

Merit Selection of Judges

Under Attack Without Merit

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Prior to 1974, what did Morris Udall, Sandra Day O'Connor, William Browning and Stanley Feldman want that Missouri had? And what is now claimed by some to have resulted in judicial activism and the demise of judicial accountability in Arizona?

The answer to both questions is the same: merit selection of judges.¹

Since its inception in 1974, Arizona's system for merit selection of judges has been seriously attacked in the state legislature at least 13 times.² So why, while other states fight to enact merit selection of judges, is there serious discussion in Arizona about emasculating or abolishing it? Will Arizona become the first of 31 states with merit selection to abandon it?

To understand why those questions are so important, we should begin by viewing a world without merit selection, one in which judges and potential judges scrap publicly as they seek to reach the bench.

The Stench of Judicial Campaigning

First of all, what purportedly guides those seeking to be a judge?

The Canons of the Judicial Code of Conduct prohibit candidates for judicial office from having constituents or making any pledges or promises of conduct in office other than that they will "faithfully and impartially" perform their duties.³ The Canons also bar judicial candidates from revealing their views on disputed legal or political issues.⁴ Despite the Canons, campaigns and campaign funding accompany judicial elections.

Sentiment on the topic is strong. A recent survey by the American Bar Association demonstrates that three out of four Americans believe judicial campaigning compromises the impartiality of elected judges.⁵ Similarly, a 1999 poll sponsored by the Texas Supreme Court demonstrated

that 79 percent of lawyers and 48 percent of judges in that state believed campaign contributions have a "significant" impact on judicial decisions.⁶

If Pima and Maricopa Counties returned to the election of judges, Arizona could join the ranks of states such as Alabama, which has raised \$41 million since 1993 for Supreme Court elections, or Texas, which spent \$27 million over that same period.⁷

Needless to say, the costs associated with contested judicial elections have escalated exponentially since Arizona last held such elections in the early 1970s. Where do judges raise these funds? From lawyers and litigants, of course. Might this create an appearance of impropriety, if not outright judicial misconduct? Absolutely, and recent cases offer interesting case studies.

- Pennzoil filed suit against Texaco in Texas, where judicial campaigning is legend. Within days of filing the action, Pennzoil's attorney donated \$10,000 to the campaign fund of the trial judge. Before judgment was awarded, attorneys for both sides began to donate hundreds of thousands of dollars to members of the Texas Supreme Court. Pennzoil's attorneys donated \$315,000, whereas those from Texaco donated only \$75,000. Pennzoil was awarded \$10.3 billion, most of which was upheld by the Texas Court of Appeals. To very little surprise, the Texas Supreme Court refused to hear Texaco's appeal.⁸
- In Louisiana, the Supreme Court enacted rules in 1999 that prohibited student clinics from representing community organizations unless at least 51 percent of the organization's members could demonstrate incomes below 200 percent of federal poverty guidelines. Other rule changes the same year allowed the Supreme Court to terminate "without any showing of cause" a

law school dean's certification of a student's capacity to practice in Louisiana courts. These rule changes were particularly directed at the Tulane Environmental Law Clinic at the Tulane Law College.

What had the Clinic done to warrant such harsh treatment? It had brought a lawsuit to block the construction of a polyvinyl-chloride and ethylene-dichloride production facility near a residential neighborhood. Rather than fight this litigation, the chemical manufacturer decided to build the plant elsewhere. The Louisiana business community was incensed and determined to ensure that future businesses considering Louisiana as a home would not be hampered in this manner. Consequently, individual businesses and the Louisiana For Business and Industry Organization made significant contributions to Louisiana Supreme Court justices who were up for re-election. Shortly thereafter, the rule amendments were enacted.

When the Tulane Clinic challenged these new rules in federal court, the case was assigned to District Court Judge Eldon Fallon. Judge Fallon readily acknowledged "the close temporal relationship between the business community's expression of outrage and the subsequent changes" to court rules. Judge Fallon said that although these issues probably warranted closer examination, the proper forum was in the political arena and not federal court. Most interesting, however, Judge Fallon emphasized in his ruling that "in Louisiana where state judges are elected, one can not claim complete surprise when political pressure somehow manifests itself within the judiciary."⁹

- Similarly in Idaho in 1999, Justice Cathy Silak authored a 3-2 decision that upheld federal government control

over water rights in certain wilderness areas. Despite earlier decisions by Silak favoring states' rights on water issues, the 1999 ruling sent the mining and real estate interests and the Idaho Christian Coalition to work. They launched an expensive campaign to oust Silak, suggesting that she was inclined to support same-sex marriage and partial-birth abortions, and that Idahoans could end up "pretty dry" if they did not vote Silak off the bench. Simultaneously, a "push poll" was instituted throughout the state asking voters if they "support the move by the courts to transfer control over Idaho water rights to the federal government."¹⁰

This campaign was successful, and Silak was voted out of office by a 20 percent margin. Months later, when the mining interests filed a motion for rehearing in the water rights case, Justice Linda Trout, who had joined Silak in the original 3-2 vote, changed her vote and swung the majority to the other side of the issue. It is not surprising that Trout was up for re-election at the time of the rehearing.¹¹

These are only three examples, but other documented instances of improper and unsavory judicial campaign conduct are abundant.¹² As District Judge Jim Parsons, a candidate last fall for the Texas Supreme Court, explained: "I'm afraid that justice is still for sale in Texas and other states."¹³

Why All the Fuss?

The examples cited previously may be unfortunate, you may think, but how often do they occur? And who says that merit selection is under attack, anyway? Is this a tempest in a teapot?

Although some opposition to judicial independence has always existed, recent developments indicate that diverse hostility to just and impartial courts is coalescing. Our fair and neutral courts are under threat as never before.

