

A New Look at an Old Debate: Life Tenure and the Article III Judge

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I. INTRODUCTION

How long should federal judges serve? Although Article III¹ judges have traditionally enjoyed life tenure, many commentators today—from both ends of the political spectrum²—are questioning the wisdom of this practice.³ Some have

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1. Article III 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.

U.S. CONST. art. III, § 1.

2. See, e.g., Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23. Akhil Amar later declared: "One of the reasons Steve and I decided to coauthor our [8/9/02] OpEd was to make clear that ours is not a partisan proposal. He's a Reagan Republican and I'm a registered Democrat." Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices Be Term-Limited?: A Dialogue*, FINDLAW'S WRIT: LEGAL COMMENTARY (Aug. 23, 2002), at <http://writ.findlaw.com/amar/20020823.html> (last visited Sept. 15, 2003).

3. See, e.g., Smith Introduces Bill Calling for Term Limits for Judges (Mar. 30, 1999), in GOVERNMENT PRESS RELEASES BY FEDERAL DOCUMENT CLEARING HOUSE (1999) (available at 1999

proposed specific strategies for changing the status quo, including everything from asking judicial nominees to promise that they will retire⁴ to amending the Constitution.⁵

Some critics of the present system bemoan the tendency for life tenured judges to time their retirement⁶ with the crest of their political party's strength in Washington, D.C., thus politicizing the supposedly non-partisan appointment process.⁷ Others call for restrictions on a judiciary they see as bent on usurping power and skirting the democratic process.⁸

Modern participants in the life tenure debate tend to focus their attention on the nine justices of the United States Supreme Court.⁹ Notwithstanding the Court's tremendous power, ignoring the inferior courts may be myopic. Nearly twenty times as many judges preside over the United States Courts of Appeal than over the Supreme Court, all of whom also enjoy life tenure under Article III of the

WL 2222972) (announcing the re-introduction of New Hampshire Senator Bob Smith's 1997 legislation capping a federal judge's term at ten years); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 996 (2000) (calling for a constitutional amendment requiring Supreme Court Justices to retire at the age of seventy-five); Gregg Easterbrook, *Geritol Justice: The Case for Supreme Court Term Limits*, NEW REPUBLIC, Aug. 19 & 26, 1991, at 18 (calling for ten-year term limits for Supreme Court Justices); John Gibeaut, *Mending Judicial Fences*, A.B.A. J., Aug. 1997, at 92 (reporting that, according to a 1996 Gallup poll of Republican voters, seventy-three percent believed that term limits on federal judges should be in the party platform); John Gruhl, *The Impact of Term Limits For Supreme Court Justices*, JUDICATURE, Sep.-Oct. 1997, at 66 (relating that calls for judicial term limits "have come not only from pundits and politicians, but also from law professors and former judges").

4. See, e.g., Amar & Calabresi, *supra* note 2, at A23 ("Alternatively, the Senate could insist that all future court nominees publicly agree to term limits, or risk nonconfirmation. Though such agreements would be legally unenforceable, justices would feel honor-bound to keep their word.").

5. See, e.g., 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, 800 (1986).

6. Federal judges, upon reaching a certain chronological age and a certain number of years of service, may elect to go on "senior status" (as it is commonly referred to), an arrangement by which federal judges reduce their work load but remain in service and receive their full salary. See 28 U.S.C. § 371(b)(1) (2000). Federal judges may also elect senior status by providing written certification to the President of a permanent mental or physical disability. See 28 U.S.C. § 372(a) (2000). Because the President can nominate a successor to a federal judge who elects to "go senior," the move has the same political effect as retirement from judicial office. See 28 U.S.C. §§ 371(d), 372(a) (2000).

7. See, e.g., Amar & Calabresi, *supra* note 2, at A23.

8. See, e.g., PATRICK J. BUCHANAN, *THE DEATH OF THE WEST: HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* 183-90, 254 (2002); William Kristol, *The Judiciary: Conservatism's Lost Branch*, 17 HARV. J.L. & PUB. POL'Y 131, 135 Winter (1994) ("If we are to have a living Constitution, as the liberals desire, we should have a living judiciary as well.").

9. See, e.g., Garrow, *supra* note 3, at 995; Gruhl, *supra* note 3, at 66; Oliver, *supra* note 5, at 799; Amar & Calabresi, *supra* note 2, at A23.

Constitution.¹⁰ Given the extremely small percentage of cases that are heard each year by the Supreme Court,¹¹ these federal appellate courts essentially function as the courts of last resort for most Americans. Their burgeoning caseload is but one indicator that their decisions are having an increasing influence on our society. Consequently, the life tenure question is not merely an academic one.¹²

The debate is likely to continue to move from scholarly journals to the front pages of popular newspapers in the coming months, particularly if Supreme Court seats begin to become vacant. With the change of control in the Senate after the Fall 2002 elections, many are forecasting a series of stormy confrontations over nominations to any level of the federal judiciary.¹³ A key reason why the fights over judicial nominees promise to be controversial is that many Americans appear to be convinced that the tenured members of the judiciary will have a greater and more enduring impact on their lives and on the lives of their children than any other governmental official and that opposing (or supporting) judicial nominees represent their only opportunity to make a difference.¹⁴

This article will first provide an overview of this important debate and conclude with a very modest proposal: Fix by statute the number of years that an Article III judge may sit on the Court of Appeals, at which time the judge would rotate to a position at the district level.¹⁵ Operating within the limits of the present Constitution,

10. The number of judgeships in each of the thirteen federal judicial circuits is provided for in 28 U.S.C. § 44(a). 28 U.S.C. § 44(a) (2000). The number of district judges in the nation's ninety-four U.S. federal trial courts is established by 28 U.S.C. § 133(a). 28 U.S.C. § 133(a) (2000). "Life" tenure is set forth in Article III, Section 1 of the United States Constitution. U.S. CONST. art III, § 1.

11. See *The Justices' Caseload* <http://www.supremecourtus.gov/about/justicecaseload.pdf> (last visited Sept. 2, 2003) (explaining that the Supreme Court's caseload has rapidly increased in recent years to more than 7,000 cases per term and that the Court grants certiorari about one percent of the time, i.e., granting plenary review about once every 100 cases).

12. See, e.g., Charles W. Nihan & Harvey Rishikof, *Rethinking the Federal Court System: Thinking the Unthinkable*, 14 MISS. C. L. REV. 349, 350 (1994) (reciting statistics showing the "mushrooming caseload burden" of the federal bench).

13. See, e.g., Edward Walsh, *Confirmation Fight: Replay and Preview, Picking Combatants Recall Bork Case, See Looming Battle over Any High Court Vacancy*, WASH. POST, Mar. 14, 2002, at A06.

14. See generally, William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 2 (1990) ("A clear trend, however, exists toward an increased public awareness of the importance of federal judicial nominations and a growing public participation in the selection process.").

15. Similar proposals have been aired before, but have focused on amending the Constitution so that Supreme Court Justices would rotate down to the Courts of Appeal after a certain number of years on the Supreme Court. See, e.g., Stephen L. Carter, *Why the Confirmation Process Can't Be Fixed*, 1993 U. ILL. L. REV. 1, 15 (proposing a twelve-year term limit for Supreme Court Justices, after which the justices would return "to private law practice or academia or politics or a speaking tour—even to a lower federal court"); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541 (1999) (calling for the elimination of permanent positions on the Supreme Court by means of a Constitutional amendment); Symposium, *Panel Five: Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997) (presenting comments by Judge Laurence H. Silberman, Circuit Judge on the United States Court of Appeals for the District of Columbia, to a Federalist

and in fact reflecting the principles of the Judiciary Act of 1789,¹⁶ the statute would effectively realign the power structure of the federal judiciary without triggering fears that its independence would be compromised.¹⁷ The proposal would also not force seasoned jurists into retirement, which is another criticism often leveled at typical term limit proposals.¹⁸ The practice of judicial rotation would allow judges to cycle through the two-level system of inferior courts discussed in Article III, encouraging the diffusion of their ideas and experience and adding to the diversity of opinions at the appellate level.¹⁹

At the same time, this proposal would impose *de facto* term limits on the judges who hear appeals in our federal courts. Based on an eminently reasonable interpretation of Article III, which was sanctioned by the First Congress, this plan would not require a Constitutional amendment.²⁰ On the contrary, this proposal encourages lawmakers to revisit the nineteenth century legislation establishing the office of circuit judge²¹ and the Circuit Courts of Appeals.²² For this reason alone, it would be more likely to receive bipartisan support than the more radical propositions that have typically been offered.²³

The statute might also serve as a safeguard against judicial activism from either the right or the left. Like the earliest Supreme Court Justices who were "circuit rid[ers]"²⁴ when not hearing Supreme Court cases, federal judges who serve only periodically at the appellate level may be more inclined to craft their opinions with greater care for their implications, knowing that they will have to live under them at the district level²⁵ or defend them at the appellate level.²⁶ As one appellate judge

Society symposium in which he proposed a five-year term limit for Supreme Court Justices followed by service on the Court of Appeals for the remainder of their life tenure).

16. See *infra* Part III.

17. See, e.g., Stephen B. Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 KY. L.J. 643, 650 (1987/1988).

18. See, e.g., MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 204-05 (1998).

19. Those judges who see life on a lower court as beneath them would continue to have the right, but not the obligation, to leave the bench.

20. See *infra* Part III.

21. Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44.

22. Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826.

23. See *infra* Part II.E.

24. See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1753 (2003).

25. See McGinnis, *supra* note 15, at 542 (arguing that circuit-riding justices in the Supreme Court would be more likely to exercise judicial restraint, acting more like judges and less like the "priests of our collective conscience" and treating "constitutional issues and other momentous decisions more like the other quotidian matters that they [are] accustomed to resolving in their courts").

26. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1303 (2002) ("A judge who cares about his or her reputation, or about having his or her decisions followed by other judges, must ground decisions in existing legal materials.").

suggested, rotating judges may also be more likely to view their temporary posts as civil service and less as a sinecure.²⁷ Most importantly, the statute could also quite possibly reduce the turmoil of the judicial nomination process and the often bitter and destructive Senate hearings by simply lowering their stakes.

