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A RESPONSE TO STRAS & SCOTT'S *ARE SENIOR JUDGES UNCONSTITUTIONAL?*

Honorable Betty Binns Fletcher†

I have been asked to respond to David Stras and Ryan Scott's article, *Are Senior Judges Unconstitutional?*¹ I do so on a policy level, commenting on whether the statute authorizing senior-judge status is a wise piece of legislation with somewhat scanty attention to the technical, legalistic arguments of the authors.

I also take this opportunity, which I welcome, to straighten out the apparently widely accepted misconceptions about the operation of the antinepotism statute extant at the time of my son William A. Fletcher's appointment to my court, the Ninth Circuit Court of Appeals.

POLICY CONSIDERATIONS

Stras and Scott's article focuses on the constitutional problems they see in the provisions of 28 U.S.C. § 371:² How can it be that a senior judge "may retain the office, but retire from regular active service" (in other words, not be required to perform the duties that active judges are required to perform)?³

Indeed a dilemma. If the judge has "retain[ed] the office" and has life tenure, how can he or she be subject to the beck and call of the circuit's chief judge, the circuit council, or the Chief Justice of the United States? Senior judges by the statute must be designated and assigned before performing judicial duties.⁴ Refusal to designate strips a judge of the power to decide cases—the equivalent of removal

† Senior Circuit Judge for the Ninth Circuit Court of Appeals. I thank the *Cornell Law Review* for inviting me to respond to Stras and Scott's interesting and provocative article.

¹ David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 *CORNELL L. REV.* 453 (2007).

² *See id.* at 456. 28 U.S.C. § 371 in pertinent part reads as follows: "Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired." 28 U.S.C. § 371(a) (2000). Various tests for eligibility follow, specifying qualifying activities and quantity of work. *See id.* In addition, certification of disability qualifies a judge for continued full pay including postretirement increases. *See id.*

³ *See* Stras & Scott, *supra* note 1. A senior judge who "retains" the office has essentially relinquished it so that a replacement may be appointed.

⁴ *See* 28 U.S.C. § 294.

from the "retained" office—a result that Article III of the Constitution allows only through the impeachment process.

What about the constraints of the Appointments Clause?⁵ Are the duties of senior judges fundamentally different from those they were appointed to perform? According to Stras and Scott, Congress has ignored those constraints, seizing power that unlawfully usurps the appointment power that the Constitution reserves to the President.

There we have in fine the authors' premises. Do I agree with their theses and their "solutions"? Let's see, where do I begin? I shall start by objecting to being labeled "unconstitutional." Statutes can be "unconstitutional" and people have "constitutions." But I thought only actions or statutes could be "unconstitutional." The acts I perform as a senior judge may be unconstitutional if the authors' premises are correct. If they are right, an unconstitutional statute may have created my status. But I protest: I, myself, am not "unconstitutional."

Stras and Scott's article piques considerable interest in me and I admire the authors' imaginations—posing what I see as imaginary problems and nonsolutions to the problems they have created.

The statute creating the status of "senior judge" is an ingenious one—an elegant response to a real problem. Article III judges are appointed for life and good behavior.⁶ But judges, like all other human beings, become tired, infirm, less productive, and progress through life on different biological timetables. Without such status, many judges would remain in office "in active status" for life, perhaps eventually becoming senile or completely infirm, depriving the court system and the public of the ability to appoint replacements. Without such status, the courts also would be deprived of valuable service and assistance from those willing and able to continue to perform substantial judicial service but unwilling to commit indefinitely to full-time service.

The need to protect the courts and the public from the particular, rare judge who does not recognize his or her loss of capacity to think and act clearly or rationally is apparent. "Willing and able," I submit, are precise and objective terms. Far from putting a judge at the mercy of a vindictive, venal, or politically motivated chief, these terms set an objective standard. Any possible abuse is the hesitancy of a chief to deny designation or certification where such action is warranted, rather than to overuse the power.

Do I have any reservations about the wisdom or the constitutionality of the statute? Yes, I have one. The statute denies salary in-

⁵ U.S. CONST. art. II, § 2.

