John Roberts, similarly warned that if judgeships were no longer "the capstone of a distinguished career," then "the Framers' goal of a truly independent judiciary will be placed in serious jeopardy."[3] His former colleague Justice Breyer agreed that judgeships as a "stepping stone to some other thing" would be "death for the judiciary."[4]

Policymakers should appreciate the real conflicts and concerns of federal judges leaving the bench for private practice.[5] In Part I, I highlight

2. Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service–and Disservice–1789-1992*, 142 U. PA. L. REV. 333, 400 (1993) [hereinafter Van Tassel, *Resignations and Removals*].

3. CHIEF JUSTICE JOHN G. ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY, https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf [https://perma.cc/W5RD-RGWY].

4. *Federal Judicial Compensation: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 110th Cong. 7–13 (2007) (statement of Stephen Breyer, Assoc. Just. of U.S. Sup. Ct.).

5. This Article focuses exclusively on the conflicts and concerns of the bench-to-practice pipeline of Article III judges. It does not address other categories of judges who, although operating under different authorities or in different tribunals, may similarly leverage their expertise and experience for personal gain in the private sector.

the problems with the bench-to-practice pipeline. It covers how judicial pensions cannot compete with lucrative law firm paydays. It then discusses the reasons why federal judges prematurely leave the bench and the lack of any regime that regulates their post-judicial activity. As the Judicial Conference concedes, "[u]ntil recently there have been very few former federal judges."[6] Yet "[w]ith federal judges returning to the practice of law in increasing numbers, ethical considerations arise."[7] But because there are no rules or guidelines covering federal judges' post-employment work, federal judges can leave on Friday and start work at a firm on Monday. They can solicit clients by highlighting their judicial experience. And they may still call themselves "judges" on their firm's website bios.

Part II explains that federal judges are outliers. Other senior government officials—in Congress and the executive branch—abide by post-employment restrictions. The most common federal restriction is a cooling-off period, a limited time span before these public servants can advocate before and lobby their former colleagues. Many state judges face post-employment restrictions. Judges in common law countries like Canada, England, Australia, and India face post-employment restrictions, including cooling-off periods or conventions against returning to practice entirely.

Part III considers reforms and evaluates their merits. Some reforms look to make it more attractive for federal judges to stay aboard. A significant reform would be to increase judicial pay. But even doubling judiciary salaries wouldn't compete with major firms. And Congress is unlikely to go along with a dramatic increase in judicial pay. Some have argued for an English-style ban that prohibits former judges from reentering private practice altogether. But, this approach is both unwieldy and unlikely for several reasons—including that it would be difficult to implement and would likely harm judicial recruitment.

Ultimately, I recommend that policymakers implement a brief cooling-off period before former Article III judges can appear in federal court. This restriction is similar to those that judges manage elsewhere and that members of Congress and senior Administration officials face. Cooling-off periods mitigate several ethics concerns. For instance, they would make it more difficult for judges to negotiate for post-judicial positions while still hearing cases. Some might argue that this

6. 2B Jud. Conf. Comm. on Codes of Conduct, Guide to Judiciary Pol'y: Published Advisory Ops., Ch. 2, No. 72, at 108 (2019) https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf [https://perma.cc/WM63-4ZNQ] [hereinafter Advisory Op. 72].

7. *Id.*

restriction doesn't go far enough. However, cooling-off periods provide a practical solution without the downsides of a permanent ban, making it a more feasible and enforceable option. Additionally, I recommend restricting the use of honorifics. Some states already curb former judges from using their former titles in private practice; former federal judges should follow suit. Although largely symbolic, this modest change could easily complement other restrictions.

There are several ways to implement these modest restrictions. The Judicial Conference could amend its own guidelines. Congress could make new laws or expand current revolving door laws to include judicial officers. Alternatively, bar associations and local courts could amend their rules to limit when former federal judges can be admitted to practice in their jurisdictions.

Given the political incentives and recent trend of presidents nominating younger federal judges, the trend of judges prematurely leaving the court and moving to private practice will likely grow.[8] If federal judges using their positions as a "stepping stone" could be "death for the judiciary," it's necessary to look for implementable restrictions.

I. The "Bench-to-Practice Pipeline"

For over 150 years, Congress has repeatedly adjusted the retirement and pension system for federal judges. Yet, as noted in the Introduction, Congress has given little attention to what federal judges do after leaving the bench. This lack of oversight might not be significant if only a few former judges returned to private practice, but a surprising number of former federal judges move to lucrative private sector positions, resulting in several potential ethical concerns.

A. Resignations and Retirements

Judicial independence was very much on the Founders' minds during both the drafting of the Declaration of Independence and the Constitution. Among other grievances, the Declaration alleged that King George III had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[9] The Constitution later guaranteed federal judges life tenure, absent impeachment.[10]

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8. *See* Suzanne Monyak, *Biden Favors Younger Judges in Shift from Previous Democrat*s, BL (July 24, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/biden-favors-younger-judges-in-shift-from-previous-democrats [https://perma.cc/CUM4-9F8J].

9. The Declaration of Independence para. 11 (U.S. 1776).

10. U.S. Const. art. III, § 1.

Judicial independence and life tenure were deliberate incentives to attract qualified nominees. In Federalist 78, Alexander Hamilton argued that a "temporary duration in office" would discourage qualified nominees "from quitting a lucrative line of practice to accept a seat on the bench."[11] A few decades later, Chancellor James Kent similarly argued that the guarantee would "enable[] and induce[]" qualified nominees "to quit the lucrative pursuits of private business, for the duties of that important station."[12]

Despite the guarantees of life tenure, in the beginning, the position of a federal judge was an unattractive job for the young nation's elite lawyers. The Judiciary Act of 1789 created both federal district and circuit courts.[13] This design mirrored our current system in name only. At the time, circuit courts had limited appellate review and original jurisdiction over most major controversies.[14] Circuit courts were unstaffed and consisted of panels of district judges and Supreme Court justices who were famously required to "ride circuit."[15] Rising caseloads often overwhelmed early federal judges.[16] Salaries—although protected from diminution—were low and a frequent source of complaint.[17]

Adding to the position's unattractiveness, federal judges also did not enjoy retirement benefits or pensions once they left the bench for eighty years.[18] The Judiciary Act of 1869 created the first judicial retirement system.[19] Under this system, judges seventy years or older

11. THE FEDERALIST NO. 78 (Alexander Hamilton).

12. JAMES KENT, COMMENTARIES ON AMERICAN L. 276 (John M. Gould ed., 14th ed., 1826).

13. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.

14. Jonathan Remy Nash & Michael G. Collins, *The Certificate of Division and the Early Supreme Court*, 94 S. CAL. L. REV. 733, 736 (2021).

15. *Id.* at 737.

16. *See* Petitions, Memorials, and Resolutions of the State Legislature referred to the Committee on the Judiciary; Petition of George W. Williams et al. referred to the House of Representatives Committee on the Judiciary; Statement of Senator William Morris of Nevada (Feb. 23, 1869) *in* 1 DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, 236–38, 252–54 (Bruce A. Ragsdale ed., 2013).

17. *See* Van Tassel, *Resignations and Removals*, *supra* note 2, at 425; Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary "Crisis"*, 87 MARQ. L. REV. 55, 59 (2003) (highlighting decades' worth of complaints about judicial salaries).

18. As summarized by three scholars, "[i]n the absence of any constitutional provision for age or disability, federal judges had only two options for the end of their judicial careers: resign without further compensation or remain on the bench until death." Stephen B. Burbank et al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 7 (2012).

19. Judiciary Act of 1869, ch. 22, § 5, 16 Stat. 44, 45.

with at least ten years of service could retire with their current salary.[20] Over the years, Congress continued to tweak the Article III retirement system. In 1919, Congress created the "senior status" position for judges, allowing judges to continue judicial duties at a reduced rate (and creating a vacancy for a President to fill).[21] Twenty years later, Congress provided voluntary disability retirement for judges not otherwise eligible to retire.[22]

Today, federal judicial retirement is governed mainly by 28 U.S.C. § 371. Section 371 establishes the modern "Rule of 80" for retirement by Article III judges.[23] Under this rule, once a judge reaches age sixty-five and has at least fifteen years of service (or any other subsequent combination of age and service that equals eighty), they are eligible for an annuity equal to their final salary.[24] Alternatively, a judge may choose not to retire and continue work as a "senior judge." Senior judges are entitled to any pay increases offered for full-time judges.[25] To keep this designation, senior judges must remain "certified" by keeping a workload of at least one-fourth that of a full-time judge.[26]

The Rule of 80 is an all-or-nothing offer. A judge who resigns (leaving the bench before satisfying the Rule of 80) rather than retiring is not eligible for retirement benefits.[27] There is no partial vesting.[28] And there is no opportunity to become a senior judge down the road. This retirement framework seeks to create financial incentives for federal judges to have long tenures on the bench. At the same time, this system does not compel them to work far into their later years. It tries to satisfy

20. *Id*. The new retirement system was an immediate hit with the federal judiciary. According to one count, "[w]ithin the first thirty years after Congress provided for retirement, the number of retirements equaled the number of age and health resignations for the previous eighty years." Van Tassel, *Resignations and Removals*, *supra* note 2, at 395.

21. *See* Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157–58. Throughout the 20th century, Congress continued to make additional changes to the judicial retirement system, including establishing the modern "Rule of 80." Van Tassel, *Resignations and Removals*, *supra* note 2, at 397–98.

22. Act of Aug. 5, 1939, ch. 433, § 1, 53 Stat. 1204.

23. *See* 28 U.S.C. § 371(c). Other federal judges, like magistrate and bankruptcy judges, are governed by another retirement system. *See* 28 U.S.C. § 377.

24. 28 U.S.C. § 371(a).

25. 28 U.S.C. § 371(e)(1).

26. *Id*.

27. *See supra* note 24.

28. Of course, resigning federal judges could receive credit and some benefits from the federal government's Federal Employee Retirement System or past contributions to a Thrift Savings Plan. Denis Steven Rutkus, Cong. Rsch. Serv., RL34281, Jud. Salary: Current Issues and Options for Congress 9–10 (2008).

two competing concerns: that federal judges do not prematurely use their position as a "stepping stone" to more lucrative work and that they gracefully leave the bench when their abilities are not as sharp.[29]

B. Current Post-Employment Restrictions

The federal judiciary offers no firm rules for judges who have returned to private practice. The Code of Conduct for United States judges only guides *sitting* judges and nominees.[30] Federal law and individual court practices create post-employment restrictions only for non-Article III judges and law clerks.

The Committee responsible for drafting the Code of Conduct has offered a few advisory opinions on how *sitting* judges may seek post-judicial employment and should handle appearances by former colleagues who have returned to argue in their court. For sitting judges contemplating post-judicial employment, the Committee encourages judges to weigh whether they can properly negotiate with a firm that often appears before them and recuse themselves on matters concerning a prospective employer.[31] Afterward, the Code advises judges to announce their new position only once they leave the bench. The Committee reasons that doing so will "avoid . . . the appearance of impropriety" as there is no longer a judicial "position to exploit."[32]

Two other advisory opinions concern whether sitting judges should recuse themselves when a colleague appears before them and

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29. Van Tassel, *Resignations and Removals*, *supra* note 2, at 400; Stephen J. Choi et al., *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111, 116 (2013) (observing that the "main advantage of this system" is that—bluntly—"incompetent judges over 65 who have satisfied the Rule of 80 will be tempted to resign.").

30. According to the Code, only former federal judges who have taken senior status, retired with a disability, or are subject to recall are instructed to continue complying with the Code. CODE OF CONDUCT FOR U.S. JUDGES Canon 5 commentary (JUD. CONF. OF THE U.S. 2019).

31. 2B JUD. CONF. COMM. ON CODES OF CONDUCT, GUIDE TO JUDICIARY POL'Y: PUBLISHED ADVISORY OPS., CH. 2, NO. 84, at 128 (2019), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf [https://perma.cc/WM63-4ZNQ] [hereinafter ADVISORY OP. 84]. Judges are also instructed to follow the STOCK Act, which "requires judges to submit a statement within three days of the commencement of any negotiation or agreement for post-judicial employment, and to file similar statements concerning recusal with respect to a future employer." *Id.*; STOCK Act, Pub. L. No. 112-105, 126 Stat. 291 (2012).

32. ADVISORY OP. 84, *supra* note 31, at 130. The advisory opinion goes on that a judge announcing new employment before they leave the court "unavoidably lends the prestige of judicial official to" benefit the judge's future employer. *Id.* Yet, as discussed later, there is little difference between announcing new employment the day before—or after—leaving the bench. Any announcement, during or after a judge's tenure, that an employer hires a federal judge for legal work inherently lends the court's prestige on behalf of the new employer.

if they should address their former colleague as "Judge." First, "the Committee finds no objection to appearances by former judges."[33] Even so, it does recommend that sitting judges recuse themselves for a fixed period—one to two years—when a former colleague appears as counsel.[34] Second, the Committee advises sitting judges not to refer to former judges as "Judge" in either the courtroom or in writing.[35]

That said, neither the Code of Conduct nor its advisory opinions are firm rules. According to its authors, "[n]ot every violation of the Code should lead to disciplinary action."[36] Instead, the Code is "designed to provide guidance" and suggests that "judges may reasonably differ in their interpretation."[37] In any event, if a federal judge violates the Code or commits some other indiscretion and a complaint is brought against them, a swift retirement and jump to the private sector can avoid any potential sanction.[38] After all, today, once a person "is no longer a federal judge, the misconduct procedures and remedies no longer apply to [them]."[39]

But while the Code of Conduct is silent on post-employment opportunities, federal law dissuades non-Article III judges from returning to private practice through threatening their retirements. For example, under federal law, bankruptcy and magistrate judges may receive a lifetime annuity after retirement.[40] But they must forfeit any future annuity if they return to practicing law.[41] Along these lines, if bankruptcy or magistrate judges retire and begin working for the federal government (in a position other than as judge), they forfeit their annuity for the period they are employed.[42]

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33. 2B Jud. Conf. Comm. on Codes of Conduct, Guide to Judiciary Pol'y: Published Advisory Ops., Ch. 2, No. 70, at 103, 104 (2019) https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02.pdf [https://perma.cc/WM63-4ZNQ] [hereinafter Advisory Op. 70].

34. *Id*. at 103.

35. The Committee cautions that "[a] litigant whose lawyer is called 'Mr.,' and whose adversary's lawyer is called 'Judge,' may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary." Advisory Op. 72, *supra* note 6, at 108.

36. Code of Conduct for U.S. Judges Canon 1 commentary (Jud. Conf. of the U.S. 2019).

37. *Id.*

38. *See* 28 U.S.C. § 351 (stating that complaints may only be brought against "a circuit judge, district judge, bankruptcy judge, or magistrate judge," not former judges).

39. *In re* Jud. Misconduct, 751 F.3d 611, 627 (U.S. Jud. Conf. 2014).

40. *See* 28 U.S.C. § 377(a). Bankruptcy and magistrate judges are entitled to an annuity equal to their salary if they reach sixty-five years old and fourteen years on the bench before retirement. *Id.*

41. 28 U.S.C. § 377(m)(1). Alternatively, before returning to practice law, bankruptcy and magistrate judges may freeze their annuity while employed but forfeit any future cost-of-living adjustments. 28 U.S.C. § 377(m)(B).

42. 28 U.S.C. § 377(m)(3). Of course, no similar restriction exists for Article III judges. And legislative history offers little explanation for the distinction. In Professor Mary

While not mandated by federal law, several courts have enacted policies limiting when former clerks may return to practice in their former court. Most notably, the Supreme Court bars its former clerks from appearing before the Court for two years.[43] It is a longstanding rule, appearing in the Court's Rules as early as 1928.[44] Other federal courts have followed suit. Both the First Circuit and Eighth Circuit Court of Appeals, for example, bar law clerks and staff attorneys from participating in any case before the court for one year.[45] Some district courts (and individual judges) have similar rules.[46]

Because of the close professional relationship between judges and clerks, some litigants have moved to recuse a judge handling a case when a former clerk appears as counsel. These motions have largely failed.[47] That said, at least one circuit court has supported a "principle that a certain insulation period should pass before a judge sits on a case in which his or her former law clerk acts as counsel," noting that "[a]voiding the appearance of impropriety is as important to developing public confidence in the judiciary as avoiding impropriety itself."[48]

C. The Considerable "Bench-to-Practice Pipeline"

Although the Rule of 80 seeks to discourage Article III judges from using their tenure as a "stepping stone" to the private sector, more and more federal judges have passed on judicial retirement benefits and have returned to private practice. This former rarity is now more common. And, as noted above, there are no rules or regulations that prohibit the practice. In a review of Article III judges who had resigned from 2011 to 2023, I found that 84.6% had returned to private practice.

Clark's article scrutinizing federal judge retirement practices, she speculates that the distinction is attributed to the "lack of constitutional solicitude afforded non-Article III judges." Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 870 (2011).

43. SUP. CT. R. 7.

44. SUP. CT. R. 3 (1928).

45. 1ST CIR. R. 46.0(e); 8TH CIR. R. 47G.