II. A HISTORICAL OVERVIEW OF THE LIFETIME TENURE DEBATE

The Constitution does not explicitly state that Article III judges serve for life. Lifetime tenure is implied in the provision that “The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behaviour”²⁸ The concept of “good behavior” appears to have been borrowed from English law.²⁹ The Act of Settlement in 1701 provided that judges should serve during good behavior (“*quamdiu se bene gesserint*”),³⁰ a step up from the more precarious standard of serving at the Crown’s pleasure (“*durante beneplacito*”).³¹ Whatever its origin, the concept received disparate treatment from the Founders.³²

A. Early Advocates of Life Tenure

Lifetime tenure advocate Alexander Hamilton argued that “permanency in office” would help ensure the judiciary’s “firmness and independence.”³³ Writing on behalf of his fellow Federalists in the spring of 1788, Hamilton tried to assure his readers that the “least dangerous”³⁴ third branch of the government, on account of its “natural feebleness,”³⁵ could never endanger “the general liberty of the people,”³⁶ as it exercised “no influence over either the sword or the purse.”³⁷ Hamilton even went so far as to claim that lifetime tenure “may therefore be justly regarded as an

27. See Symposium, *supra* note 14, at 687 (expressing the hope that if Supreme Court Justices were subjected to limited terms, “they would think of themselves more as judges and less as platonic guardians, and I think that would reduce the extent of the corruption which exists today”).

28. U.S. CONST. art. III, § 1.

29. William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal without Impeachment*, 35 VILL. L. REV. 1063, 1067 (1990).

30. See Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3 (Eng.), available at <http://www.worldfreeinternet.net/parliament/settlement.htm> (last visited Aug. 26, 2003).

31. EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 63 (1944); see also Ross, *supra* note 29, at 1067.

32. See *infra* Part II.A-B.

33. Alexander Hamilton, *The Federalist No. 78*, in *THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES* 228 (Roy P. Fairfield ed., 2d ed., Johns Hopkins Univ. Press 1981).

34. *Id.* at 227.

35. *Id.* at 228.

36. *Id.* at 227.

37. *Id.*

indispensable ingredient in [the judiciary's] constitution, and, in a great measure, as the citadel of the public justice and the public security."³⁸

Hamilton was not alone in his alacrity to link the value of judicial independence with the practical tool of life tenure. Even Thomas Jefferson, at least before his election to the Presidency, favored the appointment of judges for life: "The judges . . . should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior."³⁹ Though Jefferson would later change his mind on this point, the Federalists did not and remained ardent defenders of an independent, life tenured judiciary.⁴⁰

B. *Early Opponents of Life Tenure*

Not everyone was enthused with the prospect of having judges so insulated from the democratic process.⁴¹ On November 12, 1787, Connecticut Anti-federalist Benjamin Gale delivered a caustic speech at the Killingworth town meeting.⁴² In his speech, Gale warned of an encroaching federal judiciary lurking behind the language of Article III in the proposed Constitution:

Here they tell us of a Supreme Court to be erected somewhere, but they don't tell us where – and that they shall have a compensation for their services, but they don't tell us how much – and that they shall hold their seats during good behavior, by that I understand as long as they live or, at most, until some fitter tool to serve their purposes shall appear to oust them Now, gentlemen, the designs of these paragraphs is that these courts appointed by this new-fangled Congress shall eat up our courts, of which our representatives have now the right of appointing the judges annually If we cannot by this Constitution eat up the lawyers, they will soon eat *us* up.⁴³

Two weeks later, the residents of Preston, Connecticut instructed the two delegates to their state's ratifying convention (Colonel Jeremiah Halsey and Mr. Wheeler Coit) that the terms of Supreme Court Justices and lower federal judges

38. Hamilton, *supra* note 33, at 228. Hamilton did warn, however, that "The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body." *Id.* at 230 (emphasis in original).

39. HAYNES, *supra* note 31, at 93.

40. *See id.*

41. *See* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 420 (Merrill Jensen ed., 1978).

42. *Id.*

43. *Id.* at 428 (emphasis in original).

ought to be limited to two years, reasoning that "Any longer term of holding the judicial powers are [sic] inconsistent in a free country."⁴⁴

The sentiments of the Preston denizens were echoed by Anti-federalist Robert Yates.⁴⁵ Writing in *The New York Journal* in March 1788 under the pseudonym "Brutus," Yates argued that giving life tenure to Article III judges would make them "independent, in the fullest sense of the word."⁴⁶

There is no power above them, to controul [sic] any of their decisions. There is no authority that can remove them, and they cannot be controuled [sic] 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.⁴⁷

Yates conceded that the judges, as in England, "ought to hold their offices during good behaviour [sic]," but only if there were some provision for making them "properly responsible."⁴⁸ In England, such independence was necessary to protect the judiciary from a powerful monarch, whereas, on this side of the Atlantic, it was neither necessary nor advisable: "the reasons in favour [sic] of this establishment of the judges in England, do by no means apply to this country."⁴⁹ In fact, Yates argued, such an imperial judiciary would enjoy a power "in many cases superior to that of the legislature" insofar as the court had the unchecked power to interpret the Constitution "not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it."⁵⁰

Just over a decade after "Brutus" made his appeal to the people of New York, Representative Robert Williams of North Carolina rejected the notion that the people needed to be protected from themselves through judicial power during the debates over the Repeal Act of 1802: "Are the people to be told that they are so lost to a sense of their own interests, so ignorant and regardless of them, that they must take fifteen or twenty men to guard them from themselves?"⁵¹ If that were the case, he continued, "the sovereignty of the Government [is] to be swallowed up in the vortex of the

44. *Id.* at 439-40.

45. 2 THE COMPLETE ANTI-FEDERALIST 358 (Herbert J. Storing ed., 1981).

46. *Id.* at 438 (emphasis in original).

47. *Id.*

48. *Id.* at 438-39.

49. *Id.* at 439.

50. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 45, at 440.

51. Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, in 1993 THE SUPREME COURT REVIEW 374 (Hutchinson et al. eds., 1994) (quoting James A. O' Fallon, *Marbury*, 44 STAN. L. REV. 219, 236 (1992)). Alfange also points out that the Republicans used the Federalist judges' vigorous enforcement of the Sedition Act to support the proposition that an independent judiciary could not be trusted to protect individual rights against government encroachments. *See id.*

Judiciary. . . . [T]he people [will] be astonished to hear that their laws depend upon the will of the judges, who are themselves independent of all law."⁵²

Notwithstanding his earlier support of life tenure,⁵³ Thomas Jefferson became one of the most powerful and outspoken opponents of unchecked judicial power.⁵⁴ Any predilection for life tenure felt by Jefferson before assuming the Presidency vanished after *Marbury v. Madison*⁵⁵ in which Chief Justice John Marshall asserted the judiciary's role as interpreter of the Constitution in the famous words: "It is emphatically the province and duty of the judicial department to say what the law is."⁵⁶ An example of several Jeffersonian criticisms regarding *Marbury* is his June 2, 1807 letter to the United States District Attorney for Virginia, George Hay.⁵⁷ Writing four years after *Marbury* had been decided, Jefferson fumed that he had "long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law. . . ."⁵⁸ Writing to William Jarvis in 1820, Jefferson warned 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."⁵⁹ This fear turned Jefferson into an opponent of lifetime tenure for federal judges, regarding which he stated:

In England, where judges were named and removable at the will of an hereditary executive, from which branch most misrule was feared, and has flowed, it was a great point gained, by fixing them for life, to make them independent of that executive. But in a government founded on the public will, this principle operates in an opposite direction, and against that will.⁶⁰

In a letter to William T. Barry dated July 2, 1822, the seventy-nine year old Jefferson suggested term limits as a means by which the power of the judiciary could be curtailed:

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 Senate. This will bring their conduct, at regular periods, under

52. *Id.* (citing *Annals of Congress*, 7th Cong. 1st Sess. c 532).

53. *See* HAYNES, *supra* note 31, at 93.

54. *See id.*

55. 5 U.S. (1 Cranch) 137 (1803).

56. *Id.* at 177.

57. Letter from Thomas Jefferson to George Hay (June 2, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 213 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

58. *Id.* at 215.

59. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) in 15 THE WRITINGS OF THOMAS JEFFERSON 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

60. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 34 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

revision and probation, and may keep them in equipoise between the general and special governments.⁶¹

Jefferson went so far as to admit that “we have erred in this point, by copying England, where certainly it is a good thing to have the judges independent of the king.”⁶² Jefferson continued:

But we have omitted to copy their caution also, which makes a judge removable on the address of both legislative Houses. That there should be public functionaries independent of the nation, whatever may be their demerit, is a solecism in a republic, of the first order of absurdity and inconsistency.⁶³

What is also “inconsistent,” however, is the amount of animus anti-Federalists such as Jefferson displayed toward judicial review from time to time.⁶⁴ Beyond Jefferson’s pre-presidential statements in favor of life tenure quoted above,⁶⁵ the woeful tale of disabled Revolutionary War veteran William Hayburn presents an interesting case in point.⁶⁶ It may also stand for the general principle that the degree of one’s contempt for judicial review might often be in direct proportion to one’s interest in the issue being reviewed.⁶⁷ Beyond standing, as the first, although often overlooked, instance of the exercise of judicial review,⁶⁸ the case arguably also furnishes an early example of how our judicial system tolerated the same personnel on different levels of the federal judiciary.⁶⁹

61. Letter from Thomas Jefferson to William T. Barry (July 2, 1882), in 15 THE WRITINGS OF THOMAS JEFFERSON 389 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

62. *Id.*

63. *Id.* at 389-90.

64. Compare HAYNES, *supra* note 31, at 93, with 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 72-73 (1923), and WILLIAM J. QUIRK & R. RANDALL BRIDWELL, JUDICIAL DICTATORSHIP 1-4 (1995).

65. See HAYNES, *supra* note 31, at 93; see also text accompanying note 39.

66. See generally, Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527 (giving detailed analysis of Hayburn’s case); see also Hayburn’s Case, 2 U.S. (2 Dall.) 408 (1792).

67. See, e.g., Johnny C. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U. L. REV. 585, 631 (1987).

68. See generally Marcus & Teir, *supra* note 66, at 527 (commenting that while every first year law student is acquainted with *Marbury*, *Hayburn* is virtually ignored).

69. *Id.* at 530-31.

