PART III:

Reining in Judicial Life Te

A Solution Without A Problem

BY GREGORY S. FISHER

Life tenure for federal judges has been colorfully dismissed as the "stupidest provision" in the Constitution.[1] Indeed, two separate essays targeted life tenure in the now-celebrated 1995 "Constitutional Stupidities Symposium" published by *Constitutional Commentary*.[2] Yet, life tenure persists and with two 2005 vacancies on the Court, it again is center stage. With Judge Roberts' confirmation, he will be the 109th Justice on the United States Supreme Court,[3] and Justice O'Connor's replacement will be the 110th. That sounds like an exclusive club until one reflects that only nine dogs have ever played Lassie,[4] and no Justice ever had his or her ears scratched by June Lockhart, but I'm straying from my subject.

What is the purpose for life tenure and does it work? Do we need reform and, if so, what type?

A consensus may be slowly taking shape that life tenure is a relic of the 18th century that no longer serves its intended purpose. Leading authorities offer well-reasoned proposals for reform.[5] Others support life tenure, but more as an accustomed tradition than a choice.[6]

This essay briefly reviews the debate and current proposals for change and summarizes the debate that has largely passed unnoticed by rank-and-file members of the federal bar. Although life tenure's critics offer many persuasive reasons for change, it should be retained because it reflects values and serves purposes that are still important for the functioning of an independent federal judiciary.

The Origins of Life Tenure

Article III of the U.S. Constitution provides that federal judges hold office "during good Behaviour," a construction universally accepted as life tenure.[7] The standard explanation for life tenure, derived from Federalist No. 78, is that Article III judges had to have a secure livelihood to ensure that they would be free from political, economic or social pressures that might impermissibly influence their judgment.[8] Life tenure resulted from the recognition that our judges are corruptible, which is not to say that they are corrupt but to recognize that they are human.

In recent years, however, several scholars have called into question the continuing need for life tenure, pointing out that it was designed in a different era for circumstances that may no longer apply in the 21st century.[9] The problems most typically noted are that Article III judges (particularly U.S. Supreme Court Justices) are being appointed younger and living longer, thereby enabling them to shape law and policy in a manner disproportionate to their office, and incompatible with a form of government based on checks and balances.[10]

For example, it is frequently noted that between 1789 and 1970, the average tenure for a Supreme Court Justice was approximately 15 years, and Justices retired around the age of 68. Since then, the average tenure is hovering in the 25-year range, with retirement rising to almost 79 years of age.[11]

In addition to increasingly lengthy terms, critics of life tenure observe that there is a freakish randomness to vacancies, especially on higher federal courts, that tends to "turn each one into a galvanizing crisis."[12] They also argue that long-serving federal judges risk losing touch with society, thereby squandering social and political capital necessary for the court's legitimacy, that life tenure tempts presidents to exercise appointment powers to extend their respective political visions far into the future, and that, ultimately, life tenure promotes unchecked power.

Validating Criticism of Life Tenure

Life tenure's critics offer well-researched and persuasive arguments. There is little doubt that practical experience belies life tenure as an imperative safeguard.

Article I judges—federal Magistrates Judges, Bankruptcy Judges and Tax Court Judges—fulfill necessary and important functions without life tenure. Most state court judges serve terms or stand for retention elections at periodic intervals.[13] All of these judicial officers somehow muddle through and Rome hasn't burned.

Moreover, as some note, life tenure is not a life sentence and therefore provides no assurance that extra-judicial influences will not affect judges.[14] Unlike service academy graduates, who must commit to serve designated terms, federal judges are free to resign or retire at any time and return to private practice. Indeed, recent statistics suggest that federal judges are retiring in greater numbers.[15]

Similarly, there is little doubt that life tenure places stress on political and social discourse. The stakes for the "appointments game" have produced a nomination process that seems part Kabuki play and part tag-team steel cage professional wrestling event.

Proposals

Of those favoring some form of change, current proposals generally fall within one of four models:

(1) term limits of a moderate length (18

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This essay is dedicated to the memory of the late Professor Bernard F. Huppé, Harpur College, S.U.N.Y. Binghamton.

years seems to be the most-selected length), at which time the judge or justice would leave the court;

(2) an absolute age limit, at which time the judge or justice would have to retire and leave the court;

(3) life tenure with mandatory senior status, requiring judges or justices to leave the active bench at a specified age but allowing them to remain a judge on senior status; and

(4) for the United States Supreme Court—and perhaps Circuit Courts of Appeal—to develop a system by which judges are rotated through the Court from lower courts.[16]

Most of the proposals require constitutional amendment, which effectively relegates them to academic status. However, one proposal is different, in that it could be implemented by legislation.

