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ASSESSING AND ADDRESSING THE PROBLEMS CAUSED BY LIFE TENURE ON THE SUPREME COURT

Philip D. Oliver*

All would agree that the Justices of the Supreme Court of the United States collectively exercise enormous power. Only slightly less obvious is the fact that, given the frequency of five-to-four decisions, especially in the most important and controversial cases, each individual Justice is an important political actor. Writing half a century ago, Professor Frank opined that "the individual Supreme Court Justice probably has more actual power than any other individual in American public life except the President."[1] Some might dispute this precise assertion—observers have sometimes given the number two ranking to the Chairman of the Federal Reserve System, for example.[2] On the other hand, people with an interest in the law might argue that, after the President, the most important American decisionmaker over the past several years has been Justice Kennedy. And on the momentous day last summer when the Court upheld "Obamacare," no one doubted the importance of Chief Justice Roberts. Regardless of the precise pecking

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1. John P. Frank, *Marble Palace: The Supreme Court in American Life* 8–9 (Knopf 1958).

2. *Forbes*, which provides various rankings of the rich and powerful, recently ranked Federal Reserve Chairman Ben Bernanke as the fourth most powerful person on the planet, and the second most powerful American, behind only President Obama. (Hu Jintao, President of the People's Republic of China, and Vladimir Putin, Russian Prime Minister, were ranked second and third on the world stage, between Obama and Bernanke.) Michael Noer, *The Most Powerful People on Earth*, 10 Forbes 86 (2010).

order, it is obvious that the identity of the individuals who sit on the Supreme Court is quite important to the country.

Justices, like other Article III federal judges, enjoy life tenure.[3] In this article, I contend that such life tenure is an anachronism that poses various problems, at least on the Supreme Court; that there is reason to believe that these problems are increasing; that life tenure is not justified by our legitimate concern for judicial independence; and that, therefore, either life tenure for Supreme Court Justices should be ended, or the adverse effects of life tenure be reduced by less drastic measures.

I. LIFE TENURE IS AN ANACHRONISM.

Unquestionably, life tenure is a uniquely powerful way of guaranteeing the independence of Supreme Court Justices from political pressures. But this benefit must be weighed against its extremely anti-democratic nature.

I seriously question that we would opt for life tenure for Justices if we were drafting our Constitution today. I am unaware of any other country that uses a system of life tenure for its judges.[4] Admittedly, foreign practice alone is not reason for us to abandon life tenure. But, particularly given that the American system of government is known and admired throughout the world, it is interesting that apparently no one else follows this practice.

At the time that the Constitution was drafted, it would have been easy to regard life tenure as a step forward. In the personal memory of the drafters, judges had served at the pleasure of the Crown, a practice wholly at odds with any notion of an

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3. U.S. Const. art. III, § 1 (providing that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour," which has almost uniformly been understood to equate to effective life tenure) (available at http://www.senate.gov/civics/constitution_item/constitution.htm#a1).

4. *See e.g.* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Policy 769, 821 (2006) ("[E]very other major democratic nation that we know of—all of which drafted their respective constitutions or otherwise established their supreme constitutional courts after 1789—has chosen not to follow the American model of guaranteeing life tenure to justices equivalent to those on our highest court.").

independent judiciary.[5] The regard for judicial independence that led the Constitutional drafters to opt for life tenure was apparently persuasive in the states as well. Eight of the original thirteen states gave their judges life tenure,[6] as did eight of the eleven states admitted before 1830.[7] But as the Nineteenth Century wore on, concern about the anti-democratic nature of life tenure came to be seen as more important, with the result that state after state abandoned life tenure. By a fairly recent count, judges in forty-six states "face some form of electoral review."[8] Apparently only one state—Rhode Island—maintains a system of life tenure equivalent to that enjoyed by United States Supreme Court Justices.[9]

Consideration of the structure of the entire federal government suggests that more than a concern for judicial independence underlay the adoption of life tenure. Democratic self-government was a largely untested project, and the framers were treading lightly in all branches of government. In the executive, the President was not to be elected by the people. The electoral college arrangement allocated votes to the states, and the electors were to be "appoint[ed], in such Manner as the legislature thereof may direct."[10] Even assuming that the legislature opted for popular election, the people would be trusted only to the extent of allowing them to select the distinguished men of the various states who would, in turn, choose the President.[11] In the past two centuries, political and

5. This lack of independence was among the colonial grievances that led to the Revolutionary War. Arthur Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection* 21 (Boston U. Press 1956).

6. *Id.*

7. *Id.*

8. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. Rev. 233, 275–76 (1988).

9. Calabresi & Lindgren, *supra* n. 4, at 821.

10. U.S. Const. art. II, § 1 (available at http://www.senate.gov/civics/constitution/_item/constitution.htm#a1)).

11. In addition to providing for an indirect method of election, the electoral college has the effect of slightly increasing the relative weight of smaller states. If State X has three Representatives, State Y, with five times as much population, will have fifteen members. In a system of direct popular election for the President, one would expect that State Y would influence the outcome about five times as much as State X. But in the electoral college, State X will have five votes and State Y seventeen, or considerably less than five times the weight given State X.

legal changes have rendered the electoral college merely a quaint way of counting the popular vote.[12]

Limited democracy is also apparent in the legislative branch. While the House of Representatives has always been popularly elected, the Senate—which is, it should be noted, the more powerful body[13]—is another matter. For over a century, Senators were chosen by state legislatures, until 1913, when the increased taste for popular sovereignty led to adoption of the Seventeenth Amendment.