C. *The Hayburn Case*

On March 23, 1792, Congress passed an Act providing financial assistance to injured veterans and their families.⁷⁰ The statute assigned federal judges the task of hearing claims for benefits under the Act in order to determine if petitioners were indeed disabled as a result of military service.⁷¹ As provided by statute, these factual determinations were also reviewable by the Secretary of War⁷² and it was on this point that the justices of the nascent Supreme Court protested.⁷³

Since the Supreme Court Justices also served as traveling circuit court judges, the Court's opinion in *Hayburn* was registered in stages.⁷⁴ First to weigh in were Chief Justice John Jay and Justice William Cushing, writing with their colleague on the New York Circuit Court, District Judge James Duane.⁷⁵ On April 5, 1792, just two weeks after the Act was passed, the three authored a letter to President George Washington, essentially informing him that the Act was unconstitutional insofar as it purported to subject judicial decisions to review by the other two branches of government.⁷⁶ Nevertheless, the judges continued, in view of the fact that:

[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the national Legislature, they will execute this act in the capacity of *commissioners*.⁷⁷

Two other Supreme Court Justices—James Wilson and John Blair—writing with their colleague, District Judge Richard Peters for the District of Pennsylvania Circuit Court, declined to interpret the statute in the same manner.⁷⁸ On April 18, 1792, they sent their own letter to President Washington in which they expressed their alarm that Congress had ordained a statute that would have caused the courts to act “without constitutional authority.”⁷⁹

[I]f, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controlled by the legislature, and by an officer in the executive department. Such revision

70. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by the Act of Feb. 28, 1793, ch. 17, 1 Stat. 324).

71. *Id.*; see also Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (listing amendments to 1792 Act).

72. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (repealed in part and amended by Act of Feb. 28, 1793, ch. 17, 1 Stat. 324); Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

73. See *Hayburn's Case*, 2 U.S. (2 Dall) 408, 410 (1792).

74. *Id.* Whether the *Hayburn* case was anything more than an advisory opinion is open to debate. See Marcus & Teir, *supra* note 66, at 527-28.

75. See Marcus & Teir, *supra* note 66, at 529-30.

76. 2 U.S. (2 Dall.) at 410.

77. *Id.* (emphasis supplied).

78. See Marcus & Teir, *supra* note 66, at 531.

79. 2 U.S. (2 Dall.) at 411.

and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts⁸⁰

Interestingly, the authors took great pains to share their anguish with the President:

These, sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again.⁸¹

Such “excited feelings” were experienced again and many times thereafter.⁸² Indeed, the exercise of judicial review caused many to argue for methods by which the judiciary could be subject to tighter control.⁸³ Such calls for “reform,” however, ebbed and flowed considerably.⁸⁴

Anti-Federalist papers, for instance, generally applauded the *Hayburn* decision.⁸⁵ The *National Gazette*, in fact, hoped that it was a harbinger of promise:

And whilst we view the exercise of this noble prerogative [declaring an act of Congress to be unconstitutional] of the Judges in the hands of such able, wise and independent men as compose the present Judiciary of the United States, it affords a just hope that not only future encroachments will be prevented, but also that any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or of States, will, at convenient season, undergo a revision⁸⁶

Similarly, Philadelphia’s *General Advertiser* mocked Congress’ delusions of grandeur and heaped scorn upon the legislators’ anger at being blocked:

80. *Id.*

81. *Id.* Justice James Iredell wrote an opinion in which he stated that his court (the Circuit Court for the District of North Carolina) could not proceed for the same reason given by the other two courts. *See id.* The sixth and final member of the Court, Justice Thomas Johnson, appointed to replace Justice John Rutledge (who had resigned to become Chief Justice of the Supreme Court of Carolina), did not register an opinion in *Hayburn*. *See* 1 WARREN, *supra* note 64, at 56-57. Interestingly, Justice Johnson—who, at fifty-nine years of age, was the oldest man on this first Court—agreed to accept his appointment from President George Washington only after he was assured that Congress would soon mitigate the Circuit Court system’s demanding travel requirements. *Id.* at 57.

82. *See generally* Marcus & Teir, *supra* note 66.

83. *Id.* at 545-46.

84. *Id.* at 541-45.

85. *See* 1 WARREN, *supra* note 64, at 72.

86. *Id.* at 72-73.

Never was the word 'impeachment' so hackneyed, as it has been since the spirited sentence passed by our Judges on an unconstitutional law. The high-fliers in and out of Congress, and the very humblest of their humble retainers, talk of nothing but impeachment! impeachment! impeachment! As if, forsooth, Congress were wrapped up in the cloak of the infallibility which has been torn from the shoulders of the Pope; and that it was damnable heresy and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calf skin.⁸⁷

The reaction of the Federalists to *Hayburn* was more restrained (though not universally negative).⁸⁸ Noted Federalist Fisher Ames wrote that the *Hayburn* decision, "generally censured as indiscreet and erroneous," threatened to make the aims of the Federalists more difficult to accomplish by "embolden[ing] the states and their courts to make many claims of power, which otherwise they would not have thought of."⁸⁹

The Federalist and Anti-federalist camps reacted differently eleven years later in the wake of *Marbury*.⁹⁰ While the Federalists heaped praise upon Chief Justice John Marshall's opinion,⁹¹ the Anti-federalists were so furious that they launched attempts at removing Federalist judges through impeachment.⁹² As the impeachment movement gathered steam, Chief Justice John Marshall privately advanced a surprising concession—that Congress be given veto power over Supreme Court decisions.⁹³ However, after the Senate failed to convict the impeached Justice Samuel Chase, Marshall's remarkable proposal was rendered moot.⁹⁴

Does this mean that the *Hayburn* decision stands for the proposition that judicial review really is necessary to protect the Constitution from the mercurial opinions of ephemeral majorities?⁹⁵ While relevant to the topic of life tenure,⁹⁶ the issue of

87. *Id.* at 73-74.

88. *See id.* at 76-77.

89. Letter from Fisher Ames to Thomas Dwight (Apr. 25, 1792), in 2 WORKS OF FISHER AMES 942-43 (W.B. Allen ed., Liberty Classics 1983).

90. 5 U.S. (1 Cranch.) 137 (1803).

91. *See* Burris, *supra* note 67, at 634-35.

92. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 28-31 (Stanford Levinson rev., 3d ed. 2000).

93. *Id.* at 29.

94. *Id.* at 29-30. "As a biographer remarks, we could not credit that Marshall ever subscribed to such an extraordinary notion if it had not been set forth in his own hand and the letter preserved." *Id.* at 29.

95. *See* James Madison, *The Federalist No. 10*, in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS WRITTEN IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES 16-20 (Roy P. Fairfield ed., 2d ed., Johns Hopkins Univ. Press 1981); Hamilton, *supra* note 33, at 230-32.

96. *See, e.g.,* Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 682-88 (1999) (arguing the Hamiltonian position that term limits imperil the ability of the judiciary to exercise its important function as guardian of the Constitution). *See generally* QUIRK & BRIDWELL, *supra* note 64 (asserting the Jeffersonian position that term limits

judicial review is beyond the scope of this article. Rather than analyzing the merits of judicial review (either in theory or how it is practiced today by the federal courts),⁹⁷ this article advocates a statutory modification of the present system so that the judges of the Courts of Appeal are effectively held more accountable, but are still able to discharge their constitutional duties.

D. *Nineteenth Century Efforts at Limiting Life Tenure*

Concerns about a “judicial oligarchy” replacing the monarchy of King George began to spawn efforts to restrict the power of the third branch of government.⁹⁸ Less than two decades after Congress organized the U.S. judicial system in 1789, amendments limiting the tenure of federal judges had been proposed no less than four times.⁹⁹ The first three amendments, introduced between 1807 and 1808, called for term limits.¹⁰⁰ The fourth attempt by Kentucky’s Republican Senator, John Pope, in 1809, proposed a mandatory retirement age of sixty-five.¹⁰¹

Term limits for federal judges were introduced anew in the early 1830s when three resolutions were presented.¹⁰² On four occasions between 1839 and 1844, Ohio Senator Benjamin Tappan, a Democrat, offered amendments limiting a judge’s term to seven years.¹⁰³ Another was presented in 1848 by Democratic Congressman Jacob Thompson of Mississippi.¹⁰⁴

are one way to curb the power of the judiciary from even attempting to exercise the spurious concept of judicial review).

97. The philosophical underpinnings of judicial review, *i.e.*, the immutability of transcendent truths such as “true justice” and the need to protect it from the “temporary passions of the moment,” are called into question as often in recent years as they were taken for granted in years past. Compare Hal W. Greer, *Elective Judiciary and Democracy*, 43 AM. L. REV. 516, 517 (1909) (“Men’s interests, emotions, feelings and impulses are changed almost as often as their attire; but the fundamental principles of justice are as unchanging and as consistent as birth and death . . .”), with Ronald Dworkin, *On Gaps in the Law*, in *CONTROVERSIES ABOUT LAW’S ONTOLOGY* 85 (Paul Amselek & Neil MacCormick eds., 1991) (stating that “any proposition of law which is true, is true because it figures in, or is the consequence of, the best interpretation of a community’s political history”), and Alan R. Madry, *Legal Indeterminacy and the Bivalence of Legal Truth*, 82 MARQ. L. REV. 581, 589 & n.19 (1999) (quoting Dworkin, *supra*).

98. See QUIRK & BRIDWELL, *supra* note 64, at 3-4 (citing the Jeffersonian view that judicial supremacy could not coexist with democracy).

99. HERMAN VANDENBURG AMES, *THE PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES DURING THE FIRST CENTURY OF ITS HISTORY* 145, 151-52 (1897).

100. *Id.* at 152.

101. *Id.* at 151. In 1826, the forty-four year old New Hampshire Representative Nehemiah Eastman introduced a resolution calling for a mandatory retirement age of seventy, which was raised again in 1835. *Id.* Any party affiliations of the congressional representatives named in this article come from the *Biographical Directory of the United States Congress: 1774-Present*, at <http://bioguide.congress.gov/biosearch/biosearch.asp> (last visited Aug. 26, 2003).

102. AMES, *supra* note 99, at 152.

103. *Id.*

104. *Id.* at 152 n.4.