⁶ See 28 U.S.C. § 371(b)(1).

creases other than annual cost of living adjustments (COLAs) to senior judges who are able but not actively performing services to the courts.⁷ Historically, salary increases for judges have been rare, obtained with great difficulty and only when Congress rewards itself.⁸ COLAs have not been granted in many years, and studies have established that judicial salaries have not kept pace with inflation.⁹ Not only is it unsound and unfair as a matter of policy to deny some senior judges salary increases, but it may also be a violation of Article III's provision that judges "shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."¹⁰

Justice Owen Roberts, speaking for the Supreme Court in *Booth v. United States*, held that a retired judge (as contrasted to a resigned judge) retained his office as a judge and that denying him increases in pay granted subsequent to his retirement constituted a diminution in pay that violated the Constitution.¹¹ Although the statute has been amended to allow COLAs to all senior judges, other pay raises are denied unless a senior judge has been certified in each calendar year as having "carried in the preceding calendar year a caseload involving courtroom participation which is equal to or greater than the amount of work involving courtroom participation which an average judge in active service would perform in three months."¹² Administrative service in lieu of court work can also suffice.¹³ Certification of disability to perform any services also qualifies a senior judge for full pay including pay increases postretirement.¹⁴ I suggest that a challenge to this provision in an appropriate case might succeed.

CONSTITUTIONALITY OF THE STATUTE

The authors make ingenious arguments based on questions raised by Article III's limitation on the sole means for removing judges (i.e., impeachment) and the Article II Appointments Clause.

⁷ See *id.* § 371(b)(2) (cross-referencing *id.* § 461 for judges who resign).

⁸ See *id.* §§ 5, 44, 135; PAUL A. VOLCKER, NAT'L COMM'N ON PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 22–23 (2003), <http://www.brookings.edu/gs/cps/volcker/reportfinal.pdf>.

⁹ See, e.g., DAVID M. WALKER, U.S. GOV'T ACCOUNTABILITY OFFICE, TESTIMONY BEFORE THE SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION, COMMITTEE ON GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES, HUMAN CAPITAL: TRENDS IN EXECUTIVE COMPENSATION AND JUDICIAL PAY SUGGEST A REEXAMINATION OF THE TOTAL COMPENSATION PACKAGE 2 (2006), <http://www.gao.gov/new.items/d061116t.pdf>.

¹⁰ U.S. CONST. art. III, § 1.

¹¹ See 291 U.S. 339, 352 (1934).

¹² 28 U.S.C. § 371(e)(1)(A).

¹³ See *id.* § 371(e)(1)(B).

¹⁴ See *id.* § 371(e)(1)(A).

As interesting as these arguments are, I take comfort in Justice John Paul Stevens's opinion for the Court in *Nguyen v. United States*, wherein he stated, "The panel convened to hear their appeals included the Chief Judge and a Senior Circuit Judge of the Ninth Circuit, both of whom are, of course, life-tenured Article III judges who serve during 'good behavior' for compensation that may not be diminished while in office."¹⁵

THE ANTINEPOTISM STATUTE

Stras and Scott's assertion that my son William A. Fletcher's appointment to my court, the Ninth Circuit Court of Appeals, violated the antinepotism statute if I retained my status as a judge of that court causes me to respond to the charge.

Section 458 of Title 28, the antinepotism statute, provided as follows at the time of my son's nomination and appointment: "No person shall be appointed or employed in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court."¹⁶ My examination of practice, precedent, the Constitution, and the statute itself leads me to conclude that the statute did not apply to appointments made by the President of the United States that are subject to confirmation by the Senate.

First, practice was to the contrary. Learned Hand and his first cousin, Augustus Hand, served together on the U.S. District Court for the Southern District of New York. The Arnold brothers, Richard and Morris, served on the Eighth Circuit. Judge William Matthew Byrne, Sr. and Judge William Matthew Byrne, Jr., his son, served on the U.S. District Court for the Central District of California. Other examples of which I am unaware may exist.

Second, constraining the President's appointment power raises serious constitutional concerns. Any such interpretation to limit the class of persons whom the President may appoint certainly raises serious constitutional concerns as well as issues of sound policy.¹⁷ Attention to the constitutional principle of separation of powers cautions

¹⁵ 539 U.S. 69, 72 (2003) (citing U.S. CONST. art. III, § 1); see also *Booth*, 291 U.S. at 350 (noting that retired federal judges as contrasted to resigned judges continue to hold the office of judge and may continue to perform services as a judge).