46. *See, e.g.*, ALVIN B. RUBIN & LAURA B. BARTELL, LAW CLERK HANDBOOK, FED. JUD. CTR. 23 (rev. 1989); E.D. MO. R. 12.04; Baptiste v. Massachusetts, No. 1:20-CV-11335-MLW, 2020 WL 6940128, at *1 (D. Mass. July 21, 2020) ("As my clerks are informed, I require that they do not appear before me for two years after the conclusion of their clerkship."); Biomedino, LLC v. Water Techs Corp., No. CV05-0042, 2005 WL 8172699, at *1 (W.D. Wash. Oct. 27, 2005) ("In other courts . . . the rules are unwritten and left to the discretion of individual judges. This Court for example forbids former law clerks from appearing within one year of their clerkship.").

47. *See* Griffin v. United States, No. 5:18-CR-00096-FL, 2022 WL 16735465, at *4 (E.D.N.C. Mar. 14, 2022), *report and recommendation adopted*, No. 5:18-CR-96-FL-1, 2022 WL 16550314 (E.D.N.C. Oct. 31, 2022) (collecting cases).

48. United States v. Hollister, 746 F.2d 420, 425–26 (8th Cir. 1984).

Of all judges (both retired and resigned) who had left the bench within the same timeframe, 39.4% had returned to private practice.

This review follows the substantial work by Emily Van Tassel and Mary Clark to analyze why federal judges leave the bench and what they do once they leave.[49] Their combined work is exhaustive, covering motivations and data from the first Judiciary Act of 1789 to the early twenty-first century. Van Tassel's work focused on judges who—from 1789 to the early 1990s—left "the bench for stated reasons other than age or health."[50] Her research revealed that of the 2,627 Article III judges who served between 1789 and 1992, only 5% (127 out of 2,627) had "left office prematurely and returned to private practice or accepted some other form of legal employment."[51] Although Van Tassel's study did not focus on retirements, she did highlight the fourteen Article III judges who retired between 1990 and 1992—the two years before her article's publication.[52] Of these retired judges, half of them entered private practice. Van Tassel advised that, without comparable historical data, the "numbers should be interpreted with caution."[53] Still, she warned of a perception within the judiciary that federal judges are using the position to advance to more lucrative private sector jobs.[54]

Clark's research saw a greater trend of former federal judges moving to private practice. She supplemented Van Tassel's findings and focused on judges—whether they had resigned or retired—who had returned to private practice after leaving the bench. Taking up where Van Tassel left off, Clark looked at judges who had either retired or resigned between January 1, 1993, and December 31, 2010.[55] In all, she found that 47.15% of Article III judges that had left the bench in that time (58 out of 123) had returned to practice.[56] Clark also found that more resigned judges (65.63%) returned to practice in this period than retired judges (40.66%).[57]

Following Clark's study, I identified the 142 Article III judges that had retired or resigned from January 1, 2011, to December 31, 2023. Like Clark, I used the Federal Judicial Center's ("FJC") public

49. *See* Van Tassel, *Resignations and Removals*, *supra* note 2; Clark, *supra* note 42.

50. Van Tassel, *Resignations and Removals*, *supra* note 2, at 338–39. She focused on these two categories because the number of impeached federal judges "is quite small" and there is no "comprehensive accurate listing" of judges who had retired after the first retirement system was implemented in 1869. *Id.* at 338–339 n.24.

51. *Id.* at 365.

52. *Id.* at 399.

53. *Id.*

54. *Id.*

55. Clark, *supra* note 42, at 866.

56. *Id.* at 910.

57. *Id.*

directory of all Article III judges from 1789 through 2023.[58] Using the FJC's database, I searched for "termination" dates after January 1, 2011. Like Clark, I only included judges who had left the bench under two circumstances: resignation or retirement. My methodology, however, was narrower than Clark's. I did not include a judge if they practiced only in the public sector or if they became a "lawyer-consultant." I only included former federal judges who subsequently moved to law firms or appeared in federal court on behalf of private clients.[59]

From the FJC's list of retired or resigned judges, I referenced online databases, law firm websites, news articles, and other resources to determine whether an outgoing judge moved to private practice.[60] From this review, I found that 56 judges had ultimately returned to practice—or 39.4%. Of judges who resigned during this period, a more significant percentage—84.6%—ultimately moved to private practice. Of retired judges, 34.8% ultimately moved to private practice.

A few themes emerged from this review. First, over the past thirty years, there has been a marked and unprecedented increase in the number of federal judges transitioning to private practice. Similarly, the trend of resigning judges entering private practice has also risen significantly in the past decade. Second, most judges who returned to private practice moved to firms in the same city or state as their former chambers. Third, few judges joined small local firms but instead joined larger, more prominent regional or national firms (firms that could likely offer more compensation and benefits). Fourth, most judges—either resigned or retired—were not "lifers" and had fewer than 20 years of service on the bench.[61]

D. The Reasons for the Bench-to-Practice Pipeline

What is the motivation for the growing bench-to-practice pipeline? A significant, if not primary, motivation is greater compensation in the

58. *Biographical Directory of Article III Federal Judges, 1789-present*, FED. JUD. CTR., https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-1789-present [https://perma.cc/PU2D-LSMF] (last visited July 29, 2024).

59. In her study, Clark defined "practice" as work "on behalf of public or private entities and includes work as a lawyer or lawyer-consultant." The term "lawyer-consultant" is undefined. Clark, however, did not include "work as a neutral arbitrator or mediator" as "practice." Clark, *supra* note 42, at 910.

60. The FJC's biographical directory of Article III judges often includes a detailed chronology of their careers before they join the bench. However, most entries rarely include information on what judges do after they leave. Determining whether former federal judges eventually went into private practice is left to outside researchers. To benefit future researchers, the Federal Judicial Center should consider including federal judges' post-employment activities in their database.

61. In my review, just over 39% of judges had 15 years or less of judicial service. Six judges (or 10%) had fewer than ten years of service.

private sector. When Chief Justice Roberts warned in 2006 that judges using the bench as a "stepping stone to a lucrative position in private practice" would put our "independent judiciary . . . in serious jeopardy," he was pushing Congress to increase judiciary salaries. Otherwise, Chief Justice Roberts said that many judges "have no realistic choice except to retire from judicial service and return to private practice."[62]

Justice Stephen Breyer testified before a House Judiciary Subcommittee a year later, making a similar plea for greater judicial pay. During his remarks, Justice Breyer said it was a "bad sign" when a high number of judges leave the judiciary. He then expressed his disappointment seeing many former judges take private sector work. Echoing Chief Justice Roberts, he concluded that when federal judgeships were a stepping stone rather than a capstone, it would be "death for the judiciary."[63]

Although the last few decades have seen a greater rise in federal judges leaving for the private sector, earlier political figures were still worried about the trend's corrosive effects. In the 1960s, the reporting of two federal judges leaving for the private sector was enough to warrant a response by the President. In responding to the news, President John F. Kennedy said that life tenure was not just to avoid "improprieties" but even the "appearance" of them. He later said that federal judges should not serve "unless they are prepared to fill [the role] for life."[64]

From 1970 to 1987, fifty-four judges had left the court (compared to the 142 who had either retired or resigned from 2011 to 2023). That comparatively modest number was still enough for key figures to speak out. Chief Justice Rehnquist feared more judges leaving would imperil the "first-rate talent" in the federal judiciary. Former Congressman and then-D.C. Circuit Judge Abner Mikva said federal judgeships should "be the last stop on the road."[65] And former White House counsel Fred Fielding, who screened potential judicial nominees during the Reagan administration, conceded that many lawyers did not pursue judgeships because of low salaries.[66]

To be sure, judicial salaries are much higher today than they were in past decades. In 2007, District Judges made $165,200 annually.

62. Roberts, *supra* note 3.

63. Breyer, *supra* note 4.

64. *News Conference 20, Jan. 15, 1962*, John F. Kennedy Presidential Library and Museum (Jan. 15, 1962), https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-press-conferences/news-conference-20 [https://perma.cc/YL5X-2PSJ].

65. Bill McAllister, *The Judiciary's "Quiet Crisis": Prestige Doesn't Pay the Tuition*, Wash. Post, Jan. 21, 1987, at A19.

66. *Id.*

Today, it is north of $240,000.[67] Circuit Judges and Associate Justices of the Supreme Court now receive salaries of $257,900 and $298,500, respectively.[68] And under current law, judges receive small annual salary adjustments each year.[69] But the likely private sector compensation for former federal judges is much higher. According to one survey, the average compensation for partners was north of $1.1 million, multiple times the salary of any federal judge.[70] A former federal judge's background and experience make it easy to speculate that their salaries at larger firms could fall well above the average.

Another indication that former, well-experienced federal judges entering private practice would receive compensation well above their judicial salaries is the current compensation for young attorneys and law clerks working in large law firms. According to another recent survey, the median first-year associate salary was $200,000, with large international firms potentially paying recent law school graduates even more.[71] With fewer than five years of experience, associates at larger firms could expect a higher salary than the Chief Justice of the United States.[72] On top of base salaries, many large firms offer substantial bonuses to former federal law clerks. After only a year of work for a federal judge, some firms are willing to pay $100,000 as a bonus.[73] At some firms, former Supreme Court clerks can expect a $500,000 bonus for their year at One First Street.[74]

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67. *Judicial Compensation*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/FW3Y-X7ED].

68. *Id.*

69. *Id.*

70. Major, Lindsey & Africa, 2022 Partner Compensation Survey 12–13 (2022), https://www.mlaglobal.com/en/insights/research/2022-partner-compensation-survey [https://perma.cc/9YFT-GWLP].

71. Nat'l Ass'n L. Placement, 2023 Associate Salary Survey, https://www.nalp.org/uploads/ASSR/2023_ASSR_Participants_Summary.pdf [https://perma.cc/PET8-TY3E]. For example, the median base salary for first-year associates at a firm with more than 1,000 lawyers was $215,000. *Id.*

72. *Compare id. with Judicial Compensation*, U.S. Courts, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/T5HT-PQM6] (last visited Aug. 4, 2024).

73. *Judicial Clerks*, White & Case LLP, https://www.whitecase.com/careers/locations/united-states/experienced-lawyers-clerks/how-apply/judicial-clerks [https://perma.cc/GV6A-UWGY]; Press Release, *Susman Godfrey Announces Substantial Increases to Clerkship Bonuses*, Susman Godfrey LLP (Apr. 26, 2022), https://www.susmangodfrey.com/news/susman-godfrey-announces-substantial-increases-to-clerkship-bonuses/ [https://perma.cc/T9YX-AQ6H]; *We Have Clerk Appeal*, Patterson Belknap Webb & Tyler LLP, https://www.pbwt.com/careers/we-have-clerk-appeal [https://perma.cc/W5GW-DUXB] (last visited Aug. 4, 2024).

74. Tobi Raji, *Clerks for Hire: The Supreme Court Recruiting Race*, Wash. Post (Jan. 25, 2024), https://www.washingtonpost.com/politics/2024/01/25/supreme-court-clerks-bonuses-law-firms/ [https://perma.cc/R7ZJ-XQJB].

The Rule of 80 and its retirement benefits can hardly compete with lucrative private sector salaries and benefits. As a result, it is unsurprising that many younger federal judges resign after short tenures on the bench, forego judicial retirement benefits, and move to prominent law firms. One recent analysis found that although the average age of judicial nominees over the last fifty years has remained between fifty and fifty-two years old, "only thirteen of the eighty resignees" from this time "were appointed to the bench at age fifty or above."[75] In fact, most resigning federal judges from this time were under forty-five when they began serving on the bench.[76] Another study analyzing judicial resignations from 1970 to 2009 reached a similar conclusion, finding that "judges appointed at younger ages are more likely to resign" and join the private sector.[77] The authors concluded that, for judicial resignations, financial considerations "play a larger role than in the past."[78]

The trend of younger appointed judges resigning well before their judicial colleagues continues today. Recently, five federal judges—all confirmed before age forty-five during the Obama Administration—have resigned from the bench and joined prominent law firms.[79] John Michael Vazquez, previously from the District of New Jersey and one the most recent judges to resign, served only seven years on the bench before his resignation.[80]

At least two judicial resignees have stated that money was the primary cause for prematurely leaving the bench. Katherine Forrest, a former Southern District of New York judge who resigned in 2018, said that family changes and the cost of living in New York led her to believe she could not "continue to perform as a judge because of the

75. *The Flipside of Youthful Appointments*, Vetting Room (July 29, 2022), https://vettingroom.org/2022/07/29/the-flipside-of-youthful-appointments/ [https://perma.cc/AC6X-J827].

76. *Id.*

77. Stephen B. Burbank et. al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. Pa. L. Rev. 1, 18 (2012).

78. *Id.* at 87.

79. Justin Wise, *Wave of Federal Judges Ditch Bench for Lucrative Big Law Job*, Bloomberg L. (Mar. 16, 2023), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X9R3HU9C000000?bna_news_filter=business-and-practice#jcite [https://perma.cc/C32C-EULH].

80. *John Michael Vazquez*, Fed. Jud. Ctr., https://www.fjc.gov/history/judges/vazquez-john-michael [https://perma.cc/AFB7-X3PW] (last visited Aug. 4, 2024); David Wildstein, *Federal Judge Named by Obama Will Retire at Age 52*, N.J. Globe (July 29, 2022), https://newjerseyglobe.com/judiciary/federal-judge-named-by-obama-will-retire-at-age-52/ [https://perma.cc/Q53G-QHKW].

money."[81] More recently, George Hazel, a former District of Maryland judge, joined the law firm Gibson Dunn three days after resigning from the bench at age forty-seven.[82] In one interview, Hazel said that salary was "absolutely a factor" in leaving the judiciary.[83] In another, Hazel observed that he had "been in public service for about 18 years," and "I get to [forty-seven], I'm thinking about what my market value could be. I don't come from generational wealth."[84] Money is also a factor encouraging *retirement-eligible* judges to leave the bench. The same study that analyzed *resignations* from 1970 to 2009 also looked at *retirements* from the same period. From returned questionnaires, the authors found "that the two most important influences on retirement . . . are the desire for more income and the desire for new challenges."[85]

Additional qualitative research has backed up these findings. In 2016, Ninth Circuit Judge Johnnie Rawlinson conducted research interviews with forty-eight former and current Article III judges.[86] Some interview questions focused on whether money "was a motivating factor in their career decisions."[87] The interviews focused on three "clusters" of judges: (1) federal judges with fewer than five years of experience, (2) judges within five years or less of qualifying for senior status, and (3) judges who recently left the bench.[88]

In the first category, younger judges coming from the private sector largely acknowledged the "huge paycut" to become a federal judge, and Judge Rawlinson speculates that some judges in private practice "conserved a considerable portion of their substantial earnings to fuel future public service opportunities."[89] For the majority in this group, "no amount of money would tempt them to relinquish their Article III status."[90]

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81. Avalon Zoppo, *A Double-Edged Sword: Why Young Judges Might Not Stick Around*, LAW.COM (Feb. 3, 2023), https://www.law.com/2023/02/03/a-double-edged-sword-why-young-judges-might-not-stick-around/ [https://perma.cc/7J8Z-QW95].

82. Jenna Greene, *From Bench to Big Law: Why Judge Hazel Is the Latest to Hang Up His Robe*, REUTERS (Mar. 6, 2023), https://www.reuters.com/legal/government/bench-big-law-why-judge-hazel-is-latest-hang-up-his-robe-2023-03-06/ [https://perma.cc/2AH5-VV3W].

83. *Id.* ("At Gibson Dunn, average profits per equity partner in 2021 were $4.4 million.").

84. Wise, *supra* note 79.

85. Burbank et al., *supra* note 77, at 88.

86. Hon. Johnnie Blakeney Rawlinson, It's So Hard to Say Goodbye: Why Article III Judges Leave (or Don't) (Mar. 31, 2016) (unpublished Master's thesis, Duke University), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1008&context=mjs [https://perma.cc/2GJ8-KNRD].

87. *Id.* at 8.

88. *Id.* at 3.

89. *Id.* at 42–43.

90. *Id.* at 45.

But the middle category—and more experienced—group of interviewed judges were more concerned with finances. According to Judge Rawlinson, one-third of interviewees from this group "acknowledged that financial considerations might influence their decisions to relinquish their Article III status in favor of a more lucrative position in the private sector."[91] One judge from this category admitted teaching at a local law school because they "needed the money."[92] Although the judge admitted they were "a little tempted by money," they were also concerned that the private sector "could be seen as a corrupting influence."[93]

In the final category, judges who had left the court, finances were a significant factor in leaving—some leaving earlier than they hoped to. One former judge admitted that leaving "was totally driven by finances," noting they had "three kids in college."[94] A second judge mentioned they were unable "to accumulate a nest egg while practicing" and joined the bench before "the real explosion of legal salaries commenced."[95] A third judge blamed Congress, saying it gives "no real serious thought . . . to the money needs of judges."[96]

To be sure, money is not the only reason for federal judges to leave the bench. Some former judges have lamented the, at times, lonely nature of the work.[97] Some judges become disillusioned with the role. Former Ninth Circuit Judge Paul Watford has said that he was "disheartened" by some of the Supreme Court's recent opinions and became discouraged that he would continue to "be at odds" with the current court while obligated "to apply those decisions faithfully."[98] Others feel muzzled by the position and unable to speak publicly on issues important to them. In his resignation letter to President Reagan, D.C. Circuit Judge Robert Bork stated he wanted to "speak, write, and teach about law and other issues of public policy more extensively and more freely than is possible in my present position."[99] In an interview with Judge Rawlinson, one former judge considered themselves an

91. *Id.* at 68.
92. *Id.* at 66.
93. *Id.*
94. *Id.* at 81.
95. *Id.* at 84.
96. *Id.* at 82.
97. Burbank et al., *supra* note 77, at 63 n.239.
98. Avalon Zoppo, *Ex-Judge Watford Talks Supreme Court Shortlist, Judge Shopping, Why He Resigned*, Law.com (Nov. 20, 2023), https://www.law.com/nationallawjournal/2023/11/20/ex-judge-watford-talks-supreme-court-shortlist-judge-shopping-why-he-resigned/ [https://perma.cc/CFG4-EWX9].
99. Letter from Robert H. Bork, U.S. Circuit Judge, to Ronald Reagan, U.S. President (Dec. 6, 1987) (on file with the Ronald Reagan Presidential Library), https://www.