While other branches of the federal government have become more democratic since the Constitution was drafted, the judiciary has, if anything, become less so. The only real check on the power of the judiciary provided by the Constitution is the power of impeachment,[14] but no Justice has ever been removed from office. Indeed, over two hundred years ago, President Jefferson came to the conclusion that the impeachment power was a "scarecrow."[15]

In every aspect of government, a balance must be struck between two values, both of which are desirable. First, we would prefer to provide policymakers sufficient protection from

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12. Rarities such as the election of 2000, in which the popular vote winner lost the electoral college vote, offer zero support for the idea that we do not at present trust the people to elect the President. At most, the present role of the electoral college represents a commitment to a continuing role for states in the Presidential election. More likely, our present arrangement marks the present stage of the progression from an indirect process distrustful of democracy to a fully democratic election. Because the electoral college and the popular vote almost always yield the same result, continued adherence to the electoral college could be placed in the "if it ain't broke, don't fix it" category. Indeed, I ask the reader: Is there any chance whatever that we would include the electoral college in our Constitution if we were starting over?

13. Both branches must concur in order for a statute to be enacted. But the Senate has a wide range of powers not shared by the House. The most important of these is the power of advice and consent to the making of treaties and to the appointment of ambassadors and other officials of the executive branch. U.S. Const. art. II, § 2 (available at http://www.senate.gov/civics/constitution_item/constitution.htm#a1)). And, of course, relevant to the subject of this article, the Senate must consent to the appointment of Supreme Court Justices and other federal judges. *Id.*

14. Impeachment is structured to be difficult. The power is divided between the two houses of Congress. The House of Representatives has the power to impeach, after which the Senate must convict by a two-thirds vote. U.S. Const. art. I, § 2, cl. 5 (vesting power of impeachment in House); art. I, § 3, cl. 6 (vesting power to try all impeachments in Senate) (available at http://www.senate.gov/civics/constitution_item/constitution.htm#a1).

15. *Courts, Judges, and Politics: An Introduction to the Judicial Process* 552 (Walter F. Murphy & C. Herman Pritchett eds., Random House 1961).

political pressures in order that they be able to do what they think best. But this argument can carry us too far. Rule by an enlightened despot can be viewed as an ideal governmental system, because the despot can make desirable changes that might be blocked by a political system more responsive to popular will.[16] However, a second value, fundamental from our founding, is that "Governments are instituted among Men, deriving their just powers from the consent of the governed."[17] The system of life tenure finds strong support from the first principle, but gives short shrift to the second. This raises the following question: Given the undemocratic nature of life tenure, how much protection of the Court from political influence is desirable?

II. HOW MUCH INDEPENDENCE FROM THE POLITICAL PROCESS?

The makeup of the Supreme Court is determined by the political process. If we truly find impingement of the political process on the proper functioning of the Supreme Court to be corrupting, such political involvement could be avoided. For example, if a vacancy on the Court arose, the existing Justices—individuals whom defenders of life tenure apparently trust to act independently of the political process—could select a new Justice, rather than leaving that important decision to the crass politicians in the White House and the Senate. The remaining Justices could act much as the College of Cardinals in selecting a new Pope. Although judicial independence would be quite well vindicated—the Court could make its important decisions almost wholly independent from the political processes that otherwise govern the country—I suggest that few defenders of

16. Peter the Great moved Russia toward modernization far more effectively than would have been possible had he been forced to make his decisions palatable to the nobility of his empire, not to speak of the populace.

In contemporary America, any reader can think of numerous examples of desirable (to the reader) change that is frustrated by the political process. Some might name more effective action against global warming as a policy that enlightened policymakers unencumbered by political considerations might implement. My own personal favorite would be legalization of drugs. The list could be extended almost infinitely.

17. Declaration of Independence ¶ 2 (U.S. 1776) (available at http://www.archives.gov//exhibits/charters/declaration_transcript.html).

life tenure would want to carry things quite so far. We all desire judicial independence, but we also desire a Court that is ultimately shaped by the political processes of the country. The question is how we achieve an appropriate balance. Those who simply repeat the mantra that we desire "an independent judiciary" avoid the real issue.

Nonetheless, I do not merely concede but emphatically endorse the idea that judicial independence is an important value. If the only considerations were judicial independence versus desirability of governing by consent of the governed, I would regard the question of life tenure as close. Unfortunately, life tenure on the Supreme Court carries with it several problems that even defenders of judicial independence should find troubling. A lengthy but fixed term could provide substantial judicial independence while avoiding or lessening these problems.

III. PERNICIOUS EFFECTS OF LIFE TENURE

Life tenure carries one very serious, and unavoidable, problem, which I believe most defenders of life tenure would concede to be a problem. In addition, there are a number of lesser consequences that, in my view, constitute additional reasons to be concerned about life tenure.