Historically, the principal challenges to merit selection, and particularly those that advocate partisan judicial elections, have come from legislators who must run for office and feel that judges should not be exempt. Other historical attacks have come from citizens who simply believe that all

government officials in a democracy should be directly accountable to the public at the polls.

More recently, "value voters" have become a significant political force on the landscape. These are voters guided less by party affiliation and more by certain strongly held ideological beliefs surrounding "hot-button" issues—such as abortion, separation of church and state, and the Fourth Amendment rights of accused criminals—are organizing and flexing their political muscle. The object for many of these voters is not judicial competence, neutrality or faithfulness to the Constitution and laws. To the contrary, many opponents of merit selection candidly acknowledge that their object and values come from a "higher source" than the United States or Arizona Constitutions. These opponents of merit selection insist that the Constitution and laws of Arizona must be interpreted and applied in harmony with those values. And when judges make decisions that are inconsistent with opponents' ideology, they seek an easier way to remove judges than is permitted by merit selection.

The Basic Philosophical Difference

A major philosophical conflict is at the heart of this debate.

Proponents of merit selection argue that our founding fathers were right in placing judicial independence above all else in Article III of the United States Constitution. Quite simply, the job of judges is to fairly apply and interpret the law, guided by knowledge and wisdom, yet absolutely uninfluenced by popular opinion, campaign contributors or the input of those who sign paychecks.

As Chief Justice John Roberts recognized in his recent confirmation hearings before the United States Senate, judges can be analogized to umpires calling balls and strikes at baseball games. Imagine how respect for these arbiters would erode if fans were allowed to vote on the calls or the umpires' tenure. Imagine the effect on the integrity of the game, if as an amenity for those fans in the luxury suites, these viewers were offered disproportionately weighted votes.

A popular vote is appropriate for the leg-

islative and executive branches of government. Under our democratic system, these institutions are properly subject to the will of the people. That is absolutely not the case when it comes to the judiciary. An independent judiciary, free from political pressure, is essential to the separation of powers. Knowing that judges are not influenced by political pressures or campaign contributors allows litigants and their attorneys to trust that judicial decision-making will be based on merit and a reasoned interpretation of the law, and not on judicial fears of unemployment should decisions be unpopular.

There is nothing more fundamental to our system of government than that we are governed by laws and not by individuals. This precept will only be true in practice if those who are charged with interpreting and applying the laws are neutral, impartial and stand uncorrupted by improper influence.

Finally, opponents of merit selection do not suggest the system produces judges who lack knowledge, intelligence or the ability to be fair and impartial. Rather, their motivation is ideological: They are unhappy with decisions made by particular judges that do not jive with their ideology, regardless of what the Constitution or laws command. Opponents want a better vehicle for retaliating at the polls against judges who decide cases contrary to their views.

Put simply, detractors of merit selection are not looking for better-qualified judges; they are looking for a way to influence decision-making.

Accountability and control of judges based on how they decide matters has no place in American jurisprudence. When we speak of accountability, we must respect that the very cornerstone of our judicial system requires judges to first and foremost be accountable to the Constitution and law.

On the other side of the aisle, those unhappy with merit selection say the system is a thinly disguised political appointment that, as a practical matter for most judges, turns out to be a lifetime appointment. They argue that retention elections do not flush out the issues or educate voters as opposing candidates would. Consequently, judges, once appointed, become arrogant activists, legislating from the bench, letting

criminals walk the streets and issuing rulings that are directly contrary to the values of the electorate.

Judges are public servants just like legislators, so goes this argument, and they ought not be exempt from the rigors of campaigns and the will of the public. Judges should be sensitive to the fact that their decisions might influence an electorate to vote them out of office. This is the democratic way. In short, merit selection fails to properly balance accountability against what opponents argue is unfettered judicial independence.

A Brief History

A description of the long history of judicial independence is in order.

It is not surprising that the American colonists were staunch supporters of judicial independence. In fact, a paramount complaint raised in the Declaration of Independence was that colonial judges depended on the King of England for appointment, tenure and the amount of their salaries. Therefore, Article III, Section 1, of the Constitution provides that federal judges shall serve indefinitely as long as they exercise “good behavior.” This section also forbids Congress from diminishing judicial salaries during judges’ terms in office. Judges in the federal system can only be removed by impeachment, which requires a trial in the Senate and two-thirds vote by the House of Representatives.¹⁴

Following the Jacksonian Movement in the mid-1800s, states began to mandate partisan elections for judges. Party politics took over, and Tammany Hall and similar political machines across the country dictated which judges would be elected. The fact that selected judges were beholden to the party bosses was less than veiled. In direct response, many states moved to nonpartisan elections in the early 1900s as part of a so-called Progressive Movement.¹⁵

By the mid-1900s, however, it was widely recognized that the promise of accountability through judicial elections was mostly an illusion. These elections also promoted the unsavory practice of judges raising campaign funds from litigants and lawyers, along with the obligatory attention-grabbing advertisements and campaign promises. Observers recognized that the best cam-

aigners were often not the best judges, and those most suited by intellect, education and temperament were often the least likely to politick for the job.¹⁶

The move to do something about this in Arizona began in 1959 under the guidance of Tucson attorney Morris Udall, who chaired a State Bar Committee on the Courts. Udall’s committee proposed that Arizona adopt the Missouri model for merit selection, which had first been enacted in that state in 1940.

