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HOW LONG

Should Supreme Court Justices Serve?

BALANCING JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY

BY HON. ALBERT DIAZ

I appreciate the return visit to Marquette Law School and the opportunity to give the E. Harold Hallows Lecture. I hope that my remarks will be worthy of the man for whom this lecture is named.

Permit me to begin with a disclaimer, a note of thanks, and a recollection. The disclaimer is that I offer today my personal thoughts on the topic of life tenure on the bench; I'm fairly confident that they do not reflect the views of many of my judicial colleagues, perhaps to understate the point. The thanks go to two people: One is my former law clerk, Michael McIntosh, whose research assistance was invaluable in my preparing this lecture. The other person you can see—at least his picture: Over there on the courtroom wall, we have the smiling face of my good friend and colleague, Jim Wynn, a Marquette lawyer. I have him to thank (or blame) for my being here tonight.

For the recollection: When I accepted the invitation in 2015 to give this lecture, we had, of course, no way of foretelling the passing of Justice Antonin Scalia, just a few weeks ago, and the firestorm that has erupted over the choice of his successor. I will leave it to others to ruminate over that and concerning the rich legacy that is Justice Scalia's jurisprudence. Indeed, the latter subject would provide ample material for a law school seminar, such has been the influence that Justice Scalia has had on how judges perform their craft. I take here a moment to share a more personal reflection on the man. ▶▶



Albert Diaz

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I had the good fortune to spend time with Justice Scalia in several social settings. As so many have confirmed since his passing, he could not have been more kind and gracious in those instances. In April 2004, I was a North Carolina state trial judge and Marine reservist invited to attend a dinner, at Camp Lejeune, for

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Marine lawyers. Justice Scalia was the guest of the honor—and he took to that task with relish. His remarks were filled with his usual biting wit, but what was clear was the genuine respect and admiration that he had for the young lawyers in uniform. Perhaps that is not surprising, given that one of the justice’s sons is an officer in the United States Army. Justice Scalia stayed until the last autograph was signed and the last picture taken, before repairing to the officers’ club to spend more time with the Marines over cigars and Scotch. That night was, without question, a highlight for many of those

young lawyers and showed a side of the justice that few knew. The nation rightly mourns this giant of the law. He will be missed.

Striking a Balance Between Independence and Accountability

Preparing my remarks put a serious dent in my TV binge-watching time. Among the shows that proved most distracting recently is the Netflix documentary series entitled *Making a Murderer*. Given that it recounts the protracted involvement of one Steven Avery with the Wisconsin judicial system, I imagine that most if not all of you either have seen it or at any rate know about the 2007 headline-grabbing case on which the documentary is based.

Why do I mention it? Well, in many ways, the high-stakes drama that was the Steven Avery trial brings to the forefront the theme of my talk tonight: specifically,

how best to balance the tension between judicial independence and judicial accountability. Wisconsin, of course, elects its judges. My home state of North Carolina does the same, save for a small group of so-called special superior court judges appointed by the governor.

Manitowoc County Circuit Court Judge Patrick Willis had been on the bench for 10 years when he drew the Steven Avery murder case. He was appointed in 1997, winning election to a six-year term the following year. If you’ve seen the television series, you know that Judge Willis made several tough and controversial (at least in the minds of some) rulings during the trial, from refusing to allow the defense to test a vial of Avery’s blood that the defense claimed had been tampered with, to allowing the admission of expert testimony favorable to the prosecution on the chemical attributes of blood samples found in the victim’s car. And Judge Willis presided over this blockbuster case against the backdrop of a system where the electorate would be poised to assess his work three years later. He won reelection in 2010 without opposition and retired two years later.

Contrast that with the environment in which my colleagues and I on the federal bench perform our work. Once nominated and confirmed, we keep our office “during good Behaviour”—effectively for life. This the Framers of the Constitution thought necessary to ensure judicial independence. More about the Framers later.