A. Justices Time Their Retirements to Assure the Appointment of Like-Minded Replacements.

"Life tenure" usually does not mean that Justices remain on the Court until death, of course. Most Justices choose to retire at some point. But, unlike most of us who are likely to base the *timing* of the decision to retire almost entirely on personal factors, Justices may well time their retirement decisions to increase the likelihood that their replacements on the Court will continue, in a general sense, to represent their viewpoints. I do not wish to overstate this factor. It seems reasonable to assume that most Justices will stay on the Court as long as they find the work rewarding, and retire shortly thereafter. (Justices need not consider the need for earnings, no doubt the overriding factor in the timing of retirement for most people, because they receive

their salary for life.[18]) But many retirement decisions based entirely on personal factors might reasonably be made at any point over a period of a few years. If a Justice might choose, for personal reasons, to retire at some point during a several-year period, there seems to be every reason to believe that the Justice would prefer to time his[19] departure to coincide with the administration of a President likely to appoint a new Justice who would, in general terms, share the judicial philosophy of the outgoing Justice. If the Justice does not die unexpectedly, or suffer a serious and sudden decline that cannot be ignored, timing retirement with this consideration is mind is likely to be successful. Only once in the past sixty years has one party held the White House for more than eight years at a stretch. This suggests that a Justice with any skill whatever at reading the political tea leaves is likely to be able, by moving up or back his retirement by only a couple of years from the personally desired date, to get the "right" President to name his replacement.

How often this happens we cannot say with any assurance. Precisely because many people might think such a consideration by a Justice illegitimate, Justices are unlikely to reveal that this factor played a role in the timing of their retirement decision. Only rarely will Justices be so unguarded as Justice Douglas, who was quoted as having said: "I won't resign while there's a breath in my body—until we get a Democratic President."[20] But history surely affords other examples. Sometimes Justices will advance their retirements, as did Chief Justice Warren[21] and perhaps Chief Justice Burger.[22]

18. The Justice must have at least fifteen years of service and have attained age sixty-five, or ten years of service at age seventy. Between the ages of sixty-five and seventy, the service requirement is reduced by one year for each additional year of age. 28 U.S.C. § 371 (available at http://uscode.house.gov).

19. This article uses the masculine pronoun where gender is indefinite. At a time when women comprise one third of the Supreme Court, it is unfortunate that the English language does not provide a simple sex-neutral third-person-singular pronoun.

20. *Douglas Finally Leaves the Bench*, Time 69 (Nov. 24, 1975). Douglas's departure from the bench is filled with irony. Not only did he finally find it necessary to retire with a Republican in the White House, but that Republican was Gerald Ford, who, while in Congress, had taken part in an attempt to impeach Douglas. Yet, Ford's choice to replace Douglas was John Paul Stevens. It is unlikely that Douglas could have hoped for a successor—even one appointed by a liberal Democrat—whose decisions on the Court would have more closely reflected Douglas's liberal philosophy.

21. Warren, though a Republican, felt far more aligned with the Democratic party by the end of his tenure with the Court. Anticipating President Nixon's election in 1968, he

There is also evidence that a number of Justices have delayed their retirements in an attempt to wait for a like-minded President who would name a new Justice who shared the retiring Justice's philosophy. Chief Justice Taft concluded that despite being "older and slower and less acute and more confused," he "must stay on the court in order to prevent the Bolsheviki from getting control."[23] Chief Justice Stone presided in open court a few hours before his death; Stone's son surmised that he "would be surprised" if his father "had not thought of staying on long enough for a Republican President to be able to appoint his successor."[24]

Judging only by their actions, the most recent departures from the Court may well have fit in this pattern. Justices Souter and Stevens, two of the more liberal justices on the Court, appear to have waited for President George W. Bush to leave the White House in order that a more liberal President could name their replacements. Perhaps not. But it is suggestive that Justice Souter announced his retirement only three months after President Obama's inauguration. Justice Stevens waited until

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attempted to resign in time for President Johnson to replace him as Chief with Associate Justice Fortas, and replace Fortas with another Associate Justice with a similar liberal philosophy. In the event, the plan fell apart following revelations of ethically questionable actions by Fortas, with the result that both Warren and Fortas left the Court by 1969, both to be replaced by Nixon. *See e.g.* Bernard Schwartz, *Super Chief* 680–83, 720–25 (N.Y.U. Press 1983); G. Edward White, *Earl Warren: A Public Life* 306–08 (Oxford U. Press 1982).

22. Chief Justice Burger's stated reason for leaving the Court in 1986 was that he was to head the commission for the celebration of the bicentennial of the Constitution—surely an unusual career move. According to unnamed "sources familiar with the process," Burger was also concerned that if he waited another year, even though President Reagan would still be in the White House, Democrats might have gained control of the Senate in the off-year elections of 1986. In that case, "[a] Democratic-controlled Senate would be far less amenable to confirming conservative Reagan-appointed Justices." Stephen Wermiel, *Changes on High Court Are Likely to Increase Conservatives' Clout*, Wall St. J. 23 (June 18, 1986). Such a concern would appear to have been well founded. In 1987, Judge Robert Bork, President Reagan's nominee to succeed Justice Powell, was defeated in the newly Democratic Senate; it seems likely that a Republican Senate would have confirmed Bork.

23. Henry F. Pringle, *The Life and Times of William Howard Taft* vol. 2, 967 (Farrar & Rinehart 1939). Taft, despite having served as President, seems not to have been a successful political prognosticator. The "Bolshevik" in the White House at the time was President Hoover, who surely named a new Chief Justice (Hughes) more attuned to Taft's views than would have Hoover's successor, President Franklin Roosevelt.

