20-1085

Case No.

In The
Supreme Court of the United States

SCOTT ERIK STAFNE

Petitioner,

v.

THOMAS ZILLY ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR CERTIORARI

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QUESTION PRESENTED

Throughout history people have struggled to obtain justice. This quest directly led to the Separation of Powers doctrine which requires our federal government to have a judicial branch composed of independent judges who are responsible for exercising judicial power within the scope of their delegated jurisdictions.

By the end of the Twentieth Century there appeared to be general consensus among civilized nations that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country." Principle 1. *Basic Principles on the Independence of the Judiciary* (1985)[1]

This case presents the question for federal courts and judges in the United States as to:

> Whether the challenge that a jurist is not an Article III judge because she or he does not have "good behaviour"[2] tenure is a jurisdictional one which must be considered by federal courts and judges.

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[1] Endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

[2] Courts sometimes refer to the "good behaviour" tenure language in Article III as being life tenure because unless a judge misbehaves and is impeached or gives up their good behaviour tenure she or he can remain in office for life. *See e.g. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1938. (2015) *Id.* at 1951 Roberts, CJ. Dissenting

PARTIES TO THE PROCEEDINGS

Petitioner Scott E. Stafne is a resident of Washington state. He is admitted to practice law as an attorney in both the state courts and federal district courts of Washington state. Stafne is also admitted to practice law before the Ninth Circuit Court of Appeals and this Court.

Respondents Thomas S. Zilly and John C. Coughenour are residents of Washington who are adjudicating cases for the federal judicial branch of government as senior judges of the United States District Court for Western Washington pursuant to a statutory retirement program that allows them to exercise judicial power when designated by other judges to do so.

Respondent Barry G. Silverman is a resident of the state of Arizona. Silverman adjudicates appeals for the judicial branch of the federal government while acting as a senior judge for the United States Ninth Circuit Court of Appeals pursuant to the same statutory retirement program.

Respondent Trenary, who was sued in both his official and individual capacity, was the Sheriff of Snohomish County Washington until January 1, 2021, when he was replaced by Adam Fortney. A corporate disclosure statement is not required because Mr. Stafne is not a corporate entity. *See* Sup. Ct. R. 29.6.

RELATED PROCEEDINGS

Bank of New York Mellon v. Scott Stafne, 9th Circuit Court of Appeals No. 16-3602 reported at *Bank of N.Y. Mellon v. Stafne*, 824 F. App'x 536 (9th Cir. 2020).

Bank of New York Mellon v. Stafne is an in rem foreclosure action against land owned by Scott and Todd Stafne, and for a deficiency alleged owed against Scott Stafne. The action was brought by Bank of New York Mellon and others. The Bank of New York Mellon case (hereinafter BNYM) is the precursor of this case in that this case sought relief from *Bank of New Mellon's* judgment through a collateral attack that is based in part on one of the same legal theories that is asserted here, *i.e.*, that Article III does not allow senior judges without good behaviour tenure to exercise judicial power.

Hoang v. Bank of America, U.S. District Court for the Western District of Washington Case No. 2:17-cv-00874-JLR.

Hoang v. Bank of America was remanded back from the Ninth Circuit Court of Appeals to the District Court of Western Washington to allow Plaintiffs Jerry Hoang and Le Uyen Thi Nyguen to amend their complaint to assert rescission claims against lenders under the Truth in Lending Act consistent with this Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.*, 574 U.S. 259 (2015). *See Hoang v. Bank of Am., N.A.*, 910 F.3d 1096 (9th Cir. 2018). After remand Hoang amended his complaint to assert the senior judge deciding the case for the District Court did not have the tenure attributes required of an Article III judge and for that reason was not independent within the meaning of Article III.

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The Memorandum decision of the Ninth Circuit Court of Appeals affirming the district court's dismissal of Stafne's complaint is not published, but is reported at *Stafne v. Zilly,* 820 F. App'x 594 (9th Cir. 2020). It is reprinted at Pet. App. 1a–4a. The decision of the District Court dismissing Stafne's Complaint is published at *Stafne v. Zilly*, 337 F. Supp. 3d 1079 (W.D. Wash. 2018) and reprinted at Pet. App. 5a–32a. The District Court's Order denying Post Judgment Relief is not published. It is attached as Pet. App. 33a–35a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on September 3, 2020, Pet. App. 1a. No motion for rehearing or reconsideration was filed.

On March 19, 2020, this Court by Order granted a 60-day extension of time in which to file petitions for certiorari because of the COVID-19 Pandemic. Stafne's Petition for Certiorari is being filed within this emergency time frame. Accordingly, the jurisdiction of this Court is invoked under 28 U.S.C. § 1245(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and Article V of the United States Constitution together with relevant statutory provisions are reprinted in an appendix to this brief. Pet. App. 36a–42(a)

STATEMENT OF THE CASE

A. Introduction

28 U.S.C. § 133(a) provides that the President shall appoint by and with the consent of the Senate seven district court judges for the Western District of Washington. At the time this case was filed the District Court had only four active Article III judges with good behaviour tenure. Pet. App. 58a–57a. Today the U.S. District Court for Western Washington has only two judges with good behaviour tenure, out of 23 adjudicators, deciding cases brought by litigants in this Federal District Court for Western Washington.[3]

B. The Case Below

1. Relief requested from the District Court

Scott Stafne is a third-generation attorney who filed this case *pro se* against three senior judges he alleged did not have the constitutionally required attributes to exercise federal judicial power as an Article III judge. Stafne also alleged, particularly regarding Senior Judge Thomas S. Zilly, that Zilly was factually biased in favor of his adversaries.

Stafne also sued the Sheriff of Snohomish County in this case because the sheriff, a local law enforcement official of the State of Washington, was threatening to evict Stafne from his home based on Senior Judge Zilly's foreclosure order in BNYM (a related case in which certiorari by this Court will also be sought in the next few weeks.)

Stafne's Complaint, attached at Pet App. 42a–108a, requested whatever relief was available under the circumstances he had alleged. However, Stafne wasn't particularly interested in damages. Stafne requested only one dollar in

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[3] *See* https://www.wawd.uscourts.gov/judges.

damages from Senior Judge Zilly under 42 U.S.C. § 1983 because his "goal is to bring to the attention of Congress and the rest of the world the shoddy condition of the United States' judicial system.[4]" Pet. App. 103a–104a, ¶¶ 12.10, 12.11, notes 25 and 26. And in his prayer for relief Stafne indicates he is willing to accept

> no damages for his injuries because the purpose of this litigation is to restore the judicial department's adherence to those aspects and provisions of the Constitution necessary to protect the liberty of the people and to protect against that judicial tyranny which pervades the judicial department . . .

Pet App. 108a–09a, Prayer for Relief ¶ 3.