For many, however, the independence granted federal judges through life tenure is anathema, in that it purportedly immunizes the bench from criticism or rebuke. In my experience, however, nothing could be further from the truth. As Judge Willis can surely attest, the art of judging is not for the faint of heart. In every case, and after every decision, the winning party believes you to be the second coming of Oliver Wendell Holmes, Jr., Learned Hand, and Thurgood Marshall all rolled into one, while the loser is certain that your judicial acumen compares unfavorably with that of Judge Judy.

Assessed fairly, however, “judicial independence” means nothing more than a judge’s freedom to decide, with a minimum of outside influence or bias. My qualification here reflects the reality that judging is a human endeavor, and therefore the results, despite our best efforts, are not always free from taint.

The question, then, is how to maximize the positive attributes of judicial independence, and in particular how best to do that on the front end, when society plucks from what President John Adams described as the “lot of humanity” those thought to be best suited for the work.

Having campaigned (unsuccessfully) for judicial office in North Carolina, I see several difficulties with electing judges: The first is a practical one for those (like me as a state judge) who are first appointed and then must run. As the incumbent, and assuming that you take seriously your oath, the campaign must always cede to the court's docket. Needless to say, a rookie judge has much to learn, but for the judge who has to stand before the voters, mastering his or her craft runs headlong into doing all that must be done to keep the job.

But the problems go far beyond that. Forcing judges to act like politicians is, it seems to me, patently inconsistent with the role of the judicial branch. Judges, at least those who remain true to their oaths, don't have a constituency, nor do they make campaign promises—at least not any that mean anything. Instead, on the campaign trail, they often resort to banalities, promising to be “fair and impartial,” as if that required some superhuman effort and concentration. Moreover, in my experience, judicial races are often nothing more than white noise for most voters, particularly during presidential or gubernatorial election cycles when the judges are relegated to the bottom of the ballot.

To make matters worse, what little traction judicial candidates gain is almost always a function of the cash they can pry from the bar, largely from the very same lawyers and parties who appear before them. And the amount of cash that is being funneled into judicial races (particularly at the top of the ticket) is staggering. In 2015, candidates and independent groups spent more than \$16.5 million to fill three vacancies on the Pennsylvania Supreme Court, topping the previous record of \$15 million spent in Illinois in 2004. To say that this system of selecting judges undermines the public's perception of the courts as fair and impartial is, in my view, an understatement.

Ironically, despite the public's insistence on electing its judges, most of our fellow citizens are woefully uninformed when it comes to that task. That ignorance is due in part to the limited information typically available on judicial candidates, but it is also a reflection of how little most Americans know or understand about our form of government. According to a 2014 survey, only 36 percent of Americans can name the three branches of our federal government. And two-thirds of Americans cannot name a single Supreme Court justice. This dearth of knowledge has potential for great mischief.

In short, at least when it comes to judicial races, an uninformed electorate is the norm. Or it is until a Steven

Avery sort of case comes along, at which point the election often devolves into a referendum on the judge's handling of that one case.

Now I am not so naïve as to believe that appointing judges is a panacea for what ails us. Indeed, such a process can rightly be criticized as trading one set of politics for another, albeit more-focused, political tussle. Particularly troubling is the view that an appointed system tends to narrow the field of candidates and may limit opportunities for minorities and women or those who have devoted their professional lives to public service. If judicial independence means anything, it must mean that our bench should reflect the voices and experiences of our diverse society.

Of course, fixing on the manner of selecting a judge is but half of the puzzle. The related, equally important question is just how long is too long for a judge to hold office. I turn to that now.

Looking Back at the Framers' Debate

Some of you may have heard that we have an election coming up. President Barack Obama is set to end his second term, and another man (or woman) will soon take the oath of office as our chief executive.