"activist by orientation" and "felt the need to speak out about certain issues and do something about them."[100] Along similar lines, another judge remarked that although they enjoyed their tenure as a judge, they missed advocating for clients.[101]

Many civil cases are settled by mediation, and most others are settled well before trial. As a result, some judges have become frustrated with the larger criminal percentage of their docket. One former judge exclaimed that federal courts had become only "criminal courts with no trial of civil cases" and left partially due to their "frustration with the federalization of crimes."[102] A former judge from the Eastern District of Virginia served only four years before leaving for private practice.[103] The reason for leaving, he remarked, was he didn't "enjoy the day-to-day drugs and guns and immigration cases that make up much of our docket . . . ."[104]

Beyond the little control federal judges have over their docket, many judges have also cited the strain of high, burdensome caseloads.[105] For instance, in 2018, Judge Lawrence O'Neill and eight of his colleagues from the Eastern District of California wrote to Congress to "provide notice of the current crisis" and request more resources and judgeships for the district.[106] According to one report, "Judge O'Neill and his colleagues have suffered medical ailments, stress, and punishing work schedules to continue to keep up with cases as best they can."[107]

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reaganlibrary.gov/archives/speech/letter-accepting-resignation-robert-h-bork-united-states-circuit-judge [https://perma.cc/A63W-44R4].

100. Rawlinson, *supra* note 86, at 102–03.

101. David Thomas, *Federal Judge Leaves Chicago Bench for Latham Law Firm*, Reuters (Jan. 5, 2023), https://www.reuters.com/legal/government/federal-judge-leaves-chicago-bench-latham-law-firm-2023-01-05/ [https://perma.cc/SGT9-AKWQ].

102. Rawlinson, *supra* note 86, at 83. *See also* Van Tassel, *Resignations and Removals*, *supra* note 2, at 354 ("Judge Griffin Bell returned to private practice a few months before President Jimmy Carter appointed him to the office of Attorney General, saying of the Fifth Circuit, "the work had become dreary, given the heavy load of criminal and habeas corpus matters.").

103. Tim McGlone, *U.S. District Judge Kelley Will Resign, Work for D.C. Law Firm*, Virginian-Pilot (Feb. 11, 2008), https://www.pilotonline.com/2008/02/11/us-district-judge-kelley-will-resign-work-for-dc-law-firm/ [https://perma.cc/9UW7-YB3L].

104. Tim McGlone, *Resigning Judge Says He Was Tired of Drug and Gun Cases*, Virginian-Pilot (Feb. 14, 2008), https://www.pilotonline.com/2008/02/14/resigning-judge-says-he-was-tired-of-drug-and-gun-cases/ [https://perma.cc/2FL4-DH9B].

105. *See, e.g.*, Burbank et al., *supra* note 77, at 15 ("Judge Gabrielle McDonald noted the role of 'overloaded dockets and lack of support services' in her decision to resign.").

106. Letter from Lawrence J. O'Neill, U.S. District Judge, to members of the Senate and the House of Representatives within the Eastern District of California (June 19, 2018), http://www.caed.uscourts.gov/caednew/assets/File/Judgeship%20Letter%20June%202018.pdf [https://perma.cc/BF6A-TGGH].

107. Jennifer L. Thurston, *The One Who Could: Judge Lawrence J. O'Neill, U.S. District Court for the Eastern District of California*, 104 Judicature 80, 81 (2020),

Ultimately, Judge O'Neill retired in 2020.[108] To date, no additional judgeships have been authorized for the Eastern District.

Many courts continue to suffer from crushing caseloads, no doubt encouraging others to eventually leave the bench. Today, the Judicial Conference of the United States—the policymaking body for the federal court system—recommends 430 weighted filings per judgeship.[109] But many district courts well exceed this threshold, some exceeding even 600 or 700 filings per judgeship.[110] To date, the Judicial Conference has identified over twenty "judicial emergencies" in courts around the country.[111] The Eastern District of California, the former home of Judge O'Neill, still has over 750 filings per judgeship.[112]

Of course, some judges leave the bench on good terms and only for other public service opportunities. For example, in 2021, former D.C. Circuit Judge Merrick Garland was confirmed as Attorney General.[113] Before becoming the Governor of Nevada, Brian Sandoval was a district judge in the state.[114] And—likely unique to California—Judge Rawlinson's interviews revealed four federal judges that had left federal district court to serve in California's state appellate courts.[115]

Finally, although less common, some judges leave the court for health reasons or under allegations of misconduct.[116] In the last few

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https://judicature.duke.edu/articles/the-one-who-could-judge-lawrence-j-oneill-u-s-district-court-for-the-eastern-district-of-california/ [https://perma.cc/Y37K-Q6HT].

108. *Id.*

109. *Federal Judiciary Seeks New Judgeship Positions*, U.S. COURTS (Mar. 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/K36Q-BYLS]; *Explanation of Selected Terms*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/explanation-selected-terms-district-march-2012_0.pdf [https://perma.cc/Y4VT-H2LT] (last visited Aug. 4, 2024) ("Weighted filings statistics account for the different amounts of time district judges require to resolve various types of civil and criminal actions.").

110. *See* ADMIN. OFF. OF THE U.S. COURTS, ANN. REP. OF THE DIR.: JUD. BUS. OF THE UNITED STATES COURTS (2023), https://www.uscourts.gov/sites/default/files/fcms_na_distprofile0930.2023.pdf [https://perma.cc/RM8C-JUHR] [hereinafter ANN. REP.].

111. *Judicial Emergencies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies [https://perma.cc/W2UV-N4S9] (last visited Aug. 4, 2024).

112. ANN. REP., *supra* note 110, at 67.

113. *Meet the Attorney General*, U.S. OF DEP'T JUST., https://www.justice.gov/ag/staff-profile/meet-attorney-general [https://perma.cc/P3RQ-R956] (last visited Aug. 4, 2023).

114. Sandoval now serves as the President of the University of Nevada, Reno. *About the President*, UNIV. OF NEV., RENO, https://www.unr.edu/president/biography [https://perma.cc/67H7-PGMF] (last visited Aug. 4, 2024).

115. Rawlinson, *supra* note 86, at 88–89.

116. Burbank et al., *supra* note 77, at 13–16.

years, four federal judges have resigned after allegations of improper sexual harassment.[117]

E. Headaches with a "Bench-to-Practice Pipeline"

Along with drafting the Code of Conduct for United States Judges, the Judicial Conference's Committee on Codes of Conduct also publishes advisory opinions on common ethics questions. Yet very few of the Committee's advisory opinions concern former federal judges. After all, the Committee observes, "[u]ntil recently there have been very few former federal judges."[118] But "[w]ith federal judges returning to the practice of law in increasing numbers, ethical considerations arise."[119] As a result, what was previously "an academic question" of how to treat the bench-to-practice pipeline has recently turned "into a matter of practical significance."[120]

Despite limited guidance from the Committee's advisory opinions, three prominent—and largely unresolved—headaches arise with a growing and influential bench-to-practice pipeline. The first is the appearance that departing judges could give preferential treatment to prospective employers. The second is the advantage that well-resourced law firms gain by hiring former federal judges who have unique insights into the court system. The final headache is the potential advantage that former judges may have when returning to litigate, which can create an uneven playing field for other advocates.

1. Appearance of preferential treatment for prospective employers

Both the Code of Conduct and federal law provide that federal judges must recuse themselves from any proceeding where their "impartiality might reasonably be questioned."[121] The word "might" in the instruction suggests that, in close cases, judges should err on the side of recusal.[122] After all, the policy rationale behind the requirement "is to avoid even the appearance of partiality."[123]

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117. Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. Times (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html [https://perma.cc/9TM6-9MXW]; Mattathias Schwartz, *Federal Judge in Alaska Resigns Amid Accusations of Sexual Harassment*, N.Y. Times (July 9, 2024), https://www.nytimes.com/2024/07/09/us/federal-judge-alaska-sexual-harassment.html [https://perma.cc/3F9X-9MPB].

118. Advisory Op. 72, *supra* note 6, at 108.

119. *Id.*

120. *Id.*

121. 28 U.S.C. § 455(a); Code of Conduct for U. S. Judges Canon 3(C)(1) (Jud. Conf. of the U.S. 2019).

122. Nichols v. Alley, 71 F.3d 347, 352 (10th Cir. 1995).

123. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 860 (1988) (quoting Health Servs. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 802 (5th Cir. 1986)).

As Emily Van Tassel observed, judges leaving the bench to enter private practice creates the appearance that they may give preferential treatment to prospective employers.[124] Even still, as highlighted above, the Committee on Codes of Conduct advises that sitting judges who are considering leaving the bench "may explore a professional relationship" with firms or other potential employers.[125] While doing so, the Committee gives only a few restrictions. The most obvious is that a judge negotiating with a firm must recuse from any current matter involving the firm.[126] But judges enjoy deference in determining when it is appropriate to negotiate with firms that have previously appeared before them.[127] Judges are also welcome to negotiate with any law firm that currently appears before other judges in the same court.[128]

Although these advisory opinions offer federal judges a loose leash to negotiate with future employers, judges must still "preserve both the reality and appearance of impartiality."[129] To an outside observer, a judge on the bench negotiating with a law firm for a subsequent well-paid position fosters unnecessary cynicism and suspicion of the judicial system. After all, under the current guidelines, while a judge must recuse in matters involving their future employers, there is nothing to prevent a judge from writing an opinion benefiting that employer's clients or issuing orders to obstruct the soon-to-be employer's common adversaries. The rule that a judge may not publicly announce their new employer until the day after they leave the bench does little to quash these concerns.

The Judicial Conference's guidance that a judge may only announce their new position *after* leaving the court is a distinction with little practical difference. Employment negotiations often happen while the judges are still on the bench. In one example, a Chicago-based federal judge resigned from the bench on New Year's Eve and was publicly announced as a litigation partner in a global law firm's Chicago office five days later.[130] More recently, a New Jersey federal

124. Van Tassel, *Resignations and Removals*, *supra* note 2, at 363.

125. ADVISORY OP. 72, *supra* note 6, at 129.

126. *Id.* Additionally, judges must also comply with the STOCK Act, which requires internal notice soon after any negotiation or offer from a future employer. *See* STOCK Act, *supra* note 31.

127. ADVISORY OP. 72, *supra* note 6, at 129.

128. *See id.* ("In this regard, the Committee believes that a judge properly may negotiate with a law firm that appears before the court on which the judge serves, but only if the judge's recusal in such cases would not unduly affect the litigants or the court's docket.").

129. *In re* Al-Nashiri, 921 F.3d 224, 234 (D.C. Cir. 2019).

130. *Latham Enhances Litigation Practice in Chicago; Welcomes Former Federal District Judge and State Solicitor General*, LATHAM & WATKINS LLP (Jan. 5, 2023), https://www.lw.com/en/news/2023/01/latham-enhances-

judge resigned on a Friday, and on Monday, his move to a firm was picked up by media.[131] The firm later issued a press release hailing his "decades of experience and relationships to resolve high stakes and high-profile litigation matters."[132]

A brazen judge need not follow any ethical canon or advisory opinion.[133] A federal judge may simply resign or retire to avoid an ethics investigation.[134] In 2017, over a dozen women accused Ninth Circuit Judge Alex Kozinski of sexual harassment.[135] Kozinski retired soon after an internal investigation began, avoiding any judicial sanction or impact on retirement payments.[136] Similarly, a judge determined to move to the private sector could ignore ethics rules and jump to the private sector before any investigation is completed or a sanction is imposed. Kozinski, for instance, returned to practicing law and argued an intellectual property case before his old colleagues in less than two years.[137]

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litigation-practice-chicago-welcomes-former-us-federal-judge-state-solicitor-general [https://perma.cc/7SJG-QLTH].

131. Amanda O'Brien, *Former NJ Federal Judge John Michael Vazquez Moves to Chiesa Shahinian & Giantomasi*, Law.Com (Sept. 11, 2023), https://www.law.com/njlawjournal/2023/09/11/former-nj-federal-judge-john-michael-vazquez-moves-to-chiesa-shahinian-giantomasi/?slreturn=20241221-41933 [https://perma.cc/2T86-9VU6].

132. *Former Federal District Judge Joins CSG Law*, Com. & Indus. Ass'n N.J. (Sept. 15, 2023), https://web.cianj.org/news/NewsArticleDisplay.aspx?articleid=1427 [https://perma.cc/W75G-GTCK].

133. *See* Code of Conduct for U.S. Judges Canon 1 commentary (Jud. Conf. of the U.S. 2019) ("The Code is designed to provide guidance to judges and nominees for judicial office.").

134. Veronica Root Martinez, *Avoiding Judicial Discipline*, 115 Nw. U. L. Rev. 953, 957 (2020) ("The [Judicial Conduct and Disability] Act's mandate, however, applies only to current judges, which has resulted in some judges stepping down from the bench after a complaint is levied against them.").

135. Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, Wash. Post (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html [https://perma.cc/YQX7-W6XP].

136. Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, Wash. Post (Dec. 18, 2007), https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html [https://perma.cc/C79Q-W4X9].

137. Ross Todd, *Alex Kozinski Set to Return to 9th Circuit as Oral Advocate*, Law.com (Dec. 5, 2019), https://www.law.com/therecorder/2019/12/05/alex-kozinski-set-to-return-to-9th-circuit-as-oral-advocate/ [https://perma.cc/V8QJ-QTMQ].

2. Advantages for law firms that hire former judges

There are many reasons why law firms want to employ former federal judges. Former judges can offer unique institutional insights into the inner workings of their court. Law firms are often eager to hire law clerks for similar reasons. Large law firms are willing to offer tens of thousands of dollars in bonuses for former law clerks. Many former law clerks have solid legal skills that would greatly assist a firm's work. But these bonuses are more likely tied to the clerk's experience and familiarity with the small and deliberative world of a judge's chambers. As summarized by one political scientist, "knowing your former boss gives you a leg up."[138]

Hiring a former federal judge offers the same benefits as hiring a former law clerk, and more. Former judges bring vastly more legal experience, stronger relationships with other judges and the bar, and the authority to advise high-paying clients and senior law firm colleagues.

Former judges are a unique resource. One former federal judge recently said that his new multinational firm colleagues often ask him "how a judge might respond to a certain case." He's also been asked to oversee mock trials and moot court arguments from colleagues. In an interview, another former federal judge said that his new law partners will advise clients on the law; he provides a judge's perspective. "It makes an effective pitch," he told a reporter.[139]

Former federal judges also give law firms additional prestige to help grow and develop their businesses.[140] Federal judges bring credibility. Moreover, law firms are not shy about boasting about how many former judges work in their offices.[141] Indeed, although advisory

138. Adam Liptak, *Law Firms Pay Supreme Court Clerks $400,000 Bonuses. What Are They Buying?*, N.Y. Times (Sept. 21, 2020), https://www.nytimes.com/2020/09/21/us/politics/supreme-court-clerk-bonuses.html#:~:text=After%20a%20year%20of%20service,a%20Supreme%20Court%20clerkship%20glitters [https://perma.cc/45JR-CLCY].

139. Roy Strom, *Judges Start at the Beginning After Leaving Bench for Big Law*, Bloomberg L. (Feb. 29, 2024), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X1N412RG000000?bna_news_filter=business-and-practice#jcite [https://perma.cc/7GX3-P6TN].

140. In an advisory opinion, the Judicial Conference Committee on Codes of Conduct warned that "by allowing a future employer to advertise the judge's employment while the judge remains in office, the judge unavoidably lends the prestige of judicial office to advance the private interests of the future employer." Advisory Op. 84, *supra* note 31, at 131. But whether a judge announces the new role before or after leaving the bench, the firm still leverages the former judge's judicial status to enhance its own prestige. This dynamic remains problematic, as the association with a former judge continues to benefit the firm.

141. Law firms are also willing to sell to potential clients the influence of former law clerks who work at the firm. For example, in 2012, reporting copied a letter a large firm sent to a potential client highlighting the dozen former "high court clerks" on staff and

opinions recommend that former judges not use the title "judge" in the courtroom or litigation documents, there are many examples of law firms using "Hon." or "Judge" in press releases and attorney biographies.[142] It has been a successful playbook for firms that can afford it. Within two years of leaving the bench, former federal judges working at large firms have been able to represent major companies and organizations, including Google, ExxonMobil, Meta, Amazon, Lowe's, and the National Football League.[143]

3. A leg up for former judges in litigation

A final concern is that former federal judges who return to litigation may have an unfair advantage over other advocates. Due to their unique experience and connections, former judges may seem to have an advantage in court, causing potential discomfort for both sitting judges and opposing counsel. This complex dynamic can lead to perceptions of unfairness and impact the integrity of the judicial process.

