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Retirement of Judge

Out 3/1/74

This is in response to your oral request for our advice on Judge retirement status.

According to the papers transmitted to us, Judge advised the President by letter dated February 12, 1974, that, being permanently disabled, he elected to retire from regular active service, effective on the close of business April 1, 1974, pursuant to the provisions of 28 U.S.C. 372(a). His letter was accompanied by the required certificate signed by Chief Judge

Under the provision a judge or justice of the United States, who is permanently disabled from performing his duties may retire from regular active service. If a judge retiring under that section has served for ten years he receives the salary of his office for the remainder of his life. If he has served for less than ten years he is entitled to receive one-half of the salary of the office for life.

By a subsequent letter, dated February 20, 1974, Judge notified the President that he had received further medical advice which has led him to believe that he is not permanently disabled, and that he now reasonably feels that after having received proper medical treatment he "can fully render effective service" in his capacity of Chief Judge

Judge therefore is withdrawing his election to retire and requests "if regulations permit" that the Certificate

of Disability issued by Chief Judge [redacted] be returned to him. It appears that the President has not as yet taken any action on Judge [redacted] initial letter.

The White House presumably is seeking the advice of the Department of Justice as to Judge [redacted] ability to withdraw his election to retire, effective April 1, 1974. In our view, he may do so. Accordingly, [redacted] certificate may properly be returned, as requested.

There appears to be no precedent dealing with the precise question whether an election to retire may be withdrawn. However, in the closely related field of resignations it has been established by a number of recent court rulings that a resignation to take effect in the future may be withdrawn prior to its effective date, especially where, as here, it had not been accepted prior to that time. Goodman v. United States, 424 F.2d 914 (C.A. D.C. 1970); Cunningham v. United States, 191 C.Cl. 471, 479-482, 423 F.2d 1379, 1384-1385 (1970); Haine v. Googe, 248 F.Supp. 349, 351-352 (S.D. N.Y. 1965).

The rationale applicable to resignations would appear to extend equally to retirements. Here there is the additional consideration that the statutory retirement pay benefits referred to above apply only to judges who are "permanently disabled". It has become apparent prior to the retirement date that Judge [redacted] is not permanently disabled and hence not entitled to such benefits.^{2/} In these circumstances it is only appropriate

^{1/} These cases involve the question whether federal officers or employees may withdraw their resignations prior to the day on which those resignations were to become effective.

^{2/} Judge [redacted] has been on the bench since [redacted] and therefore could retire at his full salary for disability. However, since he is only [redacted] years of age he could not qualify for any benefits under 28 U.S.C. 371. (Retirement for age.)

that a judge should be permitted, if indeed he is not required, to withdraw his election to retire for disability when it is discovered, prior to the effective date of his retirement and before the President has taken any action on that election, that the judge is not in fact permanently disabled.