Stafne also sought relief to prevent these senior judges from exercising federal judicial power in those federal cases in which he would appear as a litigant or as an attorney representing clients in the future.[5] His final prayer for relief requested: "such other relief as may be appropriate under law and

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[4] Stafne concedes his complaint might have been better written. But he did the best he could under the circumstances that existed at that time. Stafne also understood that the District Court was required to freely grant him leave to amend his complaint "when justice so requires." Fed. R. Civ. Pro. 15 (a)(1)(B). *See also Johnson v. City of Shelby*, 135 S. Ct. 346, 346-47 (2014). Pet. App. 108a

[5] ¶ 3.6 of Stafne's complaint states:

> As an attorney admitted to practice and practicing before the USDCWW and the Ninth Circuit Court of Appeals Stafne seeks such relief as is necessary to prevent senior judge volunteers in these Courts from exercising judicial power after they have resigned their office and . . . been succeeded in that office. Pet. App. 51a

¶3.7 states in pertinent part:

> Alternatively, as an attorney admitted to practice and practicing before the USDCWW and the Ninth Circuit Court of Appeals Stafne seeks such relief as is necessary to prevent senior judge volunteers in these Courts from exercising judicial power without the consent of the parties . . . Pet. App. 51a–52a.

equity to provide an appropriate remedy for the facts pled in this complaint." App. 110, ¶ 4, citing to *Johnson v. City of Shelby*, 135 S. Ct. 346, 346-47 (2014).

2. The Article III legal theories alleged in Stafne's Complaint

Stafne's Complaint challenged these senior judges because they lacked the Article III attributes for judicial independence, including good behaviour tenure. His legal theories in this regard were based in large part on a law review article by David R. Stras and Ryan W. Scott,[6] which he incorporated into his complaint. The District Court acknowledges this incorporation of that article into Stafne's Complaint:

> Stafne . . . argues that Congress' creation of the position of "senior judge" violates the Appointments Clause of the U.S. Constitution, contained in Article II, § 2. ***Stafne incorporates by reference a law review article written by David R. Stras and Ryan W. Scott. Stafne argues that for the reasons discussed by Judge Stras and Professor Scott, the Federal Judge Defendants do not validly exercise federal judicial power under Article III.*** Stafne argues that, as senior judges, the Federal Judge Defendants do not properly hold the office of an Article III Judge, but instead act as mere "judicial volunteers." Stafne adds that although the Western District of Washington has a policy that litigants may consent to a case being heard by a U.S. Magistrate Judge or a U.S. Bankruptcy Judge, there is no similar policy for seeking or requiring consent to a case being heard by a "senior judge." Stafne also asserts that "active judges" in the Western District of Washington do not provide meaningful oversight of the work of senior judges. . . .

Pet. App. 13a (Emphasis Supplied)

Stafne asserts Judge Stras and Professor Scott set forth jurisdictional challenges based on Article III making clear why senior judges who have resigned their good behaviour tenure are no longer Article III judges, **which *the***

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[6] *See e.g.*, David R. Stras & Ryan W. Scott, *Article: Are Senior Judges Unconstitutional?* 92 *Cornell L. Rev.* 453 (2007).

District Court should have considered before dismissing his complaint without leave to amend. For example, Stras and Scott explain:

> The first global constitutional objection [to senior judges] derives from Article III, Section 1, which grants life tenure to federal judges by providing that "the Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour." Upon assuming senior status, however, judges no longer have the right to perform judicial duties. Other Article III judges have discretion to decide whether to allow senior judges to sit on any court, including their "home" court. [28 U.S.C. 294(c), (d).] The possibility that a senior judge could be barred from performing judicial duties amounts to a constructive removal from office, which violates the tenure protection of Article III.

Stras & Ryan at 481

To paraphrase, (without limiting purposes of Stafne's originally filed Complaint) Eighth Circuit Court of Appeals Judge Stras' and Professor Scott's arguments assert that 28 U.S.C. § 294(d) prohibits each senior judge from exercising judicial power unless he or she obtains two forms of annual certification: one under 28 U.S.C. § 371(e)(1) and one under 28 U.S.C. § 294(c). Because such periodic certification interferes with each adjudicator's good behaviour tenure by limiting his or her ability to exercise judicial power; and as a result, may prevent receipt of that salary which the Framers intended such judges must be paid, Stafne challenges senior judges are not independent judges within the meaning of Article III.

It is difficult to understand how the District Court understood Stafne's challenge to senior judges as being only a nonjurisdictional challenge based on U.S. Const. art. II, § 2, cl. 2. For certainly it is made clear in the law review article (which the District Court conceded was incorporated as part of Stafne's Complaint) that Article III is a primary basis for the constitutional infirmities

asserted. Indeed, Professor Scott stated in SCOTUSblog[7] about his article at the time it was published:

> We make two chief constitutional arguments: (1) the requirement that senior judges (and Justices) be designated and assigned by another federal judge before performing any judicial work violates the tenure protection of Article III; and (2) permitting senior judges (and Justices) to elect senior status, without a second intervening appointment, violates the Appointments Clause.

Other judges who have commented on this article have understood its Article III theories. Indeed, Senior Court of Appeals Judge Frederick Block writes in his essay "*Senior Status: An 'Active' Senior Judge Corrects Some Common Misunderstandings,*" 92 Cornell L. Rev. 533 (March 2007):

> One prominent jurist (who has not taken senior status) has viewed submission to the "designation and assignment" requirement of § 294 in exchange for continued compensation as a relinquishment of lifetime tenure, being "a variant of the 'buy out' schemes by which universities and other employers try to induce retirement." David Stras and Ryan Scott take that argument a step further and suggest that this feature of senior status, among others, makes it unconstitutional. . . ." *Id.* at 541.

The District Court appears to have avoided Stafne's Article III jurisdictional challenges by erroneously interpreting Stafne's Complaint against senior judges as being based solely on an Appointments Clause challenge, *see* Pet. App. 6a; 12a–24a; 26a–31a.; thereby avoiding consideration of the Article III precedent Stafne relies upon. *See infra.* Based on its erroneous limitation of Stafne's Complaint to only an Appointments Clause challenge the District Court holds that Stafne's Complaint against the senior judges (1) is not cognizable pursuant to 42 U.S.C. § 1983, presumably because they are *de facto*

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[7] Last accessed on January 17, 2021 at https://www.scotusblog.com/2007/03/are-senior-justices-and-judges-unconstitutional/

judges, Pet. App. 15a–17a; (2) is precluded by the collateral attack doctrine, Pet. App. 17a–18a; (3) does not adequately allege standing for purposes of obtaining injunctive relief, Pet. App. 18a–21a; and (4) is precluded by the doctrine of judicial immunity, Pet App. 21a–29a. In the final section of its Order and Opinion the District Court determines that 28 U.S.C. § 371 does not violate the Appointments clause but ignores the Article III challenge jurisdictional challenge asserted by Stafne. Pet. App. 29a–31a

After the District Court's decision was entered Stafne timely filed a motion for Post Judgment Relief arguing, among other things, that the District Court must address his Article III challenges. The District Court refused, stating:

> Plaintiff is essentially rearguing the same points that the Court previously rejected. Further, to the extent that Plaintiff seeks leave to amend his complaint, the Court finds that any such amendment as described by Plaintiff would be futile because Plaintiff's claims would continue to suffer from many of the same legal deficiencies previously ruled upon by the Court. . . .