Many of those running for president have taken direct aim at what they view as federal courts run amok, deciding controversial issues in defiance of the will of the people. And it is certainly true that the federal courts, and the Supreme Court in particular, have been thrust into some of the most contentious issues of the day. Senator Ted Cruz has proposed a constitutional amendment that would require Supreme Court justices to be subject to retention elections every eight years. Both Hillary Clinton and Senator Bernie Sanders have vowed to appoint justices committed to overturning what they consider to be the abomination that is *Citizens United*. And before they bowed out of the presidential race, Mike Huckabee and Rick Santorum suggested that Supreme Court rulings were not necessarily binding.

Despite the charged rhetoric, the federal judiciary, which Alexander Hamilton characterized as the “least dangerous branch” of government, will go about its business largely immune to the frenzy that has become our election cycle. And that, of course, is precisely what the Founders intended.

In declaring our nation's independence and announcing certain “self-evident” truths, Thomas Jefferson delineated a host of grievances that the colonies had against the British crown: Among them were (1) that >>



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the king was “obstruct[ing] the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers,” and (2) that he “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

Those concerns framed the debate as to the scope of judicial power in the new government being sketched in Philadelphia during the long, hot summer of 1787. As the late U.S. Circuit Judge Irving Kaufman aptly noted in a 1978 speech to the New York City Bar Association, “Our Founding Fathers were determined that the judiciary of the new republic would not be so feeble.” Perhaps that is why the convention accepted with relatively little debate the provisions for judicial service during good behavior and for fixed salaries. The merits of those provisions, however, became the subject of animated discussion during the debates leading to ratification of the Constitution in the states.

In the Framers’ most detailed examination of the reasons for providing life tenure to federal judges, Alexander Hamilton (now taking a star turn on Broadway) explained its virtues in *The Federalist* No. 78:

The standard of good behavior for the continuance in office of [a judge], is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Beyond the soaring rhetoric, Hamilton’s defense of life tenure for federal judges included some practical considerations. He noted that the nature of judicial service—and, in particular, the need for “long and laborious study” to acquire competence in the law (the students here this evening can attest to that)—means that “but few [people] will have sufficient skill in the laws to qualify them for the stations of judge,” and a “still smaller [number] who unite the requisite integrity with the requisite knowledge.” A temporary duration in office, said Hamilton, would provide little incentive for these select few to quit their practices for a seat on the bench, but would instead “throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.”

This line of reasoning echoed comments made by Benjamin Franklin at the constitutional convention.

As the Framers grappled with whether judicial appointment should be by the legislature as a whole, the Senate alone, or the executive, Franklin declared this to be “a point of great moment.” He then somewhat tongue-in-cheek twice commended a mode of appointment practiced in Scotland whereby judicial nominations emanated from the bar, which according to Franklin invariably selected “the ablest of the profession in order to get rid of him,” so that the lawyers could then divide up the nominee’s practice among themselves.

But Hamilton’s defense of the judiciary went far beyond the practical. He contended that “the judiciary is beyond comparison the weakest of the three departments of power” and thus required special care (including life tenure) to defend against the legislature and the executive.

Moreover, said Hamilton, the comparative weakness of the judiciary meant that the people had little to fear from the courts.

Hamilton also argued that judicial independence was needed as a check on the legislature, emphasizing that “[l]imitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose

duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.” Life tenure, said Hamilton, was crucial to fortify the judges in taking on this formidable task.

In addition to preventing the legislature from exceeding its limited powers under the Constitution in the abstract, Hamilton argued that life tenure was needed also to protect the rights of individuals from misguided and oppressive laws. In Hamilton’s view, the legislature’s awareness that an independent judiciary acted as a check on its powers would act as a deterrent against a legislature run amok.

Tying all of these threads together, Hamilton offered this powerful defense of life tenure for federal judges:

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of ▶▶

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justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Jefferson: Life Tenure Is “A Very Dangerous Doctrine”

Of course, not everyone in Philadelphia favored life tenure. Although the view that the judiciary should be granted independent authority and filled by judges with life tenure prevailed in the framing, a vocal minority objected to what it viewed as unchecked power in the hands of an unelected—and unaccountable—few.

