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Reforming the Supreme Court

Roger C. Cramton†

Life tenure for Supreme Court Justices has had harmful consequences that could not have been foreseen by the Founders. The seriousness of these harms makes it necessary and proper to use the hindsight we enjoy today to correct them. This Article begins with a brief summary of the constitutional provisions relevant to judicial tenure and examines how the system of life tenure functions today. The harmful consequences of life tenure are then examined, leading to the conclusion that a statutory solution is required. The article then proposes such a solution and examines its constitutionality, concluding that language, history and purpose support the conclusion that Congress has legislative authority to enact the needed statutory reform.

I

THE HISTORY AND PURPOSE OF THE GOOD BEHAVIOR CLAUSE AND THE COMPENSATION CLAUSE

Article III, Section I of the Constitution provides:

The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

The Founders knew of the long struggle of their English ancestors to obtain a judiciary that, although appointed by the crown, was not subservient to either the executive or legislative branches of government. As Blackstone put it, if judges were subservient to the ministers of the

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government, “the life, liberty, and property [of citizens] would be in the hands of arbitrary judges.”¹ In 1776, the Declaration of Independence proclaimed as a grounds for independence of the colonies that King George III had “made [colonial] Judges dependent on his Will alone, for the tenure of their offices, and offices, and the amount and payment of their salaries.”² In contrast, the constitutions of at least three colonies - Virginia (1776), Maryland (1776), and Massachusetts (1780) - provided that judges hold office “during good behaviour.”³ Other colonial constitutions provided for a limited term of office (eight years in New York) or for life tenure with removal by action of the legislature. Today, however, all state constitutions reject life tenure for their high court judges, providing instead for limited tenure through age limits, term limits or removal by address of the legislature.

Records of the Federal Convention of 1787 and the state ratifying conventions indicate that the Founders intended the Good Behavior Clause and the Compensation Clause to provide a federal judiciary that would exercise independent judgment in deciding cases, free from influence or control of the political branches of the federal government - the President and Congress. As James Wilson stated to the Pennsylvania ratifying convention, “the servile dependence of the judges [who are appointed and perhaps reappointed after five or seven years, as in some colonies] endangers the liberty and property of the citizen.”⁴ Opponents of the Constitution, such as Brutus, recognized that federal judges would be “independent, in the fullest sense of the word,” but thought this unwise:

... [there is] no authority that can remove them, and they can not be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.⁵

Hamilton, in defending the Good Behavior Clause in Federalist No. 78, replied that “the permanent tenure of judicial offices” would provide judges with the “independent spirit” essential to their “faithful performance” of their constitutional duty to keep the legislative branch of a limited government “within the limits assigned to their authority.”⁶ In

1. WILLIAM BLACKSTONE, 1 COMMENTARIES 259-60 (1768), *quoted in* PHILIP B. KURLAND & RALPH LERNER, 4 THE FOUNDERS' CONSTITUTION 132 (1987) [hereinafter FOUNDERS' CONSTITUTION].

2. DECLARATION OF INDEPENDENCE (U.S.1776).

3. FOUNDERS' CONSTITUTION, *supra* note 1, at 133. The Virginia Constitution also provided for “fixed and adequate salaries.” *Id.* The Maryland Constitution spelled out that tenure during “good behaviour” meant that they were “removable only for misbehavior, on conviction in a Court of law.” *Id.*

4. *See id.* at 139 (quoting from Elliot's Debate in Pennsylvania, Dec. 1987).

5. *Id.* at 141 (quoting THE ANTI-FEDERALIST NO. 15 (Brutus)).

6. *Id.* at 142-43.

Federalist No. 79, Hamilton argued that the Compensation Clause was also vital to judicial independence because “a power over a man’s subsistence amounts to power over his will.”⁷ Salaries, however, should be subject to increase because “judges, who, if they behave properly, will be secured in their places for life” may serve a long time and a stipend sufficient at the beginning may prove inadequate later.⁸

Reflecting the circumstances of the time, Hamilton stated reasons why the Good Behavior Clause would not result in extremely long service or “in the imaginary danger of a superannuated bench.”⁹ Most men did not survive that long: “few there are who outlive the season of intellectual vigor.” Of those who did, the “deliberating and comparing faculties generally preserve their strength.”¹⁰

The Founders acted at a time when experience with constitution-making was limited to the recent experience of the colonies. They accepted judicial review of legislative and executive action as an abstract idea but did not and could not know how its practice would evolve. They also had little experience with life tenure for judges in 1789 (the colonies mandating life-tenure for judges had acted subsequent to the Declaration of Independence). And judicial review of legislative action was outside the authority of British judges who had been given life tenure earlier in the eighteenth century to increase their independence from the King and his ministers in adjudicating cases.

Moreover, the Founders had no conception of government service as a lifetime job. Only a century later, with the establishment of the civil service, did the concept of lifetime public office become possible. The Founders believed that public service was the duty of intelligent and propertied individuals who would serve in government office for a period before returning to their home, family, and original employment, just as George Washington would return to his plantation at Mount Vernon and John Adams to his farm in Brookline. Furthermore, the principle of rotation in public office governed all other branches of the federal government: Representatives were elected for two-year terms; Senators for six-year terms; and Presidents for four-year terms, with any continuance in office dependent upon re-election.

The Founders, therefore, anticipated many of those appointed to the Supreme Court would resign to pursue other activities or would die after relatively short periods of service. As a result, new appointments would occur with some frequency. This was indeed the case throughout most of

7. FOUNDERS’ CONSTITUTION, *supra* note 1, at 144.

8. *Id.*

9. *Id.*

10. *Id.*

the nation's history.¹¹ Since 1789, the average age of appointment to the Court has been fifty-three, with most appointees falling between age fifty and fifty-five. Until 1970, Justices resigned or died at an average age of sixty-eight, thus serving an average tenure of about fifteen years. A new Justice joined the Court about every two years. The rotation in office contemplated by the Founders was the general rule, sometimes speeded by an expansion in the size of the Court or the threat of such expansion.¹²

Since 1970, however, although the average age of appointment has not changed, the average tenure in office has increased to almost twenty-six years (an increase of eleven years) and will likely increase further without any changes. The average age in leaving office has also risen eleven years, from age sixty-eight to age seventy-nine. No new appointment to the Court occurred between 1994 and 2005, the longest period without change since the Court's size was fixed at nine Justices. The lengthening tenure of Justices has nearly doubled the time between appointments from 1.7 years prior to 1970 to 3.3 years since. Prior to 1970, almost every President serving a four-year term received at least one appointment to the Court. Since then, three of the last seven four-year presidential terms have had no appointments to the Court.

