

# Democratic Responses to the Breadth of Power of the Chief Justice

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## Some Agreed Upon Facts and Premises

Several relevant facts are not much in dispute. The first is that while Article III of the United States Constitution provides that the “judicial Power of the United States” shall vest in courts with judges holding “their Offices during good Behaviour,” and specifies that such judges’ salaries cannot be diminished, the Constitution does not define the phrase “during good Behaviour.” Second, since the country’s founding, Article III judges have not by statute had either a defined term of office or an age for which retirement is mandatory.

Third, in practice, because Article III judges make their own decisions about when to vacate a seat to permit a new appointment, various kinds of problems have emerged. When choosing the timing of retirement, justices and judges may engage in opportunistic behavior—either to make optimal use of

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federal pension opportunities, to enhance further economic rewards by going “on the market” to find better paid employment, to protect their own leisure time, to respond to personal needs, or to maximize the power of a particular party by creating a vacancy to fill. Some studies of turnover on the lower courts suggest politically-motivated behavior, although more recent work concludes that the vesting of pension rights is a key variable.<sup>1</sup> Yet others, such as David Garrow writing in this symposium, worry that justices serve even as their health and abilities begin to falter.

Fourth, as is also exemplified by several chapters in this volume, many commentators share a reading of the recent data: that today’s Article III judges have an unusually long term of service, when compared to jurists in other systems and to their predecessors. Looking at how other democracies protect judicial independence, one finds that the United States has become anomalous. Many democracies provide for judges to retire, including those on their high courts, at a fixed age while others specify that high court jurists serve for a fixed period of time.<sup>2</sup> Both Australia and Israel require retirement at age seventy.<sup>3</sup> In Canada, the age of mandatory retirement is seventy-five.<sup>4</sup> The con-

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1. See Deborah Barrow & Gary Zuk, *An Institutional Analysis of Turnover in Lower Federal Courts, 1900–1987*, 52 J. Pol. 457–76 (1990). But see Albert Yoon, *The End of the Rainbow: Understanding Turnover Among Federal Judges* (manuscript, spring 2004, cited with permission) (arguing that the study did not sufficiently control for the role played by the availability of pensions and, with different and more data, concluding that pensions play a pivotal role in determining when lower court judges shift from “active” to “senior” status).

2. See generally Lee Epstein, Jack C. Knight, Jr., & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 Wm. & Mary Bill of Rts. J. 7, 23 (2001) (surveying twenty-seven European countries and finding compulsory term limits and/or mandatory retirement in most).

3. Until 1977, when the Australian Constitution was amended by a referendum, judges were appointed for life; judges appointed after the date of that amendment serve until seventy. See Austl. Const. ch. III, §72 (“The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has obtained that age.”) (also providing that judges of “other courts created by the Parliament,” that is the federal courts, must also retire at that age). Israel’s basic law has a similar requirement. See Israel, Basic Law: The Judiciary, Courts Law [Consolidated Version], 5744–1984, Sections 1–24 <<http://www.oefre.unibe.ch/law/icl/is03000.html>> (providing for the term to end at the age of seventy, upon removal through specified means including that a person’s health makes continuation of service impossible).

4. Supreme Court Act, R.S.C. ch. S-26 §9(2) (1985) (Can.) (“A judge shall cease to hold office on attaining the age of seventy-five years.”).

stitutional courts of Germany and France rely on another system: fixed terms of twelve and nine years respectively.<sup>5</sup>

Further, as I have detailed elsewhere, during the first twenty years of the life of the United States, justices on the Supreme Court averaged fourteen years in service.<sup>6</sup> Lower court judges averaged sixteen years in office, but just under half (twenty-two out of forty-seven) served fewer than ten years.<sup>7</sup> Looking forward some decades to the period between 1833 and 1853, once again the average length of service on the lower courts was fourteen years, while nine Supreme Court justices who terminated their service during that interval worked for longer—twenty years on average.<sup>8</sup>

Moving centuries forward to the period from 1983 to 2003 and having to deal with a larger group of people coming and going, the average term for the six Supreme Court justices whose service ended during that time period grew yet larger. On average, the six justices whose service terminated each served on the Court for about twenty-four years. Chief Justice Rehnquist served on the Court yet longer—for some thirty-three years. For the lower courts (again on average based on 530 judges, and with some judgments about how to calculate the relevant intervals), Article III judges served about twenty-four years,<sup>9</sup> about ten years longer than those in the prior century.

5. Article 4, Law of the Federal Constitutional Court of Germany (as amended 1998); France Const. tit. VII, art. 56 (adopted 1958).

6. See, e.g., Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure* 26 *Cardozo L. Rev.* 597 (2005).

7. See *id.*, Appendix, Methodological Note on Estimating the Lengths of Service, 1800s/2000s, at 648–58. As noted above, a total of forty-seven judges were counted in the data on the first time period. For Supreme Court justices, a total of sixteen judges. The average length of service is skewed upward by a few judges, who served for unusually long periods of time—including Henry Potter who spent fifty-seven years on the federal bench and William Cranch who served for fifty-five years. As is further detailed in that Appendix, for the earlier time period, one can begin with judges who start their service at 1789. For the later interval, Stephen Wu and I worked back from 2003, looking only at the length of service of those judges who had retired in that year or during the twenty prior years.