Throughout the course of his long political career, Andrew Johnson advocated a twelve-year limit on federal judges.¹⁰⁵ A Democratic Congressman from Tennessee in the early 1850s, Johnson presented an amendment that capped a federal judge's term at twelve years with one-third of the judges retiring from service every four years.¹⁰⁶ As a Senator in 1860, Johnson recommended a similar amendment.¹⁰⁷ This amendment contained a compromise provision, which provided that one-half of judicial vacancies would be filled by judges from slave-states while the other half was to be filled by nominees from free-states.¹⁰⁸ Finally, three years after assuming the presidency following the assassination of Republican President Abraham Lincoln, Johnson made the same appeal in a special message to Congress in 1868:

It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am surely sustained by the evidence of popular judgment upon this subject in the different States of the Union.¹⁰⁹

Six more propositions were brought up in the late 1860s and 1870s.¹¹⁰ Republican Amasa Cobb, a Wisconsin Congressman, made two proposals; both were aimed not only at limiting the tenure of judges to eight-year terms, but also at having nominations come from both Houses of Congress.¹¹¹ Two other resolutions proposed ten-year terms while a third proposed a twenty-year term.¹¹² In 1879, Democratic Senator Ebenezer Byron Finley of Ohio resurrected the amendment proposing a twelve-year term limit.¹¹³ The preamble to this resolution characterized "the life tenure of office" as "a relic of the Old World and incompatible with the genius and spirit of our republican form of government, placing public functionaries above a due sense of responsibility to the people."¹¹⁴

This relentless, albeit unsuccessful, attempt at imposing term limits on federal judges is somewhat surprising given the relative restraint of the judiciary during the first half of the nineteenth century.¹¹⁵ After all, once *Marbury* was decided in 1803,

105. *Id.* at 152.

106. *Id.*

107. AMES, *supra* note 99, at 152.

108. *Id.*

109. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1908 643 (James D. Richardson ed. 1897), quoted in *Reconfirmation of Federal Judges: Hearing Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 92d Cong. 19 (1973) (reprinting a Memorandum of Law by Edward J. White, Special Assistant to Senator Harry F. Byrd, Jr., entitled "A Challenge to the Concept of Life Tenure for the Federal Judiciary").

110. AMES, *supra* note 99, at 152.

111. *Id.* at 152 & n.9.

112. *Id.* at 152.

113. *Id.* at 152 & n.11.

114. *Id.* at 152-53.

115. QUIRK & BRIDWELL, *supra* note 64, at 36.

the Supreme Court did not strike down another federal law as unconstitutional until its infamous *Dred Scott* decision in 1856.¹¹⁶

One reason why there was a steady stream of proposals imposing a limit on federal judges may have been pecuniary in nature.¹¹⁷ Before a federal pension was enacted in 1869, Article III judges may have been tempted to stay in active service longer than their physical or mental health would allow.¹¹⁸ One representative commented that it was a "sad sight to see 'one-third of its members sleeping upon the bench and dying with age, and one-third or more crazed with the glitter of the Presidency.'"¹¹⁹ As Professor Ames suggests, this may be the reason that age limits were repeatedly proposed alongside or in conjunction with term limits throughout the four decades leading up to the creation of the retirement allowance.¹²⁰

E. *Attacks on Life Tenure at the Turn of the Twentieth Century*

The life tenure debate began heating up again in the latter part of the nineteenth and early twentieth centuries as decisions from the federal bench began to galvanize opposition to the federal judiciary, especially among populists and progressives.¹²¹ Some began to suggest not only term limits, but also popular elections as a way to curb the power of the judiciary.¹²²

The earliest bill calling for the popular election of federal judges was introduced in 1881 by Senator Daniel W. Voorhees, a Democrat from Indiana.¹²³ Two more were proposed within the next two years, one of which included a fourteen-year term limit and removal for disability.¹²⁴ An 1899 bill called for a constitutional amendment that would have put all federal judges, including Supreme Court Justices, on the national ballot for eight-year terms.¹²⁵

Between 1907 and 1917, six more amendments were proposed.¹²⁶ Democratic Representative William B. Lamar of Florida introduced several bills—two in 1907—calling for all federal judges to be elected to eight-year terms.¹²⁷ Five years after Lamar's efforts failed, Republican Representative Abraham Walter Lafferty of Oregon suggested judges be elected to serve twelve-year terms subject to recall every

116. *Id.*; see also *Dred Scott v. Sandford*, 60 U.S. 393, 452 (1856).

117. AMES, *supra* note 99, at 151.

118. *Id.*

119. *Id.* at 151 n.6 (citation omitted).

120. *Id.*

121. See Ross, *supra* note 29, at 1069.

122. *Id.*

123. *Id.* at 1069 n.30 (citing S.J. Res. 14, 47th Cong. (1st Sess. 1881)).

124. AMES, *supra* note 99, at 147 & n.2.

125. Ross, *supra* note 29, at 1071 n.38 (citing S. Res. 47, 56th Cong. (1st Sess. 1899)).

126. *Id.* (citations omitted).

127. *Id.* (citing H.R.J. Res. 226, 59th Cong. (2d Sess. 1907); H.R.J. Res. 50, 60th Cong. (1907)).

four years.¹²⁸ The next year, Democratic Representative George A. Neeley of Kansas proposed six-year terms.¹²⁹ In 1915 and 1917, Representative John A. Moon, a Democrat from Tennessee, introduced measures calling for the election of judges on the lower federal courts to fifteen-year terms.¹³⁰

Those who advocated an elected federal bench made arguments similar to those of the anti-Federalists a century earlier, namely, that appointing judges for life was anomalous in a representative democracy.¹³¹ Walter Clark, Chief Justice of the North Carolina Supreme Court, expressed this sentiment in these terms: "If the people are to be trusted to select the Executive and Legislature they are also fit to select the judges."¹³² Another critic reasoned that "if judges are to act as legislators, they must be elected by the people, and easily be displaced or recalled. . . . Otherwise, democracy is replaced by absolutism."¹³³

The concept of having federal judges chosen by popular vote was not without its detractors.¹³⁴ Some argued that the First Amendment and property rights of Americans might be put at risk by popularly elected judges imbued with "socialistic" ideas.¹³⁵ Others, including some progressives, worried that the electorate would either be incapable of electing good judges or susceptible to the influence of "political machines."¹³⁶ One scholar noted:

The burden thrown upon the electorate in choosing among a host of candidates those best fitted for office has been so great that the system has broken down. It has been fully recognized for some time that the voter is not a free agent in the selection of the officers of government but has come to rely upon the advice of the professional politician who really determines the choice and calls upon the electorate to ratify his work.¹³⁷

Life tenure triggered opposition from even more moderate and conservative camps.¹³⁸ *The Central Law Journal*, for example, acknowledging that the views of its

128. *Id.* (citing H.R.J. Res. 227, 62d Cong. (1912)).

129. *Id.* (citing H.R.J. Res. 17, 63d Cong. (1913)).

130. Ross, *supra* note 29, at 1071 n.38 (citing H.R.J. Res. 43, 64th Cong (1915); H.R.J. Res. 50, 65th Cong. (1917)). Senator Clarence Dill of Washington, a Democrat, suggested that judges on the lower federal courts be popularly elected, but that the Supreme Court Justices be appointed from their ranks. Dill's proposals were introduced (without success) in 1924, 1926, 1930, and 1931. *See id.* (citations omitted).

131. *Id.* at 1070.

132. *Id.* at 1070 n.33 (citation omitted).

133. *Id.* at 1070 & n.35 (citing Henderson, *The Progressive Movement and Constitutional Reform*, 3 YALE L. REV. 78, 87 (1914)).

134. Greer, *supra* note 97, at 522-24.

135. *Id.*

136. Ross, *supra* note 29, at 1074.

137. *Id.* at 1074 n.49 (citing University of Wisconsin Professor William S. Carpenter in WILLIAM S. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES 209 (1918)).

138. *Id.* at 1070.

editors on life tenure “have only recently become fixed,”¹³⁹ called for a ten-year term limit for judges on the lower federal courts as a condition for higher pay.¹⁴⁰ *The Central Law Journal* argued that life tenure “frequently promotes disregard of proper criticism,” “aroused a suspicion of unloyalty to the people’s interest,” “impaired public confidence” in the judiciary, and “promoted an insolent disrespect of state sovereignty, and thus antagonized state courts and legislatures, promoting unnecessary ruptures.”¹⁴¹

Term limits for appointed federal judges garnered more support than did efforts for an elected judiciary, but ultimately still failed.¹⁴² Between 1894 and 1918, nearly two dozen Congressional amendments were proposed calling for term limits.¹⁴³ Over half of those mandated limits for all federal judges; the others only capped the service of judges on the inferior courts.¹⁴⁴

The first of nine turn-of-the-century proposals imposing limits on all federal judges came up in 1894.¹⁴⁵ That year, the House Committee on the Judiciary recommended a ten-year term limit for all federal judges.¹⁴⁶ The basis for this recommendation was to “restore popular confidence in a judiciary that was ‘frequently suspected of having no sympathy’ with the people,” and instead was often viewed as “exhibiting partiality toward corporations and personal favorites.”¹⁴⁷ Texas Representative Samuel Bronson Cooper, a Democrat, made similar proposals in 1899, 1901, 1903, and 1907, all of which invited Congress to set terms for all Article III judges.¹⁴⁸ In 1909, Cooper’s fellow Texan, Democratic Representative Gordon James Russell, introduced a bill with three different term limits: A twelve-year limit for Supreme Court Justices, an eight-year limit for circuit court judges, and a six-year limit for federal district court judges.¹⁴⁹ Four years later, Senator James Alexander Reed of Missouri, a Democrat, urged his senate colleagues to vote for twelve-year terms for all federal judges and proposed that judges be reappointed.¹⁵⁰ Two similar bills arose in the next two sessions of Congress, both from House Democrats.¹⁵¹ Wisconsin Representative Michael Reilly’s bill provided for a maximum period of

139. 70 CENT. L.J. 266 (1910).

140. *Id.*

141. *Id.* at 266-67. The suggested pay raise, incidentally, would have brought a district judge’s annual salary from \$6,000 to \$9,000 and the salaries of circuit court judges from \$7,000 to \$10,000. *See id.* at 266.

142. Ross, *supra* note 29, at 1071-73 & nn.37, 43.

143. *Id.* at 1071-73 nn.37, 38, 43.

144. *Id.*

145. *Id.* at 1070 n.32.

146. *Id.*

147. Ross, *supra* note 29, at 1070 n.32 (citing H.R. Rep. No. 466, 53d Cong. (1894)).

148. *Id.* at 1071 n.37 (citing H.R.J. Res. 27, 60th Cong. (1907); H.R.J. Res. 38, 58th Cong. (1st Sess. 1903); H.R.J. Res. 77, 57th Cong. (1st Sess. 1901); H.R.J. Res. 101, 55th Cong. (2d Sess. 1899)).

149. *Id.* at 1072 n.43 (citing H.R.J. Res. 80, 61st Cong. (1909)).

150. *Id.* (citing S.J. Res. 6, 63d Cong. (1913)).