The language and history of the Good Behavior Clause, viewed in the light of the circumstances of the time, establish two propositions: (1) the Clause was intended to establish a judicial branch that would be independent from executive or legislative control; and (2) the Founders expected that vacancies on the Supreme Court would arise in a frequency that would prevent "superannuation" and result in fairly frequent appointment of new Justices.

II

REASONS FOR LONGER TENURE ON THE COURT

The ability of modern medicine to keep elderly people alive, even after they have developed life-threatening diseases, is part of the reason that turnover on the Court has decreased since 1970. The Founders lived at a time in which life expectancy at age 45-55 was probably less than fifteen

11. The source of the data in this and the following paragraph is Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. PUB. POLICY 769, 777-87 (2006) [hereinafter Calabresi & Lindgren]. Other sources contain very similar figures but there are inevitable variations because of differences in dealing with unusual circumstances (e.g., does the length of service of Charles Evans Hughes, who was appointed twice to the Court with an intervening period when he was not on the Court, count as two separate terms or one extended term?).

12. The Supreme Court has varied in size from six Justices at the outset to a high of ten Justices during the Civil War, but has been stable at nine Justices since 1870. President Roosevelt's 1937 proposal to expand the Court to as many as sixteen Justices was precipitated by a series of decisions striking down New Deal legislation by 5-4 votes in his first term of office. The legislation, characterized by opponents and the media as "court packing," was abandoned when a change in Justice Roberts' voting pattern upheld legislation early in the President's second term.

years (it had grown to only eighteen years in 1900).¹³ During the twentieth century, however, longevity at birth increased about three years per decade and this trend continues. Today, a Supreme Court appointee of average age (50-55) can expect to live thirty or more years after appointment—about twice as long as the individual would have lived in 1800.¹⁴ Two other factors, however, are much more important than increased longevity: (1) the fact that the Court now controls its own workload; and (2) reluctance on the part of Justices to relinquish the power and celebrity accompanying the office.

A. Control over Workload

In the early twentieth century, when many litigants had a right to appeal a federal question to the Court, the Justices were in the same position as are the judges of the lower federal courts today: they were overwhelmed by a heavy and steadily increasing caseload of mandatory appeals. On lower federal courts, increasing caseloads can be dealt with by the creation of new judgeships. But since this expansion of decisional capacity always lags behind the increasing dockets, judges of those courts often take senior status or retire because the constant caseload pressure is time consuming and ultimately tiresome.

The same situation faced the Supreme Court Justices in the early decades of the twentieth century. In response to the Court's complaints that mandatory appeals were overwhelming the Court, Congress in 1925 instituted the certiorari process. The gradual abandonment of almost all mandatory jurisdiction gave the Court increasing control over its docket by 1980. The result was a steady reduction in the number of cases decided on the merits. Instead of deciding as many as 350 cases per year, the Court has gradually reduced its caseload to no more than 100 cases involving about 70-75 opinions for the Court. Each Justice is now responsible on average for 8-9 opinions for the Court per year.

Meanwhile, very able staff assistants (four law clerks per Justice rather than the one clerk of the era of Holmes and Brandeis) support the Justices. Justices increasingly delegate research and writing of opinions in varying degrees to the law clerks, who also do the unpleasant detail work involved in nearly all jobs. The failure of some Justices to fully engage in the work of the Court, as was the case with Thurgood Marshall in his later

13. See Robert Pear, *Social Security Underestimates Future Life Spans*, *Critics Say*, N.Y. TIMES, Dec. 31, 2004, <http://www.nytimes.com/2004/12/31/politics/31benefit.html?>

14. See National Center of Health Statistics, *LEWK3, United States Life Tables, 1999-2002* (providing the remaining life expectancy for persons who have attained age 50: Entire population: 30.3 years; White females: 33.3 years; White males: 28.5 years; Black males: 24.6 years). Moreover, the ability of modern medicine allows a person who gets the best available medical care to continue to exercise very important responsibilities despite severe coronary problems (e.g., Vice President Cheney) or life-threatening bouts of cancer (Chief Justice Rehnquist and Justices Stevens and Ginsburg).

years,¹⁵ is often known to insiders but not widely reported by the press. Members of the Court have no legal obligation to provide health information to the public and only incidents involving disabilities evident in court proceedings or unusual absences from the bench are reported. The Court's reduced workload also leaves many important issues of federal law unresolved, sometimes resulting in different rules being applied to different parts of the nation.¹⁶

B. Increase in the Power and Saliency of Supreme Court Decision Making

Federal judges are eligible for "senior status" after a combination of age and years of service. Most lower court federal judges make this election when eligible because it allows them to have a reduced and more flexible workload. Supreme Court Justices, however, only rarely take senior status when eligible to do so, primarily because they are reluctant to give up the great power that now rests in the office. The Constitution the Justices interpret is extremely difficult to amend - perhaps more difficult to amend than any other on the planet. As a result, the word of the Justices is the last word on many important social and political questions. A Justice of the Supreme Court, therefore, occupies one of the most powerful offices in the nation, and only the Justices serve for an unlimited term.

The political prominence of the Court and its Justices has also steadily grown in recent decades. In each of the last six presidential elections the identity of persons or types of person the rival candidates might appoint to the Court has been an important issue. In the 2000 election, the Court decided who would be the person to appoint some of its own members.¹⁷ Supreme Court appointments have become politically contentious not only because Justices exercise great power, but because they exercise that power for so long.

The Founders, in providing for tenure during "good behavior," did not contemplate that life tenure would accentuate the tendency of Justices to consider themselves as Platonic Guardians for American society.¹⁸ In

15. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1072-80 (2000) [hereinafter Garrow] (stating that "far and away the most serious problem with decrepitude during the early 1990s involved Justice Thurgood Marshall" and fully documents his assertion).

