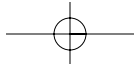
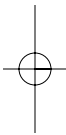
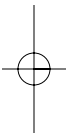


REFORMING THE COURT



REFORMING THE COURT

TERM LIMITS FOR SUPREME COURT JUSTICES

Edited by

Roger C. Cramton

Paul D. Carrington

CAROLINA ACADEMIC PRESS

Durham, North Carolina

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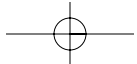
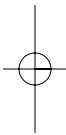
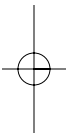
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The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during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

The United States Constitution
art. III, § 1 (1789)



CONTENTS

Reforming the Supreme Court: An Introduction <i>Paul D. Carrington & Roger C. Cramton</i>	3
--------------------------------------------------------------------------------------------------	---

IS THE PROLONGED TENURE OF JUSTICES A PROBLEM REQUIRING ATTENTION?

Term Limits for the Supreme Court: Life Tenure Reconsidered <i>Steven G. Calabresi & James Lindgren</i>	15
“Marble Palace, We’ve Got a Problem—with You” <i>L. A. Powe, Jr.</i>	99
Thinking about Age and Supreme Court Tenure <i>Daniel J. Meador</i>	115

PROLONGED TENURE OF JUSTICES AS PART OF A LARGER PROBLEM

Limiting the Court by Limiting Life Tenure <i>Robert F. Nagel</i>	127
Checks and Balances: Congress and the Federal Courts <i>Paul D. Carrington</i>	137
Democratic Responses to the Breadth of Power of the Chief Justice <i>Judith Resnik</i>	181

MAKING A SYSTEM OF TERM LIMITS WORK

Opting for Change in Supreme Court Selection, and for the Chief Justice, Too <i>Alan B. Morrison</i>	203
Internal Dynamics of Term Limits for Justices <i>Thomas W. Merrill</i>	225

viii CONTENTS

ARGUMENTS THAT PROLONGED TENURE IS NOT A PROBLEM

The Case for Life Tenure <i>Ward Farnsworth</i>	251
Protecting and Enhancing the U.S. Supreme Court <i>David J. Garrow</i>	271
Reining in the Supreme Court: Are Term Limits the Answer? <i>Arthur D. Hellman</i>	291
An Interdisciplinary Perspective on the Tenure of Supreme Court Justices <i>Stephen B. Burbank</i>	317

**CONSTITUTIONALITY OF LEGISLATION
LIMITING THE TENURE OF JUSTICES**

Constitutionality of Reforming the Supreme Court by Statute <i>Roger C. Cramton</i>	345
The Power of Congress over the Terms of Justices of the Supreme Court <i>John Harrison</i>	361
Life Tenure and the Supreme Court: What Is to Be Done? <i>Sanford Levinson</i>	375
Constitutional Futility of Statutory Term Limits for Supreme Court Justices <i>William Van Alstyne</i>	385

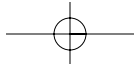
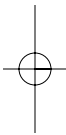
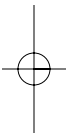
OTHER LEGISLATIVE AND CONSTITUTIONAL ALTERNATIVES

Increasing the Size of the Court As a Partial but Clearly Constitutional Alternative <i>Philip D. Oliver</i>	405
Mandatory Retirement for Supreme Court Justices <i>Richard A. Epstein</i>	415
Promoting Equity in the Distribution of Supreme Court Appointments <i>Terri L. Peretti</i>	435
Restraining the Court by Curbing District Court Jurisdiction and Improving Litigation Procedure <i>George W. Liebmann</i>	455

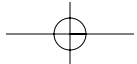
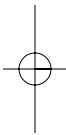
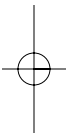
CONTENTS ix

APPENDIX: THE EDITORS' INITIAL PROPOSAL

The Supreme Court Renewal Act: A Return to Basic Principles <i>Paul D. Carrington & Roger C. Cramton</i>	467
Index	473



REFORMING THE COURT



REFORMING THE SUPREME COURT: AN INTRODUCTION

*Paul D. Carrington & Roger C. Cramton**

This symposium deals with an important issue concerning the “ascendant branch” of the federal government—the Supreme Court of the United States—that has received remarkably little attention: the lengthening tenure in office of Supreme Court justices. The Framers provided in Article III, section 1 of the Constitution that federal judges would serve “during good Behaviour,” in contrast to the relatively short and fixed terms of other federal offices. The phrase was drawn from earlier legislation by Parliament enacted to protect royal judges who had long served at the pleasure of the British crown and its ministers and were subservient to them. The purpose of the Good Behavior Clause was to protect federal judges from control by the President or the Congress. This constitutional provision has served that purpose well with respect to lower federal court judges, but questions of its meaning and continued efficacy with respect to Supreme Court justices have been raised in the past. Those questions should now be seriously considered.