Many federal district courts are small, with only a few judges serving in a particular district. Judges often mentor other judges; they often talk, discuss legal issues, and offer guidance on how to move a case along. This close-knit environment can benefit any former judge litigating in their former—or any other—court.

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claiming, "We know how to customize and tailor arguments to particular justices who may be skeptical or swing votes." John Shiffman, *Former Clerks: Today's Prospects, Tomorrow's Elite*, Reuters (Dec. 8, 2014), https://jp.reuters.com/article/scotus-firms-clerks/former-clerks-todays-prospects-tomorrows-elite-idUSL1N0TS0JB20141208 [https://perma.cc/H2LX-696N].

142. Advisory Op. 72, *supra* note 6, at 108; Press Release, *Former U.S. District Judge George Hazel to Join Gibson Dunn in Washington, D.C.*, Gibson, Dunn & Crutcher LLP (Mar. 1, 2023), https://www.gibsondunn.com/former-u-s-district-judge-george-hazel-to-join-gibson-dunn-in-washington-d-c/ [https://perma.cc/H55F-Y3UX]; *Judge Jose L. Linares*, McCarter & English LLP, https://www.mccarter.com/people/judge-jose-l-linares/ [https://perma.cc/L864-MRDU] (last visited Aug. 5, 2024); *John Gleeson*, Debevoise & Plimpton LLP, https://www.debevoise.com/johngleeson?tab=biography [https://perma.cc/QN7M-EBVM] (last visited Aug. 5, 2024); *Thomas B. Griffith*, Hunton Andrews Kurth LLP, https://www.huntonak.com/en/people/thomas-griffith.html [https://perma.cc/8RMC-RNWZ] (last visited Aug. 5, 2024); *Judge Kevin Sharp*, Sanford Heisler Sharp McKnight, LLP, https://www.sanfordheisler.com/team/judge-kevin-sharp/ [https://perma.cc/XRV7-WYW9] (last visited Aug. 5, 2024); *Hon. Ursula Ungaro*, Boies Schiller Flexner LLP, https://www.bsfllp.com/lawyers/ursula-ungaro.html [https://perma.cc/8DKR-ZU4E] (last visited Aug. 5, 2024); *Leonard Davis*, Fish & Richardson, https://www.fr.com/team/judge-leonard-davis/ [https://perma.cc/3YUQ-KXLM] (last visited Aug. 5, 2024); *Judge Eduardo C. Robreno*, McCarter & English, https://www.mccarter.com/people/judge-eduardo-c-robreno/ [https://perma.cc/S48P-W87Q] (last visited Aug. 5, 2024).

143. Strom, *supra* note 139.

Likely because of its recent phenomena, there is little research on the litigation success of former federal judges. However, some research suggests that law clerks might have additional success before their former bosses. In one study of former Supreme Court clerks, researchers found that former clerks were 16% more likely to garner their former boss's vote.[144] In another paper, researchers concluded that the Court was more likely to take a case when former Supreme Court clerks were counsel on a cert petition or amicus brief.[145]

As summarized by one former Supreme Court clerk, the experience is a "chance to see from the inside how courts operate and how real-life judges think" and offers a "sense of what sorts of legal arguments will fly and which ones will draw hoots" from a judge.[146] Similarly, one circuit judge offered that clerks "are sounding boards" and "privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be."[147] Former judges have a similar advantage and, in some ways, a more impactful one. Unlike term clerks, judges can spend years with their colleagues and, especially at the appellate level, develop a strong sense of what they find persuasive and how they develop a legal opinion.

Even if a judge does not offer a litigation advantage, it is nonetheless an uncomfortable scenario for both judges and litigants when a former judge enters the courtroom from the front door. In one advisory opinion, the Judiciary Conference notes that "[a] litigant whose lawyer is called 'Mr.,' and whose adversary's lawyer is called 'Judge,' may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary."[148] The opinion goes further to recommend that an advocate's former title, "Judge," not be used in the court "or in papers involved in the litigation," unless necessary for the facts of a case.[149]

Additionally, in a separate advisory opinion, the Judicial Conference recommends that sitting judges have a stated recusal period (whether one to two years) before they hear a case where a former colleague

144. Ryan C. Black & Ryan J. Owens, *TRENDS: The Influence of Personalized Knowledge at the Supreme Court: How (Some) Former Law Clerks Have the Inside Track*, 74 Pol. Res. Q. 795, 803 (2021).

145. Huchen Liu & Jonathan Kastellec, *The Revolving Door in Judicial Politics: Former Clerks and Agenda Setting on the U.S. Supreme Court*, 51(1) Am. Pol. Res. 7–10 (2022).

146. John G. Kester, *The Brighter Side of Clerkships*, 36 J. Legal Ed. 140, 141 (1986).

147. Hall v. Small Bus. Admin., 695 F.2d 175, 179 (5th Cir. 1983).

148. Advisory Op. 72, *supra* note 6, at 108.

149. *Id.* In one instance, the U.S. Court of Appeals for the D.C. Circuit even rejected an amicus brief by a group of former federal judges, citing Advisory Opinion 72. Boumediene v. Bush, 476 F.3d 934 (D.C. Cir. 2006).

appears as counsel.[150] Yet beyond that point, judges may continue to recuse if their "impartiality might reasonably be questioned."[151] Sitting judges should consider the Committee's suggestion. As other scholars have observed, there is a natural "awkwardness" when judges return as advocates before their former colleagues.[152] Many litigation opponents will believe they received an unfair shake if they find themselves against a former judge in their former court.

This concern is not merely speculative; former judges do appear before their former courts. For instance, a former Fifth Circuit and Texas federal judge left the court in 2022 and soon after appeared on behalf of clients throughout the state.[153] Similarly, a Northern District of Illinois judge who left at the end of 2022 joined a case before a former colleague by the following summer.[154] Back in Texas, the former Chief Judge of the Eastern District of Texas, who was the only judge to sit in the Texarkana Division, recently returned to his old courthouse to represent the owner of the Dallas Cowboys before the judge who had replaced him on the bench.[155]

II. Post-Employment Restrictions for Other Public Servants

Federal judges are an ethical outlier. The executive and legislative branches have clear and mandatory restrictions governing post-employment activities. These restrictions are designed to address obvious conflicts of interest and maintain public trust. Similarly, several states and common law countries have long-established post-employment

150. Advisory Op. 70, *supra* note 33, at 105.

151. *Id*. at 103–04. To assist sitting judges on whether to recuse, the Committee has offered a two-pronged test: "First, does the judge feel capable of disregarding the relationship; second, can others reasonably be expected to believe the relationship is disregarded?". *Id.*

152. *See* Clark, *supra* note 42, at 901; *see also* Charles T. Fenn, *Supreme Court Justices: Arguing Before the Court After Resigning from the Bench*, 84 Geo. L.J. 2473, 2486–87 (1996) (describing how Justice Charles Evan Hughes felt "ill at ease in addressing his former brethren" when returning to argue before the Supreme Court following his first stint on the Court).

153. *See In re* Cassava Sciences, Inc. Securities Litigation, No. 1:21-cv-751-dae, 2023 WL 3442087 (W.D. Tex. May 11, 2023), Am. All. for Equal Rts. v. Hidden Star, No. 1:24-cv-00128 (W.D. Tex. Feb. 5, 2024), FTC v. U.S. Anesthesia Partners, Inc., No. 4:23-cv-03560 (S.D. Tex. Sept. 21, 2023*)*, *In re* F45 Training Holdings, Inc. Securities Litigation, No. 1:22-cv-01291 (W.D. Tex. Dec. 8, 2022). Former Fifth Circuit JUDGE Gregg J. Costa represented various parties in the above cases.

154. *In re* Manufactured Home Lot Rents Antitrust Litigation, No. 1:23-cv-06715 (N.D. Ill. Aug. 31, 2023). Former District Court JUDGE Gary Feinerman represented two defendants in this antitrust class action.

155. Jones v. Davis, No. 5:23-cv-00032 (E.D. Tex. Mar. 27, 2023). Former District Court JUDGE David Folsom represented Cowboys owner Jerry Jones.

restrictions for former judges. These established norms elsewhere underscore the need for similar rules for federal judges leaving the bench for private practice.

A. Congressional Restrictions

About half of outgoing members of Congress who left office over the past fifteen years become lobbyists or advisors to private corporations and trade associations.[156] The positions are lucrative—sometimes fetching seven-figure salaries.[157] In return, lobbying shops add legitimacy and insider knowledge to their roster, and clients gain an advisor with institutional knowledge who has personal relationships with some of the most influential figures in Washington. Today, more than 350 former members work as lobbyists (or "senior advisors") in the private sector.[158]

In recent decades, Congress has passed legislation and enacted institutional rules to restrict former Members from lobbying their colleagues right out of the gate. In 1989, Congress expanded 18 U.S.C. § 207—which created post-employment lobbying restrictions for executive branch employees—to members of Congress and their staffs.[159] More recently, the Honest Leadership Act of 2007 increased the lobbying "cooling off period" for Senators and senior staff.[160]

Current federal law and institutional rules touch each congressional chamber differently. For example, under Section 207, former senators are prohibited from communicating or appearing before any current member or employee for two years.[161] Former House members are prohibited from doing so for only one year.[162] Senate Rule 37.8 also limits former Senators from lobbying current Senators and staff for two years even if they are not registered lobbyists but work for an "entity" that does lobby.[163] The House does not have a similar rule for its former members.

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156. *Former Members of Congress*, OpenSecrets, https://www.opensecrets.org/revolving-door/former-members-of-congress [https://perma.cc/FZ6P-ASZV] (last visited Aug. 5, 2024).

157. Kate Ackley, *These are the soon-to-be former members K Street wants to woo*, Roll Call (Nov. 17, 2022), https://rollcall.com/2022/11/17/these-are-the-soon-to-be-former-members-k-street-wants-to-woo/ [https://perma.cc/Z3Y4-CHA7].

158. *Former Members of Congress*, *supra* note 156.

159. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 207, 103 Stat 1716, 1719–22 (1989).

160. The Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 401, 121 Stat. 735, 737 (2007).

161. 18 U.S.C. § 207(e)(1)(A).

162. 18 U.S.C. § 207(e)(1)(B).

163. S. Comm. on Rules and Admin., 113th Cong., Standing Rules of the Senate, S. Doc. 113–18, at 58 (1st Sess. 2013).

Despite these differences, the remaining post-employment restrictions for both members and staff are similar. Generally, both chambers' outgoing personal staff, committee, and leadership office staff may not lobby their former colleagues for one year.[164] The House and Senate also have similar rules for floor privileges for former members. Typically, former members maintain access to the floor of the chambers they served.[165] But members lose their floor access in either chamber if they become registered lobbyists or an "agent of a foreign principal."[166]

Even with these rules in place, controversies still arise. In one example, once known as the "Mayor of Capitol Hill" for his powerful role leading the House Administration Committee, former Ohio Representative Bob Ney pleaded guilty in 2006 to various offenses, including his role in allowing his former Chief of Staff to violate his one-year lobbying ban after leaving Congress.[167] In 2002, a former House member was arrested for failing to register as a foreign agent after being paid millions by the Venezuelan government to lobby Congress to improve the U.S.'s relationship with the country.[168]

Former members lobbying their colleagues is an unpopular practice among most Americans, who support some additional restrictions.[169] Lawmakers introduce myriad reforms in each Congress to extend

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164. 18 U.S.C. § 207(e).

165. Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 117-161, at 410 (2023) (House Rule IV (2)(a)(15)); S. Doc. 113–18, *supra* note 163, at 4.

166. S. Comm. on Rules and Admin., 113th Cong., Standing Rules of the Senate, S. Doc. No. 113-18, at 18 (2013) (Senate Rule XXIII(2)(a)); Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 117-161, at 410 (2023) (House Rule IV(4)(a)(1)).

167. Press Release, U.S. Dep't of Just., *Congressman Robert W. Ney Agrees to Plead Guilty to Charges Involving Corruption and False Statements* (Sept. 15, 2006), https://www.justice.gov/archive/opa/pr/2006/September/06_crm_622.html [https://perma.cc/X7BK-ZZJV]. Ney was eventually sentenced to 30 months in prison. Press Release, U.S. Dep't of Just., *Former Congressman Robert W. Ney Sentenced to 30 Months in Prison for Corruption Crimes* (Jan. 19, 2007), https://www.justice.gov/archive/opa/pr/2007/January/07_crm_027.html [https://perma.cc/WDY5-B5DW].

168. Bill Chappell, *A former Florida congressman is arrested on charges of lobbying for Venezuela*, NPR (Dec. 6, 2022), https://www.npr.org/2022/12/06/1141028977/venezuela-lobbying-florida-rep-david-rivera-arrested-indicted [https://perma.cc/6J39-EUC9].

169. *Large Bipartisan Majority Favors Increasing Lobbying Restrictions on Former Members of Congress and Other Government Officials*, Univ. of Md. Sch. of Pub. Pol'y (Dec. 14, 2022), https://www.publicconsultation.org/united-states/large-bipartisan-majority-favors-increasing-lobbying-restrictions-on-former-members-of-congress-and-other-government-officials/ [https://perma.cc/JM9Q-PUQ4]; Ashley Balcerzak, *Liberals and conservatives agree: Ex-congressmen should put brakes on lobbying careers*, Ctr. for Pub. Integrity (Dec. 12, 2017), https://publicintegrity.

cooling-off periods or ban the practice outright.[170] Yet there has been little success in recent years. As a result, although members of Congress (and former staff) are barred from lobbying their colleagues from the private sector immediately, they may do so only after a brief cooling-off period.

B. Executive Branch Restrictions

Federal laws, regulations, and executive orders seeking to curb the "revolving door" between the private sector and the executive branch have a long history. According to the Congressional Research Service, the first federal conflict-of-interest restriction for executive branch employees came from an 1872 appropriations law barring former employees from later acting "as counsel, attorney, or agent" in "any claim against the United States" which would have occurred while the government employed the person.[171] Congress enacted similar restrictions again in 1919 and 1944.[172]

In 1962, Congress enacted 18 U.S.C. § 207 which—although amended in part over the years—remains the primary source for post-employment restrictions for executive branch employees.[173] Today, the law provides six important restrictions—three for all former employees and three for only senior officials:

> (1) permanently bars former officers or employees from representing someone before the government on an issue where the government has a "direct and substantial" interest in which the former employee "personally and substantially" participated in their official capacity;[174]
>
> (2) a two-year restriction for former employees to represent someone before the government on an issue in which the government had "a direct and substantial interest" and that they knew was pending under their official responsibility;[175]
>
> (3) a one-year restriction for former employees who substantively participated in a trade or treaty negotiation to advise someone else about the negotiation;[176]

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org/politics/liberals-and-conservatives-agree-ex-congressmen-should-put-brakes-on-lobbying-careers/ [https://perma.cc/KN46-TDRJ].

170. *See, e.g.*, BLAST Act, S. 88, 118th Cong. (2023); Restoring Trust in Public Servants Act, H.R. 1463, 118th Cong. (2023); Ban Members from Becoming Lobbyists Act, H.R. 1601, 118th Cong. (2023); HUMBLE Act, H.R. 507, 118th Cong. (2023).

171. Jacob R. Straus, Cong. Rsch. Serv., R45946, Executive Branch Service and the "Revolving Door" in Cabinet Departments: Background and Issues for Congress 2 (2019).

172. *Id.*

173. *Id.* at 3–4.

174. 18 U.S.C § 207(a)(1).

175. *Id.* at § 207(a)(2).

176. *Id.* at § 207(b)(1).

> (4) a one-year restriction for former senior officials to communicate with their former agency in a representational capacity;[177]
>
> (5) a two-year restriction for former "very senior" officials to communicate, in a representational capacity, with any executive branch high-ranking official officers or employees of any department or agency the "very senior" officials served in within a year before ending their employment;[178] and
>
> (6) a one-year restriction for former senior officials to represent or advise a foreign entity with the intent to influence U.S. policy.[179]

Penalties for violating Section 207 have teeth and include both imprisonment and substantial fines.[180] But Section 207 prosecutions are rare. From 2015 to 2020, only nine federal prosecutions were brought under the statute.[181]

Beyond statutory restrictions, recent presidential administrations have enacted various Executive Orders ("EO") expanding restrictions on employees leaving the executive branch.[182] Typically, incoming administrations revoke these executive orders and replace them with a new variation. On the day of his inauguration, President Biden enacted his own EO, which required new appointees to pledge that the "ethical choices of post-Government employment" would "not raise the appearance that I have used my Government service for private gain."[183]

The Biden EO implements several restrictions adapted by past administrations. For example, like Presidents Obama and Trump, Biden's EO bars appointees entering government from working on matters involving their former employer. The EO also follows Presidents

177. *Id.* at § 207(c)(1).
178. *Id.* at § 207(d).
179. *Id.* at § 207(f)(1).
180. *See* 18 U.S.C. § 216.
181. *Conflict of Interest Prosecution Surveys Index (by Statute)*, U.S. OFF. OF GOV'T ETHICS, https://www.oge.gov/web/oge.nsf/Resources/Conflict+of+Interest+Prosecution+Surveys+Index+(by+Statute) [https://perma.cc/9JNL-M28Q] (last visited Aug. 4, 2024).
182. In two instances, outgoing presidents withdrew these ethics EOs before leaving office. *See* Exec. Order No. 13,184, 66 Fed. Reg. 697 (Jan. 3, 2001) (President Clinton's withdrawal of Executive Order 12834 "Ethics Commitments by Executive Branch Appointees" and providing that former employees were no longer "subject to [its] commitments."); Exec. Order No. 13,983, 86 Fed. Reg. 6835 (Jan. 25, 2021) (President Trump's withdrawal of Executive Order 13770 "Ethics Commitments by Executive Branch Appointees" and similarly providing that former employees "will not be subject to those commitments.").
183. Exec. Order No. 13,989, 86 Fed. Reg. 7029 (Jan. 20, 2021).