24. Alpheas Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 800 (Viking Press 1956); *id.* at 805–06.

age ninety to retire, but waited no more after a liberal President was in office.[25]

Surely it strains credulity to think that Justices who have worked for decades to develop legal and Constitutional doctrines are indifferent concerning whether the Court will build on, or disregard, those doctrines. Surely, at least frequently, Justices take account of the political situation that will determine their successors.

I submit that an outgoing Justice exercising indirect influence over the naming of his successor is both an unavoidable, and a wholly undesirable, consequence of life tenure. It is quite enough of a concession to judicial independence to say that Justices will, for so long as they choose, be part of a small group that exercises vast power to make unreviewable decisions that shape basic policies for the country. It goes much too far to allow those individuals, in effect, to pass on such power to like-minded successors by the timing of their retirements. To state the problem in terms of a single individual, it is quite enough that Justice Stevens enjoyed totally unchecked power for a third of a century, without then allowing him to hand off power to Justice Kagan for perhaps another third of a century.

B. Unbalanced Power of Presidents to Shape the Court

Even if we assumed that Justices left the Court entirely for personal reasons, with no intent to influence the identity or philosophy of their successors, we would be opting for a system that distributes to Presidents (with Senate oversight) the enormous power to shape the Court *on a random basis.* A voter chooses among Presidential candidates on a range of issues, including the important power to shape the Supreme Court

25. Souter retired in 2009, Stevens in 2010. I would suggest that both left as soon as was reasonably possible after Obama became President, but Stevens waited a year because of a tradition that two Justices not leave the Court in the same year. (Obviously, there are exceptions to the tradition, such as in 2005, but usually not for routine retirement decisions. In 2005, Justice O'Connor announced her retirement, President George W. Bush nominated John Roberts to replace her as Associate Justice, and then Chief Justice Rehnquist died. While O'Connor would likely have delayed her retirement had Rehnquist died before she announced it, in the event Bush filled the two vacancies simultaneously, naming Roberts as Chief Justice and Samuel Alito to replace O'Connor.)

through appointments.[26] But it is random whether the issue is a real one or not, because whether a given election matters to the future of the Court depends on the unknown, personal retirement decisions of Justices. There is no triumph of logic in a system that allows President Nixon four appointments in five-plus years, and President Carter none in four. And, of course, if we drop the pretense that the Justices' retirement decisions are simply random choices made for entirely personal reasons, the present system becomes even harder to defend.

My preferred system would establish a term of eighteen years, with an appointment coming every two years. All involved would know that a Presidential election would carry the power to name exactly two full-term Justices to the Court. (The President would also have the power to name replacements for Justices who left before their terms expired, but such replacements would serve out only the unexpired portion of the term.[27])

C. Other Problems Arising from Life Tenure

While Justices' power to manipulate the appointment of their replacements is the most serious adverse consequence of life tenure, and the (at best) random dispersal of the power to shape the Court through appointment is a significant shortcoming, life tenure causes a number of lesser problems. In general, these arise from Justices who, enjoying life tenure, choose to serve for very long periods of time.

1. Justices May Stay Past Their Prime Years.

Objectively viewed, Justices are now staying on the Court

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26. *See e.g.* Noah Feldman, *The Court's the Thing*, Ark. Democrat-Gaz. B6 (Little Rock, Ark.) (Nov. 1, 2012) (arguing that in 2012, "[a] reasonable person could vote on the basis of future Supreme Court nominations alone—because on almost everything else that matters, the differences between the candidates are going to be vanishingly small when put into practice," in part because "presidents don't get to implement the majority of their most important domestic policies without Congress, and Congress is not going to back either side in making radical changes").

27. Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 Ohio St. L.J. 799, 811–12 (1986).

longer than has traditionally been the case. According to a recent compilation, Justices who left the Court in the 1970–2005 period had averaged over twenty-six years in office. This compares to an average of less than fifteen years throughout our previous history, and of less than fifteen years through the first seventy years of the twentieth century.[28] But does "longer" equal "too long"? An exhaustive review of the Court's entire historical record appears to suggest that the answer is "yes." Although the problem of Justices' "mental decrepitude" dates back to the Washington Administration, Professor David Garrow demonstrates that the problem has been growing over time.[29]

Over the years, many reform proposals have been put forward that are, in general, justified on the same rationale that generally supports forced retirement—namely, that the incumbent may otherwise stay on past his prime. States frequently take the approach of establishing a maximum age. The typical proposal for change to the federal rule of life tenure would establish a fixed term, or a maximum age, or both.[30] I am

28. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in *Reforming the Court: Term Limits for Supreme Court Justices* 16 (Roger C. Cramton & Paul D. Carrington eds., Carolina Academic Press 2006) [hereinafter *Reforming the Court*].

29. Professor Garrow, who proposes a Constitutional amendment mandating retirement from the Court at age 75, provides a detailed account of every instance of mental decrepitude in the Court's history. His conclusion includes the following tally:

> While the pre-twentieth-century Court featured at least four justices—Baldwin, Grier, Clifford, and Field—and perhaps two more—Rutledge and Cushing—whose mental incapacity should have barred their continued service, the twentieth-century Court has featured *eleven* justices whose mental decrepitude or mentally infirm judgment should have led to their departure years or months before they did vacate their seats. Prior to World War II, both Chief Justices Fuller and Taft, and Justices McKenna and Holmes, all remained on the Court longer than their colleagues and relatives knew was in the public interest. Since World War II, two Justices—Murphy and Whittaker—suffered from conditions which should have precluded their ongoing service, and five others—Minton, Black, Douglas, Powell, and Marshall—all overstayed the length of service their mental energies were capable of delivering.