The factual background of the symposium’s topic is not in dispute and is elaborated in the leading article by Steven Calabresi and James Lindgren,¹ and discussed in many of the other papers. The undisputed factual predicate is that justices today serve much longer than they did throughout our history. There are three general reasons why this is so.

* Paul D. Carrington is Chadwick Professor of Law, Duke University; Roger C. Cramton is Stevens Professor of Law Emeritus, Cornell University Law School.

1. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, pp. 15–98.

First, improved public health and modern medicine have enormously increased the life expectancy of a mature person of an age likely to be considered for appointment to the Supreme Court. Indeed, life expectancy at age fifty, for example, has more than doubled since 1789. Moreover, the life expectancy figures are rising steadily every year and those in a position to receive the best medical care, which includes justices, usually survive beyond the averages. For reasons to be discussed below, few justices in modern times have voluntarily retired from the Court until they became physically or mentally incapacitated. The inevitable conclusion from these undisputed facts is that future appointees to the Court are likely to occupy an office that has become one of the most powerful in the land for twenty-five to forty or more years. A tenure in office of a generation or more was not contemplated by the Framers when, in a desire to protect judicial independence, they adopted the Good Behavior Clause.

The second factor that results in justices continuing in office until they die or become seriously incapacitated is that, unlike their predecessors prior to 1925, the Court now has virtually total control over its workload. Each justice today is entitled to the assistance of a very capable personal staff, including four law clerks. Prior to 1925, justices such as Holmes and Brandeis wrote twenty or more opinions for the Court each year, assisted by only a single secretary or law clerk who provided research and proof-reading assistance. Prior to 1986 the Court rendered full opinions in about one hundred fifty cases a year, an amount that itself was much lower than earlier in the twentieth century. Since then, the Rehnquist Court has reduced the number of full opinions on the merits each year by one-half, to about seventy-five cases a year. Each justice today is responsible for only eight or nine opinions per year. In varying degrees, each justice now delegates much of the initial drafting of opinions to law clerks. These changes in the burdensomeness of the Court's work permit aging justices to continue to serve even as energy declines with advanced age. Although ordinary Americans retire in largest number at age sixty-two and most have retired by age sixty-five, Supreme Court justices continue to work on during their seventies and eighties. It was truly extraordinary that Justice Sandra Day O'Connor stepped down in 2005 at the mere age of seventy-five, and while still fully mobile. But Chief Justice Rehnquist stayed in office thirty-four years until his death at age 80 and Justice Stevens, who is eighty-three and has held office for thirty years, has not retired.

The third and most important factor resulting in the justices' lengthening tenure is a consequence of the enormous increase in the power and saliency of the Court's decision-making. The power of the Court to give new meaning to old language of the Bill of Rights has made the Supreme Court, in a former Solicitor General's language, "the ascendant branch" of the federal gov-

ernment.² Each justice occupies an office that is perhaps the second most powerful in the land. And all other powerful federal offices are accountable to the people through fixed terms and periodic elections. Even the rare congressional leader who is regularly reelected exercises the authority of a majority or minority leader for a much shorter period.

Every informed observer, whether of the left, the right or the center, recognizes that the Court is now an institution exercising extraordinary power. It is not surprising that justices relish the exercise of the great power the Court now possesses. The celebrity that now renders sober justices as famous as rock stars, is flattering, enjoyable, stimulating, and provides many opportunities for travel and influence. The justices are honored by prestigious academic and private organizations; and they are invited and paid to travel to events throughout the country and around the world. On today's terms, it is a great job. Who would give it up voluntarily? Well, Justice O'Connor did, but Chief Justice Rehnquist, who was older and suffered from physical ailments for a very long time, remained in office until removed from it by his sudden death.

We believe that the facts stated and our general conclusions are accepted by all twenty-one of the diverse and talented authors who have contributed to this symposium, although they would probably state them in somewhat different language. All agree that the lengthening tenure of Supreme Court justices raises a challenge to life tenure that is worthy of serious inquiry and debate by academics, politicians and the public. This view is also supported by the following scholars, bar leaders, and distinguished judges, who have expressed agreement "in principle" with the specific legislative proposal advanced by the two of us and which was the subject of an academic conference held at Duke in April 2005. Most of the papers in this book arose out of that conference.