151. *Id.* (citing H.R.J. Res. 349, 63d Cong. (1913); H.R.J. Res. 387, 63d Cong. (1914)).

ten years of service as a federal judge while Georgia Representative Carl Vinson's¹⁵² bill called for a six-year cap.¹⁵³

Three of the eight proposals, aimed solely at the inferior courts, originated in the Senate and all contained specific limits on service (either six or ten-year terms).¹⁵⁴ Two of the five House proposals included the ten-year limit idea raised in the Senate.¹⁵⁵ Also introduced was an eight-year limit, which was proposed by Kansas Democrat George Neeley in 1912,¹⁵⁶ and two additional proposals that would have given Congress the power to decide the terms of the lower federal court judges.¹⁵⁷

Opponents of these measures warned that term limits, particularly for short periods, would encourage judges to "strive for popularity," leading them to issue "popular decisions with a view of becoming candidates for office and we would have what is now unknown in this country—the whole Federal judiciary actively engaged in party politics."¹⁵⁸ As Professor Ross stated, the only one of these term limit bills to be reported favorably by the House Judiciary Committee was the one introduced in 1894.¹⁵⁹ The others, he says, "sunk with scarcely a trace."¹⁶⁰

After this flurry of proposals, the flames of fury against a life-tenured judiciary began to die down, as judges—at least on the federal level—who had once seemed so out of touch with the demands of democracy started to become more receptive to progressive legislation.¹⁶¹ However, the Supreme Court's reaction to New Deal legislation provided ample ammunition for those seeking judicial term limits once again.

152. Interestingly enough, Carl Vinson was the grand-uncle of Georgia Senator Sam Nunn, who would have his own experience advocating a method of removing federal judges some seventy years later. See Garrow, *supra* note 3, at 1059-65; <http://bioguide.congress.gov/scripts/biodisplay.pl?index=v000105> (last visited Dec. 10, 2003).

153. Ross, *supra* note 29, at 1072 n.43 (citing H.R.J. Res. 387, 63d Cong. (1914); H.R.J. Res. 349, 63d Cong. (1913)).

154. *Id.* at 1072-73 n.43 (citing S.J. Res. 137, 65th Cong. (1918) (proposing a six-year limit); S.J. Res. 19, 63d Cong. (1913) (proposing a ten-year limit); S.J. Res. 109, 62d Cong. (1912) (proposing a ten-year limit)).

155. *Id.* (citing H.R.J. Res. 214, 62d Cong. (1912); H.R.J. Res. 149, 62d Cong. (1911)).

156. *Id.* (citing H.R.J. Res. 270, 62d Cong. (1912)).

157. *Id.* at 1071 n.37 (citing H.R.J. Res. 15, 60th Cong. (1907); H.R.J. Res. 249, 59th Cong. (2d Sess. 1907)).

158. Ross, *supra* note 29, at 1074 n.48 (citing H.R. REP. NO. 466, at 4 (1894)).

159. See *id.* at 1072.

160. *Id.*

161. There were, however, at least three proposals in the early 1910s that aimed to permit the recall of Article III judges, including Supreme Court Justices. See *id.* at 1073. In addition, the 1924 presidential platform of independent candidate Senator Robert M. LaFollette of Wisconsin called for a ten-year term limit for federal judges. See *id.* at 1075 n.53. See also William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 404-12 (2002) (discussing in detail Senator LaFollette's presidential campaign proposal in 1924 to limit terms of federal judges).

F. *The Assault on the "Nine Old Men"*

Franklin Delano Roosevelt's frustration with the judicial blockade of his New Deal is well known.¹⁶² When the fifty-five year old Democratic president announced his "court packing" scheme on February 5, 1937, it was clear to all that FDR was determined not to let a handful of Supreme Court Justices halt his efforts to bring his country out of the Great Depression.¹⁶³ Clearer still is the fact that President Roosevelt's scheme of appointing additional justices was more closely related to ideology than age.¹⁶⁴

Roosevelt's proposed statute would have allowed a president to name an additional Supreme Court justice (up to a maximum of six) for each sitting justice with over ten years of service who failed to leave the Supreme Court within six months of reaching the age of seventy.¹⁶⁵ In his remarks to Congress, the wheelchair-bound Roosevelt warned that "A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions."¹⁶⁶ The irony was that Roosevelt delivered these remarks some fifteen years after an apparent bout with polio had impaired his "physical vigor" by paralyzing his legs. However, as Emory law professor David Garrow noted in his comprehensive historical survey of the mental health of members of the high court, "the Supreme Court in early 1937—unlike so many other times in the Court's previous history—actually did not include a single Justice against whom a case of mental decrepitude could be accurately lodged."¹⁶⁷ More importantly, despite being lampooned in the press as "The Nine Old Men," only six of the sitting justices in 1937 were older than seventy and three of those six were liberals—Louis D. Brandeis, Benjamin N. Cardozo, and Chief Justice Charles E. Hughes.¹⁶⁸

In any event, history shows that President Roosevelt insisted on a quick solution to his immediate problem by means of this *statutory* court-packing plan and that his

162. See e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 82 (1995).

163. See *id.* at 82-162 (detailing President Roosevelt's 1937 battle with the Supreme Court).

164. See, e.g., David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 146-49 (1998).

165. See Garrow, *supra* note 3, at 1020.

166. *Id.* at 1020 n.121 (quoting Franklin D. Roosevelt, To the Congress (Feb. 5, 1937), in 6 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1937 VOLUME: THE CONSTITUTION PREVAILS* at 55 (Samuel I. Rosenman, Compiler and Collator, 1941)).

167. Garrow, *supra* note 3, at 1019. However, Professor Garrow's argument for a mandatory retirement age is somewhat weakened by his account of Supreme Court Justices who showed signs of "decrepitude" well before they reached his proposed compulsory retirement age of seventy-five, i.e., Justices Sherman Minton at age sixty-five and Charles Whittaker at age fifty-six. *Id.* at 1043-45. His argument is also weakened by his admissions that some Justices were still able to show remarkable acumen despite their advanced age, e.g., Justice Oliver Wendell Holmes, who evidently was capable of writing and thinking clearly until the age of eighty-five. *Id.* at 1017-18, 1084.

168. See *id.* at 1019.

attempt became unnecessary after the “switch in time” that “save[d] nine.”¹⁶⁹ What is perhaps less well-known, however, is that drafts of constitutional amendments were circulating among Roosevelt’s advisors in the White House as well as in the halls of Congress at the same time as the statutory proposal.¹⁷⁰ In fact, perhaps more than at any other time in this country’s history, life tenure for Article III judges appeared to be in real jeopardy, either because of concerns about the age of the judges,¹⁷¹ the power of the judiciary,¹⁷² or both.¹⁷³

Just ten days after Roosevelt announced his plan to pack the Court, Senator Allen Ellender, a Democrat from Louisiana, proposed a constitutional amendment requiring all federal judges (including Supreme Court Justices) to retire at the age of seventy.¹⁷⁴ Nebraska’s two senators, although hailing from different political parties, both proposed constitutional amendments.¹⁷⁵ Democrat Edward Raymond Burke’s amendment mandated retirement at age seventy-five while independent Republican George William Norris’ amendment limited the tenure of all Article III judges to nine years.¹⁷⁶ A series of similar bills soon followed¹⁷⁷ while other bills only aimed to cap the service of Supreme Court Justices.¹⁷⁸ Given the broad support for these types of initiatives, it is certainly possible that they would have enjoyed success in some form,¹⁷⁹ but FDR’s opposition to pursuing a constitutional amendment spelled their doom.¹⁸⁰

169. Pepper, *supra* note 164, at 139 n.465 (quoting JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* 135 (1938)).

170. See Garrow, *supra* note 3, at 1023-24.

171. See *id.* at 1023-25.

172. See *id.* at 1020-21.

173. *Id.* at 1023 (“This aspect of the ‘Court packing’ controversy has inexplicably gone unmentioned in all of the major, standard secondary accounts of the battle, but contemporary congressional records and newspaper stories detailed it prominently.”).

174. *Id.* at 1023 n.134 (citing S.J. Res. 77, 75th Cong., 81 CONG. REC. 1195 (1937)).

175. See Jane Perry Clark, *Some Recent Proposals for Constitutional Amendment*, 12 WIS. L. REV. 313, 320 & n.26 (1937) (citing *Court Debate Looses Flood of Amendments*, N.Y. TIMES, Mar. 21, 1937).

176. *Id.*

177. See, e.g., Garrow, *supra* note 3, at 1023 n.135 (citing S.J. Res. 86, 75th Cong., 81 CONG. REC. S 1273 (1937) (proposed by Nebraska Democratic Senator Edward R. Burke)); *Id.* at 1024 n.137 (citing H.J. Res. 293, 75th Cong., 81 CONG. REC. H 2731 (1937) (proposed by Democratic Representative Alfred Lee Bulwinkle of North Carolina)).

178. See, e.g., *id.* at 1024 n.137 (citing S. J. Res. 100, 75th Cong., 81 CONG. REC. S 2138 (1937) (proposed by Florida’s Democratic Senator Charles O. Andrews)).

179. See *id.* at 1024 n.138, 1025 n.148 (listing supporters of these measures, including Columbia University Professor Raymond Moley, Princeton University President H.W. Dodds, prominent Chicago attorney Walter F. Dodd, Reverend Anson Phelps Stokes (Canon of the Washington Cathedral), Fordham Law School Dean Ignatius M. Wilkinson, and Edward T. Lee, Dean of Chicago’s John Marshall Law School); see also Charles S. Collier, *The Supreme Court and the Principle of Rotation in Office*, 6 GEO. WASH. L. REV. 401, 419 (1938) (suggesting twelve-year term limits for Supreme Court Justices).

