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August 30, 2012

The Honorable Greg Abbott
Attorney General of Texas
Attention Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Via Certified Mail

Dear Mr. Abbott,

Request is here made by Tom Maness, Jefferson County District Attorney, for an AG opinion clarifying and describing the authority of a federal senior status judge to perform marriages in the State of Texas. A brief is attached hereto for your consideration in conjunction with your opinion.

Thank you for your assistance.

Tom Maness
Jefferson County Criminal District Attorney

By: Philip Babin,
Assistant District Attorney

Enclosure-Brief

**BRIEF IN SUPPORT OF REQUEST FOR ATTORNEY GENERAL
OPINION REGARDING AUTHORITY OF SENIOR STATUS FEDERAL
JUDGES TO CONDUCT MARRIAGE CEREMONIES IN TEXAS**

I. QUESTION PRESENTED

Is a senior status federal judge who has been designated and assigned to hold court in Texas authorized by Texas law to conduct marriage ceremonies?

II. FACTUAL BACKGROUND

U.S. District Judge Thad Heartfield is periodically asked to perform marriage ceremonies in the State of Texas. The Texas statute designating persons authorized to conduct marriage ceremonies has been interpreted to not vest authority to marry individuals in retired federal judges. Although Judge Heartfield has not resigned from the bench, he advised President Obama that effective January 1, 2010 he intended to retire from regular active duty service but continue rendering substantial judicial service as a senior judge. *See Exhibit 1—Letter to President Obama.* That same day, Judge Heartfield advised Fifth Circuit Chief Judge Edith Jones of his intentions and requested designation as a senior judge. *See Exhibit 2—Letter to Chief Judge Jones.* On December 5, 2011 the U.S. Senate confirmed President Obama's nomination of Rodney Gilstrap to fill the vacancy in the court created by Judge Heartfield's senior status election. On December 6, 2011 Chief Judge Jones designated and assigned Judge Heartfield to hold court in the Eastern District of Texas from January 1, 2012 to December 31, 2012. *See Exhibit 3—Order of Designation.* Thereafter, Chief Judge David Folsom of the Eastern District of Texas advised Chief Judge Jones that he supported allocation of a full staff to Judge Heartfield based upon an annual case disposition record exceeding 200 caseweights. *See Exhibit 4—Recommendation Letter.* Thereafter, Chief Judge Jones certified that Judge Heartfield performed judicial and court-related duties equal to the work

of an average judge in active service. *See Exhibit 5—Senior Judge Certification.* On February 13, 2012, the Fifth Circuit executive allocated Judge Heartfield a full staff through Fiscal Year 2013 based upon his caseload disposition record. *See Exhibit 6—Staffing Resources Certification Report.*

III. LEGAL AUTHORITIES

A. Texas Family Code § 2.202 (a)(4)—Persons Authorized to Conduct Marriage Ceremonies in the State of Texas (Exhibit 7)

“The following persons are authorized to conduct a marriage ceremony:

* * *

a justice of the supreme court, judge of the court of criminal appeals, justice of the courts of appeals, judge of the district, county, and probate courts, judge of the county courts at law, judge of the courts of domestic relations, judge of the juvenile courts, retired justice or judge of those courts, justice of the peace, retired justice of the peace, judge of a municipal court, or *judge or magistrate of a federal court of this state*” (emphasis added).

B. Texas Attorney General Opinion GA-0948 (2012)—Retired Federal Judges Not Authorized to Conduct Marriage Ceremonies in the State of Texas (Exhibit 8)

“Section 2.02(a)(4) of the Family Code does not authorize a retired federal judge to conduct a marriage ceremony in Texas.”

C. 28 U.S.C. § 371—Retirement in Senior Status by Federal Judge (Exhibit 9)

Any justice or judge of the United States appointed to hold office during good behavior *may retain the office but retire from regular active service* after attaining the age and meeting the service requirements, whether continuous or otherwise, of subsection (c) of this section and shall, during the remainder of his or her lifetime, continue to receive the salary of the office if he or she meets the requirements of subsection (e). 28 U.S.C. § 371(b)(1) (emphasis added).