Pet. App. 35a

On appeal Stafne continued to adamantly assert his Article III challenges that senior judges were not independent Article III judges because they lacked good behaviour tenure. But like the District Court, the Ninth Circuit panel, refused to address the Article III issues Stafne raised. The Ninth Circuit affirmed the District Court because it found (1) Stafne's request for injunctive and declaratory relief was an improper collateral attack on the *BNYM* decision, Memorandum, Pet. App. 2a; (2) judicial immunity barred any injunctive and declaratory relief as a result of judicial acts by the senior judges, Pet App. 2a; and (3) for purposes of 42 U.S.C. § 1983 the senior judges acted only pursuant

to federal law, not state law, when deciding the case. Memorandum Pet. App. 2a–3a. The Court of Appeals does not appear to have affirmed the District Court's standing analysis because its Memorandum does not address this issue. *See* Pet. App. 1a–3a.

PETITION FOR WRIT OF CERTIORARI

Scott E. Stafne, an attorney, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case pursuant to Supreme Court Rule 10(a).

REASONS WHY CERTIORARI SHOULD BE GRANTED

In this case Stafne is complaining that senior judges who have resigned their good behaviour tenure, and must periodically be afforded permission to exercise Article III judicial power, are interloper jurists because such judges no longer have those attributes the Constitution makes essential for being independent judges. Further, that the courts below purposely avoided considering this jurisdictional issue that was squarely before them.

ARGUMENT

A. Why Article III judges are required to have good behaviour tenure

The United States' Separation of Powers structure of government and Article III are based in part on our Framers' experience with English courts. Early on—well before Baron de Montesquieu wrote *The Spirit of Laws* in 1750 which inspired our Framers adoption of the Separation of Powers as part of our structure of government—English courts had established that judges exercising judicial power in England must be neutral and independent as between litigants in order to exercise judicial power. In 1610, for example, Lord Coke established one of the early precedents for judicial independence in

Britain; namely that judicial officers cannot adjudicate cases in which they have an interest. *See Bonham's Case*, 77 Eng. Rep. 646 (1610).[8] This Court has separately held that the principle that no man should be a judge in his own case is also required by the Due Process Clause. *See, e.g., Williams v. Pennsylvania,* 136 S. Ct. 1899 (2016) ("No man can be a judge in his own case" is a maxim of due process); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (same); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (same); *In re Murchison*, 349 U.S. 133, 136 (1955) (same).

By the time our Constitution was adopted the principle expressed in *Bonham's Case* and this Court's later Due Process cases was well enough accepted in the colonies for James Madison to write on November 22, 1787, that: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. . . ." Federalist Papers No. 10.[9] *See also* Alexander Hamilton, Federalist Paper No. 80 (stating the same principle). Thus, it is apparent that when the Constitution was written and ratified our Founders recognized the exercise of judicial power should be through a separate judicial department composed of

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[8] Because the principle of judicial independence was used in *Bonham* to void a statute of Parliament many commentators have argued that is one of the earliest cases supporting the concept of judicial review as it was articulated by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Compare* Gough, Fundamental Law in English Constitutional History (supporting the case for judicial review) *with* George P. Smith II, Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence, 41 Wash. L. Rev. 297 (1966) (also supporting the premise that Bonham's Case involves an early instance of juridical review *with* Berger, Raoul, "Dr. Bonhams Case: Statutory History or Constitutional Theory?" 117 University of Pennsylvania Law Review 521 (Feb. 1969) (neutral commentary), *with* R. H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 Journal of Legal Analysis (2009) (arguing that the statute was properly voided pursuant to natural law not judicial review.)

[9] Last accessed on1/29/21: https://founders.archives.gov/documents/Madison/01-10-02-0178

independent judges. *Id. See also* James Madison, *Federalist Paper No. 9* ("The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The regular distribution of power into distinct departments [including]; the institution of courts composed of judges holding their offices during good behaviour . . ." *See also* Alexander Hamilton, *Federalist Paper No. 78* generally and *No. 79* ("NEXT to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . .")

It is now beyond dispute that the language guaranteeing judicial independence in the Constitution (that federal judges "shall hold their Offices during good behaviour") was derived from the British Act of Settlement of 1701, which provided that "judges' commissions shall be made *quamdiu se bene geserint* [as long as he shall behave himself well]." *Act of Settlement, 12 &*, 13 Will. 2, ch. 2, section 3 (1700) (Eng.). We know this because in 1760 King George III declared that the Act of Settlement, with its good behaviour tenure provision, did not apply to the colonies, and that colonial judges held their offices only "at the pleasure of the Crown."

These policies denying colonists access to that system of judicial independence available to litigants in England provoked armed disputes in North Carolina, South Carolina, and Massachusetts in the 1760s and 1770s. *See e.g.*, Wood, *Creation of the American Republic*, 160; Black, *Massachusetts and the judges*, 108–09; Richard Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, 6–7 (1971); Mary L. Volcansek and Jacqueline Lucienne Lafon, *Judicial Selection: The Cross Evolution of French and American Practices*, 19–20 (1988).

The change in judicial customs abrogating the good behaviour tenure of judges also went against the rules of judicial independence that the colonists had already established for themselves. *See* Smith, Joseph, *An Independent Judiciary: The Colonial Background*, 124 University of Pennsylvania Law Review 1104 (1976); *see also* Federalist Papers, No. 9, 10, 78, 79, 80, and 81. Thus, when complaints were made against the King in the Declaration of Independence, they specifically included those related to the lack of good behaviour tenure for judges. "He (the King) has made Judges dependent on his Will alone, for the Tenure of their offices, and the Amount and Payment of their Salaries." And language overturning this emasculation of United States Federal judges was included as part of Article III. *See* Federalist Papers 78 and 79.

Of course, this Court already knows this. *See United States v. Will*, 449 U.S. 200 (1980)("Independence won, the colonists did not forget the reasons that caused them to separate from the Mother Country. Thus, when the Framers met in Philadelphia in 1787 to draft our organic law, they made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that had brought on the Revolution and separation." *Id.* 449 U.S. at 219). *See also* Pipeline *Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("[T]he principle of life tenure can be traced back at least as far as the Act of Settlement in 1701, . . . To be sure, . . . [the principles of good behaviour tenure were] eroded during the late colonial period, but that departure did not escape notice and indignant rejection by the Revolutionary generation. . . ." *Id.* at 59–60.)

B. Statutes Establishing the Organization of Courts

Part I of 28 U.S.C. establishes the organization of federal courts. Chapter 13 of that chapter contains statutory provisions relating to the "assignment of judges to other courts" §§ 291–297. Chapter 17 of Part I of 28 U.S.C. sets forth the statutory provisions related to the resignation and retirement of justices and judges. §§ 371–377.

Years before the private sector created retirement pensions, the federal government began attempting to do so for federal judges. In the Judiciary Act of 1869 Congress authorized a pension for federal judges who retired after ten years' service. Act of April 10, 1869, ch. 22, § 5, 16 Stat. 45 (codified at 28 U.S.C. §§ 371, 372 (1970)). *See* Federal Judicial Council, "*History of the Federal Judiciary, The Evolution of Judicial Retirement*".[10] The Federal Judicial Council states the retirement provisions of this statute were enacted partially to entice Justice Robert C. Grier to retire from the Supreme Court because he could not otherwise be removed pursuant to Article III's grant of life tenure to judges. *Id.* Other commentators have documented that several other statutory amendments to Article III justices' and judges' retirement programs have also been agreed to by people occupying the federal government's three branches of government so as to induce other specific Supreme Court justices to retire because there was no other way they could be constitutionally replaced. *See e.g., Note, Judicial Disability and the Good Behaviour Clause,* 85 Yale L.J. 706, 720 (1976).