Bruce A. Ackerman, Yale Law School
Albert W. Alschuler, University of Chicago Law School
Vickram D. Amar, University of California Hastings College of Law
Jack M. Balkin, Yale Law School
Jerome A. Barron, George Washington University Law School
Kevin M. Clermont, Cornell Law School
John J. Costonis, Chancellor, Louisiana State University
John J. Curtin, Jr., Esq., Boston (Former President, American Bar Association)
Walter E. Dellinger III, Duke University School of Law
Norman Dorsen, New York University School of Law

2. The phrase is that of Seth Waxman, Esq., a recent Solicitor General of the United States, quoted in the *National Law Journal* C7 (Aug. 6, 2001).

6 PAUL D. CARRINGTON & ROGER C. CRAMTON

Craig Enoch, Esq., Dallas, Texas (former Justice, Supreme Court of Texas)
Garrett Epps, University of Oregon School of Law
Richard A. Epstein, University of Chicago Law School
James G. Exum, Esq., Greensboro, North Carolina (former Chief Justice
of North Carolina)
Richard H. Fallon, Harvard University Law School
John H. Garvey, Boston College Law School
Lino A. Graglia, University of Texas School of Law
Michael Heise, Cornell Law School
Wythe Holt, University of Alabama Law School
R. William Ide III, Esq., Atlanta, Georgia (former President, American
Bar Association)
Yale Kamisar, University of Michigan Law School
Larry D. Kramer, Stanford University Law School
Lewis Henry LaRue, Washington & Lee University School of Law
Sanford Levinson, University of Texas School of Law
George Liebmann, Esq., Baltimore, Maryland, Visiting Scholar, Cambridge
University
Theodore J. Lowi, Senior Professor of American Institutions, Cornell
University
Ira C. Lupu, George Washington University School of Law
Robert MacCrate, Esq., New York City (former President, American Bar
Association)
Frank I. Michelman, Harvard University Law School
Thomas D. Morgan, George Washington University Law School
Alan Morrison, Stanford University Law School
Robert R. Nagel, University of Colorado School of Law
Philip D. Oliver, University of Arkansas at Little Rock School of Law
Russell Osgood, President, Grinnell College
William G. Paul, Esq., Oklahoma City, Oklahoma (former President,
American Bar Association)
Richard D. Parker, Harvard University Law School
Michael John Perry, Emory University School of Law
H. Jefferson Powell, Professor of Law and Divinity, Duke University
School of Law
L. A. (Scot) Powe, Jr., University of Texas School of Law
John Phillip Reid, New York University School of Law
William L. Reynolds, University of Maryland School of Law
Thomas D. Rowe, Jr., Duke University School of Law
Theodore St. Antoine, University of Michigan Law School

Christopher H. Schroeder, Professor of Law and Policy Sciences, Duke University
Peter H. Schuck, Yale Law School
David L. Shapiro, Harvard University Law School
Carol S. Steiker, Harvard University Law School
Nadine Strossen, New York Law School
Peter L. Strauss, Columbia University School of Law
Lawrence H. Tribe, Harvard University Law School
Mark V. Tushnet, Georgetown University Law Center
Jon M. Van Dyke, University of Hawai'i School of Law
Herbert P. Wilkins, Boston College Law School (former Chief Justice of Massachusetts)
Michael D. Zimmerman, Esq., Salt Lake City (former Chief Justice of Utah)

Informed readers will recognize that this list includes persons of almost every imaginable political orientation.

The needed inquiry and debate concern the questions that are the subject of the original papers written for this symposium: (1) what harmful consequences, if any, are caused by the life tenure of Supreme Court justices; (2) are those consequences sufficiently serious that remedial proposals should be considered; and (3) what remedies are most appropriate?

All participants in the symposium agree that current arrangements for Supreme Court justices have resulted in at least two harmful consequences. First, David Garrow's prior work and that of others establish that instances of harm to the Court because an aging justice is mentally or physically compromised occur much more frequently than is generally understood.³ Second, current arrangements create incentives for strategic behavior by presidents, justices and senators that may not be in the interest of the Court or the public. Presidents have an incentive to choose a less-experienced and less-qualified younger appointee who, if a correct assessment is made of the appointee's future constitutional decision-making, is likely to provide the President an even longer influence on the Court's decisions. Justices often seek to time their retirements so that like-minded presidents will appoint their successors. Experience suggests, for example, that Justice O'Connor, a Reagan appointee, might not have retired when she did had John Kerry been elected President in 2004. And senators, aware of the high stakes inherent in the appointment of a justice who could serve

3. See *infra* David J. Garrow, *Protecting and Enhancing the U.S. Supreme Court*, pp. 271–289. See also David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court*, 67 U. Chi. L. Rev. 995 (2000).

for a generation or more, may frustrate the president's power of appointment by using procedural tactics to prevent a vote on the appointment.