16. The Commission on Revision of the Federal Court Appellate System studied this problem and recommended the creation of a National Court of Appeals between the Supreme Court and the Courts of Appeal. See the Commission's REPORT, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 5-39 (June 1975). I believe the recommendation was sound and that the problem is even more serious today.

17. See *Bush v. Gore*, 531 U.S. 98 (2000).

18. Judge Learned Hand, who raised doubts about the legitimacy of judicial review in 1958, applied the term "Platonic Guardians" to the Justices of the Court. The Court, in his view, had become a third, legislative, chamber. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." See *LEARNED HAND, THE BILL OF RIGHTS* 73 (1958).

Federalist No. 78 Hamilton expressed views about the Court that are quixotic in the light of contemporary reality.¹⁹ The Court, he stated, would be “the least dangerous” branch of the federal government because it had neither the sword of the executive nor the purse and law-making powers of the legislature. The federal judiciary, Hamilton famously said, has “neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”²⁰ Hamilton described a Court that would parse judicial precedent and resolve narrow legal questions with rare legal skill; he stated that the major qualification for appointment would be the knowledge acquired by “laborious study” of existing precedents.²¹

No one today believes, as Hamilton said, that Justices are “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”²² That narrow view of the judicial function, especially as descriptive of the current policy-oriented decision making of the Court, is quaint but totally inaccurate.

C. Increased Celebrity Status

In addition to their current exercise of significant power, Supreme Court Justices also enjoy a celebrity status. Justices are featured in major stories in newspapers and magazines and cited in law review articles by academics who agree with their views.²³ They are honored guests at Washington events and diplomatic gatherings and are invited by a wide variety of educational institutions and organizations, domestic and international, to make appearances or give prestigious lectures, some involving compensation as well as reimbursement of expenses; and they receive honors and awards from these organizations. The Court’s calendar (approximately one month free in the winter and two months during the summer) leaves Justices free to enjoy domestic and foreign travel and the accompanying celebrity. Justice O’Connor, for example, reported taking twenty-eight trips in 2004 for which she received reimbursement for expenses, four of them to foreign countries. The Court’s schedule is convenient enough so that Justice Stevens, at age eighty-four, can live in Florida and commute to Washington by plane for the days of oral argument and the weekly conference. The honors and attention surely have a

19. THE FEDERALIST NO. 78 (Alexander Hamilton), *quoted in* FOUNDERS’ CONSTITUTION, *supra* note 1, at 141-44. See L.H. Larue, *Neither Force Nor Will*, 12 CONSTITUTIONAL COMMENTARY 179-82 (1995), which I have drawn upon here.

20. FOUNDERS’ CONSTITUTION, *supra* note 1, at 142.

21. *Id.* at 143.

22. *Id.*

23. See, e.g. Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, http://www.newamerica.net/publications/articles/2005/supreme_confidence.

tendency to contribute to feelings of self-importance and may make Justices less inclined to retire from the Court.

The office of being a Justice of the Supreme Court is probably the most powerful office in the nation other than those of the President, the Speaker of the House, and the Senate Majority Leader. Only the Justices serve for an unlimited term. Andrew Jackson, in an 1829 message to Congress, stated a profound truth: those who hold public office on a continuing basis tend to consider the office "as a species of property."²⁴ Rotation in office, he argued, was an essential principle of ordered liberty. Until the twentieth century, and especially since 1970, the lifetime tenure of Justices resulted in a vacancy arising every two years and service on the Court averaged about fifteen years.

III

THE HARMFUL CONSEQUENCES OF LIFE TENURE

The current concerns of life tenure for Justices did not clearly emerge until the twentieth century and became particularly evident after 1970. The Constitution provides only one explicit mechanism by which the political branches (the President and Congress) may influence the Supreme Court: the appointment process. Justices are nominated by the President and confirmed by the "advice and consent of the Senate."²⁵ This process, when it occurs with some frequency, helps make the Court aware of and accountable to the will of the people. Although Justices, like other federal officers, may be removed by the cumbersome process of impeachment, an attempt to use this process early in our history failed.²⁶ No Justice has been removed by impeachment and there is general agreement that serious misconduct, such as committing a felony, must be established.²⁷

24. President Andrew Jackson's Message to Congress, December 1829, *quoted in* LEONARD D. WHITE, *INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION* 308-09 (4th ed. 1955).

25. U.S. CONST. art. II, § 2 provides: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law; but the Congress may by Law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

26. Chief Justice Rehnquist has explored the early attempt to impeach Justice Samuel Chase. *See* WILLIAM H. REHNQUIST, *GRAND INQUEST: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992) (discussing the politically motivated impeachment of Justice Chase and concluding that its failure fortified judicial independence).

27. *See* REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 9-26 (Aug. 1993) (concluding that Art. III judges may be removed only by impeachment and recommending that a statute provide for automatic suspension of duties when a judge is convicted of a felony). For subsequent discussion of the evolution of federal appellate justice, *see* RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS (Arthur D. Hellman ed., 1990).

Exercise by Congress of its legislative authority to regulate the size,²⁸ jurisdiction,²⁹ structure, procedure, and terms of employment of Justices or other Article III judges is constitutionally permissible, at least within broad limits, but often comes with unwelcome consequences. Denying the Supreme Court authority to exercise jurisdiction over a particular subject matter, for example, may leave conflicting decisions of the lower federal courts in place. Legislation denying jurisdiction to any federal court has the effect of leaving in place possibly conflicting state court decisions of federal constitutional questions. These unwelcome consequences make such proposals unattractive and politically dangerous.³⁰

The drastically decreased turnover of Justices since 1970, however, has substantially reduced the effectiveness of the appointment process in keeping the Court in touch with popular will. With rare exceptions, Justices in the twentieth century have remained on the Court until they die in office, become physically or mentally decrepit, or decide to retire when a President in office is likely to appoint a Justice with similar political views. The result is that decisions having great moment for the nation's future are made by Justices whose appointments came many years before and who may not be influenced by, or even knowledgeable about, the views of those voters who are members of generations other than that of the most elderly. None of these developments could have been foreseen by the Founders.