Under the Missouri plan, a committee of laypersons and lawyers screened judicial applicants and sent three or more names to the governor for appointment. The governor was required to appoint the new judge from the commission’s list. The appointed judge would then sit subject to an unopposed retention vote before the expiration of his or her term. Udall was ahead of his time on this and many other things, and the proposal failed to gather adequate support.¹⁷

In 1971, a nearly identical proposal was submitted to the state legislature by then-State Senator Sandra Day O’Connor. The bill never left committee, but the seed Udall planted was continuing to grow.¹⁸

In 1972, State Bar President-Elect William Browning made merit selection a priority of his presidency. He created and chaired a State Bar committee on merit selection, and when renewed efforts failed in the legislature, Browning also formed a Citizens’ Committee. With the help of ensuing State Bar President Stanley Feldman, Browning and the Citizens’ Committee led the charge to secure placement of Proposition 108 on the ballot. In fall 1974, Arizona voters passed this proposition with 54 percent of the vote: Missouri had come to Arizona.¹⁹

One event in the evolution of our truly fair courts is instructive. On April 8, 1973, more than 100 Arizonans gathered at the Rio Rico Inn in Nogales. The occasion was the 22nd Arizona Town Hall, whose topic that year was “The Adequacy of Arizona’s Court System.” The assembled participants assessed the effectiveness of all court components, including court management, treatment of jurors, the public’s perception of courts, and the selection and tenure of judges.

On that last point, the Town Hall was

unequivocal:

Town Hall overwhelmingly recommends that the present system of judicial selection in the metropolitan counties of Arizona be changed and become appointive rather than elective.

Our present method of selecting judges by popular elections has serious deficiencies. ... There is a clear and recognizable danger to the integrity of the court when the candidate for judge is required to solicit funds with which to finance his race.²⁰

What else, some may ask, would a cabal of lawyers say on the eve of a state constitutional amendment? But they would be mistaken for concluding that attorney self-interest likely fueled such a position. The vast majority of Town Hall participants were laypeople, not lawyers. In fact, “The opinions of the housewives, doctors, engineers, business leaders and all others who are invited participants receive equal consideration.”²¹ Thirty-three years of Arizona history have not altered the fact that the majority of state residents—lawyer and nonlawyer alike—recognize that judicial campaigning is a bad idea.

It is interesting that when Arizona first adopted the Missouri plan in 1974, only 22 states had adopted it. Since then nine more states have followed suit, bringing the current number to 31. No state that adopted merit selection has ever abandoned it. In fact, this system is the one that judicial reformers seek to emulate in states where partisan elections still rule the day.²² Arizona’s system also is the model used by the United States when helping other countries reform their judicial system.²³

How Does Merit Selection Work?

Under Arizona’s system, there are separate nominating commissions for Pima County Superior Court and Maricopa County Superior Court and a third for appellate court appointments. Each nominating commission includes five lawyers appointed by the State Bar and 10 lay persons appointed by the governor.²⁴

To assure diversity, representatives on the trial court commissions must come from five separate districts. There must be diversity among judicial applicants, as well.

Amendments passed in 1992 require the Supreme Court to establish means for evaluating judicial performance, and they also raised the county population threshold for mandatory merit selection from 150,000 to 250,000.²⁵

The process is the same for all three commissions. Lawyers and judges who are interested in a judicial opening submit detailed applications to the commission. All applications are posted on the Internet for public view and comment. The commission reviews the applications, accepts written and verbal input from members of the legal community and community at large, interviews each of the applicants in a public setting, and then recommends a minimum of three candidates for appointment by the governor. No more than 60 percent of the nominees may be from the same political party. The governor is then obligated to select one of the commission's nominees, and if the governor fails to do that, the Chief Justice of the Arizona Supreme Court makes the appointment.²⁶

If It Ain't Broke ... ?

Arizona's merit selection plan is designed to assure that quality candidates are not turned away by the distastefulness of fund-raising and politicking. But of course, politics are not completely divorced from the process. The 10 lay members, who outnumber lawyer members two-to-one on commissions, are appointed by the governor. And the governor also makes the final selection, most often choosing someone from the governor's own political party. Since 1974, however, the governor has appointed a candidate from another political party 26 percent of the time.²⁷

The public also is not divorced from the process. As noted, public members outnumber lawyers on nominating commissions, and all members of the public are welcome to submit comment on judicial candidates. Before the expiration of each judicial term, the judge must stand before the electorate for retention and must garner 50 percent or more of the vote.²⁸ All judicial decisions are subject to review by an appellate court, giving the public a double and sometimes triple check on the propriety of court rulings. Judges are also held accountable by virtue of the Commission on Judicial Performance

Review (see the Q & A on page 22) and the Commission on Judicial Conduct, with heavy input from members of the public.

So, if the system produces the most-qualified, interested candidates without regard to their ability to engage in the surly side of politics, and if the electorate has the power to remove judges if they are not performing as expected, why would anyone advocate dumping the system?

The fact is, those opposing merit selection do not seriously contend that the system produces unqualified or incompetent judges. Rather, once you sift through their rhetoric, the most salient point raised by those opposing merit selection is that it creates elitist judges who legislate from the bench because they are not easily turned out of office. Unhappy with the results of prior attempts to remove judges at retention elections, opponents of merit selection advocate changes to the current system, including:

- putting party designations on the ballot,
- conducting merit selection, but allowing the governor to appoint anyone the governor wishes without regard to the candidates recommended by the nominating committee,
- giving the legislature final say on court rules,
- requiring a two-thirds rather than majority vote to win a retention election,
- making the governor's appointment subject to senate confirmation,
- requiring judges up for re-election to pass muster again before the senate before they are eligible to run for retention,
- returning to contested elections for judges.

The proposal for senate confirmation particularly warrants discussion. This is the system we have at the federal level, and we all have seen recently how poorly that can work. Clearly, if a judge's ability to get on the bench and stay there will be subject to the political whims of the Arizona senate, many of the best candidates simply will not apply. And, of course, the selection of judges will then become more political than ever. Judges whose ideology does not conform to the majority in the senate will be vulnerable to rejection without regard to their quali-

cations, competency, neutrality and fairness in decision-making.

So what can we look at *objectively* to determine whether the system needs to be "fixed"?