As but one example, Virginian George Mason, who refused to sign the proposed constitution, voiced concern that the power of a national judiciary would be such as to suppress and destroy the state courts, making

justice unattainable and enabling the rich to oppress and ruin the poor.

Anti-Federalists were not opposed to life tenure in the abstract. Rather, most agreed that life tenure and a salary not subject to diminution were necessary and appropriate means to ensure judicial independence. Of greater concern was that the Constitution did not provide a mechanism for ensuring judicial accountability.

These concerns were most prominently spelled out in two essays by “Brutus” (likely Robert Yates of New York), which now are considered part of the “Anti-Federalist Papers.” Brutus first stressed the novelty of an independent and powerful central judiciary, noting that “those who are to be vested with [the judicial power] are to be placed in a situation altogether unprecedented in a free country.” The judges would be “*independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot 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.”

Brutus argued that the unchecked and substantial authority granted the judiciary by the Constitution was only the beginning—given that courts, in his view, naturally would broadly interpret the Constitution to expand the reach of the federal government. At bottom, Brutus “question[ed] whether the world ever saw, in any

period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”

Brutus’s proposed solution for the constitutional problem was to create an institutional body that could hold the judiciary accountable. He conceded that it would be improper to elect the judges because that would compromise their ability to remain firm and steady in their decisions. Brutus proposed instead that the decisions of the judicial branch should be reviewable by representatives of the people.

Even after the Constitution—with its provision of life tenure to the judges in a judiciary with markedly enhanced authority—was ratified, opponents of life tenure continued the fight. Four times between 1789 and 1809, Congress considered amendments to limit the tenure of federal judges. Three of these amendments called for term limits, and the fourth sought to impose a mandatory retirement age of 65.

And some who supported life tenure during the ratification debate later rejected it. The most prominent of these was Thomas Jefferson, who became a fierce opponent of the concept following the Supreme Court’s decision in *Marbury v. Madison* (1803). Jefferson wrote in 1820 that “to consider the judges as the ultimate arbiters of all constitutional questions” was “a very dangerous doctrine” and “one which would place us under the despotism of an oligarchy.” This was particularly troubling, said Jefferson: Given that impeachment was the only means of removal, the judges “consider themselves secure for life; they skulk from responsibility to public opinion.”

In colorful prose, Jefferson proposed term limits as the answer to this supposed constitutional defect:

Before the canker is become inveterate, before its venom has reached so much of the body politic as to get beyond control, remedy should be applied. Let the future appointments of judges be for four or six years, and renewable by the President and the Senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in equipoise between the general and special governments.

One can only imagine what Jefferson would think today of the power of the federal judiciary (particularly the Supreme Court) and the tenures of those entrusted with it. In surveying this scene, Jefferson might well observe that our nation is alone “among the constitutional courts of western democracies” (in the words of Vicki Jackson and Mark Tushnet), and alone

save for one state (Rhode Island), in providing for unfettered life tenure for members of the highest courts. He might also note that the first 10 justices served on average only eight years, perhaps in part because they were then required to ride circuit on horseback. The 2016 presidential candidates may have made a number of suggestions regarding the judiciary, but thankfully I am unaware of any candidate’s proposing to issue each justice or judge a horse upon commissioning.

Finally, Jefferson would no doubt mention that the average age of the country’s first 10 Supreme Court justices to leave the bench was just shy of 60; and he would likely contrast that with the average of 80 years for the last 10 justices to have left the bench. Indeed, before 1970, as Stuart Taylor has noted, the average tenure of an individual justice was about 15 years. But justices who have left since then have averaged over 25 years on the bench. I have little reason to doubt that extended tenure is a phenomenon that stretches across the district and circuit court benches, thus fully supporting Judge Richard Posner’s observation that “[t]he judiciary is the nation’s premier geriatric occupation.”