Furthermore, the problem is magnified because a vacancy arises either unpredictably by a Justice's death or deliberately by a Justice's decision to retire. And the timing of Justices' retirement is frequently motivated by a desire to have a like-minded successor appointed.³¹ Since early in the twentieth century some of these events have clustered together, resulting in oscillating periods of very little turnover with those of very quick turnover. Because vacancies are uneven over time but sometimes are bunched, one President may make five appointments in a four-year term and others make none.³²

28. The Court was created in 1789 with six members; a seventh was added in 1807; an eighth and ninth Justice was added in 1837; a tenth was added in 1863; two seats were eliminated in 1866-1869; and a ninth seat restored in 1870. Since then the Court has not changed in size. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS AND SENATORS* 53-96 (Rev. ed. 1999).

29. For extensive discussion of statutory regulation of federal court jurisdiction and its limitations, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* Chapters 1-5 (5th ed. 2003).

30. Efforts to make Justices work harder or with less assistance may have unintended and undesirable consequences and have a vindictive or petty quality. For example, a reduction of law clerks from the current four to the former one would put a much larger burden on each Justice and especially so if more mandatory jurisdiction was also required; and complaints would be made that it handicapped the Court's ability to exercise its constitutional duties.

31. See *infra* text accompanying note 34.

32. President Taft made five appointments in his four-year term (plus the appointment of an existing Justice as Chief Justice) and President Harding made four appointments. On the other hand,

Current arrangements create perverse incentives that may result in a transient political majority controlling Supreme Court decisions for a generation or more: the randomness over time of the death of Justices may lead to one President getting three appointments in a four-year term (as President Nixon did) and another none (President Carter's experience). It is surely possible, for example, that President Bush will have more nominations before the end of his current term. If he does, and one of the retiring Justices was a liberal member of the Court, a six-member conservative faction might control constitutional decision making for decades.

Also, Presidents have a strong incentive to appoint younger but like-minded appointees, although this has happened only infrequently as yet (Justice Thomas, who was forty-three when appointed, is the most recent example).³³ More significant has been the attempt of many Justices since 1970 to obtain the appointment of a like-minded successor.³⁴ Chief Justice Warren, for example, sought belatedly to have President Johnson choose his successor, but he had waited too long and President Nixon got the appointment.³⁵

The attempt of Justices to hold their office until a like-minded President would make the appointment has contributed substantially to the increasing instances of Justices becoming physically or mentally decrepit in their final years on the Court.³⁶ Justice Black attempted to survive the Nixon presidency, and Justice Douglas attempted to survive both Nixon and then Ford, but both Justices failed.³⁷ Justices Brennan and Marshall attempted to survive Reagan, and they also failed. Justice Blackmun, on the other hand, succeeded in surviving until the Clinton administration. There is strong evidence that all five were physically or mentally impaired during their last years on the Court.³⁸ All harmed the Court because it was

President Carter made no appointments in a four-year term and three recent presidents made no appointments during their first term in office (FDR, Clinton and the second Bush).

33. See Calabresi & Lindgren, *supra* note 11, at 800-801 (stating that the average age of Justices when they are appointed or commissioned has remained relatively constant throughout history (ranging between 52 and 57 years since 1821)).

34. *Id.* at 801-811 (providing impressive statistical evidence that retirement decisions of Justices are strongly influenced by a desire to influence the appointment of a successor: nearly two thirds of resigning Justices (34 of 53) retired during the term of a president of the same party. On the other hand, of Justices who died in office, 60% (29 of 48) did so during the term of a President of the opposing party (they tried but failed to survive the term of a President of the opposing party)).

35. See 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, 805-06 (1986) (relying on judicial biographies of Chief Justice Warren by G. Edward White and Bernard Schwartz).

36. See Garrow, *supra* note 15. See DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (Kansas 1999) [hereinafter ATKINSON].

37. Calabresi & Lindgren, *supra* note 11, at 807.

38. *Id.* at 815-18. The evidence relies on the detailed discussion of individual justices in Garrow, *supra* note 15, and ATKINSON, *supra* note 36. Garrow presents strong evidence that at least

operating under a situation in which several Justices were operating by rote and decisional power was sometimes improperly influenced by another Justice or by law clerks.

This harm has even been recognized by Justices themselves. In one situation, that of Justice Douglas, who became mentally impaired in his last years, the Court, by a 7-1 vote in a conference held without notice to Douglas, determined that it would not count the Douglas vote if his vote determined the outcome.³⁹ That sensible, but perhaps lawless action, is an indicator of the serious problems caused by the current life tenure system.

In short, the primary political influence on the Court—the constitutionally-required process by which the elected representatives of the people appoint Justices - is applied irregularly, infrequently and haphazardly. And the attempt of numerous Justices to delay retirement has harmed the Court, even when health problems prevent them from most effectively carrying out their functions in an effort to ensure the appointment of a like-minded successor. All of these factors have had another long-term consequence: they have increased the contentiousness of confirmation proceedings and undermined the public's conception that the Court is an independent branch exercising "judicial" rather than "political" authority. Enactment of an appropriate and valid statutory solution is necessary. It is now desirable to renew the Supreme Court through a proposal that would limit their service on the sitting Court to eighteen years followed by lifetime service in a lower federal court.

IV

THE TERM OF SERVICE ON THE COURT SHOULD BE LIMITED EITHER BY STATUTE OR CONSTITUTIONAL AMENDMENT

A. A Statutory Proposal

A variety of proposals have been made over the years, most involving constitutional amendments that would provide age limits or term limits.⁴⁰ Age limits primarily address mental or physical decrepitude but do so indirectly and in a heavy-handed manner that discriminates on the basis of age. An appointment to a limited term of office, in connection with a particularized inquiry into health, is a better response. Term limits also

eleven justices have continued to serve when they were physically or mentally incapacitated. Even more worrisome, "nearly half of the last eleven Justices to leave office (45%) were mentally decrepit and a half of the last six Justices to leave office were mentally decrepit in their last years on the Court." Calabresi & Lindgren, *supra* note 11, at 817.

39. See Garrow, *supra* note 15, at 1053-54.

40. For a well-considered term limits proposal, see 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 (1986). For an age limits proposal, see Garrow, *supra* note 15.

have the advantage of largely eliminating the adverse effects of the randomness in the creation of new appointments. If appointees serve out the full term, vacancies will arise frequently and regularly. The regularity of appointments would prevent the clustering of appointments that sometimes can create a majority on the Court that was not built on a solid foundation of a series of electoral victories.