¹⁶ 28 U.S.C. § 458.

¹⁷ The Appointments Clause provides:

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

U.S. CONST. art. II, § 2, cl. 2.

against allowing Congress to limit the President's power of appointment, particularly without explicit reference and acknowledgment in the statute that it limits the President's authority.

Third, the purpose of antinepotism statutes is to constrain favoritism that otherwise would allow relatives to appoint close relatives thus leading to appointments for reasons other than merit or qualifying experience. But no such considerations apply to a process of nomination by the President and confirmation by the Senate. Indeed, the appointments of related persons to the Judiciary and, indeed, the same court is proof. Historically, the antinepotism statute has been aimed at judges' appointments of court clerks, deputies, and other employees of the courts related to judges, but never at the appointment of judges themselves.

Pronouncements of the Attorney General and the Office of Legal Counsel within the Attorney General's office have uniformly opined that 28 U.S.C. § 458 does not apply to presidential nominations.¹⁸ I make my point best by simply quoting portions of the memorandum:

Two bedrock principles of statutory construction guide our analysis. First, "we start, as we must, with the language of the statute." *Bailey v. United States*, 516 U.S. 137, 144 (1995). Second, "the meaning of statutory language, plain or not, depends on context." *Id.* at 145. In this case, the particularly relevant constituents of context upon which statutory meaning depends are the constitutional framework within which all statutes are drafted and enacted, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (stating principle that statutes be read to protect "the usual constitutional balance" of power), the statutory language taken as a whole, *see, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (stating the "cardinal rule" that a "statute is to be read as a whole"), and the amendment history of the statute, *see, e.g., Bailey*, 516 U.S. at 144 (taking account of amendment history of 18 U.S.C. § 924(c)(1) to determine the meaning of the word "use"). Based on our review, we conclude that the plain meaning of the statute precludes its application to presidential appointments to the federal judiciary.

We begin, as indicated, with the language of the statute. The current language of § 458 was adopted in 1911, amending a statute originally enacted in 1887. Quoting the language again, § 458 in its current form provides that: "No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court." The statute does not by its express terms apply to the President, nor does it expressly name judgeships as one of the offices to which a related person may not be appointed. We

¹⁸ *See* Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges, 19 Op. Off. Legal Counsel (1995) (Walter Dellinger).

believe that the inapplicability of this provision to presidential appointments of federal judges is conclusively established by the text of this provision, the history of its amendment, and the text of the Act of 1911 taken as a whole. We elaborate on these reasons in Parts II and III of this memorandum, which to a considerable degree recapitulate the analysis contained in our earlier memorandum. Before revisiting these points, however, in this part we analyze a feature of the constitutional framework within which statutes must be read that, in our view, also dictates the conclusion that § 458 does not apply to presidential appointments of federal judges, even if the text and its textual history did not conclusively establish the point.

Any argument that § 458 does apply to presidential appointments of federal judges depends entirely upon the fact that, while the statute refers to positions to which related persons may not be appointed, it makes no mention at all of the appointing authority, worded as it is in the passive voice. In this context, however, this silence must lead to just the opposite conclusion, because of the well-settled principle that statutes that do not expressly apply to the President must be construed as not applying to the President if such application would involve a possible conflict with the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). We can refer to this principle as a clear statement rule, one that is very well-established and that dictates the plain meaning of § 458.

Then-Assistant Attorney General William H. Rehnquist articulated this principle without limiting it to cases in which application of the statute would raise a constitutional question, opining that statutes "are construed not to include the President unless there is a specific indication that Congress intended to cover the Chief Executive." Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Re: *Closing of Government Offices in Memory of Former President Eisenhower* at 3 (Apr. 1, 1969) ("Rehnquist Memorandum"). Even if this unqualified statement of the principle is overly broad, the narrower formulation given above clearly covers § 458, because its application to presidential appointments to the federal judiciary would raise serious constitutional questions regarding the President's authority under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, as we explain below. Therefore, under the precedents of the Supreme Court as well as of the Department of Justice, § 458 may not be read as applying to presidential appointments.