In the model put forth by Professors Paul Carrington and Roger Cramton, a new United States Supreme Court Justice would be appointed every two years.[17] The Court would be constituted of the nine most junior justices. Justices would therefore serve no more than 18 years unless they died or retired. At the conclusion of an 18-year term, Justices would be bumped from the active Court and assume duties as a Senior Justice. Senior Justices could help with the Court's rule-making powers, assist with lower courts and perform other administrative tasks, but would not sit and decide cases on the Court.

The Court would therefore be reshuffled every two years, and each president would have a minimum of two appointments. Although I oppose abandoning life tenure, this model effectively addresses most of the perceived problems and has the added advantage of allowing for quick enactment and (if needed) subsequent fine-tuning.

Reform: Same As It Ever Was?

If there are problems with life tenure, are they unique to the federal judiciary, or are they problems that were not already considered when life tenure was adopted? In fact, the potential implications of "reform" have not been closely studied.

Power is the concept driving reform—concerns that too much power is vested in Article III judges and that life tenure encourages presidents to abuse their appointment powers. These are valid concerns in the abstract, but we cannot say that life tenure creates such risks or that eliminating life tenure would allay these concerns.

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The "problem" of lengthy terms is not something unique to the federal judiciary. Elected representatives enjoy incredible advantages given the undeniable power of incumbency. The United States has many senators and representatives who have served 30 or more years. In smaller states such as my home state, Alaska, such "permanent" representation is actually preferred because it affords a better chance to wield seniority powers in both the Senate and House.

Not only does the United States have a tradition of long-serving representatives, but we also have a growing tradition of political families. Indeed, a foreigner observing our political landscape could fairly suggest that we are producing dynastic strands. The practical reality of our republican form of government is that power is vested in the hands of the few for the benefit of the many—which is entirely consistent with what the founders intended—and "the few" don't change much. That's neither bad nor good, it just is what it is, and it works reasonably well.

Moreover, there is no evidence that any particular lengthy term of any particular Justice or group of Justices precipitated a constitutional crisis or resulted in some major institutional problem impairing the Court's ability to discharge its powers. There have been rumored instances in which a Justice may have overstayed his or her usefulness. But the Court rolled on.

The other side of the power equation also offers little support for reform. An examination of appointments made by each respective president fails to identify anything that could be described as having

a significant long-term effect on the Court—with one notable exception. President Jackson enjoyed truly phenomenal appointment success. He appointed six Justices, all of whom served until death, and the average tenure was 22.8 years. He gave us Chief Justice Taney, author of *Dred Scott*, and I suppose we could all agree that is as good an argument for term limits as anything else. The problem, of course, is that no one can say when such a case will come before the Court. Life tenure didn't write *Dred Scott*.

Consequently, we cannot conclude that life tenure's problems are unique and must be corrected. More troubling, are the implications of reform.

Although many proposals only address the United States Supreme Court, there is no reason why Congress would stop there. Indeed, given criticism of the federal judiciary in recent years,[18] there is every reason to believe that statutory proposals will lead to additional laws being enacted that promote institutional erosion of all Article III judgeships. Each district court and circuit court of appeals has a statutorily prescribed number of judges.[19] These periodically change as Congress adds judgeships to a district or circuit. Congress could easily apply a variation of Professor Carrington and Cramton's statutory model to restructure the entire federal judiciary. Congress might even relish the opportunity, and once started there is no reason to believe that successive congresses would not continue to tinker with the engine.[20]

Life tenure's critics sometimes note that average life expectancy at the end of the 18th century was less than 40 years old, thereby implying that no one believed an Article III judge would be around long.[21] But this statistic is skewed by the high child mortality rate that afflicted 18th-century America. The historical record we are left with suggests that an upper-middle-class member of the landed gentry who survived the ravages of childhood disease could easily expect to live into his 70s or longer.[22] Critics of life tenure correctly note that justices are getting appointed at younger ages and serving longer terms.[23] They then conclude that this trend must be different from what anyone envisioned or intended when the Constitution was adopted. However, the actual record undermines this premise. The figures here are based on my own calculations from the data available on the Oyez Web site and are rounded out.[24]

The "founding father" presidents—Washington, Adams, Jefferson, Madison and Monroe—appointed 19 justices. The average tenure was 15 years. Twelve died in office and seven resigned or retired—a 36 percent early departure rate. Four served 30 or more years. Seven of the 19 justices served 20 or more years. The average age at appointment was 47 years old. The average age at death was 68 years old. The average projected (not anticipated) tenure was therefore 21 years. By comparison, the projected tenure during President Nixon's administration was 18 years based on an average age at appointment of 56 and an average age at death of 74.