Equally important, term limits eliminate or reduce most of the major forms of strategic behavior that flow from the current life tenure arrangements. A President no longer would have an incentive to appoint younger Justices and would feel free to appoint a more qualified older lawyer or judge whose age and health would suffice to complete the fixed term of years. Terms limits also largely eliminate the ability of Justices to influence the appointment of their successors through the timing of a resignation.

Because the Constitution is so difficult to amend, serious consideration should be given to statutory alternatives. Although some constitutional law scholars believe that any statutory approach is inconsistent with the Good Behavior Clause, Paul Carrington and I are among the many who disagree. My views on the subject are stated below, and those of Carrington in his article.⁴¹

Our proposal defines the office of being a Supreme Court Justice in a way that limits participation of each Justice on the Court to about eighteen years followed by lifetime service on a lower Article III court.⁴² It has won the support of about forty-five eminent constitutional law and federal courts scholars.⁴³ The nonpartisan nature of the proposal is evidenced by the fact that it is endorsed “in principle” by a large group of scholars who are identified politically as ranging across a broad spectrum - liberal, centrist and conservative. They are persuaded that current arrangements are causing serious problems that will only get worse and that change is needed now.

Specifically, we propose that the President appoint one and only one new Justice during each term of Congress, with the nine Justices who are junior in commission serving as the active members of the Court. The proposal would result in a tenure on the sitting Court of eighteen years, which is longer than the historical average of fifteen years. Senior Justices would retain their title and compensation for life. After completion of the period of service on the sitting Court, Justices would continue to serve in accordance with the Good Behavior Clause of Article III by performing

41. Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, in REFORMING THE COURT, *supra* note †, at 137.

42. The proposal in its current form may be found at the following website: <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm>. A full list of those endorsing the proposal is included.

43. *Id.*

judicial duties in circuit courts, much as Justices were required to do during most of the nineteenth century. If needed to provide a nine-member Court, the Senior Justice junior in commission would be recalled to the Court to serve until the next term of Congress, when the new appointment would be made. Senior Justices would also participate in the Court's procedural rule-making authority; their involvement with the lower federal courts would be helpful in the Court's consideration of the procedural rules of those courts.

The fundamental purpose of the Good Behavior Clause was to ensure judicial independence from control by the political branches of the federal government. An eighteen-year term of service free from any control by the executive and legislative branches would protect judicial independence as well as the system of life tenure does. And the elimination of the strategic behavior encouraged by the current system would provide more protection against improper influence by Justices, Presidents and Senators than is the case now. The need for legislation to rectify the problems created by life tenure is becoming generally recognized and is long overdue. We summon Congress to address it and ask you to support it.

B. Constitutionality of a Statutory Solution

Congress has broad authority, among other things, to create and abolish federal courts (other than the Supreme Court),⁴⁴ determine the jurisdiction of federal courts (providing an uncertain minimum jurisdiction is left to the Supreme Court),⁴⁵ establish rules regulating federal courts, provide the terms of employment of judges subject to the Compensation Clause, and prescribe procedures by which the federal judiciary may discipline itself. The Supreme Court's appellate (as distinct from original) jurisdiction is exercised "with such Exceptions, and under such Regulations, as the Congress shall make."⁴⁶ The constitutional limitations on this legislative authority are that the regulation must not violate the prescribed methods for appointment and removal of Article III judges and must be consistent with the judicial independence protected by the Good Behavior and Compensation Clauses of Article III, Section I, discussed at the beginning of this article.

44. Discussed *infra* at text accompanying note 54.

45. See RICHARD H. FALLON, JR., DANIEL J. MELTZER AND DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003). *Id.* at 28-54 (brief summary), at 268-318 (original jurisdiction), at 466-600 (review of state court decisions), at 1552-1621 (review of federal decisions and certiorari policy).

46. U.S. CONST. art. III, § 2.

1. Circuit Riding⁴⁷

The legislative requirement that Supreme Court Justices hear and decide cases in inferior federal courts began with the Judiciary Act of 1789 and lasted for more than a century; the final steps in the demise of circuit riding were taken by the Judiciary Act of 1911. The practice imposed extreme hardship on Justices, especially in the first half of the nineteenth century when long distance travel was so difficult and onerous.⁴⁸ From the very beginning the Justices complained about the circuit-riding requirement and sought legislative relief from Congress. These pleas were rejected until late in the nineteenth century and became more compelling only when burgeoning caseloads threatened to overwhelm the Court. Members of Congress had good reasons to require circuit riding: it brought federal Justices into contact with citizens throughout the nation; it gave the Justices valuable experience in trying and deciding appeals in lower courts; and it familiarized them with the practice and problems of lower federal courts.

In the initial years of circuit riding, several Justices (e.g., Jay and Marshall) wrote private letters stating or suggesting that the practice was unconstitutional.⁴⁹ But when a case questioning the constitutionality of circuit riding came before the Court in 1803, a unanimous Court rejected the argument that the practice was unconstitutional and circuit riding continued as a requirement for most of the remainder of the century.

Circuit riding also had another consequence. A vacancy on the Court was associated with a particular circuit and the person appointed would "ride circuit" in that part of the country. This statutory requirement provided a practical limitation on the President's Article II power of appointment. Usually the President had to appoint a lawyer or judge from that circuit rather than make a selection from a nationwide pool, as is now the case.

47. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) [hereinafter Glick]. This article provides a good summary of the history of circuit riding, its purposes and effects, and the Court's attempts to eliminate it. The article also cites much of the prior literature on the subject.

48. For letters from Supreme Court Justices complaining about the burdensome nature of the long travel by carriage throughout the breadth of the country, see FOUNDERS' CONSTITUTION, *supra* note 1, at 163 (letters of Chief Justice Jay on behalf of the Court and of Justice James Iredell).