David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995, 1084–85 (2000) (emphasis in original).

The analysis of Professors Calabresi and Lindgren, focusing on the period since 1970, also suggests a growing problem as compared to historical averages: "[O]n average, a decrepit justice retired every fifteen years before 1970; since 1970, a decrepit justice has retired every seven years." Calabresi & Lindgren, *supra* n. 28, at 42.

30. Professor Garrow's analysis of decrepit Justices is put forward to support his own proposal for mandatory retirement at age seventy-five. *See generally* Garrow, *supra* n. 29. In the course of his historical discussion, he discusses a number of reform proposals,

sympathetic to these proposals, and would support them as compared to the status quo. Nonetheless, such proposals are insufficient because they do not fully deal with the biggest single problem of the present system, that of Justices who may time their departure from the Court to influence the appointment of a like-minded successor.[31]

2. Justices May Cease to Reflect the Political Understandings under which They Were Appointed and Confirmed.

A closely related problem of the Justice who stays on too long is the idea that a Justice's tenure on the Court may long outlive the political understanding that resulted in his appointment and confirmation. As discussed above, Justices enjoy essentially complete independence from political processes while on the Court, but they go on the Court as the result of intensely political calculations. As such, a new Justice represents the political balance of the time. But what of a Justice who has served for thirty years? The political understandings may have changed, and, equally important, the Justice's philosophy may have undergone considerable change unforeseen at the time of appointment and confirmation. Perhaps the tenuous balance between a tie to, and independence from, the country's political processes is upset when a Justice remains on the Court for an unusually long time.

3. Presidential Choices May Be Skewed by Life Tenure.

Life tenure may also have a pernicious effect on Presidential appointment decisions. Presidents obviously view

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particularly those that have been offered by members of Congress. As might be expected from Congress, the idea has waxed and waned with public attention; for example, a number of proposals were offered shortly after President Franklin Roosevelt's ill-fated "Court-packing" plan. *Id.* at 1023–26. A number of academic proposals are included in *Reforming the Court*, *supra* n. 28. For discussion of other academic proposals, and of foreign practice, see Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 1000–02 (2007).

31. For example, had a fixed eighteen-year term applied to Chief Justice Warren, he would have been appointed in 1953 to a term to end in 1971. But if he wanted his replacement to be named by President Johnson (as he clearly did; *see supra* n. 21), he could have retired in 1968, allowing Johnson to name a successor who would serve until 1986, or thirty-three years after Warren's initial appointment.

the appointment of Justices as important political and policy decisions, and recognize that the Justices chosen may continue to forward the appointing President's views for years, perhaps decades, after the President leaves office. It is to be supposed that a President will prefer to exert greater rather than lesser influence on the future decisions of the Court. A means of doing this is to nominate relatively young Justices, a practice that may be problematic. No doubt, there is the occasional *wunderkind* who would make an excellent Justice—and, as noted above, Justices who stay on the Court to a very advanced age pose the risk of mental decrepitude. Nonetheless, a traditional view is that wisdom grows with age and life experience. In any case, it is certainly more difficult to evaluate nominees who have lived fewer years and done fewer things. A Presidential preference for younger nominees would be reinforced because a younger nominee would be less likely to have created a paper trail that could be used by political opponents in the confirmation process. Interestingly, even in the highly contentious politics of the present, opponents appear to believe that they can justify defeating a President's Supreme Court nominee only if they can argue that something is "wrong" with the nominee. In such an atmosphere, and particularly since Judge Robert Bork's extensive writings were turned against him in his 1987 confirmation hearings, Presidents may prefer so-called "stealth" nominees to the Court,[32] individuals without substantial records that might be used by opponents.

4. Infrequent Openings on the Court May Increase Political Rancor.

Supreme Court confirmation proceedings in recent decades have been more contentious than had long been the case.[33] Some

32. Calabresi & Lindgren, *supra* n. 28, at 40 n. 73 (citing Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices be Term-Limited? A Dialogue* http://writ.corporate.findlaw.com/amar/20020823.html (Aug. 23, 2002)).

33. Thomas Halper, *Senate Rejection of Supreme Court Nominees*, 22 Drake L. Rev. 102, 102 (1972) (noting that in the seventy-four-year span from 1894 to 1968, every nominee save one—John J. Parker in 1930—was confirmed). This long period of Senate quiescence has not been the norm. *See* Laurence Tribe, *God Save This Honorable Court* 78 (Random House 1985) (noting that "the Senate has rejected a higher proportion of presidential nominations for Supreme Court Justice than for any other national office," and

commentators contend that the infrequency of appointment-and-confirmation processes—an obvious consequence of Justices staying on the Court longer—increase the partisan rancor, because so much rides on each nomination.[34] I mention this factor because others have raised it; personally, however, I do not think that shortening tenures to fifteen or eighteen years—an eternity in politics—will do much to reduce political bickering in Washington. As I see it, the rancor arises primarily because politicians and the public alike are now fully aware that the emperor has no clothes—at least since the Warren Court, the Court is recognized on all sides to be not simply a neutral interpreter of law, but an important political player. Accordingly, a seat on the Court, even for a term of years, is a prize worth fighting over.