> . . . Three times Congress specifically extended the statute to induce an ailing Justice to retire.
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> In January 1882, Congress passed a bill extending the retirement provisions to Justice Ward Hunt, provided that he retire

[10] Last accessed on January 12, 2020 at: https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement

> within thirty days. Act of Jan. 27, 1882, ch. 4, 22 Stat. 2. Justice Hunt resigned the day the bill was signed. 118 U.S. 701, 701-02 (1886). A similar bill was passed for Justice William Moody. Act of June 23, 1910, ch. 377, 36 Stat. 1861. In his case, though, Congress allowed him five months to resign. The last special provision was passed for Justice Mahlon Pitney who had served a full ten years but had not yet reached age seventy. Act of Dec. 11, 1922, ch. 1, 42 Stat. 1063. *See* 64 CONG. REC. 18 (1922).
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> In 1929 the statute was amended to require only a total of ten years' service (previously ten consecutive years had been required). Act of Mar. 1, 1929, ch. 419, 45 Stat. 1422 (codified at 28 U.S.C. §§ 371, 372 (1970)). The reason for that amendment was to permit Chief Justice Taft to retire. N.Y. Times, Feb. 4, 1930, at 1, col. 8. The pension provisions have been liberalized since 1929. A judge may now retire with full pay at age sixty-five after fifteen years' judicial service or at seventy after ten; a disabled judge who has not served ten years may retire at half pay, 28 U.S.C. §§ 371, 372 (1970).

Id. 85 Yale L.J. 706 at note 64.[11]

In 1944 Congress amended the statute to provide that senior judges must be designated and assigned as district court judges to exercise Article III judicial power in federal courts.[12] *See* Act of May 11, 1944, ch. 192, §§1–3, 58 Stat. 218, 218–19 (current version at 28 U.S.C. § 294(e) "No retired Justice or judge

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[11] The article *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995 (Fall 2000) by David J. Garrow provides a somewhat startling view of the extent of the problem aging justices pose for our democracy. If similar problems exist in the lower federal courts then certainly there may be a need consistent with the mandates of our Constitution to address the problem aging jurists may be causing our courts. *See also* Article: *Note: Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?*, 16 J. L. & Politics 139, 142-48 (Winter 2000).

[12] Prior to the 1944 legislation that clarified this designation requirement, it was reported that "some retired judges ha[d] walked into courtrooms and announced that they were ready to function, when there was no need for their services." 90 Cong. Rec. 3871 (1944) (statement of Rep. Walter). The House Judiciary Committee's report stated that "[i]n the interest of orderly administration of justice with regard to the work of the courts it is advisable that the activity of the [judges in senior status] be fitted into the schedules of the active judges." H.R. Rep. No. 78-934, at 2 (1943).

shall perform judicial duties except when designated and assigned."). The problem with the statute is short designations of judicial power rob semi-retired judges of that good behaviour tenure which Article III establishes is necessary for judges in the federal government. *See e.g.,* Alexander Hamilton, Federalist Paper 78. ("Periodical appointments, however regulated, or by whomsoever made, would in some way or other be fatal to [a judge's] necessary independence."). *See also* "Are Senior Judges Constitutional?" 92 Cornell L. Rev. at 456–457; 461–464; 481–484.

In their article Federal Court of Appeals Judge Stras and Professor Scott provide examples which demonstrate that allowing other judges to designate who gets to exercise judicial power is not the functional equivalent of good behaviour tenure.

> [I]n the past senior judges have been refused designation and assignment because of issues unrelated to inability. For example, Chief Justice Earl Warren refused to designate and assign Justice Charles Evans Whittaker to perform work on the lower court's, despite Justice Whittaker's willingness to undertake such duties, because Chief Justice Warren found him too indecisive during his active service on the Supreme Court. Chief Justice Warren reportedly told a colleague "Tell [Justice Whittaker] that I could never get him to make up his mind, and I'll be damned if I will let him do that to me again trying cases. So the answer is no."

92 Cornell L. Rev. at 482–83.

More problematically, Stras and Scott cite to *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) *aff'd, Grutter v. Bollinger*, 539 U.S. 306 (2003) as being a case in which a Court of Appeals judge alleged the Chief Judge of the Circuit had "used his position in 2001 to delay consideration of race-conscious admissions at the University of Michigan [L]aw [S]chool until two judges opposed to the policy became ineligible to vote on it." 92 Cornell L. Rev. at 483, note 221.

Other commentators have also brought attention to this problem more recently in *The Curiously Nonrandom Assignment of Sixth Circuit Senior Judges*, 108 Ky. L.J. 1 (2019–2020).

If what is said in these articles about judges' use of the senior judge system to achieve political results is true, it well supports Hamilton's contention that periodic appointments of judges by anyone violates the independence of judges that Article III contemplates.

In *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. Pa. L. Rev. 1 (December 2012) Professor Stephen B. Burbank, Court of Appeals Judge S. Jay Plager, and Professor Gregory Ablavsky claim that: "whether or not members of Congress will admit it, they are relying on judges in senior status to take them off the hook for not authorizing an adequate number of judgeships." *Id.* at 93–94. Their complaint in this regard is obvious from the situation in Stafne's home court in the District of Western Washington which has only two active district court judges, out of 23 adjudicators, who actually qualify as district court judges having good behaviour tenure.

Apparently, the three branches of the federal government have agreed among themselves that this retirement program—which frustrates the good behaviour tenure requirement of Article III—is a good way to solve the public policy problem created by elderly judges. Stafne asserts the problem cannot be solved by the federal government alone enacting a law that deprives federal judges of their good behaviour tenure but still allows them to exercise judicial power. Such a feat must be solved by way of amending Article III of the Constitution, which requires ratification by three fourths of the states pursuant to

Article V before the requirement for good behaviour of judges can be abrogated for independent judges. *Cf. Glidden Co. v. Zdanok*, 370 U.S. at 530, 598 Douglas, J. Dissenting ("[T]he dimensions of Article III can be altered only by the amending process, not by legislation.")

C. Judicial decisions interpreting assignment and designation statutes hold they are jurisdictional

In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) two set of litigants challenged they were denied the protection of judges with good behaviour tenure and salary guaranteed by Article III because the judges assigned and designated to adjudicate pursuant to 28 U.S.C. § 293(a) and 294(d) came from non-Article III courts. In a plurality opinion written by Justice Harlan and joined in by Justices Brennan and Stewart the Court held that both the Court of Claims and the Court of Appeals for the District of Columbia were Article III courts and as result their judges had the good behaviour tenure necessary to be independent judges under Article III. *Id.* at 584.