There are a number of reasons why this is so. First, life expectancy for all Americans (including judges) has increased substantially since the founding. The Supreme Court’s workload also lends itself to longevity, given that (unlike the district and circuit courts) justices have virtually unfettered control over their docket. In recent years, the Court has decided some 80 cases a term (from about 7,000 to 8,000 petitions submitted), or approximately nine majority opinions per justice. Compare that with 140 to 150 cases per term, as often decided by the Warren Court—even at a time, by the way, when justices counted on the help of but two law clerks instead of four. And, as that last observation suggests, the Court has help from some of the brightest young minds that law schools can offer, allowing even an aging justice to stay current with the work. ▶▶

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Finally, there is no gainsaying that the Court plays an outsized role in the functioning of our republic. In the last 20 years alone, it is scarcely too much to say that justices have chosen a president, substantially curbed the power of that president's authority, dramatically defined the reach (and limits) of Congress's power to legislate, and told Americans whom they may marry, when and how they may speak, and what they may do to defend themselves in their homes. Justice Ginsburg, aka "Notorious RBG," is the subject of a major motion picture of her life, and Justice Sotomayor, aka "Sonia from the Bronx," has written a memoir that is a runaway best seller and was the first justice to officiate over the New Year's Eve ball drop in Times Square. Heady stuff, indeed—and little wonder then that one might be tempted to stay as long as humanly possible.

Many scholars have raised concerns about this extended tenure on the federal bench. Some scholars argue that the appointment process acts as a check on

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the power of the Court. But even they concede that the lengthening tenure of the justices dilutes its efficacy. To highlight one extreme example in the modern era, President Richard Nixon appointed four justices in his five years as president; President Jimmy Carter appointed none in his single term; and President Ronald Reagan followed with four appointments. And when vacancies do arise, we have been witness to

pitched confirmation battles that have become routine in our political culture, certainly when it comes to Supreme Court nominees, but now increasingly enveloping lower court nominees as well. Given the stakes, there are now substantial incentives and pressures for a president to favor youth on the federal bench as a means of ensuring a legacy far beyond the president's time in office.

Other scholars argue that the comfort of life tenure gives free rein to a judge hell-bent on reigning as a philosopher king rather than applying the law. Of course, where that line is drawn is often a fine one, but there is little question that many justices have "evolved"

in the job far beyond what the nominating president and confirming senate contemplated.

Staying on the Bench into "Mental Decrepitude"

Another not insignificant concern is the judge who hangs on well past the time when he can competently serve. In an invaluable article written in 2000 for the *University of Chicago Law Review*, Professor David Garrow provides a number of examples of what he describes as "mental decrepitude" on the bench that has affected the Supreme Court and its work. According to Garrow, at least two justices (Justice Frank Murphy and Chief Justice William Rehnquist) became dependent upon prescription medications while on the bench. One justice (Justice Charles Evans Whittaker) suffered from an anxiety and depression so severe as to lead him to contemplate suicide.

As Garrow recounts, the problem of mental or physical decrepitude plagued the original members of the Court. William Cushing was appointed to the Court in 1789 and served until his death in 1810. Although Cushing was nominated and confirmed as chief justice in 1796, he refused the promotion on grounds of ill health. According to one senator, Cushing's health issues included mental impairment, but he nonetheless continued to serve on the Court primarily because he was dependent on the salary (this was before there was any provision in the law for judicial retirement at full pay and senior status).

Justice Henry Baldwin of Pennsylvania was appointed to the Court in 1830. Hospitalized for the entire 1833 term for what was described, Garrow recounts, as "incurable lunacy," Baldwin nonetheless remained on the bench for 11 more years. According to the Supreme Court's reporter of decisions at the time, most courtroom observers of the Court believed that Baldwin's mind was "out of order."