IV. PRESENT CONDITIONS ARE CONDUCIVE TO JUSTICES STAYING ON THE COURT.

As noted above, the average tenure of Justices has substantially lengthened in recent decades, even in the face of a relatively recent guarantee of salary continued for life in retirement. Given the problems of lengthy tenure, it is worth considering why that is so. The starting point must be a recognition that people, all over the world, seemingly from the dawn of history, have always been reluctant to give up great

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that "[a]lmost *one out of every five nominees* to the Court has failed to gain the Senate's 'consent'") (emphasis in original). A qualification is necessary. Professor Halper's tabulation indicates that a slight majority of these failed nominations have not been the result of Senate votes, but because the nomination was withdrawn. Halper, *supra* this note, at 103, tbl. 1 ("Supreme Court Nominees Rejected by the Senate") (showing that from 1794 to 1970, thirteen nominations were "withdrawn or not voted on"). It may be fair to include the withdrawals in the tabulation of rejections, on the theory that the most frequent reason for a nomination's withdrawal is that Senate confirmation seems unlikely.

The most important predictor for a smooth confirmation is likely to be whether the Senate is controlled by the President's party. See note 22, *supra,* for discussion of this factor as influencing the timing of Chief Justice Burger's retirement.

34. *See* Calabresi & Lindgren, *supra* n. 28, at 39 (arguing that "the irregular occurrence of vacancies on the Supreme Court means that when one does arise, the stakes are enormous, for neither the President nor the Senate can know when the next vacancy might arise. Moreover, a successful nominee has the potential to stay on the Court for a very long (and uncertain) period of time. So much is at stake in appointing a new justice that the President and the Senate (especially when controlled by the party opposite the President) inevitably get drawn into a political fight.").

power. (This holds true for American politicians, but they have to convince voters that they should be continued in office. Supreme Court Justices, enjoying life tenure, need convince only themselves.) This reluctance has presumably affected Supreme Court Justices since 1789. What is new is that the burden of serving on the Court has lessened in recent decades, while the attractions have increased.

We do not have to go back to the days when Justices rode circuit on horseback to find a time when they worked significantly harder than today. The Court's workload, at least as measured by decided cases, is down markedly from a generation ago. In the 2010 Term—the most recent for which the *Harvard Law Review* has published its annual survey—the Court decided only eighty-two cases with full opinion, including seven per curium opinions. (This was not an atypically light year; in the preceding three years it had averaged seventy-eight cases per year.) Twenty-five years earlier, in the 1985 Term, the Court decided almost twice as many cases—159—with full opinion. (Again, this total was typical for the era, exactly matching its average over the preceding three years.[35]) With the reduced caseload, not only do Justices write fewer opinions, but they need also prepare for and attend fewer oral arguments.

The Justices' job is primarily to decide cases. This is an important job, and difficult choices are daily fare. No doubt most people would find making these decisions enormously stressful. Justices, presumably, are not "most people." If a Justice finds making decisions a source of undue strain, surely he has gone into the wrong line of work.

35. These data are taken from *The Supreme Court, 2010 Term, The Statistics*, 125 Harv. L. Rev. 362 (2011) (Table 1(A): "Actions of Individual Justices") [hereinafter *2010 Statistics*], and from corresponding statistical tables for earlier Terms. *See The Supreme Court, 2009 Term, The Statistics*, 124 Harv. L. Rev. 411 (2010) (Table 1(A): "Actions of Individual Justices," showing eighty-seven cases); *The Supreme Court, 2008 Term, The Statistics*, 123 Harv. L. Rev. 382 (2009) (Table 1(A): "Actions of Individual Justices," showing seventy-eight cases); *The Supreme Court, 2007 Term, The Statistics*, 122 Harv. L. Rev. 516 (2008) (Table 1(A): "Actions of Individual Justices," showing seventy cases); *The Supreme Court, 1985 Term, The Statistics*, 100 Harv. L. Rev. 304 (1986) (Table 1(A): "Actions of Individual Justices," showing 159 cases) [hereinafter *1985 Statistics*]; *The Supreme Court, 1984 Term, The Statistics*, 99 Harv. L. Rev. 322 (1985) (Table 1(A): "Actions of Individual Justices," showing 151 cases); *The Supreme Court, 1983 Term, The Statistics*, 98 Harv. L. Rev. 307 (1984) (Table 1(A): "Actions of Individual Justices," showing 163 cases); *The Supreme Court, 1982 Term, The Statistics*, 97 Harv. L. Rev. 295 (1983) (Table 1(A): "Actions of Individual Justices," showing 162 cases).

However difficult deciding a case may be, supporting the decisions need not be terribly hard. By the time a case arrives at the Supreme Court, meticulously briefed by both parties and frequently by *amici*, and with opinions of lower courts available, it appears that a Justice will primarily be called upon to decide which plausible, well-researched, and well-developed argument to accept.

Writing opinions need not be difficult for the Justices, either. Each Justice has four intelligent and energetic young clerks fully capable of providing a polished first draft for the Justice's review.

Reviews of certiorari petitions, potentially the most burdensome part of the job, are considerably eased by the multi-Justice cert pool. And, again, most of the burden can be placed on the very able law clerks.