Other possible consequences are more intangible, uncertain, and value-laden. Longer tenure decreases the rotation in office that naturally occurred before the life expectancy of a mature person doubled or tripled. The randomness of death in office and of some retirement decisions results, as Daniel Meador⁴ and Thomas Merrill⁵ emphasize, in situations in which vacancies may be bunched. Some presidents harvest four or five appointments (e.g., Taft and Nixon) and others none (e.g., Carter). The lack of regular turnover decreases the political accountability of a branch of the federal government that has become a major policy-making institution. The popular will of an electorate that is guaranteed "a Republican Form of Government" is increasingly governed by a non-accountable gerontocracy. And the lengthened tenure, by increasing the stakes of every appointment, may have contributed to the contentiousness of confirmation. These issues are discussed from various vantage points in the articles in this symposium.

Most of the authors agree with us that these problems are serious and justify prompt consideration of alternative solutions. Daniel Meador, Alan Morrison,⁶ and Scot Powe⁷ join us in favoring legislative consideration of alternatives, especially term limits. Powe provides a useful discussion of a justice's usual life cycle, including a discussion of the intellectual autopilot that often results once a justice is past his or her prime. He also provides a comparison of length of tenure of congressional leaders with that of justices. Morrison, after agreeing that a system of limited tenure should replace current life tenure, discusses another concern: the powers and manner of appointment of the chief justice. Morrison contends that needed statutory change should include a provision authorizing the president to appoint the chief justice without a separate Senate confirmation proceeding when a vacancy in that office arises, but only from among the sitting justices. Judith Resnik also emphasizes the exceptional role of the chief justice as the chief executive officer of the third branch and advocates a measure of political accountability for the conduct of that role.⁸

4. See *infra* Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, pp. 115–123.

5. See *infra* Thomas W. Merrill, *Internal Dynamics of Term Limits for Justices*, pp. 225–248.

6. See *infra* Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, pp. 203–223.

7. See *infra* L. A. Powe, Jr., "Marble Palace, We've Got a Problem—with You," pp. 99–113.

8. See *infra* Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, pp. 181–200.

Ward Farnsworth⁹ and Arthur Hellman¹⁰ present dissenting views favoring the status quo. While not questioning the factual premises stated above, Farnsworth argues that the voice from the past is a useful element of stability for the republic and often results in a justice moving in a “liberal” (and, from his point of view, desirable) direction. Arthur Hellman argues that staggered eighteen-year terms would make the appointment process even more politically contentious because potential opponents would know when a vacancy would arise and which justice would be leaving. He also contends that regular new appointments would accentuate strategic behavior of justices in making certiorari decisions, i.e., expediting or slowing the consideration of a constitutional issue around the departure of a particular justice. Hellman also argues that term limits for justices would threaten the stability of precedent, which might in turn lead the public to believe that decisions do not rest on “impersonal and reasoned judgments.”

Philip Oliver¹¹ supports the editors’ statutory proposal but prefers a constitutional amendment imposing term limits on justices. His proposed amendment would expand the size of the Court through regular appointments by each president and diminish its size with each retirement, resignation or death.

Robert Nagel bases his support for substitution of term limits for the current life tenure system primarily on value-laden issues: the Court has regularly adopted policy positions that damage federalism and especially the effectiveness of state and local governments. This frustration of local action closer to the people frustrates participation in government, forces national homogeneity rather than local and regional variation, and moves decisionmaking from where people live and work to a national level. In doing so, the Court’s decisions frustrate and alienate those who disagree with the values forced on them. Moreover, the Court now views every aspect of ordinary life as within its control and advances its homogenizing program through “authoritarian claims on behalf of [its] judicial power.”¹² His views are generally shared by Paul Carrington,¹³ who holds that Congress has a constitutional duty to impose on the Court constraints that are consistent with the principles of judicial independence and federalism.

9. See *infra* Ward Farnsworth, *The Case for Life Tenure*, pp. 251–269.

10. See *infra* Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, pp. 291–316.

11. See *infra* Philip D. Oliver, *Increasing the Size of the Court as a Partial but Clearly Constitutional Alternative*, pp. 405–414.