Obama and Trump in banning outgoing appointees from lobbying for the remainder of the administrations.[184]

The Biden EO does make a few novel post-employment restrictions, primarily on issues concerning foreign entities. The EO created a two-year ban for incoming appointees to work on issues where they had represented a foreign principal. Stronger yet, the EO created a two-year ban on individuals *seeking* employment with an agency they engaged while a foreign agent. For appointees leaving government, the EO bars individuals from lobbying or acting as a foreign agent at the end of the administration or two years after leaving government—whichever is later.[185]

C. State Judicial Restrictions

The Constitution's guarantee that federal judges "shall hold their offices during good behavior" is virtually absent at the state level.[186] With one exception, all state judges have their tenures limited by elections, term limits, or mandatory retirement ages.[187] Given the potential that state judges may leave the bench in the early or middle part of their careers, former state judges often return to private practice. Unsurprisingly, as a result, some states have enacted post-employment restrictions for former judges.

The most significant restriction lies in New Jersey where state law prohibits retired judges who are receiving a pension from practicing law in the state court.[188] Although strict, the intended purpose seems

184. *See* JACOB R. STRAUS, CONG. RSCH. SERV., R44974, ETHICS PLEDGES AND OTHER EXECUTIVE BRANCH APPOINTEE RESTRICTIONS SINCE 1993: HISTORICAL PERSPECTIVE, CURRENT PRACTICES, AND OPTIONS FOR CHANGE 18–29 (2021) (comparing ethics Executive Orders from the Clinton, Obama, Trump, and Biden Administrations).

185. Exec. Order No. 13,989, *supra* note 183.

186. Only in Rhode Island do state judges enjoy life tenure, no term limits, and no mandatory retirement age. *See Mandatory Retirement Ages*, NAT'L CTR. FOR STATE CTS., https://cdm16501.contentdm.oclc.org/digital/collection/judicial/id/308 [https://perma.cc/ERE7-X3KS] (last visited Aug. 4, 2024); *Judicial Selection in the States*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_the_states [https://perma.cc/LY2Q-SYUH] (last visited Aug. 4, 2024); *State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_courts [https://perma.cc/6VU4-L2LQ] (last visited Aug. 5, 2024).

187. *State Supreme Courts*, *supra* note 187.

188. N.J. STAT. ANN. § 43:6A-13(a) (West 2024). At least three other states—Florida, Texas, and Maryland—had similar restrictions that have been repealed. *See* Gay v. Whitehurst, 44 So. 2d 430, 432–33 (Fla. 1950) (discussing a now-repealed statute that barred judges "drawing retirement" and "engag[ing] in the practice of law"); Mulherin v. Brown, 289 S.W.2d 609, 612 (Tex. Civ. App. 1956) (highlighting a now-repealed statute prohibiting retired judges "receiving retirement pay" if they "appear and plead as attorneys" in any Texas state court); Att'y Gen. of Maryland v. Waldron, 426 A.2d 929, 954 (Md. 1981) (declaring unconstitutional a state law that prohibited

more concerned with in-person court appearances and using "judicial prestige to advance some unrelated cause."[189] Indeed, former judges may serve as legal advisors and, in some instances, paid mediators and arbitrators.[190] And state ethics guidelines have clarified that retired judges may join law firms (but not add their name to the firm), help prepare pleadings (but not sign them), take depositions, and participate in out-of-court settlement talks.[191]

Other states prohibit retired judges from practicing law if they are open to assignment—that is, eligible to be temporarily recalled to return to service on a court.[192] In Texas, for example, to be eligible for assignment, a former judge must certify they will not "appear and plead as an attorney" in any state court for two years.[193] The certification is automatically renewed every two years unless a former judge files a written notice to the presiding judge.[194] But generally, if retired judges decline the opportunity for assignment, they may practice as lawyers and avoid restrictions designed for sitting judges.[195]

Virginia straddles the restrictions seen in New Jersey and Texas. In the Old Dominion State, former judges receiving retirement benefits are not permitted to appear as counsel in any state court. However, Virginia law offers several exceptions. For instance, judges may appear as counsel if they are not eligible for assignment *and* have been retired for two years, appearing for an indigent client, assigned the case by a nonprofit legal program, or are eligible for Social Security benefits.[196]

That said, state practices that limit former judges' ability to return to private practice are rare. More common restrictions for former judges focus on matters like honorifics and advertising. In 2013, for instance,

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practice for certain lawyers who previously held judicial office). In August 2024, New Jersey created a narrow exception that allowed former judges who were appointed by the Governor to be a county prosecutor to receive pensions. N.J. Stat. Ann. § 43:6A-13.

189. Schwartz v. Jud. Ret. Sys. of New Jersey, 584 F. Supp. 711, 721 (D.N.J. 1984).

190. Administrative Office of the Courts State of New Jersey: Directive #5-08 Guidelines on the practice of law by Retired Judges–Reissuance (with One Revision) (March 24, 2008), https://www.njcourts.gov/sites/default/files/administrative-directives/2008/03/dir_05_08.pdf [https://perma.cc/V6Q4-LQH7].

191. *Id.* Importantly, the restriction is only for state courts. The guidelines state that retired state judges are permitted to practice in New Jersey federal courts or elsewhere.

192. *See, e.g.*, Cal. Judges Ass'n Judicial Ethics Comm., Op. 38 (2008), https://www.caljudges.org/docs/Ethics%20Opinions/Op%2038%20Final.pdf [https://perma.cc/9LL4-4RM8]; Fla. Code of Jud. Conduct 41 (West 2023) , https://supremecourt.flcourts.gov/content/download/402388/file/Florida%20Code%20of%20Judicial%20Conduct.pdf [https://perma.cc/DH9F-MMRD].

193. Tex. Gov't Code Ann. § 74.055(c)(6).

194. *See* Tex. Gov't Code Ann. § 74.0551(c)-(d).

195. *Id.*

196. Va. Code Ann. § 51.1-309 (West 2023).

the Ohio Board of Professional Conduct released a lengthy opinion on whether former judges may use their judicial titles while practicing law or during other non-legal activities.[197] Citing past advisory opinions, the Ohio Board said its concern that judges using their former title "creates the appearance that an attorney can use the prestige of past judicial experience to assure a client's success and falsely indicates to clients and others that a former judge has influence over others to achieve desired ends or favorable treatment for the client."[198] The adage, "once a judge always a judge," the Board concluded, "has no basis" for former judges allowed to return to private practice.[199]

States have varied rules that limit how former judges may highlight their judicial experience in advertisements. Arizona cautions former judges that honorifics like "Judge" or "Honorable" in advertising "could be misleading" and violate the state's Rules of Professional Conduct barring misleading communications.[200] A Michigan ethics opinion barred former judges from retaining the title "Honorable," similarly reasoning that the term had "definite status implications" and may mislead a person to believe a former judge could make strides a non-former judge could not.[201] In Washington, former judges may use titles like "judge" or "justice" if they are preceded by caveats like "retired" or "former."[202]

Some former judges have challenged these restrictions, particularly limits to practicing law after retirement. In 1981, the Maryland Court of Appeals—the state's highest court—considered a former state judge's opposition to a state law that prohibited retired judges receiving pensions

197. Ohio Sup. Ct. Bd. Of Comm'rs on Grievances & Discipline, Op. 13-003 (2013), https://www.ohioadvop.org/wp-content/uploads/2017/04/Op_13-003.pdf [https://perma.cc/CXM2-3VNX].

198. *Id.* at 4.

199. *Id.* at 3. The Board went on to explain that "[t]he reliance on 'once a judge, always a judge' . . . is misplaced in modern American legal and judicial ethics. The adage is actually a restatement of the long-standing convention that British judges are generally not permitted to return to the practice of law." *Id.* Notably, the year after the Ohio Board's opinion, the state's Rules of Professional Conduct were amended to permit former judges to use their past titles if it left the bench in "good standing" and preceded the title with "retired." OHIO R. PROF. CONDUCT 8.2(c).

200. Ariz. Judicial Ethics Advisory Comm., Formal Op. 16-02, at 3 (2016), https://www.azcourts.gov/Portals/137/ethics_opinions/2016/Formal%20Opinion%2016-02.pdf [https://perma.cc/9GGH-KPG8].

201. State Bar of Mich. Standing on Pro. & Jud. Ethics, Op. RI-378 (1992), https://www.michbar.org/opinions/ethics/numbered_opinions/OpinionID=1197 [https://perma.cc/G7WW-S28M].

202. Wash. State Comm. on Jud. Conduct, Advisory Op. 02-17 (2016). Still, "Former judicial officers may not use 'Honorable' or 'Hon.' in advertising offering these services as that title attaches to the judicial office and not to an individual who formerly served as a judicial officer."

from practicing before reaching seventy years old.[203] The court sided with the retired judge, notably finding that the law violated the equal protection provisions in both the state and federal constitutions.[204] In its analysis, the Court appeared persuaded by two factors: (1) the $18,000 annual pension was an "onerous burden," and (2) the restriction to practice law affected only pensioned judges.[205] Nonpensioned judges were free to continue private practice. Despite the legislature's goal to prevent "impropriety" in the judiciary, the Court nonetheless concluded that the distinction between pensioned and nonpensioned judges bore "no relationship to the provision's objective."[206]

A few years later, New Jersey and Virginia faced similar challenges to their state laws limiting pensioned judges from reentering private practice. But unlike in Maryland, both disputes landed in federal court, and both courts upheld the state restrictions. In the New Jersey challenge, the district court distinguished the Maryland case in several ways. First, the court noted that New Jersey offered a higher pension for retired judges. Second, the district court concluded that the Maryland Court of Appeals "mixed" its state and federal equal protection claims—not settling on any clear level of review.[207] Finally, the district court found that the state had a "valid explanation" for the distinction between pensioned and nonpensioned judges, including that only pensioned judges are eligible for recall and the restriction is "known to all" who become, or remain, state judges.[208] In the end, finding the state restriction was subject to only "rational basis review," the district court upheld the state law.

In the Virginia case, four former judges argued that the pension restriction was unconstitutional, arguing, in part, that other lawyers who served in state government were not limited from private practice after

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203. Att'y Gen. of Maryland v. Waldron, 426 A.2d 929, 683 (Md. 1981). In 2022, the court was logically renamed the "Supreme Court of Maryland." Press Release, MD. COURTS OFF. OF GOV'T RELS. & PUB. AFFS., *Voter-approved constitutional change renames high courts to Supreme and Appellate Court of Maryland* (Dec. 14, 2022), https://www.courts.state.md.us/media/news/2022/pr20221214 [https://perma.cc/8T9A-86QV].

204. Separately, the Court also found that the statute violated the state's separation of powers principles, concluding that the statute was "not in the same mold as any type of enactment previously recognized by this Court to be a legitimate exercise of legislative power" in assisting the "judiciary in carrying out its constitutional obligations, or one establishing minimum standards for admission to the practice of law in this State." *Waldron*, 426 A.2d at 700–01.

205. *Id.* at 716, 725.

206. *Id.* at 727.

207. Schwartz v. Jud. Ret. Sys. of New Jersey, 584 F. Supp. 711, 726 (D.N.J. 1984).

208. *Id.* at 727.

retirement.[209] The Fourth Circuit disagreed, finding it was "entirely reasonable" for the state "to discourage retired judges from acting as litigators."[210] The panel observed that a former judge returning to counsel's table could "create infelicitous impressions." After all, the former judge is from, "in the public's eye, from the same mold, the same 'club,' as the active judges regularly sitting with the result that an unfair advantage may be perceived."[211] With this view, the panel was unpersuaded that the distinction to allow nonjudicial retirees to return to practice in state courts was improper. "Judges have sat at the adjudicating level," the panel observed, but most government attorneys had not.[212]

D. Common Law Country Restrictions

Several common law countries have post-employment restrictions for former judges. The most common restriction is a convention or firm rule against returning to practice for a certain period. This section details post-employment restrictions for judges in other common law countries.

1. Canada

Like the United States, Canada has federal, local, and specialized court systems, each with varying jurisdictions and responsibilities.[213] But unlike American federal judges, Canadian federal judges face mandatory retirement at age seventy-five.[214] Although the mandatory retirement age allows judges to serve well into their twilight years, more judges in recent years have turned to private practice after finishing their judicial careers.[215] This trend is unsurprisingly attributed

209. Thompson v. Walker, 758 F.2d 1004, 1006 (4th Cir. 1985).
210. *Id.* at 1007.
211. *Id.* at 1007–08.
212. *Id.* at 1008. Additionally, as noted above, the Fourth Circuit also observed that the state had "not pushed to the ultimate limits of its possible power . . . ." A pensioned judge could still litigate in federal court or conduct "an office practice." Finally, as the Fourth Circuit observed, a judge could always "relinquish the pension" and return to litigation in state court. *Id*. at 1008 n.8.
213. *See generally* CAN. DEP'T OF JUST., *The Judicial Structure*, https://www.justice.gc.ca/eng/csj-sjc/just/07.html [https://perma.cc/A4KC-YU2Y] (last visited Aug. 5, 2024).
214. Supreme Court Act, R.S.C., 1985, c. S-26 § 9(2) (Can.).
215. Olivia Stefanovich, *New draft ethics guidelines for judges caution them about post-bench work*, CBC (Dec. 15, 2019), https://www.cbc.ca/news/politics/stefanovich-post-judicial-employment-draft-revisions-1.5392594 [https://perma.cc/HYP2-87HS] (Noting that, over the course of four years, "[f]orty-one retired judges applied to return to practice in Ontario . . . ."); Stephen GA Pitel and Will Bortolin, *Revising Canada's Ethical Rules for Judges Returning to Practice*, 34:2 DALHOUSIE L. J. 483, 485 (2011)

to "increased life expectancy, lucrative employment opportunities, and shifting cultural attitudes about retirement."[216]

The trend of more retired judges in federal practice recently entered the country's public conscience during the country's SNC-Lavalin affair, a political scandal that focused on whether government officials pressured the attorney general to resolve a corruption case against a Montreal engineering firm.[217] In this case, four former Supreme Court justices represented a party in the controversy or were tapped to offer a legal opinion on some aspect of the high-profile scandal.[218] In an opinion editorial discussing the former justices' role, a Canadian law professor wrote that while they could engage and brought "an expertise and gravitas . . . that is highly valued by clients," their work could "raise problems of perception about judges being for hire and losing the objectivity and independence that are at the heart of their prior judicial roles."[219]

A few months later, the Canadian Judicial Council published a revised version of its *Ethical Principles for Judges*. The document, self-described as "aspirational," sought to add guidance to "new and emerging issues," including federal judges' post-judicial careers.[220] The document acknowledged that federal judges may return to law after their judicial careers. However, unlike American guidelines for judges, it is clear what legal roles former federal judges should avoid. For instance, the document emphasizes that former federal judges "should not appear as counsel before a court or tribunal in Canada."[221] Alternatively, the document proposes that former judges seek roles that maintain "the

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(Remarking that, at one point, "of the seven living former Supreme Court of Canada Justices, all are employed and five practice law.").

216. Pitel & Bortolin, *supra* 215, at 485. As summarized by one former judge, "[t]he Canadian tradition was that a retired judge grew roses, and little else." Roger Philip Kerans, *Retired and Working*, 8 J. App. Prac. & Process 271, 272 (2006).

217. Mark Gollom, *What you need to know about the SNC-Lavalin affair*, CBC (Feb. 13, 2019), https://www.cbc.ca/news/politics/trudeau-wilson-raybould-attorney-general-snc-lavalin-1.5014271 [https://perma.cc/ZFW4-M5AY].

218. Kathleen Harris, *How 4 ex-Supreme Court justices got caught up in SNC-Lavalin affair*, CBC (Aug. 15, 2019), https://www.cbc.ca/news/politics/supreme-court-justices-snc-lavalin-dion-1.5247331 [https://perma.cc/SKM7-KXSS].

219. Wayne Mackay, *Retired Supreme Court judges are free to work in private sector, but SNC-Lavalin shows that appearances matter*, The Globe and Mail (Aug. 18, 2019), https://www.theglobeandmail.com/opinion/article-retired-supreme-court-judges-are-free-to-work-in-private-sector-but/ [https://perma.cc/W6QU-KQDU].

220. Can. Jud. Council, Ethical Principles for Judges 3 (2021), https://cjc-ccm.ca/sites/default/files/documents/2021/CJC_20-301_Ethical-Principles_Bilingual%20FINAL.pdf [https://perma.cc/4YBG-3ZKW#:~:text=https%3A//perma.cc/4YBG%2D3ZKW].