From the early 19th century to the Great Depression, the average age of appointment steadily rose from 47 to 65 during Hoover's term in office, before dropping to an average age of 51 during the presidency of Franklin Delano Roosevelt. Following FDR, the average age of appointment climbed again until it hit the range of 56 years old during the 1960s.

The average age of appointment for the current Court is 52 years old. It is, in other words, not terribly different from what it was in the early 19th century. The average age of death has steadily risen over the years from 68 years old to 71 years old by Lincoln's administration to 74 years old by Nixon's era.

These figures shed additional light on how the concept of life tenure has actually affected the Court over the balance of its history. The projected tenure for appointments was actually longer, not shorter, in the Court's earliest years than in the modern era. A Justice serving 20 or more years would not have been unusual. Had the Court enjoyed the prestige it enjoys today the longevity may even have been higher. Chief Justice Jay declined a second appointment to the Court, observing that the Court lacked "the energy, weight, and dignity which are essential to its affording due support to the national

government."[25] As previously noted, a staggering 36 percent of the first 19 Justices resigned or retired prior to death. There has been a slight increase in the average age of death, which reflects societal trends. But everyone has experienced that similarly, not just United States Supreme Court Justices.

At the end of the day, we should not be persuaded that life tenure has increased the Court's power beyond that intended when Article III was adopted. Nor should we be swayed to the position that any changes are incompatible with our system of checks and balances. I also don't think that the Court's institutional trends reflect any need for change. This being the case, it's unclear to me why we need to eliminate life tenure.

Revalidating Life Tenure

If I am correct, the problems and institutional trends related to the federal judiciary are not much different from problems and trends that have existed throughout the Court's history. However, that is not really an argument for keeping life tenure so much as a belief that things are pretty much the same.

There should be more compelling reasons for retaining life tenure, and I think there are. I believe life tenure's favorable attributes have been discounted in the current debate. Today's scholars criticizing life tenure properly look to Federalist No. 78 and use it as a platform for explaining why the identified purposes for life tenure have lost viability. I agree that Federalist No. 78 is critical to analyzing life tenure. However, it's a starting point, not an ending point. I believe that there are three overriding benefits of life tenure: (1) continuity, (2) efficiency and (3) stability.

For the practicing Bar, continuity is important. Our law is precedent-based. The given range of practical precedent (the type that really matters) is not limited to published opinions but instead includes our institutional, communal knowledge of who a particular Judge is and how he or she is apt to decide any given problem (even if it is a mundane discovery dispute). In terms of predicting the current and future courses of the law, we

need to know who is on the bench and have some facility, however crude, for determining likely outcomes.

We do not need to like the results. We do not need to completely understand the results. We just need a result, and we need to have it explained to us such that we can come to grips with it and apply the decision in our day-to-day professional lives. We need that at each level, from the United States Supreme Court down to the district courts. We need it more at the district court and court of appeals levels because few of us breathe the rarified air of the U.S. Supreme Court. Life tenure best serves this goal for a federal judiciary that is constantly exposed to popular criticism for decisions affecting society.

For the judiciary, life tenure promotes efficiency—not just for the Court but for the constellation of Article III judges. It promotes efficiency in at least two respects. Not unlike practicing attorneys, lower court judges need continuity in the Court's composition, if for a different reason. Continuity assists lower court judges by providing a compass to steer their discretion. For all Article III judges, life tenure gives them a chance to develop a judicial philosophy that can only be acquired through practical experience on the bench. I don't understand why we would allow Judges or Justices to learn, develop and grow over 18 years and then usher them out the door at midnight as the 19th year begins.