12. See *infra* Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, pp. 127–136.

13. See *infra* Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, pp. 137–179.

Thomas Merrill's paper considers the effect of staggered terms on the norms governing the Court's decisional process, the Court's efficiency in deciding cases, and the ability of justices to form fairly stable voting blocs. Norm change, he concludes, would be somewhat more likely under a term limits regime, efficiency in decisionmaking would be somewhat reduced, and ad hoc rather than stable voting blocs would be more common. Conceding that these predictions are highly speculative, he concludes that, on balance, replacement of life tenure with fixed non-renewable terms would be desirable. Terri Peretti,¹⁴ viewing term limits proposals in the light of political science insights, also explores the various consequences and implications of term limits proposals; she is especially concerned about the uneven distribution of Supreme Court appointments under current arrangements.

The constitutionality of a statutory proposal, such as the one the co-editors have proposed, is considered in a number of papers. Sanford Levinson,¹⁵ affirming the power of Congress on this subject, argues that the Good Behavior Clause should be given a purposive or functional interpretation that reflects the fact that circumstances have changed sine 1789. The problem in his view is that of mobilizing the national constituency that would be necessary to get a valid statute enacted. Roger Cramton¹⁶ emphasizes the broad power given to Congress to regulate the federal courts, including the Supreme Court. Throughout our history Congress by legislation has created and abolished federal courts and has regulated the size and other aspects of the Court. For 121 years the justices were required to "ride circuit," deciding cases on lower federal courts. The only directly relevant judicial decision upheld legislative authority in broad language. Paul Carrington¹⁷ compares the constitutionality of term limits imposed on other members of the federal judiciary, more numerous than the Article III judges, who are in even greater need of judicial independence.

John Harrison¹⁸ and William Van Alstyne,¹⁹ on the other hand, argue that the texts of Articles II and III of the Constitution, and the purposes of those

14. See *infra* Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, pp. 435–453.

15. See *infra* Sanford Levinson, *Life Tenure and the Supreme Court: What Is to Be Done?*, pp. 375–383.

16. See *infra* Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, pp. 345–360.

17. See *infra* Carrington, *Checks and Balances*, pp. 137–179.

18. See *infra* John Harrison, *The Power of Congress over the Terms of Justices of the Supreme Court*, pp. 361–373.

19. See *infra* William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, pp. 385–402.

texts, make the Supreme Court, unlike other federal courts, a unique institution and prevent Congress from manipulating the office of a justice. In their view, substantial participation in the Court's decisionmaking process without a fixed limitation of term is an inherent quality of the office that is immune from legislative change. Richard Epstein's brief discussion of constitutionality takes much the same position.²⁰

Another line of argument concerning constitutionality is raised by several papers: if Congress successfully exercised authority to redefine the office of a justice, the temptation of political majorities to tinker with it for political purposes might become a serious problem.²¹ The contrary view is that the obvious importance of the structural integrity of the Court will prompt thoughtful and extensive legislative consideration quite unlike momentary and impulsive aberrations like the *Schiavo* incident.²² Like social security, it would be treated as fundamental legislation to be changed very rarely and only for good reasons.

Cumulative or alternative proposals are advanced in five papers. Richard Epstein argues that a mandatory retirement age of seventy should be coupled with the term limits proposal, each reinforcing and benefiting the other.²³ Alan Morrison and Judith Resnik would include a provision relating to the office of chief justice in any statutory revision.²⁴ Scot Powe, concerned about the increased delegation to law clerks on the part of justices, suggests that each justice be limited to only one clerk, forcing them to do more of the hard work of drafting opinions, a burden that would produce better decisions and lead justices to think more seriously of retirement as they aged. Paul Carrington proposes substantial revision of the 1925 legislation empowering the Court to control its own docket.²⁵ And, finally, George Liebmann²⁶ provides a glimpse at another alternative or cumulative proposal: legislation that restricts the jurisdiction of the Supreme Court.

An appendix provides the Carrington-Cramton proposal for statutory reform of the Court.

20. See *infra* Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, pp. 415–433.

21. See *infra*, e.g., Harrison pp. 361–373 and Hellman pp. 291–316.

22. The case of Theresa Schiavo is reported by Abby Goodnough, *The Schiavo Case: The Overview: Schiavo Dies, Ending Bitter Case over Feeding Tube*, N.Y. Times A1 (Apr. 1, 2005).

23. See *infra* Epstein pp. 415–433.

24. See *infra* Morrison pp. 203–223.

25. See *infra* Carrington pp 137–179.

26. See *infra* George W. Liebmann, *Restraining the Court by Curbing District Court Jurisdiction and Improving Litigation Procedure*, pp. 455–463.

Altogether, the articles provide a feast of information and ideas relating to an important and little-considered public problem. We hope that readers will be persuaded that the superannuation of Supreme Court justices is a problem that deserves study, debate and reflection on the part of the people and its governors. We believe that the result of such inquiry and discussion will inevitably lead to the conclusion that the time for action has come.