In 1992, the Arizona Supreme Court created a Judicial Performance Review Commission to develop a detailed and exhaustive questionnaire evaluating judges' decision-making, administrative abilities, demeanor, fairness and neutrality in the courtroom. This questionnaire has been disseminated over the years to thousands of lawyers, litigants, witnesses, jurors and other courtroom observers to thoroughly evaluate judicial performance.

Not surprisingly, since the institution of the JPR survey, 95 percent of nonlawyers responding to the survey, as well as 95 percent of all lawyers, rate both trial and appellate judges in Arizona as performing their job satisfactorily or better. This is a true testament to merit selection.

Voter Apathy

The biggest fallacy in attacks on merit selection is that returning to the election of judges will somehow assure that judges will indeed be more accountable to the public. History and common sense belie this assertion.

Another misconception advanced by abolitionists is that merit selection removes the public from the process. Opponents initially alleged the merit selection process was too secretive. This complaint no longer resonates because the interviews, meetings and voting are open to the public and even have been televised. More important, all appointed judges must stand for retention by voters. They are required to obtain 50 percent of the vote in favor of retention to continue in office.

Although it is true that only two judges have lost a retention vote, the mechanism obviously works when sentiment is strong enough.²⁹ Those unhappy with a particular judge for any reason have the ability to campaign against that judge when the retention vote is taken.

This is as it should be. Under merit selection, only the best-qualified, interested applicants are submitted to the governor for appointment. And although a governor's appointment may be political, the system assures that candidates from whom the gov-

ernor must select are all highly qualified. Once appointed, the well-qualified judge ought not be removed, so long as the judge proves to be competent and strives for fairness, neutrality and faithfulness to the laws and Constitution.

For 62 years prior to 1974, all Arizona judges were elected.³⁰ Despite this fact, 68 percent of all judges who first sat during that time were appointed by the governor. By 2004, 51 of the 76 Maricopa County Superior Court judges first took office by virtue of gubernatorial appointment.³¹ Most judges, by far, serve for life or until they wish to retire under either system. Judges also rarely vacate office precisely at the end of a term. As a result, successor judges before 1974 were most often appointed by the governor with no involvement of a merit selection commission. And due to population growth, which still continues in Arizona, new court divisions were created regularly that required initial appointments by the governor. Those appointments were always purely political.

Once on the bench, most judges historically ran unopposed or without substantial opposition.³² Even when opposed, America's tendency to re-elect incumbents, particularly when little is known about the candidates, usually assured that an elected judge remained in office for life, barring some scandal or impropriety.

The reality of American voting behavior is that voters will make a reasonable effort to become informed before casting ballots, but they are uniquely uninformed about judicial candidates, and they are apathetic about judicial candidates despite easily available information that would educate them.³³ There currently are 90 Maricopa County Superior Court judges, 27 in Pima County and 22 appellate court judges statewide. The effort required of voters to become adequately informed about this many candidates is beyond daunting.

Several studies confirm that while voters across the country can readily tell you whom they voted for in executive and legislative races, most do not recall judges for whom they voted, or they simply abstain from voting in judicial elections altogether.³⁴

For example, in the last seriously contested Arizona Supreme Court election pitting Fred Struckmeyer against Harold Riddell

and Howard Peterson against William Holohan, 20 percent of the electorate that cast votes for governor failed to vote for Supreme Court Justice, while only 10 percent failed to vote for tax commissioner.³⁵ This trend continues under the merit-selection retention-vote criteria. When voters cast votes of "yes" or "no" on retention, the vast majority vote either "yes" for all judges on the ballot or "no" for all judges.³⁶ When casting votes for judges, voters across the country almost uniformly vote consistent with their party affiliation.³⁷

Even more troubling is that numerous studies across the country have demonstrated the American public does not understand much about how the judicial system works and are flat wrong in their understanding of the judiciary's role in our government. These studies show that people react to and are most influenced by personal experiences with courts, inaccurate and incomplete media characterizations of judges and court decisions, and what they see in television dramas and at the movie theater.³⁸

It turns out that voters do not really want to choose their judges, no more than fans really want to be involved in the hiring and firing of umpires. Fans know they want competent, fair-minded umpires, but they trust Major League Baseball to handle the technical issues of what it takes by way of training and experience to make a good umpire. Similarly, voters appreciate that judging involves highly technical skills and expertise beyond their knowledge. There is more involved than they even care to know.

The fact of voter apathy is not a rub on voters; it is an expected consequence of the highly technical nature of the job of judging and of the Judicial Canons, which prohibit judges from imparting meaningful information to voters during an election outside of their qualifications to serve. Consequently, other than general and rather meaningless rhetoric, judicial candidates cannot seriously discuss any "issues" or make commitments to voters to assist them in their making decisions at the polls.

But don't we live in a democracy? Shouldn't judges be elected like everyone else? The truth is that we live in a representative form of government. We elect our legislators and governors, and we expect them to make wise choices when it comes to appoint-

ing judges and other public officials. If they make bad choices, voters exercise their franchise on the issue when voting for their governor and legislators.

A Call to Action

So what can concerned members of the State Bar do to assure that merit selection, one of the hallmarks of Arizona's judicial system, envied and copied worldwide, is preserved?

First and foremost, talk or write to members of the legislature. Articulate thoughtfully to legislators why it is imperative that this system be preserved for the good of our entire legal system.

Second, take the time to inform your clients, especially those with political influence, as to why merit selection is important not only to the public at large, but to them particularly. Explain to them how the current system best assures them a fair shake before a qualified jurist when they find themselves in litigation. Make sure they are aware of the economic costs and risks involved in a system in which litigants compete with political contributions to their judges. Urge them to actively support merit selection with their elected officials, the chamber of commerce and in their business groups.