The principle that general statutes must be read as not applying to the President if they do not expressly apply where application would arguably limit the President's constitutional role has two sources. First, it is a long-recognized "cardinal principle" of statutory interpretation that statutes be construed to avoid raising seri-

ous constitutional questions. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932). This canon of statutory construction is a cornerstone of judicial restraint in that it “not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The canon is equally applicable to executive branch interpretations. *Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731, 732 n.3 (1980).

The second source is the constitutional principle of separation of powers. The fundamental device by which the framers sought to prevent tyranny was the division of power to prevent an excessive accumulation in any single repository. Thus, the Constitution divides power between the federal and the state governments as well as among the federal government’s three coordinate and independent branches. See *Gregory*, 501 U.S. at 458. The clear statement rule exists in order to protect “th[is] ‘usual constitutional balance’” of power. See *id.* at 460 (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))), *Franklin*, 505 U.S. at 801 (“requir[ing] an express statement by Congress before assuming it intended” to subject presidential action to judicial review); *id.* (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”). Given the central position that the doctrines of federalism and separation of powers occupy in the Constitution’s design, this rule also serves to “assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters” of the balance of power among the three branches of the federal government, in the context of separation of powers, and between the federal and state governments, in the context of federalism. See *Gregory*, 501 U.S. at 461; *United States v. Bass*, 404 U.S. 336, 349 (1971).

This clear statement rule has been applied frequently by the Supreme Court as well as the executive branch with respect to statutes that might otherwise be susceptible of an application that would affect the President’s constitutional prerogatives, were one to ignore the constitutional context. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, authorized “abuse of discretion” review of final actions by the President. The APA authorizes review of final actions by “agencies,” which it defines as “each authority of the Government of the United States.” 5 U.S.C. § 701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the District of Columbia government—but not the President.

Even though the statute defined agency in a way that could include the President and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court:

[t]he President is not [expressly] excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

....

Congressional attempts to limit the class of persons from whom the President may appoint the highest officers of the government, including judges, raise serious constitutional concerns. The Appointments Clause provides that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Because the Constitution gives the President alone the power to nominate non-inferior officers of the United States, any attempt by Congress to restrict his choice of nominees, otherwise than by the Senate's refusing its consent to a nomination, is questionable under the Constitution.¹⁹

The memorandum goes on to develop fully the legislative history of the statute and elaborates the need to protect the constitutional separation of powers, but I think the portions I quote adequately make the point.

The antinepotism statute extant when my son was appointed did not and could not apply to the President's nomination of judges and confirmation by the Senate. Its subsequent amendment after my son's confirmation makes this fact even clearer. Recognizing that the statute did not restrict the class of persons whom the President could nominate, Congress amended the statute to do just that. Indeed, the statute now purports expressly to eliminate a class of persons from those among whom the President may appoint.²⁰

The legislative history of the statute's amendment is interesting. As a condition of my son's nomination moving forward in the Senate, a "deal" was struck: After his confirmation, the statute would be

¹⁹ See *id.* at 350-54, 357-58 (footnotes omitted).

²⁰ See *infra* note 21.

amended to prohibit the appointment of persons related to a sitting judge on a particular court to the same court. The statute now reads:

No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to any justice or judge of such court.²¹

Whether under appropriate challenge the statute would be found unconstitutional is an interesting question. The only point I make is that the premise behind Stras and Scott's following statement is incorrect:

Democrats and Republicans reportedly struck a deal: Judge Betty Fletcher would assume senior status if William Fletcher won confirmation. The agreement apparently held up, and the Senate confirmed Judge William Fletcher on October 8, 1998. Yet the legal theory behind the compromise seems nonsensical if Judge Betty Fletcher "retain[ed]" her original office on the Ninth Circuit. Congress's action suggests that, in the eyes of some of its members, senior judges were no longer "members" of the court to which they were appointed. Otherwise, the Senate would have squarely violated the antinepotism statute by confirming Judge William Fletcher when his mother, Judge Betty Fletcher, remained on the court in senior status.²²

²¹ 28 U.S.C. § 458(a)(1).

²² Stras & Scott, *supra* note 1, at 470 (footnotes omitted).