Garrow also describes the events leading up to the January 1932 retirement of Justice Oliver Wendell Holmes, who by then was almost 91 years old. Universally admired for his eloquence and brilliance on the Court throughout his 31-year tenure, Holmes often recounted to friends about "the mistake that I have seen it to be in others to remain on the bench after seventy," but he of course served well beyond his threescore years and ten. According to Garrow, by 1931, Holmes "found it harder and harder to write" and he "was often visibly drowsy on the bench." By 1932, a majority of the

justices persuaded Chief Justice Charles Evans Hughes to talk to their colleague in the hope of avoiding embarrassment to Holmes personally and criticism of the Court. To his credit, Holmes accepted the advice of his colleagues and resigned.

Sad to say, others have not gone as gracefully. On New Year's Eve 1974, 76-year-old Justice William O. Douglas, who had been appointed to the Court by President Franklin Roosevelt at the age of 40, suffered a stroke from which he never fully recovered. For the next two years, recounts Garrow, the Court struggled to complete its work in the face of a justice clearly unable to shoulder the load but unwilling to step down. A *New York Times* account of Justice Douglas's return to the Court, in March 1975, described him as "a frail and fragile old man, his voice thin and uncertain, his left arm hanging useless at his side, most of the once remarkable vigor . . . drained away."

Observers remarked that "Douglas's mental condition [had] deteriorated" and noted that he "addressed people at the Court by their wrong names, often uttered non-sequiturs in conversation or simply stopped speaking altogether." The *Times* reported that, given Justice Douglas's weakened state, the other justices privately agreed to hand down no cases in which Douglas's vote would determine the outcome; this was later said to include even votes on petitions for certiorari.

Douglas returned to the Court for the October 1975 term, displaying moments of "lucidity and energy followed by near incoherence and sleep." Given the circumstances, Garrow writes that the justices kept to their unwritten agreement regarding the votes of Justice Douglas. Douglas was again hospitalized at the end of October, before announcing his retirement on November 12, 1975. Even then, Garrow recounts, Justice Douglas continued reporting to work and "repeatedly tried to participate in the Court's consideration of pending cases."

Garrow provides many other troubling examples of justices who stayed too long, and his piece, of course, does not begin to describe the episodes of mental decrepitude that have no doubt plagued the lower courts. Fortunately, since 1980, the Judicial Conduct and Disability Act has provided a process by which any person can file a complaint alleging that a federal judge has become, by virtue of disability, "unable to discharge all the duties" of the judicial office. But given the life tenure afforded judges, the remedies available to a circuit judicial council making a finding of disability are quite limited. It can order the temporary suspension of case assignments, issue a public or private censure or

reprimand, ask a judge to retire voluntarily, or certify a judge's disability so that a vacancy is created. The judicial council may not, however, order removal from office of any judge appointed to hold office during good behavior. An even more glaring problem is that the act does not apply to Supreme Court justices, who are effectively left to their own devices with respect to disability.

An Idea to Consider: Long Tenure but Limited

So, what to do? Any proposed change, I submit, must safeguard the judicial independence that life tenure offers federal judges and which is a glaring omission in many of our state courts. In that regard, I note that, in a piece published in the *Marquette Lawyer* last fall, your dean highlighted this very problem when he endorsed a solution for Wisconsin's high court: one 16-year nonrenewable term, albeit via election.

That solution is not far removed from the operation of a court in front of which I practiced before joining the bench and on which I recently had the honor of sitting by designation. Before entering private practice, I was a military lawyer. I spent the bulk of my time handling criminal appeals, appearing frequently before the U.S. Court of Appeals for the Armed Forces.

Not many people know about the Court of Appeals for the Armed Forces, but it is the military's highest appellate court, created under Article I of the U.S. Constitution to hear appeals of service members convicted of crimes at courts-martial. The court's judges number five civilian members, all of whom are nominated by the president and confirmed by the Senate to one 15-year term. At the end of the 15 years, each judge is politely shown the door, albeit with a full pension and the right to continue serving the court as a senior judge.