Finally, and most importantly, life tenure provides stability by insulating our federal judiciary at a time when it has fallen under increasing attack for unpopular decisions. In many respects it's not much different from tenure for professors. I have as much a beef with some opinions or decisions as my colleagues. However, the level of animated protests from leading politicians decrying "activist" judges and their decisions should give any of us pause to consider how Professor Carrington and Cramton's model would play out in real life once we give these same politicians the keys to the car and let them take it out for a spin. This may be the chief reason for keeping life tenure—to curb legislative joy-riding.

Conclusion

My goal in submitting this essay was to bring this debate to the attention of my colleagues and outline the significant issues. Given the age and composition of the current Supreme Court and the nation's sharp blue state/red state divide, it is probable that the current debate will gain strength over the next decade. Life tenure is a small price to pay to safeguard the federal judiciary and promote the efficient and orderly administration of justice. Whether one agrees or disagrees with that view, the federal judiciary would be well served by practicing members of the bar being informed and participating in this debate as it continues to grow.

endnotes

1. *See* L. A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 LAW & SOC. INQUIRY 1227, 1234 (2000).
2. See L. H. LaRue, *Neither Force Nor Will*, 12 CONST. COMMENT. 179, 179 (1995) ("Having accepted that 'good behaviour' means 'life tenure,' I will say that this provision is stupid."); L. A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT.195, 196 (1995) ("Life tenure is the Framers' greatest lasting mistake.").
3. For a summary of all United States Supreme Court Justices, *see* www.oyez.org/oyez/ ("Oyez"), and look for the "Justices" tab. This will link to a portlet with biographies for each Justice.
4. *See* www.flyingdreams.org/tv/lassie/lassfaq.htm#number.
5. *See* Paul D. Carrington & Roger C. Cramton, "The Supreme Court Renewal Act: A Return to Basic Principles," (July 5, 2005) *available at* http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm.
6. See Ward Farnsworth, "The Regulation of Turnover on the Supreme Court," *available at* www.wardfarnsworth.com.
7. U.S. CONST. art. III, § 1.
8. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Terrence Ball ed., 2003).
9. *See* Farnsworth, *supra* note 6, at p. 1 n.1, pp. 3-5 (summarizing recent proposals).
10. *See* Carrington & Cramton, *supra* note 5, at 1-5; *see also* John W. Whitehead, "Curtailing the 'Least Dangerous Branch': Term Limits for Supreme Court Justices," The Rutherford Institute (July 25, 2005) *available at* www.rutherford.org/articles_db/commentary.asp?record_id=349; Edward Lazarus, "Life Tenure for Federal Judges: Should it be Abolished?" Special to CNN.com (Dec. 10, 2004), *available at* www.cnn.com/2004/LAW/12/10/lazarus.federal.judges.
11. *See* Carrington & Cramton, *supra* note 5, at 1; see also Whitehead and Lazarus, *supra* note 10.
12. *See* Linda Greenhouse, *How Long Is Too Long for the Court's Justices?* N.Y. TIMES, Jan. 16, 2005, *available at* http://faculty.smu.edu/jkobylka/sctitems/term%20limits.htm; *see also* Carrington & Cramton, *supra* note 5, at 2.
13. See Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug, 9, 2002, *available at* www.law.yale.edu/outside/html/public_affairs/278/yls_article.htm.
14. *See* Whitehead, *supra* note 10; *see* Farnsworth, *supra* note 6, at 39-40.
15. *See Report by the American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for Reform*, at p. 15 (Feb. 2001), *available at* www.uscourts.gov/judicialpay.pdf.
16. *See* Farnsworth, *supra* note 6, at 3-5.
17. *See* Carrington & Cramton, supra note 5, at 4-9.
18. *See An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence* (1997) *available at* www.abanet.org/govaffairs/judiciary/report.html.
19. *See* 28 U.S.C. § 44; 28 U.S.C. § 133.
20. Chief Justice Rehnquist addresses the "strained relationship between the Congress and the federal Judiciary" in his 2004 year-end report on the federal judiciary. The report is available on the Court's Web site at www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf.
21. *See* Carrington & Cramton, *supra* note 5, at 1.
22. The National Park Service has published a history of the Anglican Cemetery at Christ Church in Philadelphia that essentially makes this same point. *See* www.nps.gov/inde/cemetery.html.
23. *See* Carrington & Cramton, *supra* note 5, at 1; *See* Whitehead, *supra* note 10.
24. *See* www.oyez.org/oyez.
25. *See* Oyez's biography of Chief Justice Jay, *available at* www.oyez.org/oyez/resource/legal_entity/1/biography.