Justice Clark, with whom Chief Justice Warren joined in concurring as to the result that objected to that part of the plurality opinion which purported to overrule *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) and *Williams v. United States*, 289 U.S. 553 (1933). Significantly, these two justices agreed with the plurality that the designated judges being challenged had life tenure. "And I read the 1953 Act as unequivocally expressing Congress' intent that this court—the jurisdiction of which was then almost entirely over Article III cases—should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges." *Glidden* at 587.

Justice Douglas, joined by Justice Black, dissented to the purported overruling of the *Bakelite, supra.*, and *Williams, supra*, precedents and challenged

that the judges who had adjudicated the cases were not Article III judges because they lacked good behaviour tenure. *Glidden, supra.*, at 593–606. Thus, all the justices in *Glidden* appear to agree that in order to act as a judge in an Article III court a judge must have good behaviour tenure.

In *Frad v. Kelly*, 302 U.S. 312 (1937) a district judge in one court sat as a visiting judge under an assignment and designation in another district court to act as a judge for a specified period of time. After the designation of time expired that district court judge issued an order in a case which he had previously adjudicated in the visited district. *Id.* at 313. The Supreme Court concluded that the visiting judge's order was "null" because by the time it was issued his authority to do so under the assignment and designation had expired. *Id.* at 316.

The Court explained that while a visiting judge could "perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district," neither the statute nor the designation empowered him to act beyond the temporal limitations under which he was designated. *Id.* at 316–17. In explaining its holding, the Court noted that the statutory limitations on the authority of visiting judges are jurisdictional. *See id.* at 319.

In *Booth v. United States*, 291 U.S. 339 (1934), which was decided before Congress placed restrictions upon senior judges ability to exercise judicial power in 1944, *see supra.*, this Court held "by retiring, a federal judge does not retire from office or wholly from active service, but in the words of the statute, only 'from regular active service.'" But this holding no longer reflected the law after Congress required that semi-retired judges must be periodically assigned

and designated to exercise the judicial power of an Article III Judge. *See e.g.*, 28 U.S.C. §§ 294(c),(d), and 371(e)(1). Is this supposed to be e or c?

In *Steckel v. Lurie*, 185 F.2d 291 (6th Cir. 1950) the Sixth Circuit (without citing to *Frad*) reached a similar result when interpreting the language of 28 U.S.C. 294 (e), which provides: "No retired justice or judge shall perform judicial duties except when designated and assigned." In *Steckel* the senior judge obtained an assignment and designation to exercise judicial power, *i.e.*, hold Court, in the Eastern Division of the Northern District of Ohio. A few hours after the designation was filed it was withdrawn at the request of the senior judge. The defendant complained about the withdrawn designation, so the senior judge held in a memorandum opinion that 28 U.S.C.§ 294(d) was unconstitutional because it could not be applied to a judge exercising judicial power in the district court to which he was originally appointed with the advice and consent of the Senate. *Id.* at 923–24.

On appeal, the Six Circuit reversed that holding because "it is clear that limitations upon the jurisdiction of a district judge by Act of Congress are not unconstitutional" because inferior federal court judges have only such jurisdiction as Congress affords. *Id.* at 924–25.

In *Wrenn v. District of Columbia*, 808 F.3d 81 (D.C. Cir. 2015) the Court of Appeals concluded based on *Frad* that a senior judge who was designated to adjudicate specific cases in a district court had no authority to decide a case that had not been designated to him. The Court of Appeals held:

> We conclude that *Frad* controls this case. Like the designated judge in *Frad*, Judge Scullin had a limited designation that did not extend beyond the specifications of that designation. In *Frad*, the breached limitation was temporal; in this case, it is case designation. ***In either case, a judge acting beyond his designation acts***

> ***without jurisdiction.*** Appellees argue that the *de facto* officer doctrine supports Judge Scullin's jurisdiction, but that doctrine does not apply. The *de facto* officer doctrine applies in the context of technical defects and confers validity upon acts performed by a person acting under color of official title, even if it is later determined that the title is deficient. *Nguyen v. United States*, 539 U.S. 69, 77-78, 123 S. Ct. 2130, 156 L. Ed. 2d 64 (2003). The designation for specific cases is not a technical matter. It is in fact jurisdictional.

Id. at 84. (Emphasis Supplied)

Frad was also followed most recently in 2018 by senior judge J. Phil Gilbert in *Clark v. United States*, No. 15-cv-726-JPG, 2018 U.S. Dist. LEXIS 27596 (E.D. Wis. Feb. 21, 2018). In that case defendant Clark filed a 60(b)(4) motion to vacate his sentence because Senior Judge Gilbert had not been assigned and designated as a judge to adjudicate his case at the time Gilbert issued a sentencing order. After first dismissing the challenge, Senior Judge Gilbert ultimately agreed the motion to dismiss for lack of jurisdiction had merit but held any jurisdictional problem had been cured by a subsequent assignment and designation of the case by the Chief Judge of the Seventh Circuit Court of Appeals. "Whatever infirmities may have existed in the Court's authority to hear Clark's § 2255 motion—which the Court discusses below—they have been cured by the Wood Designation." *Id.* at 3.

> Neither the Easterbrook Designation nor 28 U.S.C. § 296 gave the undersigned judge the authority to hear new matters not submitted during the designation period, even if those new matters arose in Clark's criminal case. . . . ***Therefore, the undersigned judge lacked jurisdiction at that time to hear Clark's § 2255 case, and the judgment in that case must be vacated.***
>
> However, now that the [subsequent Chief Judge] Wood Designation has cured the lack of authority for the undersigned judge to decide Clark's § 2255 motion, the Court will reenter the same order and judgment forthwith.

Id. at ** 6–7.

Clark subsequently sued senior judge Clark and others for violating his rights pursuant to 42 U.S.C. § 1983 based on the above cited order. Judge Pepper screened Clark's complaint pursuant to 28 U.S.C. § 1915A(a). *See Clark v. Gilbert*, No. 18-cv-337-pp, 2019 U.S. Dist. LEXIS 122949 (E.D. Wis. 2019). Based on Clark's allegations that Judge Gilbert acted "beyond the limits of 28 U.S.C. §§ 291, *et. seq.* to deprive the plaintiff of his federal rights" the district court decided to stay §1983 case until after the appeal of Judge Clark's above order was decided. *Id.* at *10. She should have dismissed it if she found the allegations to be frivolous. Clark's appeal of Gilbert's sentencing order appears to be not yet resolved.

In *Leary v. United States*, 268 F.2d 623 (9th Cir. 1959) a judge from a New York federal district court was assigned to the district court for Northern California beginning August 1, 1956, and ending August 31, 1956. The judge reported for duty early and started a trial one day before his designation began. The defendant was convicted and subsequently appealed, alleging that the visiting judge had no authority to start the trial a day prior to his designation. The Ninth Circuit Court of Appeals *en banc* originally unanimously reversed the conviction in an opinion authored by Judge McGee. *Id.* at 630–37.