8. Resnik, *Judicial Selection and Democracy*, *supra* n. 6 at 618.

9. These data are summarized in Chart 4, *Estimated Lengths of Service: Contrasting Snapshots, 1800s/2000s*, *id.* at 618. That information comes from government databases that provide information on judges and their length of service. See *Members of the Supreme Court of the United States* <<http://www.supremecourtus.gov/about/members.pdf>>; *Federal Judges Biographical database* <<http://www.fjc.gov/newweb/jnetweb/nsf/his>>. These estimates are drawn from those sources and informed by those made by Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Lower Federal Court Judges: 1945–2000*, 91 *Cal. L.*

Many factors account for the growing length of service of members of the federal judiciary. More people are appointed as judges, some at earlier ages, and life spans have lengthened. Further, a trend has emerged in which judges serving at a lower court are promoted to a higher court—making for a career ladder in judging that helps to produce more years in office. And being a federal judge may correlate with longevity and even be good for one's health.

Moreover, an important economic variable—the way that the pension system works—has emerged. Under current federal statutes, when Article III judges or justices retire by taking “senior status,” they create vacancies for the courts on which they serve.<sup>10</sup> But they need not resign in order to retire. Rather, they can continue to sit as judges. Indeed, Congress has created incentives for judges to continue to work as long as they can. Upon reaching the age of sixty-five and if having served for the requisite number of years,<sup>11</sup> judges are eligible for retirement. During “the remainder” of their life-time, those judges “receive an annuity equal to the salary” that they received at the time of taking senior status. Benchmarking the salary to the last year worked may inspire some judges, ever-hopeful that Congress will respond to the many requests for pay raises, to delay “going senior” to get a higher yearly annuity. In addition, to continue to receive that salary, the chief justice or judge of a particular court must certify that the individual has “carried in the preceding calendar year . . . a caseload which is equal to or greater than the . . . work” that an “average” active judge would have done over three months.<sup>12</sup> While judges could therefore do much less while maintaining their eligibility for the annuity, many are keenly aware of the workload of their colleagues and generously shoulder a larger proportion of the work than they are obliged to undertake.<sup>13</sup>

Several of the analytic premises that helped to generate these contemporary facts are also not contested. Widespread agreement exists that some form of structural protection for judicial independence is wise and that judges should have terms of office longer than sitting Presidents or Senators. Current

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Rev. 1029 (2003). As detailed in the methodological note accompanying that article, choices exist about how to analyze the information.

10. 28 U.S.C. §371 (d).

11. If seeking to take senior status at age sixty-five, one has to have had fifteen years of service, whereas if one seeks to take senior status at age seventy, ten years of service is required. See 28 U.S.C. §371 (c).

12. 28 U.S.C. §371(a); (b); (e)(1)(A),(B). Other subsections detail the way in which the requirement can be met through administrative work or other special government duties.

13. Yoon, *Understanding Turnover*, *supra* n. 1.

as well as historical examples make plain that the drafters of the United States Constitution were right to worry about the independence of judges and to craft mechanisms for insulation. Indeed, whether the United States has done enough is a matter of debate. For example, the American Bar Association and some judges have repeatedly complained (and sometimes brought lawsuits) arguing that federal judicial salaries are too low and that the failure to raise salaries to meet increases in cost of living is unlawful, punitive, and/or unwise.<sup>14</sup> Similar concerns have been raised about judicial budgets, both state and federal.<sup>15</sup> Moreover, hundreds of persons—called magistrate, bankruptcy and administrative law judges—hold federal adjudicatory power but are not, under current doctrine, sheltered by the protections of Article III.<sup>16</sup>

In retrospect then, Article III is both too little and too much, missing some important judicial actors and also creating means for individual judges to have a kind of power for a duration that raises concerns, in democratic circles, about the degree to which so much power can be exercised by so few government officials for so long. Some commentators in this volume seek to revisit the text to amend the Constitution. Joining others, I think that statutory interventions are an appropriate and useful route. As I will detail below, during the twentieth century, the Supreme Court was notably open to inventive readings of the strictures of Article III—thereby licensing the devolution of federal judicial power to hundreds of non-life-tenured judicial officers, bank-

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14. See American Bar Association and the Federal Bar Association, *Federal Judicial Pay Erosion: A Report on the Need for Reform* (2001); *Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Justice Scalia and Kennedy, dissenting) (arguing in a class action filed by judges that federal legislation that prevented automatic adjustments to increase pay for judges in relationship to the cost of living violated Article III's non-diminution clause).

In contrast, the Canadian Supreme Court has concluded that the setting of compensation must occur through methods less dependent on the will of a sitting parliament. See *Reference on Remuneration of Judges of the Provincial Court*, 1997 Carswell Nat 3038 (1997); see also G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 *Judicature* 12 (2004) (describing an expanding doctrine of judicial inherent power to require financing for its processes and describing a 2002 Kansas Supreme Court order requiring an increase in fees to provide funds).