Third, be proactive in educating relatives, friends and other members of your community about how our judicial system works. Explain what "judicial independence" really means and why it is essential to the administration of justice under our representative form of government. Volunteer to speak at schools, clubs and other civic organizations to help citizens understand how the judicial system works. This will help voters make more intelligent decisions at the polls, whether voting on proposed changes to the Constitution or on the retention of sitting judges. Take a stand. Stand up and speak. People will listen.

Like the colonists and our forefathers, we must make sure that our judges are free to follow the law and make decisions they believe are right, without concern for public opinion and political reprisal. As John Adams stated many years ago, "[Judges should not] be distracted with jarring interests; they should not be dependent upon any man or body of men."³⁹

There is no question that the legislative

and executive branches were designed to respond to cries of the public. The judiciary, however, was designed with quite different objectives. As Justice Felix Frankfurter explained, “The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.”⁴⁰ ⁴⁷

endnotes

1. There have been five significant articles published concerning Arizona’s merit selection of judges since 1974. The seminal article was written in 1990 by then-Arizona Court of Appeals Judge, and now Federal District Court Judge, John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990). Subsequently, Court of Appeals Judge John Pelander authored *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998). Later, in 1999 Ed Hendricks authored a piece in ARIZONA ATTORNEY magazine. Hendricks, *Merit Selection Is Worth Keeping*, ARIZ. ATT’Y, Aug.–Sept. 1999, at 24. In June 2004, Ken Sherk wrote an interesting piece with facts, figures and informative anecdotal support in the *Maricopa County Lawyer*. Sherk, *Merit Selection After 30 Years: A Proven Success But With Ever Present Detractors*, available at www.maricopabar.org/maricopa-lawyer/merit-selection.pdf. Finally, in the November 2005 issue of *The Writ*, Pima County Bar Association President Chris Smith, in his “From the Desk of the President” column, wrote a pithy and thought-provoking view of the subject from the perspective of the trial lawyer. C. Smith, *From the President’s Desk*, THE WRIT, Nov. 2005.
2. Mr. Sherk points out in his article that merit selection has been seriously attacked in 1978, 1980, 1981, 1982, 1984, 1985, 1990, 1992, 1993, 1994, 1995, 1996 and 2004. *Supra* note 1.
3. JUDICIAL CODE OF CONDUCT, Canon 5(B)(1)(d)(i)&(ii).
4. *Id.* at Canon 7(B).
5. Justice at Stake, *National Poll of American Voters from 2001*, 4, available at <http://faircourts.org/file/JASNationalSurveyResults.pdf>.
6. Michael Scherer, *State Judges for Sale*, THE NATION, Sept. 2, 2002.
7. *Move to Cut Judicial Elections Brings Clash*, NAT’L L.J. (Oct. 17, 2005).
8. SARA MATHIAS, ELECTING JUSTICE: A HANDBOOK OF JUDICIAL ELECTION, 15-57, 47 (AMERICAN JUDICATURE SOCIETY 1990).
9. See Mark Kozlowski, *The Soul of an Elected Judge*, LEGAL TIMES, Aug. 9, 1999.
10. *Id.*
11. *Id.*
12. For example, in Pennsylvania, a judge running for office promised to “remember” a union official’s “friend” in exchange for a cash contribution, the repayment of debts and a promise to support her spouse’s future judicial candidacy. This official’s union was a frequent litigant in the judge’s court. See MATHIAS, *supra* note 8, at 4. In Michigan, a trial judge solicited a donation from an attorney and his firm over the telephone. The judge informed the attorney that his decision to donate could affect the outcome of his case, which was scheduled to be heard in that judge’s court. *Id.* at 54. In Florida, a former president of the state bar association endorsed a trial judge’s campaign committee. The committee called to thank the attorney but noted that no check was enclosed. All of this transpired one day before the attorney was scheduled to try a case before this judge. *Id.*
13. *Id.*
14. See Todd David Peterson, *Oh, Behave!* LEGAL AFFAIRS, Nov./Dec. 2005.
15. Roll, *supra* note 1, at 839.
16. *Id.* at 841-42.
17. *Id.* at 847.
18. *Id.* at 849.
19. *Id.* at 850-53.
20. *The Adequacy of Arizona’s Court System* (Report of the 22nd Arizona Town Hall, Arizona Academy, April 1973), at x.
21. *Id.* at ii.
22. *Move to Cut Judicial Elections, supra* note 7. *Judicial Merit Selection: Current Status* (American Judicature Society, Jan. 2004); *Another Look at Elected Judges*, HOUSTON CHRON., Nov. 2, 2005.
23. Roger F. Noriega, Assistant Secretary of State for Western Hemisphere Affairs, *U.S. Official Encourages Continued Legal Reform in Latin America*, Remarks before the American Bar Association’s Latin America & Caribbean Law Initiative Council, available at <http://usinfo.state.gov/wh/Archive/2005/APr/14-804469.html> (April 14, 2005); *Transparency and Rule of Law in Latin America: Hearings Before the H. Comm. on Int’l Affairs*, 109th Cong. 1 (2005) (statement of Adolfo A. Franco, Assistant Administrator, Bureau for Latin America and the Caribbean, United States Agency for International Development); International Information Programs, *Argentine Journalists Discuss Judicial Reform in Their Country*, available at http://usinfo.state.gov/dhr/democracy/rule_of_law/Argentina_Justice_Undergoing_Change (Dec. 2003).
24. ARIZ. CONST. art. VI; see Sherk, *supra* note 1.
25. *Id.* See Sherk, *supra* note 1.
26. ARIZ. CONST. art. VI.
27. The total number of judges appointed from a party different from that of the appointing governor was 68 (out of 260 total appointees). However, though this list obviously includes Democrats appointing Republicans and vice versa, it also includes a few Independents and one Libertarian. There were 5 Independents: (1) Susan Bolton, appointed on Sept. 14, 1988, by (D) Gov. Rose Mofford; (2) A. Craig Blakey II, appointed on Nov. 20, 2001, by (R) Gov. Jane Hull; (3) Margaret R. Mahoney, appointed on April 18, 2002, by (R) Gov. Jane Hull; (4) Helene F. Abrams, appointed on May 2, 2005, by (D) Gov. Janet Napolitano; and (5) John R. Hannah, Jr., appointed on Aug. 9, 2005, by (D) Gov. Janet Napolitano. The lone Libertarian was John A. Buttrick, appointed on Mar. 27, 2001, by (R) Gov. Jane Hull.
28. ARIZ. CONST. art. VI, § 38.
29. The two judges who have not been retained obtained a bar survey approval rating of 34 percent and 48, respectively. With these very low marks, the Maricopa County Bar Association successfully campaigned against their retention.
30. Roll, *supra* note 1, at 856.
31. See Sherk, *supra* note 1.
32. See Roll, *supra* note 1, at 855-56, 860. “According to one legal scholar, the only reason that the popular election of judges has survived nationally is because judges first take office by appointment, then run unopposed. ... In Arizona from 1958 through 1972, contested elections occurred in only one-third of the general elections for judges.” See also Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 37 (1956) *Id.* at 860.
33. As part of the 1992 amendments, the Supreme Court was charged with the responsibility of establishing a process for evaluating judicial performance. Article VI, § 42. In response, a judicial performance review committee was established and an elaborate and detailed questionnaire was created. Input is sought from lawyers, litigants, witnesses and courtroom observers regarding a plethora of issues reflecting upon the performance and judicial suitability of judges at all levels in the Arizona court system. The results of these surveys are tabulated and published for dissemination with the media and public to assist voters in selecting judges. For an excellent article concerning judicial performance reviews, see Pelander *supra* note 1. Judge Pelander concludes in his article that the problem with voter apathy persists despite the creation of the judicial performance review procedures. “Notwithstanding the commission’s good intentions and substantial efforts, the adage that ‘you can take the horse to water but you can’t make it drink’ applies to JPR as well.” *Id.* at 713.
34. Roll, *supra* note 1, at 849, 860.
35. *Id.* at 860.
36. See Pelander, *supra* note 1, at 714.
37. See Roll, *supra* note 1, at 861.
38. See Roll, *supra* note 1, at 857; see MATHIAS, *supra* note 8.
39. John Adams, on government, in C.F. ADAMS, THE WORKS OF JOHN ADAMS, 1850-56 181 (4th ed. 1988).
40. *Public Util. Comm’n v. Pollak*, 343 U.S. 451 (1952) (Frankfurter, J., in chambers).