180. Garrow, *supra* note 3, at 1026.

G. *Terminating Tenure for Octogenarians and Activists*

It took twenty years for another such constitutional amendment to garner as much attention.¹⁸¹ Supported by the efforts of the American Bar Association, conservative Republican Senator John Marshall Butler of Maryland introduced a resolution early in 1953 that called for the imposition of a mandatory retirement age of seventy-five for all federal judges.¹⁸² The fifty-six year old Butler stated that his age limit “strikes the happy medium between experience and senility”¹⁸³ and came at an opportune time to modify the composition of the Supreme Court that was then “surrounded by an aura of tranquility.”¹⁸⁴

Butler’s proposal generated support from some notable figures.¹⁸⁵ Senators John F. Kennedy of Massachusetts and Lyndon B. Johnson of Texas, for example, joined thirteen other Democrats and forty-three Republicans in voting for it when it came to a vote in the Senate on May 11, 1954.¹⁸⁶ A month later, former Attorney General William D. Mitchell was among those who testified in favor of the amendment before the House Judiciary Committee.¹⁸⁷ Former Democratic party presidential nominee John W. Davis, who at eighty-one years of age had just argued the losing side in *Brown v. Board of Education*,¹⁸⁸ wrote to President Dwight D. Eisenhower in a letter dated June 29, 1954 and urged that he support the amendment.¹⁸⁹ Just over a week later, Eisenhower confessed in a letter of response that he was “amazed” that Davis supported amending the Constitution, but added that he “hasten[ed] to agree that you give sound reasons for your attitude in this case” and he hoped “that adjournment will not prevent final Congressional consideration of this amendment.”¹⁹⁰

Congress did consider it, but not for long.¹⁹¹ The House Judiciary Committee tabled the measure after a “close” vote and “extensive debate” later that summer.¹⁹² Any chance for further consideration quickly dimmed after the Supreme Court began to issue decisions ranging from desegregation to the constitutionality of anti-

181. See *id.* at 1043.

182. *Id.* at 1029-37.

183. *Id.* at 1040.

184. *Id.* at 1036.

185. See Garrow, *supra* note 3, at 1038.

186. See *id.* (citing *Composition and Jurisdiction of the Supreme Court: Hearings Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 83d Cong. 3 (1954)). Senator Hubert H. Humphrey of Minnesota voted against the bill. *Id.*

187. *Id.* at 1040.

188. 347 U.S. 483 (1954).

189. Garrow, *supra* note 3, at 1039 n.226.

190. *Id.* (citing Letter from Dwight D. Eisenhower to John W. Davis (July 7, 1954), in Dwight D. Eisenhower, *Records as President, 1953-61*; White House Central Files, Official File, Box 371, “OF 100-A Supreme Court of the United States (1)”).

191. *Id.* at 1039 n.226, 1041.

192. *Id.* at 1041 (citing *Report of the Standing Committee on Jurisprudence and Law Reform*, 79 ANNUAL REP. ABA 242, 244 (1954)).

Communism investigation measures¹⁹³—issues which were wildly unpopular with the Republicans and conservative Democrats who had supported Butler's bill.¹⁹⁴ Butler himself soon became "an outspoken critic of the Warren Court" and, in 1958, even went so far as to propose legislation that would have limited the appellate jurisdiction of the Supreme Court.¹⁹⁵

In 1968, when angst over the Warren Court's decisions on everything from crime to religion was at its height, no fewer than sixteen bills were introduced in Congress, all intending to subject federal judges to either popular elections¹⁹⁶ or limited tenure.¹⁹⁷ A trickle of similar proposals soon became a virtual flood with proposals coming from both sides of the aisle.¹⁹⁸

In 1975, for instance, Virginia's Democratic Senator, Harry Flood Byrd, Jr., introduced a measure calling for a constitutional amendment that would have imposed an eight-year limit on the terms of all federal judges.¹⁹⁹ This amendment provided that judges would automatically be renominated to another eight-year term subject to reconfirmation by the Senate.²⁰⁰ Explaining the rationale behind his proposal in *Judicature*, Senator Byrd quoted Alexander Hamilton's assumption that the judiciary was the "weakest" of the three branches of government as it had "neither force nor will, but merely judgment."²⁰¹ Senator Byrd questioned that premise:

I submit that there is a well-founded sentiment in this nation today that some members of the federal judiciary are exercising a considerable amount of will, armed with too much force, and given to less than a full

193. See *id.* at 1042.

194. Garrow, *supra* note 3, at 1042-43; see also Kline, *supra* note 96, at 691-92 (quoting the "Southern Manifesto," a March 1956 document signed by one hundred members of Congress criticizing the Warren Court for its decision in *Brown* as "a clear abuse of judicial power climaxing a trend in the Federal judiciary to legislate and encroach upon the reserved rights of the people").

195. *Id.* at 1043.

196. Ross, *supra* note 29, at 1076 n.55 (citing H.R.J. Res. 1038, 90th Cong. (1968); H.R.J. Res. 1279, 90th Cong. (1968); H.R.J. Res. 1282, 90th Cong. (1968); H.R.J. Res. 1418, 90th Cong. (1968); H.R.J. Res. 1426, 90th Cong. (1968); H.R.J. Res. 1428, 90th Cong. (1968)).

197. *Id.* (citing H.R.J. Res. 997, 90th Cong. (1968); H.R.J. Res. 1220, 90th Cong. (1968); H.R.J. Res. 1373, 90th Cong. (1968); H.R.J. Res. 1401, 90th Cong. (1968); H.R.J. Res. 1448, 90th Cong. (1968); H.R.J. Res. 1456, 90th Cong. (1968); H.R.J. Res. 1467, 90th Cong. (1968); H.R.J. Res. 1470, 90th Cong. (1968)). While serving in the House as a representative from Texas, George Bush (the elder) proposed a constitutional amendment in 1969 setting a mandatory retirement age for all members of Congress and the federal judiciary. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 552 n.280 (1992).

198. In the ninety-second Congress alone, over a dozen resolutions were made proposing constitutional amendments affecting the terms of Article III judges. See generally AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, *JUDICIAL DISCIPLINE AND TENURE PROPOSALS* (1979).

199. Ross, *supra* note 29, at 1076 n.56 (citing S.J. Res. 16, 94th Cong. (1975)).

200. *Id.*

201. Harry F. Byrd, Jr., *Has Life Tenure Outlived its Time?*, 59 *JUDICATURE* 266, 266 (1976).

measure of judgment. There is widespread dissatisfaction with the existing system, under which some judges are exercising dictatorial powers.²⁰²

Senator Byrd also cited a law review article by Nixon appointee Judge Hiram Widener of the Fourth Circuit Court of Appeals in which Judge Widener concluded that recent federal decisions, when "Taken together . . . whether right or wrong, . . . show a drift toward judicial intervention which may not be ignored."²⁰³ This presented a problem, Senator Byrd continued, as life tenure insulated these judges from accountability and the only constitutionally permissible method of removing them—impeachment—was unavailing or, in the words of Thomas Jefferson, "a bungling way of removing judges—an impractical thing—a mere scarecrow."²⁰⁴

Four years later, Representative Dan Quayle, then a Republican Congressman from Indiana, proposed an amendment limiting all Article III judges to fifteen-year terms.²⁰⁵ Representative Quayle's proposal was similar to those aired by two Midwest Democrats. Douglas Applegate, a Democratic Representative from Ohio, offered twelve-year terms for all federal judges²⁰⁶ and Andrew Jacobs, Jr., a Democratic Representative from Indiana, suggested that federal judges could not serve more than ten years during any twelve-year period.²⁰⁷ Several other measures were also introduced, but none of them were successful.²⁰⁸

Proponents of these amendments would have been encouraged by some behind-the-scenes comments that Justice Byron White was making at the same time that these bills were being discussed.²⁰⁹ On October 20, 1975, White wrote Chief Justice Warren Burger and the six other Justices to complain of the Court's response to Justice William O. Douglas' increasing ineptitude.²¹⁰ As Justice Douglas apparently began to nap during oral argument, fading in and out of lucidity, seven of the other eight Justices voted privately that no decision should hinge on Douglas' vote and that Douglas should not be assigned any opinions.²¹¹ Justice White disagreed sharply, noting that only through Congressional impeachment could Justice Douglas be deprived of his duties and not by an action of his "colleagues [to] deprive him of his

202. *Id.*

203. *Id.*

204. *Id.* at 267.

205. Ross, *supra* note 29, at 1076 n.56 (citing H.J. Res. 160, 96th Cong. (1979)).

206. *Id.* (citing H.J. Res. 191, 96th Cong. (1979)).

207. *Id.* (citing H.J. Res. 315, 96th Cong. (1979)).

208. *Id.* (citing S.J. Res. 110, 96th Cong. (1979) (proposing ten-year limits for federal judges renewable upon renomination by the President and reconfirmation by the Senate); H.J. Res. 77, 96th Cong. (1979) (same); H.J. Res. 296, 96th Cong. (1979) (same); H.J. Res. 418, 96th Cong. (1979) (same)).

209. Garrow, *supra* note 3, at 1054-55.

210. *Id.* at 1054.

211. *Id.*

office by refusing to permit him to function as a Justice.”²¹² Justice White also stated that “I am convinced that it would have been better had retirement been required at a specified age by the Constitution” and declared that “a constitutional amendment to that effect should be proposed and adopted.”²¹³

Outside the chambers of Justice White, the trend to end life tenure continued into the 1980s and up to the present.²¹⁴ Between 1980 and 1987 alone, over two dozen constitutional amendments were introduced that would have ended life tenure, either through the introduction of elections,²¹⁵ new removal procedures,²¹⁶ or by some form of limited tenure.²¹⁷ In the 1990s, the abolition of the life tenure movement took a decidedly partisan turn with a series of proposals for constitutional amendments coming from Republican ranks.²¹⁸

In 1995, for example, Texas Republican Representative Jack Fields called for a ten-year limit for all federal judges subject to reappointment by the President and the consent of the Senate.²¹⁹ Two other House Republicans made similar proposals the same year. Louisiana Representative James Hayes suggested a six-year term limit for

212. *Id.* at 1055 (quoting Letter from Byron R. White to Warren E. Burger (Oct. 20, 1975), in LEWIS F. POWELL, JR., PAPERS, CORRESPONDENCE WITH FELLOW JUSTICES, RETIREMENT OF WILLIAM O. DOUGLAS, 1975-78) (Law Library, Washington & Lee University School of Law).

213. *Id.*

214. Ross, *supra* note 29, at 1093 n.106 (citing H.R.J. Res. 99, 101st Cong. (1989) (requiring reconfirmation by the Senate every ten years); H.R.J. Res. 628, 98th Cong. (1984) (requiring Senate reconfirmation every six years)).

215. Burbank, *supra* note 17, at 647 n.20 (citing H.R.J. Res. 451, 97th Cong. (1982) (suggesting a retention election every six years)).

216. *Id.* (citing H.R.J. Res. 56, 99th Cong. (1985) (allowing federal judges to serve during “good behavior” subject to removal upon a Senate resolution in the tenth year of any ten year period); H.R.J. Res. 570, 97th Cong. (1982) (same)).