15. See *Hearings Before the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the Committee on Appropriations of the U.S. House of Representatives*, 108 Cong. (2004) (Statement of Hon. John G. Heyburn, II, Chair, Committee on the Budget of the Judicial Conference of the United States (raising concern about the "crisis" facing the federal courts and about the levels of appropriations planned)).

16. See also Judith Resnik, *Judicial Independence and Article III—Too Little and Too Much*, 72 *S. Cal. L. Rev.* 657 (1999).

ruptcy, magistrate, and administrative law judges.<sup>17</sup> Further, Congress has already created both pensions and term limits for the chief judges of the lower courts, thus paving the way for revisiting the kind of pension system provided and for thinking of a new option for the chief justiceship: term limits. Before addressing the kind of statutes that I suggest be drafted and their constitutional plausibility, I need to explain why the particular powers of the chief justice of the United States should be in focus when discussing “reforming the Supreme Court.”

## The Multiple Sources of Power of the Chief Justice

Although the long length of service on the federal bench has drawn a good deal of attention (generating this volume, *inter alia*), the recent confirmation of John Roberts to serve as the chief justice of the United States provides the infrequent opportunity to think specifically about that post. The new chief justice is only the seventeenth person to hold the position in the life of the nation. In part because of the very few who have had this job, its status has a special importance. As was explained in the 1980s, when hearings were held on the nomination of William Rehnquist to that position, the chief justice is the “symbol of the Court.”<sup>18</sup>

As the senior jurist of nine rendering decisions on America’s highest court, the chief justice presides at the Court’s sessions and has the ability to affect its agendas, influence case load selection, and (when in the majority) to assign

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17. Details and analyses are provided by many. See Judith Resnik, “*Uncle Sam Modernizes his Justice System: Inventing the District Courts of the Twentieth Century*,” 90 *Geo. L. J.* 607, 637–43 (2002); Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 *Harv. L. Rev.* 915 (1988); Paul Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 *Ind. L. Rev.* 233 (1990).

18. See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, 12 *The Supreme Court of the United States: Hearing and Reports on Successful and Unsuccessful Nominations* at 312 (eds. Roy M. Mersky & J. Myron Jacobstein, 1989) (Opening Statement of Chairman Strom Thurmond). At that time, Senator Kennedy offered a parallel comment, that the chief justice “symbolizes the rule of law in our society; he speaks for the aspirations and beliefs of America as a Nation.” See Hearings before the Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States, 12A *The Supreme Court of the United States: Hearing and Reports on Successful and Unsuccessful Nominations* at 1549 (statement of Senator Kennedy).

opinions. Further, aided by special staff, the chief justice is the senior official in charge of the Supreme Court itself. That institution is supported by a budget of about sixty million dollars and employs more than three hundred people. The Court also promulgates special rules of practice for the Supreme Court bar and determines how the public can see its proceedings (currently, without the help of televised proceedings). Many of the aspects of the chief justiceship become plain through the words of Associate Justice Ruth Bader Ginsburg, who in her statement mourning the death of William Rehnquist, called him the “fairest, most efficient boss” whom she had ever had.<sup>19</sup>

But the chief justice is more than an icon of the Supreme Court. Chief Justice Roberts is the chief justice not only of the Supreme Court but of the United States.<sup>20</sup> As is revealed in other chapters of this book, however, even law professors are less familiar with the many roles of the chief, who serves not only the Supreme Court but also as the chief executive officer for the entire federal judicial system. The “Chief” is the spokesperson for the entire federal judiciary, is the chair of the Judicial Conference of the United States (which, as detailed below, has evolved into a major policymaking body that opines regularly to Congress about the desirability of enacting various kinds of legislation), is the person charged with appointing judges to certain specialized courts, is the person who authorizes certain judges to “sit by designation” on other courts, and is the person given a host of other, more minor, functions such as service on many boards.

Neither the Chief Justice’s special role on the Supreme Court nor the Chief Justice’s tasks as the Chief Executive Officer of the federal judiciary are constitutionally mandated obligations. Rather, the part of the Constitution devoted to establishing the judicial branch—Article III—makes no mention of a chief justice at all.<sup>21</sup> The one reference that can be found is in the Constitu-

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19. The Honorable Ruth Bader Ginsburg’s comments can be found in *Statements from the Supreme Court Regarding the Death of Chief Justice William H. Rehnquist* <[http://www.supremecourtus.gov/publicinfo/press/pr\\_09-04-05.html](http://www.supremecourtus.gov/publicinfo/press/pr_09-04-05.html)> (Sept. 4, 2005).

20. See Judith Resnik & Theodore Ruger, *One Robe, Two Hats*, N.Y. Times 4, 13 (Week in Review) (July 17, 2005). Many scholars have examined these issues. See, e.g., Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. Pa. J. Const. L. 341 (2004); Robert J. Steamer, *Chief Justice: Leadership and the Supreme Court* (1986); Peter Graham Fish, *The Politics of Federal Judicial Administration* (1973).