And what of the pluses of Supreme Court service? Justices have become the rock stars of the legal world. Any Justice who wishes can spend a week or two doing light duty over the summer at some law school's program in Geneva or Florence or Madrid, with the Justice's mere presence all the school really requires. Visits to law schools and speeches to legal audiences are simply the appearances of royalty before the fawning masses.

In short, the work is interesting, and it allows for the exercise of great power. At the same time, it is not arduous. Most of the Justice's face-to-face interactions will be cordial and, outside the confines of the Court, deferential. Why retire?

V. POSSIBLE SOLUTIONS

A. Constitutional Amendment

The most obvious solution to the problems posed by life tenure is to end life tenure. A quarter of a century ago, I advanced a detailed proposal for staggered eighteen-year terms.[36] Each Presidential election would have essentially equal weight in shaping the Court. In order to block strategically timed early retirements, my proposal provided that if a Justice

36. *See generally* Oliver, *supra* n. 27.

left the Court before his term ended, his replacement would (in most cases) only serve out his unexpired term. I still like my proposal. However, it would require a Constitutional amendment, and the Constitution is hard to amend.

B. Statute

More recently, proponents of similar arrangements have suggested that life tenure could effectively be ended by statute. Professors Paul Carrington and Roger Cramton have proposed a system in which a new Justice would be appointed every two years.[37] If this resulted in more than nine Justices—which would result if, as at present, the average tenure exceeded eighteen years—only the nine most junior would have full powers of Justices, and the more senior Justices would have markedly lesser roles. Such a proposal would achieve most of the goals that I sought through my proposed Constitutional amendment, without the necessity of an amendment. I support the proposal on the merits. However, because it can be viewed as effectively ending life tenure, it is far from clear that it would be Constitutional.[38]

But there are statutory approaches, undoubtedly Constitutional, that could overcome some of the detriments of life tenure. I have proposed simply expanding the size of the Court, a clearly Constitutional route that Congress has followed several times in the past.[39] I suggested adding a new Justice every two years, regardless of whether a Justice had retired, and simply allowing the Court to grow to whatever size resulted. In theory, we could allow for a new Justice every year, though this might require additional political arrangements to avoid a single President, particularly a two-term President, exerting too much control over the makeup of the Court.[40] Such an arrangement

37. Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in *Reforming the Court*, *supra* n. 28, at 467.

38. Professor Epstein finds the proposal "highly desirable on policy grounds" but believes it would be unconstitutional. Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, in *Reforming the Court*, *supra* n. 28, at 415, 415–16.

39. Philip D. Oliver, *Increasing the Size of the Court as a Partial but Clearly Constitutional Alternative*, in *Reforming the Court*, *supra* n. 28, at 405.

40. A new Justice coming on the Court every year would be problematic in the early years. If, for example, the practice were implemented in 2016, a President elected for two

would assure that every Presidential election carried roughly the same influence on the Court. With the Court growing in size, each Justice's importance would be reduced, and strategic retirements would become correspondingly less important. And the Court's growing size, by diminishing the importance of each Justice, might lead to Justices voluntarily leaving earlier, reducing the likelihood of mental decrepitude and of a Justice staying on the Court far beyond the time of the political understandings that had led to his appointment. However, such a statutory approach may prove almost as difficult to obtain as a Constitutional amendment. Unless it were bipartisan—which is fairly hard to see in the present climate—it is likely to be seen as a modern version of the Court-packing plan that President Franklin Roosevelt advanced in 1937. And, absent the rarity of the President's party controlling the House of Representatives and sixty votes in the Senate (necessary to overcome a filibuster), such an important change will likely be impossible except on a bipartisan basis.

Congress could increase the Court's currently low case load. As noted above, the Court is deciding only half the number of cases it decided a generation ago, despite the fact that our law, society, and economy seem no less complex or contentious.[41] Congress—which gave the Court control over its own docket less than a century ago[42]—could effectively increase the Court's workload by insisting that it accept more cases. Another body, such as a rotating group of judges from the Courts of Appeal, could be empowered to select cases that the Court would be required to review. At least so long as the Court

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terms and serving from 2017 to 2025 would be able to name a majority of the Court (assuming at least two Justices on the 2016 Court left during the eight-year period). Once the practice was fully phased in, however, the Court might have twenty-five or even thirty Justices, and a two-term President's having eight appointments might not seem excessive.

41. The lower workload is not attributable to fewer litigants seeking review by the Court, but rather to the Court's choosing to accept fewer cases. In the 2010 Term, the Court granted review to 4.7 percent of its appellate docket and 0.2 percent of its miscellaneous docket; twenty-five years earlier, it granted review to 11.2 percent of its appellate docket and 1.3 percent of its miscellaneous docket. *See 2010 Statistics*, *supra* n. 35, at 369 (Table 2(B): "Cases Granted Review"); *1985 Statistics*, *supra* n. 35, at 308 (Table 2: "Final Disposition of Cases").

42. *See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 Colum. L. Rev. 1643 (2000).

continued to have the power to accept cases on its own, such a step should be Constitutional. If Justices found their increased work load onerous, retirement might become more attractive, thus undermining life tenure to some degree.