The Court later overruled Judge McGee's decision and affirmed the conviction based on its conclusion that 28 U.S.C. § 292(c) allowed the chief judge to temporarily assign a district judge when the need arose. A fractured *en banc* court held that because the "court" which sought to exercise jurisdiction over the defendant was the proper "court", and the judge who empanelled the jury and conducted the proceedings was a duly sworn district court judge of that

"court" (except as to the date the trial was commenced) he was a *de facto* judge on July 31, 1956. The Court explained:

> [N]ot all errors go so far to the root as to make the whole proceeding a complete nullity; else the trouble and expense of litigation would go for nothing and controversy never end. Therefore, the law will not scrutinize too nicely a judge's warrant of authority; ***he may indeed have so little color of office as to stand like a mere interloper, but that is not ordinarily true, if, being duly qualified as a judge, some effort has been made to conform with the formal conditions on which his particular powers depend.*** The Supreme Court has several times refused to treat such conditions as essential to the validity of his acts.

Leary v. United States, 268 F.2d at 627–28.

Stafne asserts that *Leary* is consistent with the previously cited opinions in this section to the extent it acknowledges that an interloper judge, one without constitutional qualification, has no jurisdiction to exercise judicial power under Article III.

D. Article III cases dealing with lack of good behaviour tenure

Many cases decided by this Court have interpreted the meaning of Article III's language from the perspective of both judges and litigants. In this regard, senior judges have frequently sued to obtain relief regarding compensation to which they believed they were constitutionally entitled under the language of Article III. *See e.g., United States v. Hatter*, 532 U.S. 557, 568 (2001); *United States v. Will*, 449 U.S. 200, 219-221 (1980); *Booth v. United States*, 291 U.S. 339 (1934); *O'Donoghue v. United States*, 289 U.S. 516, 531-34 (1933); *Evans v. Gore*, 253 U.S. 245, 249 (1920). These cases demonstrate this Court has long held Article III guarantees of judicial independence exist, "not to benefit the judges," but "as a limitation imposed in the public interest." *Id.* at 568). *United States v. Hatter, supra*, at 568. *See also Evans v. Gore, supra.*

at 249 (1920) ("The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments . . . ."). Thus, this Court has in the past recognized that judges' interests in the attributes of independence are derivative from the need to provide a system of justice capable of protecting the lives and liberties of the People.

Ordinary litigants have also asserted successful Article III claims to have independent judges, *i.e.,* those with life tenure, decide their cases involving the exercise of federal judicial power by judges within the judicial department. These cases have involved both litigants who have been compelled to litigate in non-Article III forums, see *e.g. Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line*, 458 U.S. 50 (1982); *United States ex rel. Toth v. Quarles*, 350 U.S. 111 (1955), as well as litigants who have been compelled to adjudicate cases in federal courts before a substitute adjudicator who does not have the attributes, *i.e.,* tenure and salary, of an Article III judge. *See e.g., Gonzalez v. United States*, 553 U.S. 242 (2008); *Peretz v. United States*, 501 U.S. 923 (1991); *Gomez v. United States*, 490 U.S. 858 (1989); and *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). And finally, there are also cases where on appeal it has been discovered that federal lower courts have mistakenly allowed judicial officers without Article III attributes to exercise judicial power. *See e.g. Nguyen v. United States*, 539 U.S. 69, 123 S. Ct. 2130 (2003); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); *Todd v. United States*, 158 U.S. 278 (1895).

The last two types of cases referenced above, *i.e.*, those dealing with Article III adjudicators, are those which most clearly relate to Stafne's challenges against these senior court judges. In *United States v. Raddatz*, 447 U.S. 667 (1980) a statute in which Congress delegated judicial authority to magistrate adjudicators without good behaviour tenure to decide cases in federal court was challenged pursuant to Article III. The Court rejected the claim because "[i]n passing the 1976 amendments to the Federal Magistrates Act, Congress was alert to Art. III values concerning the vesting of decisionmaking power in magistrates." *Id.* at 681 and note 8. This Court upheld this delegation of Article III judicial power to magistrates only because that statute "permits the district court to give to the magistrate's proposed findings of fact and recommendations 'such weight as [their] merit commands and the sound discretion of the judge warrants.'" *Id.* at 683. This Court has frequently reiterated that the only reason magistrate adjudicators can consider some issues related to cases and controversies within the purview of the judicial department is because:

> "'the district judge—insulated by life tenure and irreducible salary—is waiting in the wings, fully able to correct errors'". *Peretz, supra,* at 938, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (quoting *United States v. Raddatz*, 447 U.S. 667, 686, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980) (Blackmun, J., concurring)).

Gonzalez v. United States, 553 U.S. 242, 251 (2008). *Cf. Exec. Bens. Ins. Agency v. Arkison*, 573 U.S. 25 (2014) (applying the same requirement of review by an Article III judge with tenure to *Stern* decisions by bankruptcy court judges)

In the other type of cases referenced above—where adjudicators without tenure have mistakenly exercised judicial power as part of an Article III court—the result has been vacation of the judgments. In *Todd v. United States*, 158 U.S. 278 (1895) after the case was submitted to the Supreme Court on

certain alleged errors, this Court became aware that the judicial officer making the decision below was not an Article III judge and simply reversed that judicial officer's decision outright. "That a commissioner is not a judge of a court of the United States within the constitutional sense is apparent and conceded. He is simply an officer of the Circuit Court, appointed and removable by that court. . . . A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States." *Id.* 158 U.S. 282–3. In so ruling, Justice Brewer relied upon the precedent established by Justice Story's decision in *U.S. v. Clark,* 1 Gallison 497(1813)[13]:

> Now, under the authority of the United States there are but three courts known in law, the District, Circuit, and Supreme Court; and as Congress alone can, by the Constitution, ordain and establish courts, none can exist but such as they create and name. . . . ***A court is not a judge, nor a judge a court. A judge is a public officer, who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.***

Id. 158 U.S. at 284 (Emphasis Supplied)

In *Nyguen v. United States, supra.*, when the Ninth Circuit Court of Appeals allowed a territorial judge without good behaviour tenure to sit on one of its panels the Supreme Court reversed that panel's decision on that basis alone. The Court held that 28 U.S.C. § 292(a) could not be read so as to authorize the Ninth Circuit Court of Appeals to allow a judge without good behaviour tenure to adjudicate appeals. 539 U.S. 74–76.

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[13] Accessible at: https://www.google.com/books/edition/Reports_of_Cases_Argued_and_Determined_i/Wec7AAAAIAAJ?q=&gbpv=1&bsq=clark#f=false

Similarly, in *Glidden Co. v. Zdanok*, *supra*, this Court sustained the exercise of judicial power by judges of courts it concluded were Article III courts who therefore had life tenure. *See supra.*

E. Stafne has standing to assert his Article III claims

The Framers developed a Constitution in which; (1) governmental power was shared between the federal and state governments (Federalism) to, among other things, protect the liberty of individuals against arbitrary governmental power. *See e.g., U.S. v. Bond*, 564 U.S. 211, 221-22 (2011) (individual had standing to challenge conviction based on premise Congress exceeded its powers by enacting a criminal statute in contravention of basic Federalism principles); and (2) the powers of the federal government were separated into three distinct departments (Separation of Powers) to, among other things, protect the liberty of individuals from such violations of the Separation of Powers as may concretely and particularly injure them. *See Id.* at 223. *See also, INS v. Chadha*, 462 U.S. 919 (1983)(individual about to be deported had standing to challenge the constitutionality of legislative veto statute); C*linton v. City of New York*, 524 U.S. 417, 433-436, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (injured parties had standing to challenge Presidential line-item veto); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (litigants had standing to challenge lack of adjudicators' Article III attributes).