21. U.S. Const., Art. III. Although the constitutional text is sparse on this subject, many federal statutes advert to the position of the chief justice. See, e.g., 28 U.S.C. §1 (describing the Supreme Court as comprised of eight associate justices and a “Chief Justice of the United States”). That usage began in the First Judiciary Act. See Act of Sept. 24, 1789, §1 (describing the Supreme Court as consisting of “a chief justice and five associate justices”).

tion's discussion of presidential impeachments—vesting sole power for trying impeachments in the Senate and specifying that “the Chief Justice shall preside” when a president is tried.<sup>22</sup> The tasks and parameters of the role of chief justice—including the very question of whether to commit such broad authority to one person—stem not from the Constitution but from dozens of statutes enacted in an ad hoc fashion over many decades, as well as from customs and from the decisions and ambitions of those who have held the office of the chief justice.<sup>23</sup> The current scope of this position is itself a tribute to the impressive leadership of Chief Justice Rehnquist.

A brief historical overview makes plain how much the chief justiceship has changed. At the turn of the twentieth century, about one hundred life-tenured federal judges were dispersed across the nation. Dealing with a total of some 30,000 cases in a year, these judges were mostly left to their own devices, with few shared practices and little means of communicating with each other except through the publication of opinions. This situation prompted Chief Justice William Howard Taft to complain in 1922 that each judge had “to paddle his own canoe.”<sup>24</sup>

In contrast today, some 2000 life-tenured and non-life tenured judges (aided by about 30,000 in staff) work in more than seven hundred and fifty courthouse facilities around the United States that deal annually with about 350,000 filings at the trial level, more than a million and a half bankruptcy petitions, and 60,000 appeals.<sup>25</sup> No longer solo actors, judges are linked to-

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22. U.S. Const., Art. I, cl. 6. The Constitution also does not use either the terms “Chief Justice of the Supreme Court” or “Chief Justice of the United States.” The later title, now in use, can be found by the second half of the nineteenth century. See Hon. William A. Richardson, *Chief Justice of the United States, or Chief Justice of the Supreme Court of the United States?* (a brief essay by the then Chief Justice of the Court of Claims and reprinted from the N.E. Historical and Genealogical Register, July 1895). Richardson reported that in 1888, Chief Justice Fuller was nominated and commissioned as the “Chief Justice of the United States.” The usage also appears in The Judiciary Act of 1869, ch.22, 16 Stat. 44, Apr. 10, 1869. Its opening provision states that “the Supreme Court of the United States shall hereafter consist of the Chief Justice of the United States and eight associate justices...”

23. As Justice Ginsburg noted, *supra* n. 19, “William H. Rehnquist used to great effect the tools Congress and tradition entrusted to him,” in his role as the leader of the United States judiciary and of the Supreme Court.

24. William Howard Taft, *The Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

25. See Administrative Office of the U.S. Courts, *The Federal Court System in the United States: An Introduction to Judges and Judicial Administration in Other Countries* 42 (2d ed. 2001); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 2004*, Caseload Highlights at 10 (2004).

gether through the Administrative Office (AO) of the United States Courts, created in 1939, and they are supported with educational programs and research provided by the Federal Judicial Center (FJC), chartered in 1967.<sup>26</sup> Their central headquarters is in one of Washington's major new buildings, named after Justice Thurgood Marshall and located across from Union Station. The day-to-day management of the entire judicial enterprise and its \$5.4 billion budget falls to the director of the AO.<sup>27</sup>

But it is the chief justice of the United States who has the power to appoint and to remove the director of the AO,<sup>28</sup> and it is the chief justice who serves as the permanent chair of the Board of the Federal Judicial Center,<sup>29</sup> who presides at the meetings of the Judicial Conference, who (upon consultation with others) selects the 250 people who sit on the twenty-four committees of the Judicial Conference, and who gives annual addresses to the nation about the administration of justice. This charter to the chief justice began to take shape through congressional responsiveness to the concerns of Chief Justice Taft. In 1922, Congress created the forerunner of what is now called the Judicial Conference of the United States,<sup>30</sup> the policymaking body of the federal judiciary.

Because it may be hard to grasp the import of the role played by the administrative apparatus of the federal court system, a bit more detail about its evolution is in order. Initially a group of eight senior circuit judges were asked to "advise" the Chief Justice about the "needs of his circuit and as to any matters in respect of which the administration of justice in the courts of the

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26. See Act of Dec. 20, 1967, Pub. L. No. 90-219, ch. 42, §620, 81 Stat. 664 (1967); Russell R. Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 L. & Contemp. Probs. 31 (1988), and "Baby Judges School" *Jump Starts Learning Process*, 37 The Third Branch: Newsletter of the Federal Courts 1 (Aug. 2005).

27. See 28 U.S.C. §601.

28. See 28 U.S.C. §601 (stating that the AO is to be "supervised by a Director and a Deputy Director appointed and subject to removal by the Chief Justice of the United States, after consulting with the Judicial Conference.").

29. See 28 U.S.C. §621 (providing that the Chief Justice "shall be the permanent Chairman of the Board").

30. See Act of Sept. 14, 1922, Ch. 306, §2, 42 Stat. 837, 836 (creating a Conference of Senior Circuit Judges "to advise [the chief justice] as to the needs of [each] circuit...and the administration of justice"). In 1937, the Act was amended to include participation by the chief judge of the United States Court of Appeals for the District of Columbia, and in 1948, the Conference of Senior Circuit Judges was renamed the Judicial Conference of the United States. See Act of June 25, 1948, ch. 646, 62 Stat. 902, now codified at 28 U.S.C. §331 (2000).