221. *Id*. at 58. According to the document, "appearance . . . is broader than physical appearance" before a tribunal. For example, although former federal judges could "review or draft legal arguments and pleadings" and "provide advice to counsel and

principle of impartiality," like mediators. Beyond these aspirational guidelines for federal judges, each province has binding rules regulating lawyers and former judges. These rules also include some restrictions for all former judges. The most common restrictions are *when* and *which* former judges may again appear on behalf of a client.[222]

Some province rules are more straightforward than others. New Brunswick and Saskatchewan, for example, adopted model language from the Federation of Law Societies of Canada to prohibit outgoing judges from generally returning to private practice for three years.[223] And while former Quebec judges may reappear before their former court within twelve months, Nunavut prohibits judges from appearing in *any* local court without approval.[224] In other provinces, it is more difficult for former high-level judges than lower-level judges to appear in court again. In Ontario, former federal and local appellate judges may not appear before *any* court without approval, which is granted only in "exceptional circumstances."[225] But former lower-level judges may appear again in court after three years.[226] British Columbia has a similar bifurcated rule but distinguishes between former *federal* judges (who must seek permission to appear) and former *local* judges (who may appear after three years).[227]

2. *England and Wales*

For nearly 200 years, English and Welsh high court judges enjoyed tenure during good behavior.[228] But in 1959, Parliament passed the Judicial Pensions Act, introducing a mandatory retirement

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parties," they should avoid "sign[ing] legal documents that are or may be the subject of proceedings before a court or tribunal." *Id.*

222. Pitel & Bortolin, *supra* 215, at 486.

223. Model Code of Pro. Conduct, FLSC, r. 7.7-1, https://flsc-s3-storage-pub.s3.ca-central-1.amazonaws.com/Model%20Code%20Oct%202022.pdf [https://perma.cc/KB8L-DTH5] (model rule); Code of Pro. Conduct, Law Soc'y of New Brunswick, r. 7.7-1, https://lawsociety-barreau.nb.ca/uploads/forms/Code_of_Professional_Conduct.pdf [https://perma.cc/2KMN-P58Z] (New Brunswick Rule); Code of Professional Conduct, Law Soc'y of Saskatchewan, r. 7.7-1 (Saskatchewan Rule).

224. Code of Ethics of Advocates, R.S.Q., c. B-1, r. 3 sec. 4.01.02, https://www.legisquebec.gouv.qc.ca/en/document/cr/B-1,%20r.%203%20/#:~:text=An%20advocate%20shall%20uphold%20respect,have%20it%20repealed%20or%20amended) [https://perma.cc/7LNU-WCWM]; Rules of the Law Society of Nunavut, Law Soc'y of Nunavut, r. 75, https://www.lawsociety.nu.ca/sites/default/files/public/Society%20Rules/LSN%20Consolidated%20Rules%20Aug%2030,%202022.pdf [https://perma.cc/ZP8W-5RGQ].

225. Rules of Pro. Conduct, Law Soc'y of Ontario r. 7.7-1.1, 1.2.

226. *Id.* at 7.7-1.3, 1.4.

227. Law Society Rules, Law Soc'y of British Columbia r. 2-87.

228. Clark, *supra* note 42, at 870.

age of seventy-five.[229] Despite the new implementation of mandatory retirement, a convention remained that retired judges would not return to private practice. During a debate over a 1970 Courts Bill in the House of Lords, Lord Denning remarked that while former judges in the United States and Canada may return to the bar, "it will remain the case that a judge on his retirement does not return to the Bar or undertake legal work."[230]

But the convention has been challenged in recent years. In 2005, for example, then-Lord Chancellor Falconer proposed undoing the convention and permitting lower court judges to return to practice.[231] Before allowing the practice outright, the Lord Chancellor consulted the Judges Council on their view.[232] In January 2006, the Judges Council submitted a report, concluding "that the current convention against returning to practice after retirement should be adhered to by all members of the judiciary."[233]

The Council's report made several important observations. The report concluded that while "there is an unwritten convention" against former judges returning to private practice, judges are not prohibited from doing so.[234] The report argued, however, that if judges returning to private practice "became the norm" or even "permitted or encouraged" it would "diminish the standing of the judiciary and seriously weaken its independence."[235] Even if judges could "be relied upon not to abuse their position," the report cautioned that "the perception of possible bias" by the public would "be a constant threat."[236] The report, however,

229. Judicial Pensions Act 1959, 7&8 Eliz. 2 c. 9 (Eng.). In 1993, Parliament reduced the mandatory retirement age to seventy. Judicial Pensions and Retirement Act 1993, c. 8 (Eng.).

230. HC Deb (19 Nov. 1970) (312) col. 1301 (UK).

231. Among other responsibilities, the Lord Chancellor is responsible for overseeing the Ministry of Justice and judicial policy. *Ministerial role, Lord Chancellor and Secretary of State for Justice*, U.K. Ministry of Just., https://www.gov.uk/government/ministers/secretary-of-state-for-justice#responsibilities [https://perma.cc/6H4L-3EN8] (last visited Aug. 4, 2024).

232. The Judges' Council is "a body broadly representative of the judiciary as a whole which will inform and advise the Lord Chief Justice on matters as requested from time to time." *Judges' Council*, U.K. Judiciary, https://www.judiciary.uk/about-the-judiciary/our-justice-system/how-the-judiciary-is-governed/judges-council/ [https://perma.cc/CEN4-U4TJ] (last visited Aug. 4, 2024).

233. Judges Council Working Group, Jud. Diversity: Return to Practice by Former Judges 9 (2006) https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Consultations/report_judges_wg_lcj_jan06.pdf. [https://perma.cc/QQL9-HC9R]. The Bar Council and London Solicitors' Litigation Association also submitted reports opposing the proposal. Clark, *supra* note 42, at 883.

234. Judges Council, *supra* note 233, at 4.

235. *Id.* at 6.

236. *Id.*

notes a "sharp distinction" between private practice and other law-related positions, like serving as a mediator or arbitrator.[237] These law-related positions, the report reasons, "all require the exercise of independence, objectivity and authority," compared to work "done for reward for a cause and for a litigant."[238]

So far, the Ministry of Justice has also supported the convention. In its February 2023 report detailing judicial salaries and benefits, it stated that "[s]alaried judges are unique in public service in that they are unable to return to private practice after becoming judges. Entering salaried judicial office is, in effect, a 'one-way street.'"[239]

To be sure, the convention does not have unanimous support in England and Wales. A 2018 report on "The attractiveness of judicial appointments in the United Kingdom" surveyed English and Welsh practitioners and judges.[240] While the report confirms a belief in "[t]he convention . . . that a person appointed to a judicial position may take a role as an arbitrator, as an in-house lawyer, or as a judge abroad, but may not return to practice in the courts," most respondents nonetheless supported more "flexibility" in the convention.[241] Indeed, a recent 2022 survey of the English and Welsh judiciary found that nearly 40% agreed that if "leaving the judiciary was a viable option," they "would consider doing so."[242] Judicial salaries and benefits were a key feature of respondents' concerns. According to the survey, the majority of judges took a pay cut to join the judiciary and overwhelmingly agreed that their pay and benefits did "not adequately reflect their work."[243]

The judiciary's unpopular benefits and the convention's strict limits post-employment have arguably hurt judicial recruitment and contributed to some frustration among members of the bar. In a 2017 Parliament committee hearing, former leaders of the Bar Council and Law Society testified that the convention was "a restraint on trade" and is

237. *Id.* at 7.
238. *Id.*
239. Ministry of Just., Ministry of Just. Evidence Pack: Jud. Pay 2023/24, at 12 (2023).
240. Sophie Turenne & John Bell, The attractiveness of jud. appointments in the U. K. (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748580/SSRB_Report_Attractiveness_Turenne-Bell_Revised_14_March_FINAL_-_temp_pdf.pdf [https://perma.cc/CL3B-3A3X].
241. *Id.* at 32.
242. Cheryl Thomas, 2022 UK Jud. Attitude Survey 70 (2023), https://www.judiciary.uk/wp-content/uploads/2023/04/England-Wales-UK-Tribunals-JAS-2022-Report-for-publication.pdf [https://perma.cc/CJG8-92JQ].
243. *Id.* at 73, 76.

"extremely influential" in deterring "would-be potential applicants."[244] A subsequent Parliament report acknowledged the testimony and recommended "examin[ing] the continuing value of the convention, and in particular, whether it serves to operate as a significant disincentive to applications for full-time judicial appointment."[245]

Today, the convention's hold may be on its last legs as more retired judges have returned to private practice. Notably, after retiring in 2017, Lord Neuberger—the former President of the UK Supreme Court—returned to private practice.[246] In a recent interview, he argued that "[i]f there had previously been a convention that former judges would not give legal advice, I believe that it had fallen by the wayside" before his retirement.[247]

And notably, the Judges Council—which once wrote passionately about protecting the convention—has also seemingly soured against it. In its most recent Guide to Judicial Conduct, it has no reference to the convention and simply notes that "[a] retired judge may still be regarded by the general public as a representative of the judiciary." As a result, "[r]etired judges should exercise caution and are encouraged therefore to refer to this guidance so as to avoid any activity that may tarnish the reputation of the judiciary."[248]

3. Australia

Australia shares several features with England and Wales, including a convention discouraging judges from returning to private practice.[249] And all judges (whether federal, state, or territorial) face mandatory

244. *Judicial Appointments: follow-up inquiry: Hearing before the Select Committee on the Constitution* (2017) (statement of Robin Allen QC), https://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/judicial-appointments-followup/oral/48920.pdf [https://perma.cc/Y8JA-XRKC].

245. U.K. Parliament Select Comm. on the Const., 2017-19, Jud. Appointments, HL 32 (UK).

246. *The Rt. Hon. Lord Neuberger of Abbotsbury*, One Essex Court, https://www.oeclaw.co.uk/barristers/profile/lord-neuberger-of-abbotsbury [https://perma.cc/MLL6-44UC] (last visited Aug. 4, 2024).

247. Richard Moorhead, *Can and should retired judges advise on live cases?*, Lawyer Watch (Mar. 14, 2022), https://lawyerwatch.wordpress.com/2022/03/14/can-retired-judges-advise-on-live-cases/ [https://perma.cc/K7H8-N9YM].

248. U.K. Judiciary Guide to Jud. Conduct 6 (2023), https://www.judiciary.uk/wp-content/uploads/2023/06/Guide-to-Judicial-Conduct-2023.pdf [https://perma.cc/Z8SA-DHSC].

249. Gabrielle Appleby & Alysia Blackham, *The Shadow of the Court: The Growing Imperative to Reform Ethical Regulation of Former Judges*, 67 Int'l & Compar. L.Q. 505, 524 (2018) (describing a "loose convention" discouraging judges from returning to private practice).

retirement ages.[250] But Australia is not left with only a convention to debate. Like Canada, some states have explicit rules prohibiting a return to practice for a certain period.

Like other nations, Australia offers a "Guide to Judicial Conduct." The Guide, written by the Australasian Institute of Judicial Administration, offers "practical guidance" to all levels of the Australian judiciary.[251] Although not binding on any level of the judiciary, the Guide offers a "positive and constructive" approach to certain ethical situations.[252] Although the Guide focuses on issues for judges while in office, it dedicates one chapter to post-judicial life. In this chapter, the Guide offers more flexibility than seen in England and Wales. Although outgoing judges are warned to conduct themselves in a way to maintain "the independence, impartiality and integrity of the judiciary," the Guide endorses that judges should use their skills "to work and contribute to society."[253]

That said, the Guide proposes a few ground rules. To begin, the Guide endorses rules prohibiting judges from appearing before certain courts for two to five years.[254] For former superior court judges (that is, former federal or appellate judges), the Guide emphasizes the "strongly held" view that they should avoid appearing before any superior court or the High Court.[255] If judges nonetheless choose to appear before a court, they should first consider whether their involvement would damage the judiciary's perception.[256] If a former judge again appears before a court, they should avoid appearing before the court where they previously served. The Guide does not discourage all legal work for former judges. Mediations and arbitrations are not "inconsistent" with the Guide's goals. And the Guide does not dismiss commercial activity, politics, or public debate so long as former judges properly balance whether their participation might hurt the judiciary's standing.[257]

Apart from the Guide's informal guidance, some Australian states have their own binding rules restricting judges' post-employment activities. Both Victoria and New South Wales—which share rules

250. Alysia Blackham, *Judges and Retirement Ages*, 39 MELB. U. L. REV. 738, 740, 747 (2016).
251. THE AUSTRALASIAN INST. OF JUD. ADMIN., GUIDE TO JUD. CONDUCT 1 (3d ed. 2022).
252. *Id.* at 1–2.
253. *Id*. at 37.
254. *Id.* (emphasizing that these "legislative restrictions are, and should be seen as, the minimum standards only . . . .").
255. *Id*. at 38.
256. *Id.*
257. *Id*. at 40.

pertaining to practicing lawyers—bar solicitors from appearing in any court they previously served or any court that appeals to a court they previously served for two years.[258] In Victoria specifically, former judges have a stronger disincentive: Under state law, a judge's pension is suspended while they are "engaged in legal practice" or "employed by any legal practitioner" in Australia.[259]

Despite Australia's convention and certain local restrictions, legal scholars Gabrielle Appleby and Alysia Blackham observe that it "has not stopped judges from openly pursuing further professional work after their judicial careers are over."[260] According to Appleby and Blackham, like other common law countries, former judges often return to practice, advise firms, or conduct mediations and arbitrations.[261] Even so, due in part to favorable benefits and working conditions, job satisfaction among Australian judges is high, minimizing the frustrations and growing ethical dilemmas facing countries like England and Wales.[262]

4. India

Distinct from the common law countries described above, India's Constitution is the ultimate authority on post-employment restrictions for judges. Article 220 provides that "No person who, after the commencement of this Constitution, has held office as a permanent Judge of a High Court shall plead or act in any court or before any authority in India except the Supreme Court and the other High Courts."[263]

Each Indian state has one High Court, and its decisions bind subordinate courts.[264] And although former High Court judges may practice before the Supreme Court or a High Court they did not serve on, former Supreme Court judges are prohibited from appearing before *any* court ever again.[265] Otherwise, the Bar Council of India rules provide that retired judges may be admitted where they are "eligible to practise."[266]

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258. Appleby & Blackham, *supra* note 249, at 524; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) pt 2 div 6 s 38 (Austl.).
259. *Constitution Act 1975* (Vic) pt III s 83(4).
260. Appleby & Blackham, *supra* note 249, at 525.
261. *Id.* at 526.
262. *Id.* at 525.
263. India Const. art. 220.
264. M.P. Singh, *Securing the Independence of the Judiciary—the Indian Experience*, 10 Ind. Int'l & Compar. L. Rev. 245, 254–55 (2000).
265. India Const. art. 124 cl. 7.
266. Bar Council of India Rules, 1975, Part II, Chapter VII; The Advocates Act, 1961.

Aside from minor restrictions, like barring "sign-boards" or stationery from stating whether an advocate was previously a judge or other high-level legal official, there is little ethical guidance for former judges.[267] Still, at least one Indian Supreme Court advocate has argued for more restrictions on honorifics for former judges, arguing former judges are still publicly "referred to as 'Hon'ble', many years after retirement," including in pleadings and orders.[268]

III. *What* Restrictions to Implement and *How* to Do It

As discussed in previous sections, outgoing federal judges have no post-employment restrictions after leaving the bench. The practice is notably distinct from restrictions placed on former members of Congress (and staff) and Executive Branch officials. It also differs from the practice in many states and common law countries. As a result, former federal judges may join high-salary firms and exploit their networks and experiences immediately after leaving the bench.

The growth of the bench-to-practice pipeline presents two emerging issues: (1) federal judges—including promising young judges—are leaving the bench for higher private sector paydays, (2) leading to the growing chance and opportunity for conflicts as former judges litigate before former colleagues. Ideally, one or a combination of reforms could help mitigate both issues. Looking comparatively to the other federal branches, state and foreign courts, and scholarship, this section highlights a few potential reforms. After identifying the most plausible reforms, it discusses how policymakers—either within the judiciary or Congress—could implement these important changes.

A. What Restrictions to Create

When policymakers consider the inherent conflicts and damage of the growing bench-to-practice pipeline, they will certainly consider a variety of potential reforms. I collect several of these reforms into two broad categories: the "carrots" (incentives for judges to stay on the bench) and the "sticks" (disincentives for judges to leave the bench).

In short, the "carrot" reforms could offer some short-term relief. Most of the "carrots" are financial incentives and could sway a judge interested in prematurely leaving the bench to stay on for a while longer. On the other hand, the "sticks" may discourage judges from

267. Ashish Goel, *Former Judges, Judicial Honorifics and Ethics*, The Leaflet (Jan. 29, 2023), https://theleaflet.in/former-judges-judicial-honorifics-and-ethics/ [https://perma.cc/34XY-RYL5].
268. *Id.*

considering the early leap altogether. When considering each proposal, policymakers should weigh the likelihood of its implementation, whether it would reduce the number of judges jumping to the private sector, and whether its implementation would create unforeseen ethical or recruitment issues for the federal judiciary.