49. Chief Justice Jay drafted a letter dated on behalf of the Court to President Washington attacking the constitutionality of circuit riding. See *id.* at 161-62. The letter, dated Sept. 15, 1790, was never delivered. The letter contains the two principal arguments advanced by the appellant in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), and discussed below: (1) cases decided by the Justices on circuit were not within either the original or appellate jurisdiction of the Court and the duties were incompatible because the Supreme Court was required to review appeals from the circuit courts; and (2) circuit riding required the Justice to hold two offices at one time and they had not been appointed by the President to the circuit court as required by Art. II, § 2.

Vestiges of circuit riding remain: each Justice is assigned by the Court to a circuit and hears applications for temporary relief from that circuit,⁵⁰ and a retired Justice “may be designated to perform such judicial duties in any circuit, including those of a circuit Justice, as he is willing to undertake.”⁵¹ At least eight retired Justices have utilized this provision since 1950; Justice Clark, for example, spent the last ten years of his life as a circuit court judge.⁵²

2. *Stuart v. Laird*⁵³

In 1802, a Republican Congress and President Jefferson abolished the circuit courts created by a Federalist Congress and President Adams by the Judiciary Act of 1801.⁵⁴ New circuit courts and judgeships replaced them. None of the circuit court judges appointed by the Federalists were reappointed to the new courts, leaving sixteen Article III judges with no cases to decide. Although none of the judges who lost their offices attacked the constitutionality of the 1802 legislation, those questions were raised in *Stuart v. Laird*.⁵⁵ A foreign creditor had obtained a judgment against a Virginia debtor in a circuit court created in 1801. When the creditor sought to enforce the judgment in the circuit court established by the 1802 legislation, Chief Justice Marshall, sitting as a circuit judge, upheld the judgment. In the appeal to the Court in *Stuart* the judgment debtor asserted several constitutional questions concerning the power of Chief Justice Marshall, acting as a circuit Justice, to enforce a judgment that, it was argued, should have been enforced by the life tenure judges appointed to the Virginia circuit under the 1801 legislation. The questions briefed and argued were as follows:

First, could judges entitled to “hold their Offices during good Behaviour”⁵⁶ be deprived of that office without an impeachment

50. 28 U.S.C. § 42 (1948).

51. *Id.* § 294(a).

52. See Glick, *supra* note 47, at 1830-31 (listing Justices who have served in lower federal courts after retiring from the Supreme Court).

53. 5 U.S. (1 Cranch) 299 (1803). *Stuart* is discussed in David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 662-63 (1982), and Glick, *supra* note 47, at 1794-1829.

54. 2 Stat. 132 (Mar. 8, 1802).

55. The Jeffersonian legislation was accompanied by a large polemical and political literature. Alexander Hamilton, when the legislation was pending, argued that, even if Congress could abolish and recreate the circuit courts, it could not “abolish the emoluments of the office,” which were retained during good behavior. See FOUNDERS’ CONSTITUTION, *supra* note 1, at 166-67, 175-79 (reprinting Hamilton’s THE EXAMINATION, Nos. 6, 12, and 13 (1802)). The constitutionality of the legislation was vigorously debated in the House of Representatives. Hamilton argued that “the Office is something different from the Court” and “the one may exist independently of the other.” *Id.* at 175-77. Moreover, “affirm[ing] the right of Congress to abolish the Judges of the Inferior Courts is absolutely fatal to the independence of the Judiciary department” because “the tenure of an office is one of its essential qualities.” *Id.* at 178.

56. U.S. CONST. art. 1, § 3.

proceeding? The judgment enforced by Chief Justice Marshall while “riding circuit” was invalid, the judgment debtor contended, because the displaced circuit court judges were deprived of their office without being removed by impeachment, in violation of the Good Behavior Clause. This argument was countered by reliance on other language of the same section of Article III that authorized Congress to vest the judicial power “in such inferior Courts as the Congress may from time to time ordain and establish.” Although the Court’s decision affirming the judgment below raised, argued and rejected this constitutional question, Justice Paterson’s opinion dealt only with the power of the court enforcing the judgment and not explicitly with the abolition of a court with previously created judgeships. The Court held, 5-0, with Chief Justice Marshall not participating, that Congress had constitutional authority to replace a previously existing court with another one and “to transfer a cause from one such tribunal to another.”⁵⁷ The opinion contains strong language of congressional authority to create, modify or abolish federal courts and their jurisdiction: “. . . there are no words in the constitution to prohibit or restrain the exercise of legislative power.”⁵⁸

Second, could a statute authorize Supreme Court Justices to hear and decide cases in a lower federal court? This argument took two forms: (1) the statute assigning circuit duties to Justices effectively appointed them as circuit judges in contravention of Article II’s provision that appointments were to be made by the President with the Senate’s consent; and (2) Justices could not sit on circuit because the cases they would try there were outside the Supreme Court’s original jurisdiction as defined by Article III. These are two aspects of the same question: Does Congress have legislative authority to mix the duties of one judicial office with that of another? Or, put another way, is the “office” of federal judges, including that of Supreme Court Justices, subject to legislative modification or redefinition? Justice Paterson’s opinion in *Stuart* upheld the power of Congress to require Justices to ride circuit but did so without replying to the opposing arguments: the “practice [of circuit riding], and acquiescence under it [by members of the Court], for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. . . . Of course, the question is at rest, and ought now to be disturbed.”⁵⁹

If a practice, begun by a Congress in which many of its members were from the Constitutional Convention and all were familiar with the debates concerning its adoption, had become “settled” after twelve years of circuit riding, fixing the meaning of the Constitution, it is surely part of the

57. *Stuart*, 5 U.S. (1 Cranch) at 309.

58. *Id.* at 308.

59. *Id.* at 309.

constitutional firmament after existing for more than 121 years with its constitutionality unquestioned. If “originalism” has any force, it must be applicable in this situation.⁶⁰

3. Abolition by Statute of Existing Federal Courts and Judgeships⁶¹

On three occasions during the first seventy-five years of U.S. history (1802, 1812 and 1863), Congress abolished federal courts with the effect of leaving duly appointed Article III judges without any cases to decide. In the first instance (repeal by the Jeffersonian Congress in 1802 of the Federalists’ Judiciary Act of 1801), discussed above, sixteen judges appointed to the circuit courts created in 1801 were essentially deprived of their office. The judges protested the constitutionality of the Act to Congress, but they did not bring any judicial proceeding seeking relief. The constitutional questions, however, were raised and rejected in *Stuart v. Laird*, discussed above.