In order to continue receiving the salary of the office under subsection (b), a justice must be certified in each calendar year by the Chief Justice, and a judge must be certified by the chief judge of the circuit in which the judge sits, as having met the requirements set forth in at least one of the following subparagraphs: The Justice or Judge must have 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. 28 U.S.C. § 371(e)(A).

D. 28 U.S.C. § 294– Assignment of Senior Judge to Active Duty (Exhibit 10)

Any judge of the United States who has *retired from regular active service* under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d). 28 U.S.C. § 294(b).

Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is willing and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake. 28 U.S.C. § 294(c).

No retired Justice or Judge shall perform judicial duties except when designated and assigned. 28 U.S.C. § 294(e).

E. 28 U.S.C. § 296–Senior Judge Powers Upon Designation and Assignment (Exhibit 11)

A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices. However, a district judge who has retired from regular active service under section 371(b) of this title, when designated and assigned to the court to which such judge was appointed, having performed in the preceding calendar year an amount of work equal to or greater than the amount of work an average judge in active service on that court would perform in 6 months, and having elected to exercise such powers, shall have the powers of a judge of that court to participate in appointment of court officers and magistrate judges, rulemaking, governance, and administrative matters (emphasis added).

F. Case Law

Booth v. United States, 291 U.S. 339, 54 S. Ct. 379 (1934)
Nguyen v. United States, 539 U.S. 69, 123 S. Ct. 2130 (2003)

United States v. Moore, 101 F.2d 56 (2d 1939)
Porter v. Commissioner of Internal Revenue, 856 F.2d 1205 (8th Cir. 1988)
United States v. Teresi, 484 F.2d 894 (7th Cir. 1973)
Steckel v. Lurie, 185 F.2d 921 (6th Cir. 1950)

IV. LEGAL BACKGROUND

The state statute setting forth who may perform marriage ceremonies in Texas only vests certain judges the authority to do so following retirement. TEXAS FAM. CODE § 2.202 (a)(4). The Texas Attorney General has construed this statute as not authorizing Article III judges who have retired from the bench to perform marriage ceremonies. *See Exhibit 8—Texas Attorney General Opinion GA-0948*. This request seeks further clarification of the Texas statute as it relates to whether an Article III judge who has retired in senior status but continues to render judicial service pursuant to designation and assignment procedures is authorized to marry individuals in the State of Texas.

Characterized as a form of quasi-retirement, senior status judges remain in office but can modify the nature, location and amount of judicial work assigned to them. Only judges who have satisfied certain age and federal judicial service eligibility requirements¹ are entitled to the privilege of retirement in senior status. 28 U.S.C. § 371(c).

Recognizing that valuable service could be performed by experienced judges who were eligible

¹ The so-called “Rule of Eighty” determines eligibility for an Article III judge to leave the bench on full salary or retire in senior status. 28 U.S.C. § 371(c). Beginning at age 65, a federal judge may elect retirement on salary after performing 15 years of active service as an Article III judge. A sliding scale of increasing age and decreasing service enables retirement on salary at age 70 with a minimum of ten years of service.

to retire on full salary, Congress established the concept of senior status retirement for Article III judges in 1919. *See Exhibit 12—Senior Status and Retirement for Article III Judges.* To induce such retirement-eligible judges to continue serving when there was little financial incentive to do so, senior judges are able to limit the number and types of cases assigned to their dockets, tailoring the work they provide to their inclinations and strengths. (Active federal judges have little or no control over the number or types of cases assigned to their dockets.) Retirement in senior status opens up the active duty judgeship for appointment, thereby allowing the president to nominate a successor to the post even when the judge elects to continue performing judicial duties on senior status.

Senior judges are critical to the operation of the federal judiciary. They ameliorate backlog problems caused by the expanding federal caseload and persistent federal bench vacancies. They serve as mentors to new judges and promote continuity within the judiciary. They have been described as “indispensable,” “essential,” “inestimable,” and “invaluable.” *See* David R. Stras and Ryan W. Scott, *Are Senior Judges Unconstitutional?* 92 Cornell Law Review 453 (2007). In the words of former Chief Judge James Oakes, they are “a boon and a bargain to the public and to the judiciary.” James L. Oakes, U.S. Court of Appeals for the Second Circuit, Remarks at the Annual Judicial Conference (September 7, 1990).