Rating the Judges

The Work of Lawyers and the Public

Fair Courts Under Fire

A Special Section on Judges
and Judicial Independence

BY TIM EIGO

Margaret Kenski had a long and successful career as a college professor, where she taught classes in government and public policy. Now she is a well-known pollster, and she has plunged deep into the realities of American government—in the review of judges' performance and judicial conduct.

We talked with Dr. Kenski about the JPR system, attacks on merit selection, and changes to each that have been proposed.

ARIZONA ATTORNEY: You are the Chair of the Commission on Judicial Performance Review; how long have you been involved with the subject?

MARGARET KENSKI: About 9 years. I had served on the Commission on Trial Court Appointments and did some committee work for them, and that was in the early '90s. And then Governor Symington appointed me to the Commission on Judicial Conduct. And the Court is always looking for public members who are willing to serve. And because by then I was retired from my teaching position—although I work as a political consultant, I'm a pollster, basically—I do have a more flexible schedule. Tom Zlaket, Chief Justice at the Supreme Court at the time, asked if I'd consider going on the JPR Commission.

One of the reasons that I was put on that one specifically was because that's what I do—polling. And a good part of the judicial performance reform process is a form of polling.

AZAT: Though your company, Arizona Opinion, does not do the polling for JPR.

KENSKI: Absolutely not.

AZAT: What attracted you to do service in the legal field in the first place?

KENSKI: For so many years I taught American National Government and National and State Constitutions. I taught at the community college [in Tucson] for 27 years. I think a large component of those courses is trying to get people to see the importance of the judicial system as the third branch of government, so it was kind of a natural from that, I think.

AZAT: The entire merit selection and JPR system has many components. What is the role of the Commission members?

KENSKI: The Commission members establish procedure. They recommend rules to the Supreme Court. And most importantly, they look at all the data that's been gathered and, as a group, decide whether or not we believe that judges who are up for retention meet or do not meet judicial performance standards.

AZAT: It's rare that you decide they do not meet standards.

KENSKI: I think that's true, and I think it's sometimes misunderstood. You'll sometimes get this criticism that the Commission is a rubber stamp, and that's not true. We take that quite seriously.

But I think there's been a change in anticipated behavior [among those seeking to become judges]. Once you have a Commission on Judicial Conduct—and I'm still on my last year on that next year—and a Commission on Judicial Performance, I think that the law of anticipated effect kicks in. I think that

people who go on the bench are aware that they're going to be evaluated, that they can't just do what they want. So you almost filter out because of this the kind of people who might be more of a maverick and want to do their own thing.

That would be like deciding you're going to be a university professor but you have no intention of publishing anything. That doesn't work. Seeking a judicial appointment knowing that you're going to be evaluated, you've got to look at those standards and say, "Hey, this is something I can live with."

AZAT: How often do you meet?

KENSKI: It's variable. Normally, about five or six times in a year.

A lot of the work has been done in subcommittees of the Commission. We have been struggling with a couple of issues. For me, the most important one is how can we present information to voters in such a way that they'll understand the data we have and be able to make their own minds up about it. The fact that 30 members of the Commission say that someone meets judicial performance standards is by no means definitive for everybody else.