The second instance occurred in 1812 when Congress passed the act admitting Louisiana as a state in the union and created a district judgeship for the state. The 1804 legislation that established the Territory of Orleans in what became Louisiana had provided a district judge with the same jurisdiction and authority as district judges in a state. When the territorial government ended, the judgeship was abolished. However, in this instance, President Madison appointed the same person to the judgeship created by the statehood act.

The third instance was in 1863 when Congress abolished the circuit court and the criminal court for the District of Columbia and replaced them with the Supreme Court for the District of Columbia. The three judges of the circuit court for the District of Columbia served with life tenure and the legislation abolished the three judgeships. In effect, the three judges were removed from office by legislation abolishing their court and creating a new one. None were appointed to the new court.⁶² The background in this instance was the Civil War and the concern of President Lincoln and

60. Calabresi & Lindgren, *supra* note 11, at 859-868 (discussing the constitutionality of statutory proposals). An earlier version of the article took the position that their statutory proposal, similar to the Carrington-Cramton proposal, was constitutional. The final version reaches the contrary conclusion, arguing that the text of the Good Behavior Clause and the clause of Art. 1, Sec. 3, that “the Chief Justice shall preside” when the Senate tries a President in an impeachment proceeding, when read together, make the office of a Supreme Court Justice that is unique and distinctive and therefore circuit riding, designation permitting service on lower courts, and prohibit successive service on a lower court after a term of years on the high court are unconstitutional. They argue that the “originalist” position is that the First Congress, the Marshall Court (with Marshall recusing himself because of his involvement in the case), *Stuart v. Laird*, and the unquestioned continuance of the practice for 121 years are all wrong. Circuit riding was an unconstitutional practice and should not be relied upon today.

61. This commentary relies in part on information provided by Bruce Ragsdale, Chief Historian, Federal Judicial Center.

62. *Id.*

Congress that one or more of the judges were Confederate sympathizers. Also in 1863, Congress abolished the judgeship for the U.S. Circuit Court for the Circuit of California, although there was no incumbent judge at the time.⁶³

The three instances, plus the Court's holding in *Stuart*, provide support for the view that Congress may essentially remove lifetime tenure judges by abolishing the court they serve on.⁶⁴

4. Subsequent History

There are no decisions subsequent to *Stuart* that directly raise the issue of the constitutionality of a statute that requires an Article III judge to exercise responsibilities on more than one constitutional court or on the Supreme Court and an inferior Article III court. Two fairly recent decisions, however, discuss the constitutionality of statutes that mix the duties of an office subject to the president's Article II appointment authority. *Morrison v. Olson* upheld the constitutionality of the independent prosecutor legislation against a separation-of-powers attack.⁶⁵ The Court stated that the validity of the legislation turned on "whether the Act, taken as a whole, violates the separation of powers by unduly interfering with the role of the Executive Branch"⁶⁶ and concluded that impermissible interference was not involved.

That conclusion seems even more self-evident in a situation in which a President is appointing an officer (an Article III judge) who is required by statute to exercise judicial duties on more than one constitutional court. The President and the Senate know the duties in advance, all duties are judicial in character, and the required duties do not unduly interfere with the president's appointment authority.

Mistretta v. United States is another relevant precedent.⁶⁷ The Court held that the legislation creating the United States Sentencing Commission did not violate the separation-of-power principle either by requiring federal judges to serve on the Commission, sharing their authority with non-judges, or by empowering the President to appoint Commission members and to remove them for cause. The conclusion that the Constitution does not prohibit Article III judges from undertaking extrajudicial duties was

63. 12 U.S. Stat. 794 (March 8, 1863).

64. The U.S. Commerce Court was created in 1910 to review decisions of the Interstate Commerce Commission. Controversial from the beginning, it was abolished in 1913, leaving its judges without judicial work. The appointees were selected from existing federal judges; but tenure on the Commerce Court was limited to five years. Two of them, Julian Mack and Martin Knapp, were some years later appointed to federal courts of appeal. Subsequent emergency courts have been staffed by existing Article III judges. See George E. Dix, *The Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEG. HIST. 238 (1964).

65. 487 U.S. 654, 693 (1988).

66. *Id.* at 695-96.

67. 488 U.S. 361, 397-412 (1989).

supported by “the historical practice of the Founders after ratification.”⁶⁸ The Court cited a number of instances in which Justices (including Jay, Ellsworth and Marshall) had served in other capacities as a result of a presidential appointment with the “advise and consent” of the Senate, followed by numerous other examples throughout the years, including Justice Jackson’s service on the Nuremberg Tribunal in the aftermath of World War II and Chief Justice Warren’s leadership of the national commission investigating the assassination of President Kennedy.⁶⁹

In language even more pertinent to the mixing of judicial duties involved in circuit riding and to the Carrington-Cramton proposal, the Court said: “This contemporaneous practice by the Founders themselves is significant evidence that the constitutional principle of separation of powers does not absolutely prohibit extrajudicial service.”⁷⁰

5. *Judicial Designation and Discipline*

A half-dozen sentences in the Constitution deal with the creation, jurisdiction and regulation of federal courts. For many years Congress and the federal judiciary have struggled to apply this constitutional language to a federal judicial system that has currently grown to 853 authorized Article III judges and carries on its judicial business with a total judicial complement that far outnumbers the authorized Article III judges and their senior status colleagues.⁷¹ Nearly 3,000 judicial officers who do not have life tenure handle a large portion of federal judicial business: 1,328 statutory judges (magistrates and bankruptcy court judges), twenty-nine judges and senior judges of the Federal Court of Claims, and 1370 administrative law judges.⁷² Efficient utilization of the services of the minority who are Article III judges and who select and supervise many of the non-tenured judicial officers is a major endeavor.

One longstanding practice authorized by statute, and always assumed to be consistent with the Constitution, involves the designation of Article III judges to provide judicial services in a court other than that of initial appointment.⁷³ These designation practices further the efficiency of the system and encourage the continuing involvement of Article III judges in its work. By designation, a judge appointed by one federal court may handle the judicial business of another: (I) retired Supreme Court Justices and retired lower federal court judges may sit on other federal

68. *Id.* at 398.