Stafne's Complaint alleged facts documenting particularized injuries-in-fact, both in the past and likely to occur in the future as a result senior judges without good behaviour tenure deciding cases in which he had been involved or would likely be involved in the future sufficient to invoke review under the standing cases just cited. As to his past claims, Stafne showed that Senior

Judges Zilly and Silverman, adjudicators without good behaviour tenure, had exercised judicial power in such a way as to cause his home to be foreclosed upon without any consideration of merits issues. As to the imminent threat of injury resulting from judges without good behaviour tenure deciding future cases in which he is involved, Stafne alleged in his complaint that only four out of that District Court's twenty-two adjudicators had the good behaviour tenure required to be an independent Article III judge. Pet. App. 58, Complaint, ¶ 4.12. And now he shows the Western Washington District Court has only two judges (out of 23) adjudicators who have good behaviour tenure. *See supra.*, p. 1. Thus, Stafne has alleged that his particular injuries are "actual [and] imminent, not 'conjectural' or 'hypothetical.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) citing *Defenders of Wildlife*, 504 U. S., 555, 560 (1991). Moreover, there can be little doubt that if Stafne's jurisdictional challenge is sustained, his past and future threatened injuries can be redressed by an Article III court. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) ("[I]njuries can be remedied by a ruling in favor of the Bank that the tribal court lacked jurisdiction and that its judgment on the discrimination claim is null and void." *Id.* at 326–27.)

F. Stafne's claims under 42 U.S.C. §1983

Stafne alleged that relief was merited under 42 U.S.C. §1983 against Defendants Zilly and Silverman "because by purporting to act as federal judges ordering [Washington state] Snohomish County Sheriff Trenary to sell Stafne's real property *res* [located in Washington state] when they had no authority to do so, they have deprived Stafne of rights, privileges, and immunities secured him by the Constitution and laws." Pet. App. 52a–53a, ¶ 3.11.

Both the District Court and the Court of Appeals dismissed Stafne's §1983 claim based solely on the authority of *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1257-58 (9th Cir. 2008). *See* 2–3a; 16a. "Ibrahim complains that the Transportation Security Administration instructs airline personnel to detain and interrogate any person whose name is on the No-Fly List, and that because her name was on the list, she was 'stigmatized, humiliated, and subjected to interrogations, delays, enhanced searches, detentions, travel impediments, and . . . actual physical arrest.'" *Id.* at 1256. The Ninth Circuit dismissed the §1983 claims against the federal government and its officials in *Ibrahim* and in Stafne's appeal because the defendants acted under color of federal law, not state law. *Id.* at 1257. But *Ibrahim*'s rationale does not apply to Stafne's claims here.

Zilly and Silverman were sued individually because Stafne alleged they did not have the required Article III attributes to be exercising judicial power under the Constitution, *i.e.,* because they were interloper, not independent judges. In other words, Zilly and Silverman were sued because they had no constitutional authority to apply that Washington law which they used to foreclose upon Stafne's home in Washington state based on jurisdiction they did not have. *See Frad v. Kelly*, 302 U.S. 312 (1937); *Todd v. United States*, 158 U.S. 278 (1895). Thus, Stafne's Complaint is premised on the *ultra vires* actions of Zilly and Silverman under color of Washington state foreclosure law by which Stafne now faces a forcible eviction from his home by a Washington State County Sheriff based on a null order of the District Court.

In *Ibrahim* the Ninth Circuit recognized the longstanding principle that federal officials can be held liable under §1983 where there is a "sufficiently

close nexus between the State and the challenged action of the [federal actors] so that the action of the latter may be fairly treated as that of the State itself," citing *Cabrera v. Martin*, 973 F.2d 735, 744 (9th Cir. 1992). *Ibrahim*, at 1257. Here, such a nexus exists by virtue of the Separation of Powers, Federalism, and supremacy of federal courts structure of the United States Constitution as well as Washington Constitution art. I, §2 which provides: "The Constitution of the United States is the supreme law of the land." Thus, these adjudicators were acting under color of both state and federal law and there is no reason their actions of under color of state law should be exempted from the consequences of the clear language of the statute under these circumstances.

G. The Collateral Attack doctrine does not apply to void judgments

A void judgment is a legal nullity, *see* Black's Law Dictionary 1822 (3d ed. 1933); *see also id.* at 1709 (9th ed. 2009). As this Court observed in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) "a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *See also* Restatement (Second) of Judgments 22 (1980); *see generally id.* § 12.

Federal court decisions by judicial interlopers qualify for the list of jurisdictional infirmities that Article III courts do not have discretion to ignore. *Compare Glidden Co. v. Zdanok*, 370 U.S. 530, 533-38 (1962) ("Article III § 1 . . . is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record." *Id.* at 34) with *Freytag v. Commissioner*, 501 U.S. 868 (1991)(Courts have "discretion to consider nonjurisdictional [Appointments Clause] claims that had not been raised below.")

Although the District Court claims otherwise, Stafne asserts that the allegations in the Stras and Scott article that senior judges did not have the tenure necessary to be independent judges constituted a jurisdictional challenge that Article III courts are required to resolve. *See e.g., Ayestas v. Davis*, 138 S. Ct. 1080, 1088 (2018) ("Before we reach that question, however, we must consider a jurisdictional argument advanced by respondent, ...") *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008) (Bank's argument that tribal court did not have authority to render judgment against it was a "jurisdictional challenge"); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (holding nonparty witness can assert challenge based on lack of subject-matter jurisdiction in case to which she was not a party.); *Cf. Glidden Co. v. Zdanok, supra.*

Because Stafne's challenge is a jurisdictional one under Article III—not simply a claims processing complaint—this Court should address it because the courts below in this case and the BNYM case have outright refused to do so notwithstanding they concede they have notice of the jurisdictional challenge. *See e.g. Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849 (2019)(distinguishing between truly jurisdictional challenges that cannot be waived and claims processing claims that are waived if not timely made). *See also United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940)(collateral attack on subject-matter jurisdiction is permissible "where the issue is waiver of sovereign immunity"); *Kalb v. Feuerstein*, 308 U.S. 433, 439-440, 444 (1940)(where debtor's petition for relief was pending in bankruptcy court and federal statute affirmatively divested other courts of jurisdiction to continue foreclosure proceedings, state-court foreclosure judgment was subject to

collateral attack). *Cf. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 153 n.6 (2009) (in refusing to hold challenged decision void this Court describes three exceptional circumstances in which a collateral attack on subject-matter jurisdiction is permitted: (1) "Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government"; or (2) "The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject-matter jurisdiction"; or (3) "The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority".