1. The Carrots

As detailed above, the largest motivation for the growing bench-to-practice pipeline is the opportunity for greater compensation in the private sector. Although federal judges are well compensated, they are underpaid compared to their private sector colleagues with comparative legal knowledge and expertise. The logic goes that higher judicial salaries and generous retirement plans—although never reaching the large sums a federal judge could obtain in private practice—would at least blunt some temptation to leave the bench prematurely.

As highlighted in Section II, the salary distinction between federal judges and private sector attorneys is jarring. A second-year associate at a prominent law firm could likely earn the same salary as a federal district judge with decades of experience.[269] By the associate's fifth year on the job, they could make as much—or more—as the Chief Justice of the United States.[270]

One proposal is to drastically increase judicial salaries, citing the importance of recruiting high-caliber attorneys to seek judicial positions and prevent high turnover. Outside the federal judiciary, the government has already created special salary exceptions for positions where recruiting or retaining employees would be difficult.[271] For instance, one federal agency recently implemented a "new special salary rate" to better attract IT and cybersecurity candidates.[272] It follows that lawmakers could use a similar rationale to recruit candidates for federal judgeships and retain younger judges who are considering resigning.

But a sharp pay raise alone will likely not diminish the growing bench-to-practice pipeline. Salaries have been a historical source of judicial contention, but the rise of judges leaving the bench is

269. *Compare Judicial Compensation*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-compensation (last visited Aug. 4, 2024) *with 2023 Associate Salary Survey*, *supra* note 71.

270. *Id.*

271. *Special Rates 2024*, OFF. OF PERS. MGMT., https://www.opm.gov/special-rates/2024/index.aspx [https://perma.cc/LFY5-5UZY].

272. John Hewitt Jones, *VA Special Salary Rate for Tech and Cybersecurity Staff Takes Effect*, FEDSCOOP (July 31, 2023), https://fedscoop.com/va-special-salary-rate-for-tech-and-cybersecurity-staff-takes-effect/ [https://perma.cc/GGN3-RYKG].

comparatively recent.[273] And over the last decade, federal judges' salaries have risen by approximately $60,000.[274] (Not enough to compare to the private sector, but an important pay raise all the same.) Additionally, it would be a tough sell to convince Congress that the judiciary—which already earns an annual salary higher than any member of Congress—should receive a substantive payday.[275] And even if Congress were persuaded, younger federal judges with a minimal nest egg may not be persuaded by an additional $50,000 or even $100,000 salary bump if there is potential to make millions in the private sector.

Beyond a simple pay raise, there have been suggestions to allow judges a greater opportunity to receive outside income.[276] Under current federal law, federal judges are limited in how they may be compensated for outside activities. For instance, federal judges may not receive "honoraria" for any appearances, speeches, or written articles.[277] On the other hand, federal judges may receive limited income (approximately $30,000) for outside teaching.[278] But some income, like investments or book royalties, have no limits.[279]

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273. *See supra* Sec. I.C.

274. *Judicial Compensation*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-compensation [https://perma.cc/S48J-5FK5] (last visited Aug. 4, 2024). The dramatic pay increase from 2013 to today was not from Congress's concern for judicial recruitment or retention. In 2012, an en banc panel of the Court of Appeals for the Federal Circuit agreed Congress's withholding of certain cost-of-living adjustments (COLAs) violated the Constitution's Compensation Clause. Beer v. United States, 696 F.3d 1174, 1176–77 (Fed. Cir. 2012), *cert. denied*, 133 S.Ct. 1997 (2013). Later, federal judicial salaries were adjustment to meet withheld COLAs, and have since risen to meet COLAs given to other federal employees. *Id.*

275. *See* IDA A. BRUDNICK, CONG. RSCH. SERV., CONG. SALARIES AND ALLOWANCES: IN BRIEF 1 (2024) ("The compensation for most Senators, Representatives, Delegates, and the Resident Commissioner from Puerto Rico is $174,000.").

276. *See, e.g.,* Ronald D. Rotunda, *A Few Modest Proposals to Reform the Law Governing Federal Judicial Salaries*, 12 No. 4 PROF. L. 1 (Fall 2000).

277. 5a U.S.C. § 501(b). Under federal law, "honorarium" is defined as "a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties . . . ." 5a U.S.C. § 505(3). But federal judges may be compensated for travel expenses. 5a U.S.C. §§ 505(3)–(4).

278. *See* 5a U.S.C. § 501(a). To be precise, federal judges may not earn outside income that exceeds 15 percent of the annual pay of a Level II Executive Schedule federal employee. *See id.*

279. 2C JUD. CONF. COMM. ON CODES OF CONDUCT, GUIDE TO JUDICIARY POL'Y, CH. 10: OUTSIDE INCOME, HONORARIA, & EMPLOYMENT, §§ 1020.25, 1020.30 (2024) https://www.uscourts.gov/sites/default/files/guide-vol02c-ch10.pdf [https://perma.cc/9665-7KKE]. Book deals, for example, have been a lucrative money earner for several current Supreme Court justices. *See* Steve Eder et al., *How Supreme Court Justices Make Millions from Book Deals,* N.Y. TIMES (July 27, 2023), https://www.nytimes.com/2023/07/27/us/politics/supreme-court-justices-book-deals.html [https://perma.cc/S68H-52BJ].

As Ronald Rotunda argued two decades ago, some of these distinguishable limits make little pragmatic sense. After all, the current rules suppose an ethical lapse if a judge is paid by a university for a day to meet law students and judge a moot court competition (an honoraria), but no concerns if the same judge is paid the same amount to teach a one-day seminar.[280] The logic follows that if a federal judge can make millions from a book deal, a federal judge should have the opportunity to gain marginally greater income from article writing, non-profit appearances, or additional teaching.

But it may be tricky to upset the broad federal applecart. Currently, *all* federal employees are prohibited from receiving honoraria, and all senior government officials are limited in how they may earn outside limited income.[281] It would be a tough sell for policymakers why federal judges should have it any different. A potential solution is a more precise definition of "honoraria" to exclude things like talks before law schools or legal organizations. Yet the greater the exemptions (and more appearances judges may make), the greater the chance for thornier ethical questions or shouts for judges to recuse from matters in their day jobs.[282]

Another alternative is to examine when judges can retire and receive an annuity equal to their last salary on the bench. Federal judges may retire at their current salary when they reach age sixty-five and their service equals eighty. Younger federal judges confirmed in their thirties or forties may not have the financial patience to serve twenty or more years to receive any retirement payments. Instead, they may find it more worthwhile to abandon a federal annuity and save more for retirement in the private sector. Lawmakers could consider loosening the "Rule of 80" by lessening the years of service requirement to create a stronger incentive for younger federal judges to stay on the bench.

With seemingly little short-term opportunity to add additional financial incentives for judges to stay on the bench, policymakers should consider other avenues to make remaining a federal judge a more attractive position. To be sure, there are aspects of the job that

280. Rotunda, *supra* note 276, at 1, 6. Along similar lines, "One who believes that one can buy a federal judge by giving him free dinner (on the condition that he attend a seminar) already believes that the judiciary is too corrupt for salvation." *Id.* at 6 n.35.

281. 5a U.S.C. §§ 501(a)–(b)

282. *See, e.g.*, Ann E. Marimow & Seung Min Kim, *Ketanji Brown Jackson's Harvard Ties Raise Recusal Questions in Supreme Court's Affirmative Action Case*, Wash. Post (March 10, 2022), https://www.washingtonpost.com/politics/2022/03/10/ketanji-jackson-harvard-affirmative-action-case/ [https://perma.cc/F35U-PRPM]; Ann E. Marimow, *Justice Barrett Gets Standing Ovation at Federalist Society Gala*, Wash. Post (Nov. 9, 2023), https://www.washingtonpost.com/politics/2023/11/09/justice-barrett-at-federalist-society-gala/ [https://perma.cc/CF94-9C5G].

are unavoidable and unlikely to change anytime soon. Judging is often solitary work.[283] Many judges who were previously legal or policy advocates may be vexed by the limited opportunities to speak on the issues that are important to them. Judges handle few trials and may become increasingly frustrated by heavy criminal and pro se dockets.[284]

Nevertheless, policymakers could look to two other "carrots"—improving caseloads and judicial security—that may encourage judges to remain in public service. As discussed above, many federal courts are suffering from a judicial capacity crisis—many judges face overwhelming caseloads with little support.[285] Some district courts face over 800 weighted filings *per* judgeship, double or triple the number of weighted filings handled by judges in other district courts.[286] One solution is to relieve overburdened judges by authorizing additional federal judges to address the heavy caseloads in certain districts. In March 2023, the Judicial Conference requested that Congress create sixty-eight new circuit and district court judgeships to better manage high caseloads.[287] However, for decades, Congress has failed to substantively increase judgeships. Since 1990, no circuit court judgeships have been added, and only thirty-one permanent district judgeships have been created.[288]

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283. *If Judges Could Change One Thing About Their Job, This Is What It Would Be (Poll Results)*, NAT'L JUD. COLL. (March 20, 2018), https://www.judges.org/news-and-info/if-judges-could-change-one-thing-about-their-job/ [https://perma.cc/GJN7-U2RH] ("Judges described feelings of isolation from spending long hours alone in chambers. One judge said weeks might pass without any personal interaction with colleagues.").

284. *See supra* Sec. I.D.

285. By November 2024, there were over twenty "judicial emergencies" around the country. *Judicial Emergencies*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies [https://perma.cc/6EFJ-MDNX]. These emergencies are determined by the Judicial Conference—the national policymaking body for the federal courts—and based on whether a district or circuit court is facing a vastly disproportionate number of filings per judgeship. *Judicial Emergency Definition*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition [https://perma.cc/M9YR-CBWY].

286. In one example, in the twelve-month period ending on September 30, 2023, the District of Connecticut faced 256 weighted filings per judgeship, while the Southern District of Florida faced roughly 1,000 weighted filings per judgeship. *See* ANNUAL REPORT, *supra* note 110. "Weighted filings" is a term of art, which applies different weights to each kind of case filed in federal court. For example, "cases involving a defaulted student loan are counted as 0.16 for each case and antitrust cases are counted as 3.72 cases." *Judicial Emergency Definition*, *supra* note 285.

287. *Federal Judiciary Seeks New Judgeship Positions*, U.S. COURTS (March 14, 2023), https://www.uscourts.gov/news/2023/03/14/federal-judiciary-seeks-new-judgeship-positions [https://perma.cc/SS5P-TPL8].

288. *Authorized Judgeships–From 1789 to Present*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/N7AP-2JAB].

During the 118th Congress, a bipartisan group introduced legislation to implement some of the Conference's recommendations.[289] The bill passed the Senate by unanimous consent and was approved in the House by a wide margin. However, President Biden vetoed the bill, citing concerns that it would "hastily add judgeships" and "fails to resolve key questions" regarding their timing and allocation. Similar bills have been introduced to no avail for over twenty years.[290] Additionally, to avoid the partisan question of which president may choose the nominees to fill these new judgeships, most recent legislation efforts kick the can down the road—creating judgeships after the following presidential election. As a result, although increasing judgeships may help reduce heavy docket loads, it is a long-term option that will not serve any judges considering resigning soon.

Alternatively, policymakers can consider increased judicial safety. Federal judges have grave responsibilities. They are responsible for imposing (or sometimes affirming) life-altering sentences, and their rulings often touch on sensitive policy topics and political controversies. Some federal judges become national figures because of the cases assigned to them. And depending on their rulings, they either become unintended public heroes or villains—sometimes both.

In 2020, a man who had appeared before District Judge Esther Salas arrived at her home that summer and shot her husband and son.[291] Her son later died. Two years later, police arrested a man walking near Justice Brett Kavanaugh's home, who claimed he had traveled from California to kill a Supreme Court justice.[292] From 2019 to 2022,

289. JUDGES Act of 2024, S. 4199, 118th Cong. (2024).

290. Anthony Marcum, *Why Federal Magistrate Judges Can Improve Judicial Capacity*, 88 U. CIN. L. REV. 1009, 1017 (2020) (identifying legislation since 1999 "that would have created dozens of new judgeships" but "failed to pass both chambers").

291. Nina Totenberg, *An Attacker Killed a Judge's Son. Now She Wants to Protect Other Families*, NPR (Nov. 20, 2020), https://www.npr.org/2020/11/20/936717194/a-judge-watched-her-son-die-now-she-wants-to-protect-other-judicial-families [https://perma.cc/84KR-K92Y]. In December of 2024, Congress passed a bill that would add 66 federal judgeships nationwide, staggered over multiple years so one president couldn't nominate judges to all the seats. (It included several more judges for the Eastern District of California.) JUDGES Act, S. 4199, 118th Cong. (2024) (Vetoed by President Biden on Dec. 23, 2024). After passing by unanimous consent in the Senate and by a large margin in the House, Biden vetoed the bill, saying it would "hastily add judgeships" and "fails to resolve key questions" on timing and allocation. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, S. Doc. No. 118-14 (message vetoing S. 4199).

292. Maria Cramer & Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. TIMES (June 9, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html [https://perma.cc/2KQZ-QCQ6].

"substantiated threats against federal judges" jumped nearly 75%.[293] Dozens of individuals have been charged in recent years for making threats to federal judges.[294]

In 2022, Congress passed the Daniel Anderl Judicial Security and Privacy Act. Named after Judge Salas's son, the law adds additional privacy protections for federal judges.[295] But more can be done. According to reports, the U.S. Marshals Service (tasked with protecting federal judges) has limited means to preemptively track and identify security risks.[296] The Judicial Conference has requested additional funds to implement the recent security law and make new investments in courthouse security and emergency management equipment.[297] Investments in increasing judgeships and security measures could be a small step toward persuading some judges not to step aside. If not, high dockets and continued threats against the judiciary could be enough to push young federal judges to go into private practice.

2. The Sticks

In the short term, there are unlikely enough incentives to keep judges determined to leave the bench for higher paydays to stay. Even more, the potential "carrots" do little to resolve the potential conflicts presented by federal judges immediately leaping to private practice. But, based on rules and practices elsewhere, there are several "sticks" that could help address both issues.

Return to Practice Prohibition. The first "stick" is an adoption of the traditional English practice that former judges do not return

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293. Lydia Wheeler, *US Marshals' Blind Spots Leave Judges Vulnerable to Threats (1)*, BLOOMBERG (Dec. 7, 2023, 10:37 AM), https://news.bloomberglaw.com/us-law-week/us-marshals-blind-spots-leave-judges-vulnerable-to-threats [https://perma.cc/5U54-C8Z9] ("The number of substantiated threats against federal judges climbed in recent years from 178 in 2019 to 311 in 2022, according to data obtained from the Marshals Service through a Freedom of Information Act request. In the first three months of 2023 there were more than 280 threats.").

294. *Id.*

295. *The Courts and Congress–Annual Report 2022*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/courts-and-congress-annual-report-2022 [https://perma.cc/7CVB-TLK2].

296. Wheeler, *supra* note 293.

297. *See* Letter from Amy J. St. Eve, Chair, Committee on the Budget, Judicial Conference of the U.S., and Roslynn R. Mauskopf, Secretary, Judicial Conference of the U.S., to the Chair and Ranking Member of the House and Senate Appropriations Committees 2, 11 (Nov. 8, 2023) https://fingfx.thomsonreuters.com/gfx/legaldocs/jnpwwnmkjpw/fy_2024_funding_request_letters_to_congress_0.pdf [https://perma.cc/FQ4X-3AYS].

to private practice. The logic is that becoming a judge is a "one-way street"—there is no going back.[298] After all, judges that left the bench and returned to private practice would "diminish" the judiciary as "the perception of possible bias" would "be a constate threat."[299]

In her article highlighting the return-to-practice rate of Article III judges, Mary Clark argues that federal judges should be barred from returning to practice in either the private or public sector.[300] She argued that either role "raise concerns for actual or apparent self-dealing and conflicts of interest," damaging "judicial independence, impartiality, and integrity."[301] She asserts that a practice prohibition would end concerns of judges currying favor with future employers while on the bench and eliminate the "awkwardness" when former judges appear before their former courts.[302]

Clark's concerns are fair. As discussed above, today, federal judges may negotiate for high-paying firm positions while still on the bench and freely appear before their former courts right after leaving chambers. At the same time, a full prohibition on public or private legal practice after leaving would be unlikely to be implemented and create some unintended consequences. To start, borrowing the English convention against judges returning to private practice would be a radical change that would be met with fierce opposition from judges and the bar. Even if the idea gained traction, implementation would be difficult. A long-term, phased-in approach would take years (if not decades), making it a poor reform for an ongoing dilemma. On the other hand, a retroactive and universal prohibition could trigger mass retirements and resignations before the policy came into effect, devastating the day-to-day work of the federal courts.

Other concerns should also discourage supporting a permanent prohibition on returning to practice. Despite all the headaches judges returning to practice raise, an outright bar could dramatically deter talented and experienced lawyers from public service. As discussed above, the English convention against returning to private practice has harmed judicial recruitment. An outright ban in the United States could discourage promising candidates without large nest eggs or family wealth from seeking judgeships. Over time, this could restrict judicial diversity and dissuade candidates who have stayed in lower-paying public sector positions. Additionally, a practice ban might encourage

298. MINISTRY OF JUST., *supra* note 239, at 12.
299. JUDGES COUNCIL WORKING GROUP, *supra* note 233, at 6.
300. Clark, *supra* note 42, at 895.
301. *Id.* at 900.
302. *Id.* at 901.

judges to stay on the bench longer than they should and past their ability to adequately do the job.[303]

Cooling-off periods. If an outright ban is infeasible, there are perhaps other more modest reforms that could act as "sticks." The most feasible reform is the creation of a mandatory cooling-off period between leaving the bench and entering private practice. A cooling-off period strikes a balance by having many benefits of a permanent return-to-practice bar but more closely resembling restrictions faced by federal officials and judges elsewhere.