69. *Id.* at 400.

70. *Id.* at 399.

71. See Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 *CARDOZO L. REV.* 579, 601-02 (2005).

72. *Id.* at 602-11.

73. 28 U.S.C. §§ 291-294 (1948).

courts;⁷⁴ (2) the Chief Judge of a Circuit Court of Appeals may designate district judges to serve on appellate panels of the circuit court;⁷⁵ and (3) the Chief Justice and the Chief Judge of a circuit may designate a lower court judge of one judicial circuit to serve in another circuit.⁷⁶

Problems of misconduct in office by Article III judges or physical or mental decrepitude interfering with the proper administration of justice have led to statutory procedures by which complaints against judges of U.S. district and circuit courts may be considered and remedied by action through the respective circuit councils.⁷⁷ On rare occasions the cases assigned to a judge have been reassigned and no new cases assigned, leaving an Article III judge without any cases to decide.⁷⁸ These methods of judicial discipline, which are authorized by statute and implemented by the federal judiciary, have withstood challenges to their constitutionality.

In *Chandler v. Judicial Council of the Tenth Circuit* a district judge sought relief by mandamus of an order of the judicial council of the Tenth Circuit.⁷⁹ The order permitted the judge to complete cases filed before a specified date but deprived him of all future cases. The judge had twice expressed agreement with this order and a prior one, but, changing his mind, he sought mandamus. The Court, in a 7-2 decision, denied the application for mandamus on the ground that the case for extraordinary relief had not been made. In doing so, Chief Justice Burger stated in dictum:

[There is] no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases. . . . [But] Congress can vest in the Judicial Council the power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine [administrative] matters.⁸⁰

This power, on the facts of *Chandler*, includes the denial of any new case assignments to a duly appointed Article III judge.

Justice Harlan, in a lengthy concurrence, stated that the Court had jurisdiction to entertain the proceeding and that, considering the case on its merits, the circuit council order removing cases from the district judge did not impair judicial independence and was a valid exercise of valid

74. *Id.* § 291(a).

75. *Id.* § 292(a).

76. *Id.* § 291(a), (d).

77. *Id.* §§ 351-364.

78. For discussion of judicial discipline and impeachment of federal judges, see Symposium, *Judicial Discipline and Impeachment*, 76 KY. L.J. 633-810 (1987-88), especially papers by Stephen B. Burbank and Ronald D. Rotunda.

79. 398 U.S. 74 (1970).

80. *Id.* at 84.

authority.⁸¹ Justices Black and Douglas, dissenting, agreed with Harlan that the case was ripe for decision. Reaching the merits, they argued that the order depriving the judge of any new cases effectively removed the judge from office without an impeachment proceeding and violated the Good Behavior Clause. In their view, the order impaired judicial independence and could not be justified on grounds of efficient administrative supervision.⁸²

Although these internal disciplinary mechanisms do not apply to the Supreme Court, the Court at least in one instance in the twentieth century determined that the vote of an impaired Justice would not be taken into account if that vote would decide the case.⁸³

6. *Interpreting the Good Behavior Clause*

The Carrington-Cramton proposal was designed with these elements of current law and practice in mind. Thus, under the proposal a Senior Justice continues to participate in the work of the Supreme Court in two ways: (1) full participation until retirement or death in the rule-making authority of the Court; and (2) the recall of a Senior Justice to fill a temporary vacancy or to provide a full Court in situations of recusal or temporary disability in the term or terms immediately following becoming a Senior Justice. It is supported by a highly plausible reading of the constitutional text, longstanding and consistent historical practices that began with the First Congress, and modern legislation that provides a judicial mechanism by which judges themselves may police judicial behavior and reassign cases to maintain the efficiency of the federal judicial system.

The circuit riding required of Supreme Court Justices in the nineteenth century (a practice that led to some Justices retiring early) and upheld by the Court in *Stuart v. Laird* establishes that today's Justices could be required, for example, to spend three months per year handling cases as a circuit or district court judge. The question, then, is whether spreading the alternative constitutional court service over time is somehow different from contemporaneous service.

Article III, Section 1 of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . ." This language can be read as drawing a distinction between "Judges" of the Supreme Court and "Judges" of the inferior courts even though both are entitled to life tenure. But this construction, reaching the conclusion that tenure as a Supreme Court Justice must continue in that capacity for life, is not a necessary reading. An equally plausible and

81. *Id.* at 89-129 (Harlan J., concurring).

82. *Id.* at 129-142 (Douglas J., dissenting).

83. *See* Garrow, *supra* note 15, at 1054.

straightforward interpretation would read it as requiring that “Judges” at both levels must enjoy life tenure but that the office of each may include not only contemporaneous service, as held in *Stuart v. Laird*, but successive service that started in the Supreme Court and moved to a lower court or vice versa. The text of the Good Behavior Clause does not separate the “Judges” of the “Supreme Court” from those of the “inferior courts.” Instead, it lumps them together in the following language: “The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour” Congress may define a judicial “Office” as including service in both the Supreme Court and an inferior Article III court.

Because the text of the Constitution is ambiguous, the choice between two plausible interpretations should be influenced or controlled by a purposive or functionalist reading of the Good Behavior Clause, read in conjunction with the Necessary and Proper Clause. The function and purpose of the Good Behavior Clause is apparent from the uniformity of statements both of those supporting and opposing the Constitution: Its purpose was to ensure that federal judges acted in a judicial capacity that was not subject to the influence or control of the political branches of the federal government.⁸⁴ “Judicial independence” has become the rubric for an essential requirement: decisions of federal judges must be protected from improper executive or congressional influence, approval or retaliation. This purpose is served by a definition of judicial office that guarantees life tenure and includes a lengthy and fixed term of service in the judicial work of the Supreme Court.

The proposed statute is constitutional because (1) it provides for life tenure on a constitutional court and (2) the term of full service on the Supreme Court is lengthy, fixed in time, non-renewable and cannot be affected by the political branches of government. The Carrington-Cramton proposal protects judicial independence just as well as do current arrangements.

84. See *supra* notes 5-8 for discussion of the statements of the founding generation (both those supporting and opposing ratification of the Constitution) evidencing that judicial independence was the purpose of the Good Behavior and Compensation Clauses.