United States may be improved.”<sup>31</sup> From my reading of the transcripts (stored in the National Archives) of the yearly meetings during the early years, I learned that the Conference discussion consisted of oral reports from the senior circuit judges. They described how the individual judges with whom they worked were (or were not) managing to stay abreast of the work, as well as whether to request more judgeships. Topics ranged from better salaries, facilities, and supplies to concerns about rules of procedure, sentencing laws, and the need to provide indigent defenders with lawyers.<sup>32</sup>

By mid-century, the Judicial Conference took on its current form, with district court judges included.<sup>33</sup> Today, with the chief justice presiding, the Conference has twenty-seven members. By statute, each circuit sends the chief judge of its appellate court, as does the Court of International Trade, and each circuit elects a district judge for a term.<sup>34</sup> Over the decades and influenced by the various chief justices, the Conference has enlarged its own agenda. While it often used to decline to comment on matters related to pending legislation by noting that certain issues were “legislative policy” and therefore inappropriate for judicial input, the Conference now takes positions regularly on an array of proposals. Beginning during the tenure of Chief Justice Earl Warren and then expanding significantly under Warren Burger and William Rehnquist, the Conference has become an important force.

As may be familiar to those who work on the Hill but less obvious to the American public, the judiciary functions in many respects like an administrative agency, seeking to equip itself with the resources needed to provide the service—adjudication—that the Constitution and Congress require. Further, during the last half century, the federal courts have also become an educational institution teaching judges about how to do their job, a research center on the administration of justice, and an agenda-setting organization—articulating future goals and plans. In addition to an Executive Committee, the Conference’s committees cover topics that range from technology to criminal justice. The Conference opines on legislation from security and court construction to proposed new civil and criminal jurisdiction for the federal courts.

The chief justice is the presiding officer of this entire apparatus and has the ability, through a host of discretionary judgments, to shape the institutional

31. Act of Sept. 14, 1922, §2, *supra* n. 30.

32. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924 (2000).

33. District judges became a part of the Conference in 1957. See Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476 (codified at 28 U.S.C. §331 (2000)).

34. See 28 U.S.C. §331.

decisions of “the federal courts.” For example, in 1991, under Chief Justice Rehnquist, the judiciary created its own Office of Judicial Impact Assessment to undertake the difficult task of anticipating the effects of proposed legislation.<sup>35</sup> In 1995, after convening a special committee on Long Range Planning, the Conference issued a *Long Range Plan for the Federal Courts*, a first-ever monograph making ninety-three recommendations about the relationships among state, federal, and administrative adjudication and about the civil and criminal dockets of the federal courts.<sup>36</sup> The *Long Range Plan’s* recommendations included asking Congress to have a presumption against enacting any new rights for civil litigants, if those actions were to be enforced in federal court, as well as a presumption against prosecuting more crimes in federal courts.<sup>37</sup>

Further, under the leadership of the chief justice, the Judicial Conference may decide to offer its views on pending legislation even though, if the legislation is enacted, judges may be required to preside on cases calling the legality of a particular provision into question. For example, in the early 1990s, when an initial version of the Violence Against Women Act (VAWA) was introduced, the Judicial Conference created an Ad Hoc Committee on Gender-Based Violence. Appointed by the Chief Justice, the Committee studied the proposed statute, which included a provision for a new civil rights remedy to be made available in federal court to victims of gender-motivated violence. The judiciary’s Ad Hoc Committee recommended opposition—which became official federal judicial policy as reported by the Chief Justice in the early 1990s.<sup>38</sup>

After the proposed legislation was modified (in part in response to the concerns raised by judges) and its scope narrowed, the Conference took no posi-

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35. That process proved complex and controversial in light of the challenges of estimating effects of not-yet enacted laws and of assessing how to count the costs and benefits afforded by enhancing access to the courts. *See generally* Conference on Assessing the Effects of Legislation on the Workload of the Courts: Papers and Proceedings (A. Fletcher Mangum ed., 1995).

36. Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (Dec. 1995), reprinted in 166 F.R.D. 49 (1995). The Conference formally adopted the ninety-three recommendations but did not specifically approve the commentary of the drafting committee.

37. *See id.* at 83 (Recommendation 1); *id.* at 88 (Recommendation 6); *id.* at 84 (Recommendation 2).