Senior judges must be certified each calendar year by the chief judge of the circuit in which the judge was commissioned as having met certain workload requirements in the preceding year in order to receive subsequent raises in judicial salary. 28 U.S.C. § 371(e). Funding for staffing and chambers/courtroom allocation is also contingent on senior judges case disposition records. Senior judges must be annually designated and assigned to perform judicial duties by the circuit chief judge,

circuit judicial council, or the Chief Justice of the Supreme Court. 28 U.S.C. § 294 (c),(d). Absent designation and assignment to a court, a senior status judge is not empowered to perform judicial duties. 28 U.S.C. § 294(e); *see also Steckel v. Lurie*, 185 F.2d 921 (6th Cir. 1950).

The phraseology “retirement in senior status” has been described as not well-chosen. Senior judges resign from active duty, but not from the office or their posts. It is helpful to consider how the Administrative Office of the United States Courts distinguishes between categories of Article III judges:

active service

senior status

retirement from office on salary

resignation

See Exhibit 12—Senior Status and Retirement for Article III Judges. The last two categories of judges relinquish the office irrevocably and may no longer perform judicial duties. Senior status judges, in contrast, retain the office. 28 U.S.C. § 371(b).

Even before the predecessor statute to section 371 included the retention of office language, the United States Supreme Court made clear that retirement in senior status is retirement from regular active service on the bench, but *not* retirement from judicial office or resignation. *Booth v. United States*, 291 U.S. 339, 348-350, 54 S. Ct. 379, 380 (1934). The high court reasoned that:

“it is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge. The act does not, and indeed could not, endue him with a new office, different from but embracing the duties of the office of judge. He does not surrender his commission, but continues to act under it.

Booth, 291 U.S. at 350-351, 54 S. Ct. at 338. Relying on *Booth*, the Second Circuit reiterated this distinction between retirement and resignation: “when a United States judge retires without resigning, he retains his office.” *United States v. Moore*, 101 F.2d 56, 58 (1939). It was not until 1948 that section 371 was drafted to include the retention language, and the revision notes explain that the phrase was included so as to distinguish resignation and retirement based on *Booth*. More recently Justice Stevens speaking for the Supreme Court observed that a senior judge serving on an appellate court three-judge panel was “of course” a life-tenured Article III judge. *Nguyen v. United States*, 539 U.S., 69, 72 123 S. Ct. 2130, 2133 (2003).

The authority of senior judges to act in judicial matters is clearly established by both statute and case law. The federal law addressing the powers of senior judges once designated and assigned provides that the judge “may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.” 28 U.S.C. § 296. “Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned” with only minor limitations.² *Id.*

The Seventh Circuit has held it “irrelevant” to a jurisdictional inquiry that the presiding district court judge was a senior judge who had been designated and assigned to the court. *United States v. Teresi*, 484 F.2d 894, 898 (7th Cir. 1973). The senior judge was empowered to “exercise the jurisdiction of the court to the same extent as any judge in regular active service.” *Id.* Once designated and assigned to serve by the circuit chief, the status of a senior judge “is the same as that of any active judge” in the

² A senior judge is not eligible to act as the chief judge of the court, to serve as a regular member of the Judicial Conference, and is not entitled (but may be allowed) to vote on administrative court decisions.

district. *Booth*, 291 U.S. at 351, 54 S. Ct. at 338. Such a judge possesses all judicial power necessary to act. *Moore*, 101 F.2d at 59.

V. CONCLUSION

Based on the foregoing analysis of retirement in senior status, it is the conclusion of the requester that a senior status federal judge who has been designated and assigned to hold court in Texas is authorized by Texas law to conduct marriage ceremonies because once designated and assigned a senior judge exercises the jurisdiction of the court concomitant to a judge in regular active service.