Some of these steps—especially those that entail increasing the size of the Court—would have the effect of reducing the rock-star status of individual Justices. Along these lines, Congress could even move the Court out of Washington. In this era of easy transportation and communication, there is no necessity for the Court to sit in the capital. After President Obama's tongue-lashing of the Court during his 2010 State of the Union address following the Court's *Citizens United* decision, former Justice O'Connor predicted that fewer Justices would attend in the future.[43] But a relevant question might be: What justification is there for the supposedly non-political Justices to rub elbows with elected officials, and to listen to the President's political program? Why not move the Court to fly-over country—to Omaha, for example, which is good enough for Warren Buffett? Or, I am confident, the Court would be welcomed in Little Rock. In either city, the Justices' pay checks would go farther than in Washington, addressing a longstanding concern.[44]

C. Filibuster

One route is open that is relatively easy to implement, because it can be implemented unilaterally by a single party—and a party in the minority, at that. That route is the filibuster. A block of forty-one Senators—and the party in opposition usually has more than that—can block consideration of a Justice. Would this be illegitimate? Perhaps not. Once we recognize that Justices are important political actors who will make important political decisions for many years—that is, that they do much

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43. Associated Press Brief, *More State of the Union No-Shows Predicted*, 159 N.Y. Times A19 (Apr. 7, 2010).

44. In the past, Chief Justice Roberts has gone so far as to portray the low pay of federal judges overall as "a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary." *See 2006 Year-End Report on the Federal Judiciary* at 1, http://www.uscourts.gov/News/The Third Branch/07-01-01/2006_Year-End_Report_on_the_Federal_Judiciary.aspx (Jan. 1, 2007).

more than call balls and strikes—we should reexamine the assumption that the President's nominees should be more-or-less automatically confirmed unless the opposition finds something "wrong" with the nominee.[45] One thing in favor of legitimating opposition based on ideology and judicial philosophy is that these are usually the actual bases for opposition. Acknowledging the legitimacy of what actually happens—and not requiring a pretense that the opposition is due to some supposed ethical failing or because the nominee is totally beyond the pale—will make the process somewhat more honest.

It is reasonable to view the Senate's role differently in passing on judicial nominees as compared to other confirmation proceedings. A strong presumption in favor of confirmation logically follows for nominees who are to assist the President in carrying out the executive functions during the President's administration—cabinet secretaries and ambassadors, for example. Whether the presumption properly attaches to judicial nominees, who serve in a different branch of government and whose term of office routinely extends many years beyond that of the President who nominates them, is a quite different question. I think the different question should be answered differently.[46]

Using the filibuster against Supreme Court nominees will likely constitute a crossing of the Rubicon. Once a full-scale, acknowledged filibuster is used by an opposition party against a President's Supreme Court nominee, the filibuster will almost certainly be used by the other party when the shoe is on the other foot. Use of the filibuster risks further politicizing the

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45. For a defense of the traditional viewpoint, see Michael M. Gallagher, *Disarming the Confirmation Process*, 50 Cleve. St. L. Rev. 513, 550 (2002–03) (arguing that "[s]ignificant historical evidence proves that the Framers did not intend Senators to examine a nominee's judicial philosophy as a criterion for confirmation," and that "[o]nly compelling reasons justify rejection of a nomination, and a nominee's ideology is not one of those reasons"). Mr. Gallagher quotes Alexander Hamilton: "[I]t is not likely that their sanction would often be refused, *where there were not special and strong reasons for the refusal.*" *Id.* n. 290 (quoting *The Federalist* No. 76 at 425 (Alexander Hamilton)) (emphasis added by Mr. Gallagher).

46. By this reasoning, perhaps the Senate should give an intermediate level of scrutiny to the President's nominees to various administrative positions who, if confirmed, would not serve at the pleasure of the President, and whose term—though fixed in years, and not for life—would not end with the President's. One might think of the Governors of the Federal Reserve System.

Court, and perhaps leaving a seat open for a considerable period of time before a political deadlock is resolved. Political deadlock already has the effect of lengthy vacancies in judicial positions on inferior courts.

But the filibuster offers significant potential benefits. Perhaps counterintuitively, the filibuster could have the effect of somewhat depoliticizing Supreme Court appointments. Presidents might be forced to name more centrist Justices in order to win confirmation. Or, the President might work with the opposition to name one Justice preferred by the President, and another more to the liking of the opposition. That could be the case, particularly, if the filibuster were linked with a statute to increase the regularity of Justices being named to the Court, perhaps by adding a new Justice each year. The opposition might approve the President's nominee this year based on an agreement identifying a more acceptable Justice for the next year's slot. Each Justice would be part of a larger Court, and thus less of a rock star, but that is not a loss to the Republic.

VI. CONCLUSION

The anti-democratic nature of life tenure is an historical anachronism. If its anti-democratic nature were its only drawback, that might be tolerated to protect the Court's independence from political pressure. Life tenure, however, causes other problems, the most significant of which is the power of Justices to influence the identity of their successors by the timing of their retirement decisions.

Life tenure should be ended—with fixed but lengthy terms assuring substantial judicial independence—and a Constitutional amendment would be the cleanest way to effect the change. Unfortunately, given the difficulty of amending the Constitution, it would also be the hardest to achieve. Various statutory measures might provide at least partial relief of the problems posed by life tenure, but a meaningful statute would, itself, be difficult to enact.

The simplest solution would be to legitimate the filibuster. Such an approach might move the Court to the center, forcing Presidents to nominate relatively moderate Justices in order to win confirmation. Use of the filibuster in confirmations might

also ease the passage of helpful statutes, particularly statutes that would allow for regular appointments of new Justices unrelated to the retirement decisions of existing Justices.