217. *Id.* (citing H.R.J. Res. 325, 100th Cong. (1987) (limiting terms to six years with a two-term cap); H.R.J. Res. 71, 100th Cong. (1987) (allowing service for only ten years during any twelve-year period); H.R.J. Res. 30, 99th Cong. (1985) (same); H.R.J. Res. 144, 98th Cong. (1983) (same); H.R.J. Res. 51, 97th Cong. (1981) (same); H.R.J. Res. 8, 97th Cong. (1981) (allowing six-year terms with a twelve-year limit); S.J. Res. 24, 97th Cong. (1981) (permitting reappointment to another court after a term of ten years); H.R.J. Res. 168, 100th Cong. (1987) (limiting a term to ten years unless the Senate consents to a continuance in office); H.R.J. Res. 184, 99th Cong. (1985) (same); H.R.J. Res. 264, 98th Cong. (1983) (same); H.R.J. Res. 490, 97th Cong. (1982) (same); H.R.J. Res. 177, 100th Cong. (1987) (suggesting Supreme Court Justices serve fifteen-year terms with eligibility for reappointment); H.R.J. Res. 557, 99th Cong. (1986) (same); H.R.J. Res. 103, 99th Cong. (1985) (allowing federal judges to serve only ten years unless the President renominates and the Senate reconfirms); S.J. Res. 30, 99th Cong. (1985) (same); H.R.J. Res. 374, 98th Cong. (1983) (same); S.J. Res. 39, 98th Cong. (1983) (same); H.R.J. Res. 60, 97th Cong. (1981) (same); S.J. Res. 21, 97th Cong. (1981) (same); H.R.J. Res. 419, 97th Cong. (1982) (proposing a ten-year term limit and an age limit of seventy for judges of the inferior courts)).

218. See Kline, *supra* note 96, at 755 n.280.

219. *Id.* (citing H.J. Res. 63, 104th Cong. (1995)).

federal judges²²⁰ and California Representative Frank Riggs introduced a measure that would have limited federal judges to eight-year terms.²²¹

Two years later, complaining loudly of judicial activism by left-leaning, life-tenured judges, New Hampshire Republican Senator Bob Smith proposed limiting the terms of all federal judges to ten years along with eligibility for reappointment.²²² Joel Hefley, a Colorado Republican, issued an essentially identical proposal in the House.²²³ That same term, fellow Republican Representative Bill Paxon of New York introduced a similar measure, requiring judges of the inferior federal courts to be reconfirmed by the Senate every twelve years.²²⁴ Frank Riggs, a Republican House member from California, urged that the Constitution be amended to limit the terms of federal judges to eight years maximum.²²⁵

III. A STATUTORY PROPOSAL MODIFYING LIFETIME TENURE

As has been illustrated above, lifetime tenure has been the subject of intense debate throughout American history. Partisans of every persuasion have offered or supported such initiatives. Political figures as well-known and as diverse as Thomas Jefferson, Andrew Johnson, John F. Kennedy, Lyndon Johnson, George Bush, Sr., Justice Byron White, and Dan Quayle—to name but a few—have all advocated the termination of life tenure.²²⁶

So why has every single one of the many attempts described above failed? Certainly not because there is an overwhelming consensus that life tenure is the best way to guarantee judicial independence.²²⁷ If that were so, one would expect other democracies to have similar practices, but that is not the case. A recent study illustrates that the American system of life tenure is something of an anomaly among modern democracies, as it lacks both of the mechanisms for accountability employed most often by other democratic governments around the world, *i.e.*, term limits and mandatory retirement ages.²²⁸ No one seriously contends that America enjoys hegemony in the area of independent judges; thus, it makes a great deal of sense to

220. *Id.* (citing H.J. Res. 160, 104th Cong. (1995)).

221. *Id.* (citing H.J. Res. 164, 104th Cong. (1995)).

222. *Id.* at 754 n.279 (citing S.J. Res. 26, 105th Cong. (1997)).

223. Kline, *supra* note 96, at 754 n.279 (citing H.J. Res. 77, 105th Cong. (1997)).

224. *Id.* (citing H.J. Res. 63, 105th Cong. (1997)).

225. *Id.* (citing H.J. Res. 74, 105th Cong. (1997)).

226. *See* Ross, *supra* note 29, at 1068 n.21 (citing 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 656-57 (1922) (explaining that Thomas Jefferson advocated six-year terms)); *Id.* at 1068-69 (stating that Andrew Johnson urged twelve-year terms); *Id.* at 1076 n.56 (stating that Dan Quayle proposed fifteen-year terms).

227. *See infra* Part II.

228. *See* Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 23 (2001); *see also* Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 NW. U. L. REV. 84, 154 (1993) (noting the practice of German courts where judges are appointed for twelve-year terms and are thereafter barred from reappointment).

explore whether service for life in the same judicial post affords the only method of maintaining the independence of the third branch.

The failure of the myriad of attempts described in this article to curtail the practice of life tenure is due to the tremendous inertia acting against amending the Constitution. Every one of the attempts introduced to end life tenure described above, regardless of the philosophical motivations of the movants, involved a fundamental change to Article III of the Constitution.²²⁹ Making such an alteration to a venerable document has consistently required a forbidding amount of political momentum and a near super-majority of popular support.²³⁰ For these reasons, this article's recommendation offers reform proponents a greater chance of success.

The concept of "rotation in office," as Professor Collier notes, is "familiar and long-tried."²³¹ It is motivated by the "historic principle" that:

[T]he democratic spirit requires that [those] elevated to positions of supreme power should not remain there till the end of their lives, as monarchs have done, but should, after a reasonable period of service, be restored to the body politic as citizens, or as functionaries of a different order.²³²

Rotating offices helps a country's institutions stay in touch with the people whom they are supposed to serve.²³³ This is particularly important in a nation's judiciary, which tends to be one of the most insular of any government organization. Is there any doubt that the federal bench draws from a select group of lawyers who have gone to elite law schools? This is certainly not a bad thing, nor is it even surprising, but it does tend to strengthen the argument that the judiciary should be wary of becoming so exclusive that it becomes segregated, causing a loss of faith among the body politic on whom the judiciary's legitimacy—and very existence—ultimately rests.²³⁴

The first Congress was evidently aware of this danger of isolation and guarded against it when creating the Judiciary Act of 1789.²³⁵ Section 4 of the Act grouped the federal district courts into three circuits—eastern, middle, and southern²³⁶—and

229. U.S. CONST. art III, § 1.

230. Garrow, *supra* note 3, at 995-98.

231. See Collier, *supra* note 179, at 412. Though Collier's article discussed this concept in terms of the rotation of Supreme Court Justices, the principles apply in this context as well.

232. *Id.*

233. *Id.*

234. *Id.*

235. For a thorough history of the Act, which was officially entitled "An Act to Establish the Judicial Courts of the United States," see JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 457-508 (1971); see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

236. These three divisions had been used by the military leaders in the first year of the Revolutionary War. See GOEBEL, *supra* note 235, at 472.

provided for biannual sessions of the court in each of the thirteen districts, the boundaries of which were roughly coterminous with state geographic lines.²³⁷ These courts were to “consist” of any two justices of the Supreme Court and the district judge.²³⁸

The practice of having justice dispensed by a team of local officials and national jurists not only reflected time-honored principles and long-standing English custom, but represented an “ingenious” way of dealing with the concern that a federal judiciary might overshadow and eventually swallow the state courts.²³⁹ The linking of one district court judge with two Supreme Court Justices was also based on the idea that a *resident* expert in matters of state practice was needed on a circuit panel, as it was assumed that litigation at the circuit level would follow local rules.²⁴⁰

Rewriting the job descriptions of federal judges on the inferior courts is not without precedent and could be accomplished by statute in the same way as it was done in the nineteenth century.²⁴¹ In 1869, for example, Congress passed a bill providing for the appointment of nine “circuit” judges to serve in each of the nine federal circuits that existed at that time.²⁴² These judges enjoyed the same authority in their circuits as did the Supreme Court Justices²⁴³ and generally presided in the circuit courts.²⁴⁴ Congress evidently hoped that the presence of permanent circuit judges would upgrade the quality of appellate judging at the federal level, as there had been several occasions where a district judge had concluded a trial and then, acting alone, convened the circuit court to hear the appeal.²⁴⁵ Such an arrangement prompted one contemporary commentator to remark: “Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.”²⁴⁶ To address this problem, the 1869 Act provided that any two of the sitting judges—whether that pair included a Supreme Court justice, circuit judge, or district judge—constituted a quorum.²⁴⁷

In 1891, Congress again modified the manner in which intermediate appellate review was administered in the federal judiciary.²⁴⁸ This modification abolished the appellate jurisdiction of the circuit courts created by the Judiciary Act of 1789 and transferred such jurisdiction to the Circuit Courts of Appeals.²⁴⁹ Popularly known as

237. *Id.*

238. *See id.* at 471-72.

239. *See id.*

240. *See id.* at 471-73.

241. *See* EDWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 61 (2d ed. 2002).

242. *Id.*

243. *See, e.g.,* *Wallace v. Loomis*, 97 U.S. 146, 156-57 (1877).

244. *See* SURRENCY, *supra* note 241, at 61.

245. RAYMAN L. SOLOMON, *HISTORY OF THE SEVENTH CIRCUIT 1891-1941* 3 (1981).

246. *Id.* at 3 n.10 (quoting W. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 302 (1887)).

247. *See* Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 45. *See also* Comm’r of Internal Revenue v. *Textile Mills Sec. Corp.*, 117 F.2d 62, 69 (3d Cir. 1940) (en banc).