AZAT: How long has the Commission existed?

KENSKI: The Court created the Commission in 1993. That was pursuant to Proposition 109, which was passed by Arizona voters in 1992. What it did was further amend or expand the merit selection process mandating that there be a process for evaluating the performance of judges and justices.

AZAT: At that point, merit selection was about 18 years old. Was JPR in response to concerns about lack of accountability?

KENSKI: Systems move slowly. ... As time went on, the [State] Bar ratings [we]ren't definitive. That's the attorneys speaking. What about citizens? They might take a different view than an attorney does. So that's why they moved toward this system of evaluation.

It was only in 1998 that we finally got funds, through the Secretary of State's good offices, that we were able to join the voter information pamphlet. Before that, we had to put little things in libraries, banks, anybody that would take it. It was a pretty hit-or-miss process.

There is a subgroup on voter education. We'd like to call people's attention to it more. I'd like to hold focus groups with voters to figure out what kind of presentation would be the most effective for them. What would make them actually notice it?

AZAT: Your meetings are public. Does the public show up?

KENSKI: No. Our average meeting, there is absolutely no public interest. [But] when we do the public vote in July on whether or not to recommend the judges had met standards, then we usually have a couple members of the public. The problem with that is, instead of coming to that meeting, it would be so much better if more members of the public would come to the public testimony meetings in March. ...

That's a more appropriate time. Say we do get a major complaint about a judge, we have the time to ask the judge to respond to allegations.

AZAT: If someone attended a regular meeting, outside of the March or July meetings, what would they see the Commissioners doing?

KENSKI: Well, coming up in February, hopefully the Supreme Court will have

ruled on our rule change recommendation; we'll go over that. We are going to talk about our plans for the conference teams that meet to review the interim midterms of the judges. We're going to be talking about voter education again and get a report from the voter education workshop.

AZAT: You mentioned the petition for a rule change to the Supreme Court. But in fact there were two from Commission members. How did the two petitions differ?

KENSKI: Right now, on the public vote, we just do an up or down. The proposal had been that we have a more elaborate system and have a couple different levels of saying that the judge met performance standards: Top judges would be exceeding the standards, middle-tier judges meet [standards], and then if someone didn't, "does not meet."

It was a feeling that it would be a way of conveying more information of who are our superstars.

I think it raised concerns that are valid. The problem is that you can have a judge that on a 4.0 system has a 3.8 average, and you still get 25 percent to 30 percent of the people who vote against him anyway; a judge like that would be in the "exceeds" category and probably would be fine. But what about the more average judge, maybe he's the greatest guy on the face of the earth but he's got a 3.0, and he's in that "meets" [category]. Aren't we inviting a more negative vote against a middle tier?

I see it as two perfectly valid conflicting approaches. One is the concern to give the voters more nuanced information, and the other is what's going to happen to the judges.

That was the specific issue that we [as a majority of the Commission] did not recommend. So those people [a minority of the Commission] sent their own petition up, making the argument for a more nuanced approach. The main petition I signed as chair was to retain the current system.

AZAT: However the Court rules, how did the viewpoint in the minority position arise? Does it resonate with the public because virtually every judge is approved in the current system?

KENSKI: I think it was a feeling of unrest because everyone tends to get approved. As I said, I think that's because [potential judges] filter themselves out. The concern with the "bad judges" from those outside the Commission had nothing to do with the standards that the JPR Commission uses. It had to do with judges making decisions that were disapproved of by political activists. No matter what we do about a rule change, it's not going to get to that. But let's leave that aside.

We have a good evaluation system, but somehow we don't think that we're giving enough or the right kind of information to the voters. This is a big ho-hum for them. We are trying to make it more interesting and more informative. That was what motivates this [the minority petition]. It had nothing to do with the other [political] issue.

AZAT: On the Commission, a majority of members are lay people; there are 30 members, and 18 are public members. What do lay Commissioners bring to judicial performance review?

KENSKI: The 18 members of the public represent the average citizen. It is important to remember that the whole governmental system is supposed to support them and be directed as they wish. If you're a member of any organization, you can tend to become a little bit elitist, and hate to be questioned. We're there to question. We're there to say, "Here's what is important to us. You're performing this service. But we think temperament is very important." Or "We think your ability to communicate is very important."

AZAT: What misconceptions do people have about JPR?

We have a good evaluation system, but somehow we don't think that we're giving enough or the right kind of information to the voters. This is a big ho-hum for them. We are trying to make it more interesting and more informative.

KENSKI: It's a rubber stamp, is one. Another one is that judges control it; not true, not true.

AZAT: Have you ever heard complaints that the public does not have a voice?

KENSKI: I have never heard too much about that. I think activist groups are very well aware that they can come to our public meetings.

I was just on the Supreme Court committee chaired by [former Chief Justice] Bud Jones, and at our public hearings, groups that had been critical of the judiciary were invited to come and comment; they didn't. So what do you do with that?

AZAT: But is devising ways to better inform the public of your data merely tinkering with a good system while JPR overall is being undermined by political interests?

KENSKI: As far as the outside groups you're talking about, it's America, they have a right to do it. Sometimes it can be terribly unfair, but judges are part of the system, and I think you have to have counter-mobilization of groups that are concerned with the independence of the judiciary. I think the State Bar is one of the groups that could counter some of that information.

AZAT: When merit selection was born, many conservative political leaders were in favor of it. But now the pendulum has swung. Why?

KENSKI: It does always focus around the decisions judges make, no question about

it. And sometimes there is a tendency not to realize that courts don't just randomly and arbitrarily go off and come up with decisions: They're somewhat bound by the law and precedent.

I was talking to a legislator one day awhile back and they said, "We just don't like how they interpret a particular law." And I said, "Why don't you draw up a law that doesn't have holes you can drive a truck through? It would help."