38. *See* William H. Rehnquist, *Chief Justice Issues 1992 Year-End Report*, 24 Third Branch 1, Jan. 1991 (objecting that the proposed private right of action was too “sweeping”).

tion on the propriety of enacting the civil rights remedy but supported other aspects of the legislation including educational efforts.<sup>39</sup> In 1994, at the behest of some forty state attorneys general and many others, Congress enacted the Violence Against Women Act, including its provision of federal jurisdiction (supplemental to that available in state courts) giving civil remedies to victims of gender-motivated violence. Thereafter, and again exercising his discretionary authority, the Chief Justice continued his criticism of VAWA. In 1998, the Chief Justice commented in a speech before the American Law Institute that the legislation raised grave problems of federalism. He cited VAWA (as well as other recent statutes) as inappropriate expansions of federal jurisdiction. In his view, “traditional principles of federalism that have guided this country throughout its existence” should have relegated these issues to state court.<sup>40</sup> In 2000, the Chief Justice wrote the majority opinion that ruled, five to four, that Congress lacked the power under the Commerce Clause to confer that form of jurisdiction on the federal courts.<sup>41</sup>

In addition to guiding the Judicial Conference, which adopts formal policy through voting, the chief justice has an independent platform from which to speak. William Howard Taft and his successors went regularly to the American Bar Association and to the American Law Institute to give major addresses on their views of the judiciary’s needs and priorities. That tradition continues.

In the 1980s, Warren Burger initiated another practice—providing annual “state of the judiciary” speeches that are released to the nation. Chief Justice Rehnquist followed suit, beginning each new year by setting out agendas and themes. In that capacity, Chief Justice Rehnquist regularly spoke about the values of judicial independence. Upon occasion, he criticized the Congress or the Executive for engaging in behavior that, he believed, suggested that the coordinate branches of government did not sufficiently appreciate the centrality of an independent judiciary to a thriving democracy.

Yet another aspect of the powers of the chief justice is important: the person holding that position has the authority to select individual judges to serve

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39. See Administrative Office of the U.S. Courts, Report of the Proceedings of the Judicial Conference of the United States 28 (1993).

40. See William H. Rehnquist, *Remarks at Monday Afternoon Session*, in Am. Law Inst., 75th Annual Meeting: Remarks and Addresses, May 11–14, 1998 at 13, 17–18 (1998) (also citing bills on juvenile crime, the Anti-Car Theft Act of 1992, the Freedom of Access to Clinic Entrances Act of 1994, and the Child Support Recovery Act of 1992).

41. See *United States v. Morrison*, 529 U.S. 598 (2000).

on specific courts. Rather than using a system of random assignment (for example, staffing a court by assigning sitting judges whose names are drawn by lot), Congress has endowed the chief justice with the power to pick individual judges to sit on specialized tribunals.

Specifically, the chief justice appoints the seven judges on the Judicial Panel on Multidistrict Litigation<sup>42</sup> (with authority to decide whether to consolidate cases pending around the country and to centralize pretrial decisionmaking in a judge selected by that panel). The chief justice also selects the eleven judges who sit for seven-year terms on the Foreign Intelligence Surveillance Act Court (FISA) which, since 1978, has approved of more than 10,000 government requests for surveillance warrants.<sup>43</sup> The chief justice also has the power to select the five judges who constitute the Alien Terrorist Removal Court, chartered in 1996 to respond when the Department of Justice filed cases seeking to deport legal aliens suspected of aiding terrorists.<sup>44</sup> As a result of these various statutes, according to Professor Theodore Ruger, Chief Justice Rehnquist made “over fifty such special court appointments, filling more federal judicial seats than did every individual United States President before Ulysses S. Grant.”<sup>45</sup>

In sum, the chief justice is not only the symbolic leader of the federal judiciary. That person also has a number of specific powers and a good deal of practical authority. The chief justice is the most powerful individual in the entire federal judicial apparatus. Time and again, chief justices have proven to be the judiciary’s most effective lobbyists, the judiciary’s most visible spokespersons, and the nation’s most important judicial leaders.

## Democratic Constitutional Responses

The repertoire of powers of the chief justice is stunning. The role entails authority significantly different from that of jurists on courts. Judges on appellate courts work collectively; they must persuade others of the correctness of their views in order to prevail. Both constitutional and common law tradi-

42. See 28 U.S.C. §1407(d).

43. See 18 U.S.C. §1803(a),(b),(d) (2004) and Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* n. 20, at 365–68.

44. See The Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, Apr. 24, 1996, 110 Stat. 1214, codified at various parts of Titles 8, 18, 28, 42.

45. Ruger, *The Judicial Appointment Power of the Chief Justice*, *supra* n. 20, at 343 (footnote omitted).

tions mandate openness in courts. Most decisions are explained in reasoning available to public scrutiny and then revisited as new cases arise. In contrast, the administrative powers of the chief justice are neither officially shared nor constrained by obligations of accounting.

Further, these many grants of power contrast sharply with the authority of other executive officials. Presidents have term limits. Heads of independent agencies generally do as well. Currently, however, the chief justice has lifetime consolidated authority over the administration of both the Supreme Court and the lower federal courts and does not have legal obligations to share that power with other jurists nor to explain the decisions made.

A ready rationale supports long terms of authority for judges, who need insulation from political retribution when ruling on cases that result in judgments likely to be opposed by interests both public and private. But no parallel need exists for insulating the administrative authority of the chief justice to the same extent. Whether turning for models to high level cabinet positions, agency heads, or corporate executives, limited terms are the norm. Indeed, managerial theorists argue that turnover is reinvigorating, helping actors within institutions to revisit and to revitalize their practices.