A cooling-off period would help mitigate some conflicts raised by federal judges moving to private practice. For starters, unlike today, a cooling-off period would restrict the need for federal judges to negotiate for high-paying private sector positions while still on the bench.[304] Nevertheless, as any current or former law student knows, law firms are more than willing to hire years before a start date. While cooling-off periods are designed to prevent judges from negotiating for law firm jobs while still on the bench, an explicit restriction on negotiations may be necessary if judges continue to do so.

A cooling-off period need not be a financial burden on the former judge. A judge could spend the cooling-off period exploring new opportunities while avoiding the many ethical landmines in negotiating a new job while still on the bench. While many judges leave the bench for financial reasons, implementing a cooling-off period is unlikely to significantly impact their overall financial well-being. During the brief cooling-off period, former judges could mediate or serve elsewhere in government.[305] They could also spend the time benefiting others with their experiences, like teaching, serving on committees, or writing.

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303. *See* Stephen J. Choi et al., *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111, 113 (2013) ("[M]edical technology keeps people alive longer but is not as good at preventing the deterioration of their mental faculties, then judges with eroded skills will stay in office longer today than they did in the past."). Notably, Clark also writes that a cooling-off period could be a "compromise position." Clark, *supra* note 42, at 903.

304. As discussed in Section I.E., law firms often make a big public splash after hiring a former federal judge—especially when it's soon after they leave the bench. Judges must recuse from any matter involving a firm they are negotiating with. Yet the announcement that a judge is leaving for a firm days after they leave the bench leaves plenty of speculation on *when* they began planning their next move and whether it impacted—consciously or otherwise—their rulings on the bench.

305. There is an argument that a judge jumping from a nonpartisan branch (the judiciary) to a partisan branch (the executive) could create similar conflicts and misperceptions as judges who jump to the private sector. Because modern judges who leave the bench rarely reenter government—especially compared to judges moving to the private sector—there is currently less concern for similar conflicts to arise.

Cooling-off periods would also mitigate some perceived advantages former federal judges in private practice may have over other advocates. Judges often collaborate with each other, discussing cases, their thought processes, and strategies. Although cooling-off periods wouldn't diminish a former judge's experience, they would at least dull their familiarity with ongoing issues that existed before they left. There would be less opportunity to share "inside baseball," as a time gap would resolve many cases that were ongoing while the judge was on the bench. Their knowledge of other judges and their approach would be closer to a law clerk's experience (many of which face cooling-off periods) or a practitioner who practices almost exclusively in one court.

Sitting judges would also appreciate a cooling-off period for their former colleagues. In an advisory opinion, the Judiciary Conference has offered recusal guidance for judges who had a "particularly close association" with a former judge now acting as counsel.[306] In certain conditions, the Conference has suggested a recusal period of one or two years is "appropriate."[307] But recusal isn't mandatory. And the Conference's advisory opinions aren't binding. A cooling-off period would alleviate the natural "awkwardness" of sitting judges hearing their former colleagues argue and enforce a time gap for judges hearing cases by their former colleagues already supported in an advisory opinion.

Cooling-off periods will not solve every conflict or perception problem. Eventually, a former judge could join a lucrative private practice and litigate in the very court they used to serve.[308] But cooling-off periods *do* help. And, importantly, cooling-off periods strike a good balance between what post-employment bans seek to do (avoid conflicts and potential appearances of bias) while mirroring a system used elsewhere in other courts and the federal government.

States and many foreign courts already have post-employment restrictions periods for judges. As discussed in Section II, New Jersey prevents pensioned judges from practicing in state court. In Texas, former judges open to "assignment" agree to not appear in state court

306. ADVISORY OP. 70, *supra* note 33, at 103.

307. *Id.*

308. While cooling-off periods address many concerns, additional measures beyond those fully discussed in this Article could complement them. For instance, former judges could be required to recuse themselves from cases involving former colleagues for an indefinite period or even face a complete ban on practicing in their former district or circuit. Nevertheless, here, I focus on cooling-off periods, as they represent the most feasible starting point for reform.

for two years. Retired judges in Virginia may appear as counsel after being retired for two years.[309]

And, as discussed earlier, post-employment restrictions are also the norm in common law countries. Canada's Judicial Council recommends, but does not require, that former judges not litigate in Canadian courts.[310] Even still, some provinces have implemented cooling-off periods of one to three years. England has an informal convention against judges returning to private practice. Australia and New Zealand have similar conventions and recommend that judges not appear before courts for two to five years. Some Australian states have enacted their own rules for mandatory cooling-off periods for outgoing judges. And India bars High Court judges from practicing in subordinate courts.

In the United States, the federal judiciary is also an outlier among the other federal branches. As covered in Section II, members of Congress and many of their staff face cooling-off periods of one to two years before advocating before their former colleagues.[311] Federal law creates varying cooling-off periods for executive branch employees, depending on their seniority.[312] And recent Executive Orders have temporarily banned executive branch employees from lobbying or acting as foreign agents.

Cooling-off periods for judges would provide a crucial balance between ethics and opportunity. Outgoing judges should not be barred from their profession, but they also should not be encouraged to profit eagerly from their public service. If cooling-off periods are infeasible, other smaller reforms could be considered.

Retirement payment reform. For judges that meet the Rule of 80, implementing a policy of pausing annuities if they return to private practice could serve as a deterrent. This approach is exemplified by New Jersey, where retired judges receiving a pension are prohibited from practicing law in state courts.

Yet this reform would face significant hurdles. Most pressingly, this measure is unlikely to be effective for younger judges eligible for retirement. Given the substantial salaries available in the private sector, these judges might find the financial incentives to return to private

309. *See supra* Sec. II.C. (Judges may appear as counsel if they are not eligible for assignment and have been retired for two years, appearing for an indigent client, assigned the case by a nonprofit legal program, or are eligible for Social Security benefits).

310. *See supra* Sec. II.D.1.

311. *See supra* Sec. II.A.

312. *See supra* Sec. II.B.

practice outweigh the benefits of retaining a judicial annuity equal to their public-sector salary. Nevertheless, an important public policy signal remains in not paying multimillion-dollar firm partners out of public funds.

In any event, fair implementation of this policy would need a phased approach, applying the restrictions only to judges who have not yet begun their judicial service. Consequently, this would make it a long-term solution, potentially taking decades to address a current problem. Immediate impacts on current judges would be minimal, delaying the intended deterrent effect. Worse still, the introduction of such a policy could face significant legal challenges, particularly concerning the issue of vested benefits. Judges who have earned their pensions under the current rules might argue that retroactively altering the terms of their retirement benefits constitutes a breach of their vested rights. These legal challenges could further complicate and delay the implementation of this policy, making it an uncertain solution to the issue of judges transitioning to lucrative private sector roles.

Bar appearances in lower courts. A more nuanced approach, inspired by the Indian Constitution, is to bar federal judges from appearing in any lower federal courts. In India, retired High Court judges (appellate judges) may not practice in lower courts—only equivalent High Courts and the country's Supreme Court.

This approach presents an interesting model. An influential former circuit judge, for example, could not use their prestige and background to influence a district court they previously reviewed. But, setting aside the difficulty of implementation, its effectiveness would be limited. Most federal judges are district judges, sitting at the trial court level. This reform would not impact their leaving the bench—only the few circuit judges who leave for greener pastures. As a result, the "Indian model" is underinclusive for the broader problem of American federal jurists leaving the bench.

Honorifics. Some states have restricted former judges from using their formal titles—like "Judge" or "Honorable"—in private practice. The idea is to mitigate undue influence or bias from a former judge's continued use of their title in a professional setting. Today, although advisory guidelines *recommend* former federal judges not use honorifics after leaving the bench, many continue to do so.

Of course, while regulating honorifics is unlikely, in isolation, to deter judges from leaving the bench for lucrative private practice opportunities, it could still serve an important symbolic role. Better still, because a limit on honorifics is modest, it can easily complement other reforms designed to curb the bench-to-practice pipeline.

B. How to Do It

Although several "carrots" or "sticks" could curb the bench-to-practice pipeline, the two reforms that are both effective and have a greater chance of implementation are cooling-off periods and limitations on honorifics. There are a variety of policy pathways to implement both reforms, each with advantages and disadvantages. For instance, the Judicial Conference could implement some "sticks" by making policy changes within the federal judiciary. Congress could be more involved by strengthening its oversight, creating new ethics provisions, or adding federal judges to the post-employment restrictions faced by other public servants. Last, bar associations may have a role in establishing and enforcing ethical guidelines for former judges.

1. Judicial Administration

For starters, the Judicial Conference of the United States, which oversees the federal judiciary's policies, could amend the Code of Conduct for U.S. Judges to include post-employment restrictions. The Code currently provides ethical guidelines for sitting judges but is silent on post-employment practices. Introducing specific provisions, such as mandatory cooling-off periods or restrictions on using honorifics, could add "sticks" without outside interference or debate. This internal, administrative approach offers some advantages. It is likely the fastest way to implement post-employment restrictions, as it does not require navigating the often slow and contentious legislative process. Moreover, these changes would be directly tailored to judicial ethics, ensuring they address the specific concerns of the bench-to-practice pipeline.

But this approach faces its own challenges. The Code's non-binding nature is a significant limitation. For instance, while the Code might suggest that former judges shouldn't refer to themselves as judges in private practice, enforcement of such a provision would be difficult. This is evidenced by the many online biographies of former judges who continue to use judicial honorifics. Additionally, implementing these changes would require building consensus within the judiciary, which could be time-consuming, given the variety of perspectives among federal judges and administrators.

2. Congress

Congress has the authority to enact ethics laws regulating federal judges. For instance, the Ethics in Government Act requires high-ranking federal employees—including "judicial officers"—to file

financial disclosure reports.[313] Similarly, federal judges follow other federal ethics laws covering gifts, honorary memberships, and IPO purchases.[314] Congress has also passed federal law disqualifying any federal judge in proceedings where their "impartiality might reasonably be questioned."[315]

It follows that Congress could create post-employment restrictions for former federal judges, just as they have done for high-ranking legislative and executive branch employees. If Congress sought to create cooling-off periods for former federal judges, it could modify and extend 18 U.S.C. § 207 to apply to outgoing federal judges.[316] Alternatively, Congress could pass separate legislation temporarily restricting judges from entering private practice.

The main advantage of this approach is that the prohibition would be binding and comprehensive, ensuring uniform application across the judiciary and other branches. This could provide a stronger deterrent to judges considering early retirement for lucrative private sector positions. Even so, the legislative route faces significant challenges. It would require bipartisan support and significant political will. Given the often-contentious nature of judiciary-related issues in Congress, passing such legislation would require both political capital and time. There is also likely to be resistance from the judiciary and legal community, who might view such restrictions as an encroachment on judicial independence or an unfair limitation on post-bench career options.

Congress could alternatively use its oversight power. It could collaborate with (or pressure) the Judicial Conference to alter the current Code of Conduct for U.S. Judges. The judiciary and oversight Committees could hold hearings or issue reports on judges leaving the bench and post-employment activities. Congress could also leverage its appropriations power to ensure certain changes from within the judiciary. This strategy offers the benefit of enhancing transparency and involving Congress more extensively. Yet it could encounter resistance from the judiciary, which may perceive it as an instance of Congress exceeding

313. Letter from John Roberts, Chief Justice, U.S. Supreme Court, to Richard Durbin, U.S. Senator 5 (April 25, 2023), https://www.judiciary.senate.gov/imo/media/doc/Letter%20to%20Chairman%20Durbin%2004.25.2023.pdf [https://perma.cc/NZ3K-6RE2] (listing ethics statutes followed by Supreme Court justices and other federal judges).

314. *Id.* at 5–6. Notably, The Stop Trading On Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 17, 126 Stat. 291, 303–04 requires federal judges to notify a supervising ethics office within three days of starting a negotiation or agreement with a private entity for a post-judicial position.

315. 28 U.S.C. § 455

316. *See supra* Sec. II.B. (addressing 18 U.S.C. § 207 in detail).

its authority. Additionally, from a practical standpoint, maintaining such oversight would require ongoing interest and dedication from Congress, a task that may prove difficult given other legislative priorities.

Finally, the Senate could use confirmation hearings to elicit pledges from nominees that they will self-impose a cooling-off period (or some other post-employment restriction) after they leave the bench. Most, if not all, nominees would not risk the embarrassment of avoiding such a pledge—especially if their confirmation rested on it. This question could become routine at hearings, as other Senators often have consistent questions for nominees.[317] Although such a pledge would create significant groundwork for new federal judges embracing cooling-off periods or other ethical commitments, it would not concern current judges considering prematurely leaving the bench. As a result, pledges would, at best, be a long-term solution to a more immediate problem.

3. Bar Associations and Local Court Rules

Federal and state bar associations could also enforce post-employment restrictions for outgoing federal judges. Through changes to state and local rules, these individual entities could implement specific restrictions on honorifics, advertising, or when former judges could return to practice in a certain jurisdiction. This framework mirrors Canada's current approach, where different provinces have different rules regulating lawyers and former judges. For example, as discussed above, provinces like New Brunswick and Saskatchewan typically prohibit outgoing judges from practicing in their courts for three years. On the other hand, Quebec only has a twelve-month cooling-off period.

In the United States, large and influential bar associations, like New York and Washington D.C., could take the lead, likely seeing other states follow. Individual state and federal courts themselves could contribute by amending their local rules to incorporate similar post-employment restrictions.[318] This method has several advantages. It would use existing ethical frameworks, which are already followed and closely observed by all members of a particular bar. It would also use

317. For instance, Senator Mazie Hirono asks all judicial nominees about whether they have ever committed or been disciplined for sexual harassment or assault. Dahlia Lithwick, *A Female Senator Figured Out One Small Way to Fight Sexual Harassment*, SLATE (Jan. 12, 2018, 3:43 PM), https://slate.com/news-and-politics/2018/01/sen-mazie-hirono-will-now-ask-all-judicial-nominees-these-two-questions-to-fight-harassment.html [https://perma.cc/D9NN-JZT6].

318. As highlighted *supra*, some courts already have cooling-off periods for former law clerks. Courts could enact similar restrictions for outgoing judges.

existing mechanisms for oversight and enforcement, making it easier to address any ethics violations that may arise.

Yet a large drawback to this approach is the potential patchwork of different rules across states and jurisdictions. Such piecemeal changes could lead to large regional and jurisdictional inconsistencies, making it difficult for former judges to navigate different requirements. Limited uniformity could also undermine the restrictions' effectiveness and complicate enforcement. Further, if one influential bar association aggressively enforces or creates these restrictions, it could be perceived as partisan, particularly if it seems to target certain judges. This would further complicate the legitimacy and neutrality of the restrictions.

Conclusion

A federal judgeship should be the capstone of a legal career. However, federal judges are leaving the bench steadily more often and pursuing lucrative private practice positions. This phenomenon is not limited to older judges looking to retire and enjoy a final, temporary pay bump; younger judges are also leaving, forfeiting generous retirement plans and seeking greater financial security in private practice.

In this Article, I address three obvious ethical problems with the current bench-to-practice pipeline: the appearance of preferential treatment for prospective employers, the appearance of advantages for law firms that hire former judges, and the appearance of a leg up for former judges in litigation. These problems are avoidable. Former federal judges are the only senior government officials who enjoy no post-employment restrictions. Members of Congress and senior staff are generally barred from advocating before former colleagues for one or two years. Senior executive branch officials have similar prohibitions. Many state and foreign common law judges face a myriad of post-employment restrictions beyond cooling-off periods.

There's little dispute that a growing bench-to-practice pipeline is troubling for the federal judiciary. But what to do about it? Judges attracted to private firm dollars are unlikely to be swayed by ethical pleas. Instead, policymakers should set modest ground rules for outgoing federal judges. I endorse two pragmatic reforms: cooling-off periods and limits on honorifics. Both are frequently used elsewhere in government and are modest enough to potentially gain sufficient support for implementation. Either could be implemented by the judiciary itself or by Congress. Local bar associations could also play a role.

For many reasons, more federal judges will likely continue to prematurely leave the court and seek paydays in private practice. While judges have the right to do so, policymakers should consider modest restrictions before the trend becomes a troubling movement.

Appendix 1: Judges who Resigned 2011–2023[319]

Year	*Resigned*	
	Total	Went to Private Practice
2011	0	0
2012	1	1
2013	1	1
2014	0	0
2015	1	0
2016	1	1
2017	1	1
2018	1	1
2019	0	0
2020	1	0
2021	0	0
2022	3	3
2023	3	3
Totals	*13*	*11*

Appendix 2: Judges who Retired 2011–2023

Year	*Retired*	
	Total	Went to Private Practice
2011	12	5
2012	7	2
2013	10	4
2014	8	2
2015	10	3
2016	14	3
2017	15	3
2018	11	5
2019	9	3
2020	8	4
2021	9	2
2022	7	4
2023	9	5
Totals	*129*	*45*

319. I collected the data in these appendices using the process described in Part I.C.