AZAT: What are your politics?

KENSKI: I'm a registered Republican. I have been a Democrat in my day.

AZAT: And does your husband still run the Southern Arizona office of Sen. John Kyl?

KENSKI: Yes, he does. They've been friends since they were 18; they were debate partners when they went through the university together.

AZAT: Do you ever get the feeling John Kyl appreciates our judiciary as it is here?

KENSKI: I think he has a high opinion of it, yes.

AZAT: It must help advocates of the current system, including the State Bar, who can point out that there are Republicans who are champions of it, as well.

KENSKI: I think that's true. But weren't there like 34 measures introduced last year [in the Legislature regarding court issues]? And none of them got through. And that means that there had to be "anti" votes

among the Republicans.

Personally—not speaking for the Commission—I liked the compromise suggested last year that would have extended judges' terms in exchange for the Senate confirmation. I thought that, yes, we have separation of powers, but we also have checks and balances. And that would give the Legislature some feeling of a little bit more input into the system. I thought that was a reasonable compromise. It fell through, but the whole point is there are some reforms that could be suggested that might defuse some of the concerns. But probably not altogether; it's just not going to happen.


AZAT: What about other legislative proposals?

KENSKI: I don't agree that the Legislature should rule on the rules of evidence; that one strikes me as really bad. But I would relax some of the rules as far as judges campaigning. If there's an attack, I think they should be allowed to be more vocal than they are. I think they should be able to defend themselves more effectively than they do.

AZAT: But couldn't that be the exception that swallows the rule? If it was known that judges could respond to an attack, wouldn't the attacks increase?

KENSKI: Yes, that's the downside of that one, isn't it?

AZAT: Overall, do you feel the public should have confidence in JPR?

KENSKI: Yes. Is it totally, statistically significant, what we do? No. It can't be. But we get more information about the judges than I think you would get in almost any system. We ask the lawyers, we ask the jurors, the witnesses, the litigants about the [judges]. It may not be a perfectly representative sample. But I always feel that some information is better than no information. 

Reining in Judicial Life Tenure

A Solution Without A Problem

BY GREGORY S. FISHER

Fair Courts Under Fire

A Special Section on Judges and Judicial Independence

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

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

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

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

The Origins of Life Tenure

Article III of the U.S. Constitution provides that federal judges hold office “dur-

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

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

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

In addition to increasingly lengthy terms, critics of life tenure observe that there is a freakish randomness to vacancies, especially on higher federal courts, that tends to “turn each one into a galvanizing crisis.”¹² They also argue that long-serving federal judges risk losing touch with society, thereby squandering social and political capital necessary for the court’s legitimacy,

that life tenure tempts presidents to exercise appointment powers to extend their respective political visions far into the future, and that, ultimately, life tenure promotes unchecked power.

Validating Criticism of Life Tenure

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

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

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

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

Proposals

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

(1) term limits of a moderate length (18

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

- years seems to be the most-selected length), at which time the judge or justice would leave the court;
- (2) an absolute age limit, at which time the judge or justice would have to retire and leave the court;
 - (3) life tenure with mandatory senior status, requiring judges or justices to leave the active bench at a specified age but allowing them to remain a judge on senior status; and
 - (4) for the United States Supreme Court—and perhaps Circuit Courts of Appeal—to develop a system by which judges are rotated through the Court from lower courts.¹⁶

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

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

The Court would therefore be reshuffled every two years, and each president

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

Reform: Same As It Ever Was?

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

Power is the concept driving reform—concerns that too much power is vested in Article III judges and that life tenure

Elected representatives enjoy incredible advantages given the undeniable power of incumbency. The United States has many senators and representatives who have served 30 or more years. In smaller states such as my home state, Alaska, such “permanent” representation is actually preferred because it affords a better chance to wield seniority powers in both the Senate and House.

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

Moreover, there is no evidence that any particular lengthy term of any particular Justice or group of Justices precipitated a constitutional crisis or resulted in some major institutional problem impairing the Court's ability to discharge its powers. There have been

rumored instances in which a Justice may have overstayed his or her usefulness. But the Court rolled on.

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

The “problem” of lengthy terms is not something unique to the federal judiciary. Elected representatives enjoy incredible advantages given the undeniable power of incumbency.

encourages presidents to abuse their appointment powers. These are valid concerns in the abstract, but we cannot say that life tenure creates such risks or that eliminating life tenure would allay these concerns.

The “problem” of lengthy terms is not something unique to the federal judiciary.



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

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

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

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

However, the actual record undermines this premise. The figures here are based on my own calculations from the data available on the Oyez Web site and are rounded out.²⁴

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

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

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

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

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

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

Revalidating Life Tenure

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

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

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

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

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


For the judiciary, life tenure promotes efficiency—not just for the Court but for the constellation of Article III judges. It promotes efficiency in at least two respects. Not unlike practicing attorneys, lower court judges need continuity in the

Court's composition, if for a different reason. Continuity assists lower court judges by providing a compass to steer their discretion. For all Article III judges, life tenure gives them a chance to develop a judicial philosophy that can only be acquired through practical experience on the bench. I don't understand why we would allow Judges or Justices to learn, develop and grow over 18 years and then usher them out the door at midnight as the 19th year begins.

Finally, and most importantly, life tenure provides stability by insulating our federal judiciary at a time when it has fallen under increasing attack for unpopular decisions. In many respects it's not much different from tenure for professors. I have as much a beef with some opinions or decisions as my colleagues. However, the level of animated protests from leading politicians decrying "activist" judges and their decisions should give any of us pause to consider how Professor Carrington and

Cramton's model would play out in real life once we give these same politicians the keys to the car and let them take it out for a spin. This may be the chief reason for keeping life tenure—to curb legislative joy-riding.

Conclusion

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

endnotes

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