At the level of policy, then, structural interventions, to enable more people to take on the role of chief justice, have appeal. Several options exist. One approach is age limits, with a mandate that a person holding the office who becomes sixty-five, or seventy or seventy-five, must leave that position. The concern, however, is that such a rule would enable gaming, via appointments of unusually young people to the position. Another option is for the chief justiceship to rotate from one justice to another on a five- or seven-year term—long enough to gain expertise but not so long as to have too much power reside in one person. The rotation could occur by seniority, by a mixture of age and seniority (such as in the lower courts, discussed below) or by election by other justices (such as on some state courts).

Congress could also create economic incentives for a person to resign the position voluntarily. As Professor Albert Yoon has detailed,<sup>46</sup> the current federal judicial pension system prompts some judges to take “senior status” but to continue to serve. Congress could, in contrast, provide significantly better pension benefits to chief justices who serve for no longer than a set period (say seven years). Economic models could assist in fashioning an optimal intervention, just as they have encouraged some universities to offer packages of

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46. See Yoon, *Understanding Turnover*, *supra* n. 1 (finding that the availability of pension rights is a key variable in a lower court judge’s decision to take senior status).

benefits and salary that have prompted tenured professors to take early retirement. Were special pension rights to vest only if a person served a fixed period, then those for whom money mattered would likely resign to create a vacancy. But the structural impact of such a reform could depend upon an individual's economic resources, with those of great means not as readily affected by a monetary reward for early retirement.

Another model already exists within the federal system—one that relies on a system that mixes seniority with term limits for the term of service of chief judges of the lower federal courts. In 1956, a committee of the Judicial Conference of the United States began a study on the chief judges of the lower courts. A survey revealed that, on average, chief judges of the circuits were about seventy-two years old, and on average about sixty-four at the district court level; the average length of service about eight and a half years. The Conference concluded that while many judges of older years did “excellent work,” the “toll of years has a tendency to diminish celerity, promptitude, and effectiveness.”<sup>47</sup> The Conference proposed that Congress enact legislation to “relieve chief judges of the circuit and district courts from their administrative duties upon reaching the age of 75, so that they may devote their entire time to the lawwork of the courts and not to the administrative details.”<sup>48</sup> The proposal was argued to be constitutional—for a “distinction is made between the judge in his judicial capacity and in his administrative capacity,”<sup>49</sup> and that what was being limited were the administrative tasks. With support from the President, the Department of Justice, and the Judiciary, the provision became law.

In the 1970s, in a report from the Commission on the Revision of the Federal Court Appellate System: Structure and Internal Procedures (nicknamed the Hruska Commission in honor of its chair, Roman Hruska), problems were noted with a straight seniority system—that no account was taken of the abilities of an individual for administration.<sup>50</sup> Rejecting election by one's peers as politicizing the decision, the Hruska Commission recommended that a chief judge serve a maximum of seven years and only one term. The results of these proposals can be found in the statutes that provide for chief judges of both trial and appellate courts to be those persons “senior in commission” who are

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47. Courts, Chief Judges, Relinquishment of Office at Age 70, S. Rep. No. 85-1780 at 3 (1958).

48. *Id.* at 1–2.

49. *Id.* at 3.

50. Commission on the Revision of the Federal Court Appellate System: Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 274–275 (1975).

sixty-four or under, have served for one year or more as a judge, and have not previously been the chief judge; such persons then have a seven-year term.<sup>51</sup>

The next question is that of legality. I do not believe that the sparse text of the Constitution—referring only to the chief justice in the context of the role of presiding at the impeachment trial of a President—supports a grant of unending power to the chief justice for all the many tasks that have now become part of the repertoire of that role. Rather, the chief justiceship as we have come to know it is not a creature of the Constitution but of Congress. The legislature is the body that endowed that office with the presiding role at the Judicial Conference and with the power to assign sitting judges to special courts, and it is the legislature that located the power to promulgate rules of practice and procedure with the Court. Thus, the legislature can—and should—revisit these grants of power, both by rewriting specific statutes (for example to provide that judges of specialized courts like the Foreign Intelligence Surveillance Act Court are chosen through mechanisms such as random selection from various circuits rather than by the chief justice) and by crafting a new regime of term limits and pension incentives that reduce the length of service.

Let me pause for a moment to expand on the legal argument that Congress could intervene—by addressing the likely objections. I have already noted that I do not believe a strong argument resides in the constitutional text, especially if a statute fixing term limits provided for an automatic extension were the chief justice's term to end during an ongoing impeachment trial of a president. The better argument against a term limit for the chief justice would couple the idea that serving “during good Behaviour” means life tenure with the practice that has emerged for the chief justiceship. The President nominates a chief justice, and the Senate holds a separate confirmation hearing, even when the individual is elevated to the position from within the Court (as was the case with Chief Justice Rehnquist). The claim would be that this custom is not optional but constitutionally compelled. That position might be bolstered by an argument made from the “Appointments Clause,” with its mandate to the President to appoint “Judges of the supreme court,”<sup>52</sup> while the appointment of “inferior Officers” may be organized by Congress. Further, while I have noted the absence of a challenge to the statutory term limits for the lower court chief judges, the rejoinder would be that those roles are not mentioned at all in the Constitution. Finally, the view could be that any current chief justice has been vested with that role, making it unalterable.