In my view, this system (or something like it) would promote the requisite level of judicial independence on the federal bench. It would leave judges free to decide cases solely on the facts and the law, with no concern about being recalled (except for bad behavior) or incurring disfavor with the parties and lawyers who appear before them. At the same time, there is a light at the end of the tunnel for each appointee, and (for what it's worth) Court of Appeals for the Armed Forces judges have historically left with most of their wits about them.

Fortunately, there are many scholars far brighter than I who have given a great deal of thought to this subject. To give one example, Laurence Silberman, longtime judge of the D.C. Circuit, has proposed a system ▶▶

whereby circuit judges would be selected to sit on the Supreme Court by designation for a term of five years and then would automatically revert to the federal courts of appeals for life. My own sense is that five years is not quite long enough. It takes time to get used to the work of a justice—someone would have barely obtained the requisite confidence and comfort level by the time of the term’s being up. And a too-short term runs the very real risk of ever-shifting sands of constitutional interpretation, which would not benefit our republic.

Replacing justices at fixed 18-year intervals would also provide fresh intellectual thought and energy to the very difficult constitutional questions that come before the Court

A proposal that I think attractive was outlined in great detail by Professors Steven Calabresi and James Lindgren in a 2006 piece published in the *Harvard Journal of Law & Public Policy*. Their term-limit proposal focuses exclusively on the Supreme Court. While the concept of fixed terms may well have merit beyond the Court, implementing such a regime across the federal judiciary might be too much to chew in one sitting.

Professors Calabresi and Lindgren propose fixing the current number of justices on the Court at nine and instituting “a system of staggered, eighteen-year term limits for Supreme Court Justices,” such that “a vacancy would occur on the Court every two years.” In effect then, every president would get to appoint at least two justices, and every two-term president would get four appointments. Although the professors do not suggest it, I believe that, to minimize the impact of recurring vacancies on the effective functioning of the Court, the Senate would have to agree to severely curtail or eliminate outright the filibuster of Supreme Court nominees—vacancies would increase and so there would be a need promptly to fill them. Alternatively, the system could allow for so-called senior justices (i.e., those who have completed their term of office) to sit by designation on the Court (as now happens in the circuit courts) until a vacancy is filled.

As the professors note, such a system, though not completely eliminating the partisan battles that would continue to erupt over nominees, would dramatically lower the temperature in the room, if for no other reason than that there would generally be a predictability as to the timing of such fights. There would also be some protection (albeit no absolute guarantee) against the “mental decrepitude” concern that I discussed earlier. On the other hand, it would also increase the odds of some of our most brilliant and seasoned legal minds serving on the Supreme Court. Each of us, I suspect, could name a number of outstanding jurists, lawyers, and—yes—academics whose primary disqualifier for service on the Court is that they are a bit too long in the tooth, at least under current standards. A fixed term would provide a pathway for these individuals to lend their talents in service of the nation.

Replacing justices at fixed 18-year intervals would also provide fresh intellectual thought and energy to the very difficult constitutional questions that come before the Court, while allowing for a sufficiently long term so as to guard against the frequent whipsawing of the Court’s jurisprudence.

That said, I recognize, as Dean Kearney observed when I mentioned my topic to him some months ago, that the odds of enacting such a revolutionary change are difficult, at best. I am inclined to believe that an amendment to the Constitution would be in order (although some scholars believe that Congress may have the statutory power to change the contours of life tenure). The Framers went to great lengths to ensure that their magisterial work would not be tinkered with lightly. I happen to agree with the Framers’ wisdom on that score, but it does present a substantial hurdle to reform.

Nonetheless, the presidential campaign has shown us that the American people (and the candidates) are in a foul mood and are eager for change. Whether that anger results in a push for reform of what some now believe has morphed into the “most powerful” branch of government remains to be seen. I note, however, that just this past month, the *Associated Press* and the editorial board of the *Washington Post* have published pieces calling for term limits on the Supreme Court.

My advice: Stay tuned.

Thank you very much for your attention. ■