248. Act of Mar. 3, 1891, ch. 517, § 4, 26 Stat. 826, 827.

249. *See id.* (amending the Judiciary Act of 1789, ch. 20, 1 Stat. 73).

the Evarts Act²⁵⁰ for its chief sponsor, Republican Senator William Evarts of New York, this Act was notable for several reasons, among them the lack of any provision assigning a group of judges exclusively to a given circuit's court of appeals.²⁵¹ Rather, the judges were chosen from among the circuit judges appointed under the 1869 Act, district judges, or even an associate Supreme Court Justice.²⁵² Interestingly, at least part of the motivation behind this legislation was to reign in those judges then serving on the inferior federal courts.²⁵³ During the House debate over this bill, Texan Democratic Representative David Browning Culberson claimed: "I have the supreme desire to witness . . . the overthrow and destruction of the kingly power of district and circuit judges."²⁵⁴

The Judicial Code of 1911 abolished the existing circuit courts altogether.²⁵⁵ This move raised two questions. First, were circuit court judges who had been appointed before the statute was enacted *ex officio* members of the new Court of Appeals for their circuit?²⁵⁶ Second, did these Courts of Appeals consist of three judges or all the active circuit court judges?²⁵⁷ The confusion was particularly keen in the Second, Seventh, and Eighth Circuits, each of which had four circuit court judges at the time.²⁵⁸

The Third Circuit, sitting en banc in 1940, addressed these questions directly in *Commissioner v. Textile Mills Securities Corp.*²⁵⁹ At issue was whether the Third Circuit consisted of all five judges in active service or simply a panel of three.²⁶⁰ The judges reflected on the statutory language in the 1891 and 1911 Acts, as well as the latter's legislative history.²⁶¹ The court found it "significant" that the 1891 Act made no provision

for the appointment of a new group of judges to serve as judges of the circuit court of appeals which the act created. On the contrary it is clear that the court was intended to be held by three judges drawn from the three existing groups of judges who were . . . made 'competent to sit as judges of the circuit court of appeals within their respective circuits,' namely, the

250. SURRENCY, *supra* note 241, at 345.

251. See Act of Mar. 3, 1891, ch. 517, §§ 2, 3, 26 Stat. 826, 827.

252. See SURRENCY, *supra* note 241, at 88; see also Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 44-45.

253. See generally, 21 CONG. REC. 3403, 3404 (1889).

254. *Id.*

255. *Comm'r of Internal Revenue v. Textile Mills Sec. Corp.*, 117 F.2d 62, 69 (3d Cir. 1940) (en banc) (clarifying the connection between the Act of Mar. 3, 1911, and the Act of Jan. 13, 1912); see Act of Jan. 13, 1912, ch.9, 37 Stat. 52, 52-53 (codifying the Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087).

256. *Textile Mills Sec. Corp.*, 117 F.2d at 69.

257. *Id.*

258. *Id.*

259. *Id.* at 67.

260. *Id.*

261. *Textile Mills Sec. Corp.*, 117 F.2d at 67-69.

circuit justice of the circuit, the circuit judges of the circuit, and the several district judges within the circuit.²⁶²

The Third Circuit stressed that “the significant feature of the arrangement” was that “the court was to be staffed by judges who were not permanently appointed to it, but who were to be drawn from time to time from existing groups of judges having primary responsibility for holding other courts”²⁶³ The Third Circuit noted that any confusion about the status of circuit court judges was clarified in 1912 when an amendment to the Judicial Code made it clear that circuit judges were assigned exclusively to the Circuit Court of Appeals.²⁶⁴ The Third Circuit quoted one of the bill’s sponsors, who commented that the amendment “makes no change whatever in the existing law except to make it clear that the circuit judges in the various circuits of the United States shall constitute the circuit court of appeals”²⁶⁵ and pointed out that the report of the Committee on the Judiciary had stated that “This bill deals with a defect in existing law. Ultimately, the court makes it clear that the circuit judges shall constitute the circuit court of appeals.”²⁶⁶

One is hard-pressed to argue that this statutory salve creates a constitutional bar preventing federal appellate courts from being staffed by life-tenured judges on a rotating basis. Such an erroneous conclusion would be nothing but a ukase supported neither by logic nor the law.

How would the rotation proposal work in practice? In general terms, the President would remain free to nominate whomever he or she wished.²⁶⁷ The Senate would still exercise its “advice and consent” role, but the judges thus confirmed would serve as *Article III* judges for a certain circuit rather than in the position of either district judge or circuit judge.²⁶⁸ The task of making those distinctions and the limited-term appointments could be left to a committee of judges in each circuit.²⁶⁹

Limiting the terms of service of appellate judges in this manner will also make it possible for the executive and legislative branches to send new judges to the Courts of Appeal at more frequent intervals. The appellate level would receive regular infusions of “new blood,” making sure that a wide array of opinions is represented in

262. *Id.* at 68.

263. *Id.* at 68-69.

264. *Id.* at 69; see also Act of Jan. 13, 1912, ch. 9, 37 Stat. 52, 53.

265. *Textile Mills Sec. Corp.*, 117 F.2d at 69 (quoting 47 CONG. REC. 2736 (1911) (statement of Senator Sutherland)).

266. *Id.* at 69-70 (quoting H.R. 199, 62d Cong. (1912)).

267. *Cf. generally*, Collier, *supra* note 179 (establishing a rotation theory for Supreme Court Justices. In Collier’s proposed rotation of justices, after serving twelve years on the Supreme Court, justices transfer to and serve as circuit judges in the Circuit Court of Appeals).

268. *Cf. id.* at 419 (suggesting that the President appoint the Supreme Court Justices “with the advice and consent of the Senate”).

269. *Cf. id.* at 428 (suggesting that a committee of judges from the Supreme Court help make recommendations when the President has appointed his allotted number of Supreme Court Justices).

some of the most powerful courts in the land.²⁷⁰ In addition, since individual members of the Courts of Appeals would, by necessity, exercise slightly less influence, the stakes of the nomination process would be lowered considerably. It would be hard to imagine, for example, widespread popular support of a filibuster blocking confirmation of a judge who was only going to serve in that post for, say, six to twelve years.²⁷¹

Throughout the years, many have pointed to the fact that state governments gradually abolished the practice of bestowing life tenure on the members of their judiciaries.²⁷² Countering this, life tenure advocates often have argued that state judges work with the common law while federal judges do not.²⁷³ This argument has lost some of its sizzle, however, as more and more decisions from the federal courts have the look, taste, smell, and feel of common law.²⁷⁴ In any event, as Collier notes, mandating the termination of a federal judge's period of service would not shock the conscience of the American populace, which is used to seeing judges serve for limited terms.²⁷⁵

Some may argue that appointing judges for limited times would trigger a flurry of wild decisions authored by activists determined to make use of the little time that they would have to write their preferences into the pages of the Federal Reporter.²⁷⁶ This argument carries almost no weight with the Courts of Appeal because cases are heard by panels of three judges and are then subject to review en banc and review by the Supreme Court. Any maverick who slips through the (more frequent) nomination process would not have free reign to rewrite the law.

Even less likely is the risk that judges with limited terms on the appellate courts would attempt to curry favor with future employers or clients.²⁷⁷ The reason for this is simple—under this proposal (unlike many of those requiring a constitutional

270. Cf. *id.* at 416 (suggesting that in limiting Supreme Court Justices and implementing a rotation of justices there is a "constant infusion of new blood.").

271. Cf. *id.* at 420-421 (suggesting that Supreme Court Justices serve for a term of twelve years. "The difference between nine and twelve years serves the interests of stability in the court and maturity in the opinion of its members, without going so far as to invoke the risks of too long a separation of the Justices from the mass of people and the body of the legal profession."). This span roughly captures the range of years proposed in the amendments described in Part II. A six to twelve year period arguably provides enough time for judges to serve well and at an efficient level, but not long enough to create the type of problems endemic to a life-tenured judiciary.

272. See Collier, *supra* note 179, at 413-14 (noting that very few states permit their judges to serve a life tenure).

273. See generally Kline, *supra* note 96.

274. Carl Tobias, *Sixth Circuit Federal Judicial Selection*, 36 U.C. DAVIS L. REV. 721, 727 (2003) (noting recent expansion of federal court jurisdiction).

275. Collier, *supra* note 179, at 414-15.

276. See, e.g., BOOT, *supra* note 18, at 204-05.

277. Cf. Collier, *supra* note 179, at 423 (explaining and then countering an argument that Supreme Court Justices who serve a limited term will turn their efforts toward helping future clients).

amendment), life tenure as an *Article III* judge is still guaranteed.²⁷⁸ A judge wishing to teach at a law school or to run for office would have no greater incentive to put a thumb on the scales while deciding cases before the court than under the current regime. Similarly, if the proposal contained a ban against all reappointments to a Court of Appeals, judges would not be tempted to jockey for position for future nominations.²⁷⁹

Opponents of this measure may also argue that it is unseemly for a distinguished Court of Appeals judge to be “demoted” to a “lowly” district court where judges have to dirty their hands with witnesses, trial lawyers, and hearsay objections.²⁸⁰ That is certainly one way of looking at it. On the other hand, requiring appellate judges to spend some time at the trial level—finding facts, developing a record, etc.—could be quite beneficial to the bar, bench, and society. Moreover, in a democracy, it is more than a bit incongruous to say that a public servant, upon being transferred from one position of great authority to another position of slightly less authority *for the integrity of the judiciary and for the good of the country*, has been “demoted.”²⁸¹ Professor Collier, in making a similar argument for judicial rotation, points to the example of John Quincy Adams, who deigned to serve in the House of Representatives after he had already served as President.²⁸²

IV. CONCLUSION

In answer to the question raised at the beginning of the article—How long should federal judges serve?—the answer is clear: For life, in accordance with Article III of the Constitution. The “twist” suggested in this article is in asking another question—*Where* should they serve? I submit that the nearly two hundred positions on the United States Courts of Appeal should be filled at regular intervals—every six to twelve years—by judges from the district courts.

The change would not require a constitutional amendment, as it would operate within the limits of the present Constitution. Leaving untouched the doctrine of judicial review and remaining outside the sanctuary of judicial independence, the statute would still act as an instrument realigning the power structure of the federal judiciary. Experienced judges would not be compelled to retire, but would have the option of either bowing out or serving the remainder of their terms in this nation’s federal trial courts, thereby disseminating their practical wisdom and their opinions.

278. Cf. *id.* at 424 (arguing that even though Supreme Court Justices no longer serve on the Supreme Court, they still are judges in appellate courts once their Supreme Court term has expired).

279. Cf. *id.* at 426 (noting that because Supreme Court Justices are not eligible for reappointment to the Supreme Court and because an Appellate Court position is guaranteed, Justices will not use their tenure trying to “maneuver for ‘position’ for the future”).

280. Cf. *id.* at 425 (suggesting the argument that transitioning a Supreme Court Justice to a judge on the Circuit Court of Appeals is a demotion).

281. Cf. *id.* at 426 (countering the argument that transferring a Supreme Court Justice to a judge on the Circuit Court of Appeals is a demotion).

282. Collier, *supra* note 179, at 426.

In the process, they would make room for other voices to be heard on the Courts of Appeal. A question to be considered is whether and how many judges would voluntarily renounce their appellate posts after a certain term and take a spot on a district court. Such a move would clearly attract interest and would perhaps get the ball rolling.

Congress should recognize that a diversity of opinions in our nation's second highest courts is a valuable asset that would be protected and nourished by this proposal. If it also leads to less acrimony during the nomination process for Article III judges, few—especially the nominees—are likely to complain.