Stafne urges the principles set forth above favor allowing his collateral attack on the BNYM judgment because: (1) Requiring Stafne to have the BNYM case decided by an adjudicator without any tenure infringed upon the authority of a constitutionally independent judge with good behaviour tenure to adjudicate the BNYM case; (2) The BNYM judgment was rendered by a district court without a constitutionally tenured judge. That court refused to adjudicate Stafne's constitutional challenge to Zilly's independence, as did the Ninth Circuit Court of Appeals in both this and the BNYM cases. As a result, Stafne's constitutional challenge has never received a fair hearing before a properly constituted Article III court; and (3) Federal courts and judges have long known about the constitutional challenges to senior judges' jurisdiction but have avoided considering them (perhaps out of self interest).

H. Senior judges' judicial immunity defense

Judicial immunity is a longstanding concept, the purpose of which is to assure judicial independence by insulating judges from adverse consequences for making decisions within the jurisdiction conferred upon them that they are required to decide. *See Pierson v. Ray*, 386 US 547, 553-54 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). Given this purpose, it is not a doctrine that is appropriately used to preempt consideration of the jurisdictional challenges to the senior judges' exercise of judicial power that Stafne makes here; namely, that these senior judges are not independent judges within the meaning of the United States Constitution who can exercise federal judicial power on behalf of Article III federal courts.

By utilizing the immunity doctrine to prevent consideration of the issue of their constitutional independence the District Court reaches a result that is inimical to the purpose of the doctrine, *i.e.,* assuring the independence of judges.

Immunity cannot be properly invoked without a court first determining whether the actors being sued have acted properly. This involves consideration and resolution of whether challenged conduct was legally appropriate. If not appropriate, the next issue is determining whether immunity should apply. *See Taylor v. Riojas*, 208 L.Ed.2d 164, 165 (2020)(holding court of appeals properly held challenged conduct violates Eight Amendment, but erred in allowing government officials qualified immunity); *Filarsky v. Delia,* 566 U.S. 377, 387, 394-95 (2012)(indicating 42 U.S.C. § 1983 may apply to judges and adjudicators acting outside the scope of their subject-matter jurisdiction.) Here, the District Court should have considered and resolved Stafne's

jurisdictional challenge based on Article III to senior judges exercising authority they did not have over him as a litigant prior to dismissing these allegations of his complaint.

In *Stump v. Sparkman*, 435 U.S. 349 (1978) this Court explained that when a judge acts without jurisdiction to do so (such as occurred in Frad *v. Kelly, supra.*,), that jurist is not entitled to immunity. In doing so this Court offered the following analogy:

> [I]f a probate judge, with jurisdiction over only wills and estates should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime he would be merely acting in excess of his jurisdiction and would be immune.

Id. at 357 n. 7 (*citing Bradley v. Fisher, supra.*)

This case is more like the first example (a judge without jurisdiction) than the second one where the judge was acting in excess of his jurisdiction. This is because Stafne's Complaint alleges these senior judges are not constitutionally qualified to exercise the judicial power of the federal branch of government—or as the Ninth Circuit put it in *Leary v. United States, supra,* that they are judicial interlopers having no right to act as judges in the Article III judicial department because they do not have that good behaviour tenure necessary to be independent judges and are not overseen by judges who do have such tenure and are independent judges.

For two reasons, the specific senior judges being challenged here for their past actions—and those who will be affected if Stafne obtains that future relief he requests—should have known that continuing to adjudicate cases as Article III judges without good behaviour tenure violates Article III's jurisdictional

provisions. First, this has long been an issue of academic and judicial debate at least as far back as 2007 when Judge Stras and Professor Scott openly asserted that position. Secondly, case law has demonstrated that federal judges without specific jurisdiction from Congress have no jurisdiction to act as federal judges. *See e.g. Frad v. Kelly*, 302 U.S. 312 (1937); *Wrenn v. District of Columbia*, 808 F.3d 81 (D.C. Cir. 2015); *Steckel v. Lurie*, 185 F.2d 291 (6th Cir. 1950). *Cf. Leary v. United States*, 268 F.2d 623 (9th Cir. 1959) Certainly if district court judges must have statutory jurisdiction to act as judges, they must also have constitutional authority to do so as well. Article III tenure is much more than the claims processing requirement the District Court suggests it is.

As this Court has long recognized all federal courts have limited jurisdiction under the Constitution. The very nature of this limitation requires that courts and judges decide at the outset of each case whether that court and judge has subject-matter jurisdiction to adjudicate it. *See e.g. Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016)(Supreme Court has an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 51-15 (2006)(same); *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented."); *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it."); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) ("[E]very federal court has a special obligation to satisfy itself not only of its jurisdiction, but also that of the lower courts in a cause under review.");

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908); ("Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded."); *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) ("This question [of Subject-Matter jurisdiction] the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."); *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 126–27 (1804) ("Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.").

Thus, for years senior judges and those courts they serve have had a responsibility under the Constitution to address the jurisdictional issues Stafne raises here without regard to such issues being raised by the parties. But no senior or active judges appear to have ever done so. And now that this jurisdictional challenge has arrived at this Court's doorstep, it would appear under its own precedents just cited that it has an obligation to resolve this jurisdictional claim now that it is properly before this Court.

I. The decisions of the Court below should be summarily reversed pursuant to this Courts' decisions in *Johnson v. City of Shelby* and *United States v. Sineneng-Smith*

Although a person reading Stafne's Complaint instituting this action, *see* Pet. App. 42a–108a, may conclude that it is not a bright light illuminating a dark heaven: it didn't have to be. All the complaint had to do was put the other side and the District Court on notice of those facts necessary to establish Stafne's jurisdictional challenge that senior judges acting as Article III Judges without good behavior tenure had violated Article III. *See* e.g. *Johnson v. City of Shelby*, 574 U.S. 10 (2014). Stafne's Complaint did this by incorporating the

facts alleged in the article by Judge Stras and Professor Scott as part of this Complaint. Pet. App. 49a–50(a), Complaint ¶ 3.1–3.2) And the District Court concedes this was done: "Stafne incorporates by reference a law review article written by David R. Stras and Ryan W. Scott. Stafne argues that for the reasons discussed by Judge Stras and Professor Scott, the Federal Judges do not validly exercise judicial power under Article III." Pet. App. 31a.

Thus, the District Court should not have dismissed Stafne's Article III jurisdictional attack with prejudice unless it was not plausible and could not be made **so** by way of amendment and only then after explaining why Stafne's jurisdictional attack should fail.

In *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) this Court observed that "[i]n our adversarial system of adjudication, we follow the principle of party presentation . . . [I]n both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

With all due respect for the District Court and Court of Appeals it appears neither followed the principles of justice set forth in *Shelby* and *Sineneng-Smith* because both refused to consider the Article III jurisdictional arguments that Stafne made based on senior judges' loss of good behaviour tenure and consequent need to be assigned and delegated by specific judges or justices periodically to exercise Article III judicial power. Unfortunately, the failure to do so under the facts of this case appears more attributable to these judges' aversion to changing a retirement system that works well for them, rather than addressing the difficult question of that program's constitutionality.

CONCLUSION

Stafne requests this Court grant his Petition for Certiorari, and if appropriate summarily reverse the decisions of lower courts with instructions to adjudicate the Article III jurisdictional challenges Stafne has raised. Dated this 1st day of February 2021.

Respectfully submitted,

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