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51. 28 U.S.C. §45 (chief judges, circuit courts); 28 U.S.C. §136 (chief judges, district courts).

52. U.S. Const., Art. I, §2, cl. 2.

The responses are straight-forward. The first is that so long as the person who has had a chief justiceship continues in office as an Article III jurist, the obligation to ensure service during good behavior has been fulfilled. A subsidiary argument—joining others in this volume claiming that term limits are constitutionally permissible for all of the justices—is that the relevant constitutional texts are sufficiently capacious, permitting statutory interventions. As noted, the Constitution does not directly address the question of what “good Behaviour” means. The academic inquiry tends to be sparked by events. For example, when debating the lawfulness of efforts to oust Justice William O. Douglas, Professor Raoul Berger traced the phrase “holding their offices during good Behaviour” to the Act of Settlement of 1701 (which protected the independence of English judges by granting them tenure “as long as they conduct[ed] themselves well, and provided for termination” only through a formal request by the Crown of the two Houses of Parliament) as well as to earlier English traditions.<sup>53</sup> Professor Berger argued that Congress had the power to define a breach of good behavior to include more than a “high crime and misdemeanor,”<sup>54</sup> while others disagreed.

A similar debate about the flexibility of Article III took place in the late 1970s, when members of Congress considered how to impose sanctions short of impeachment on Article III judges and how to facilitate the retirement or removal of judges too disabled to work.<sup>55</sup> A statute, the Judicial Conduct and Disability Act of 1980, followed thereafter and has survived a few challenges to its constitutionality.<sup>56</sup> Moreover, the congressional enactment of statutes providing for term limits for the chief judges of the trial and appellate courts have generated little debate.

Moreover, “constitutionality” depends in part on the interpretative stance of the person undertaking the analysis, and the doctrinal developments of Ar-

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53. Raoul Berger, *Impeachment of Judges and “Good Behavior” Tenure*, 79 Yale L.J. 1475 (1970).

54. *Id.* at 1530. See also Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 870 (1930); Note, *Removal of Federal Judges: A Proposed Plan*, 31 Ill. L. Rev. 631 (1937).

55. See S. Rep. No. 96-362 (1980). See generally Stephen B. Burbank, *Procedural Rule-making Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. Pa. L. Rev. 283 (1982); Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375 (1993).

56. See Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2034 (codified as amended in various sections of 28 U.S.C., including §372. A challenge, claiming the act was unconstitutional, was rejected in *Hastings v. Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1995), *cert. denied*, 477 U.S. 904 (1986).

ticle III have not been notable as instances in which forms of originalism or textualism have had much sway. Rather, a majority of the Court has repeatedly and decidedly been functionalist, as jurists read Article III to permit devolution of judicial power through statutory grants of power to magistrate and bankruptcy judges sitting inside Article III but lacking life tenure.<sup>57</sup> Through such reinterpretation, much of the “judicial Power of the United States” (words of the Constitution that could be read to limit Congress to creating courts staffed only by life-tenured judges) has been delegated to non-life-tenured jurists in Article III courts and in agencies.<sup>58</sup> Thus, if the person who served in the position of the chief justice did so for seven years (to parallel the length of service described in the statutes addressing the chief judges of the district and appellate courts), retained the status of a federal judge or justice but not the chief justiceship, that person’s tenure is well protected. Further, Congress should be sure that the term provided is not so short as to run afoul of concerns about undue interference,<sup>59</sup> as well as to be sure that reappointment to the position—by either the president or the Congress—is unavailable. Thus the statute would protect the values of judicial independence while also cabining the administrative authority of the chief justice.

Turning to the Appointment Clause issue, a textual response is that while the president is instructed to nominate “Judges” of the Supreme Court, no mention is made of a chief justice. Thus the custom of separate nominations and hearings is just that—a practice, not a constitutional mandate. To protect against other constitutional concerns, Congress could enact such a statute with prospective application, such that a current chief justice would not lose that seat. Moreover, given that the chief justice has a higher salary than other justices, Congress would need to keep the salary at the same level even after the post is relinquished to avoid arguments that the constitutional mandate against diminution of salaries would be breached. (Alternatively, Congress could abolish salary distinctions, again prospectively.)

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57. See, e.g., *United States v. Raddatz*, 447 U.S. 667 (1980); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

58. I map the doctrinal revision as well as the boundaries remaining in Resnik, *Inventing the District Courts*, *supra* n. 17, at 625–648.

59. See, e.g., *Starrs v. Ruxton*, 2000 J.C. 208 (H.J.C. 1999) (relying on Article 6 of the European Convention on Human Rights and Fundamental Freedoms to conclude that too short a term of office and a term dependent upon the prosecution for reappointment is a violation). Some Canadian cases address a comparable concern. See *Reference re. Territorial Court Act (N.W.T.) S.6(2)* (1997), 152 D.L.R. (4th) 132 (N.W.T. Sup. Ct.).

I should add that the source of change need not come only from Congress. The chief justice could decide to depart from many of the practices that I have described by, for example, asking other judges or justices to take on various tasks or by going to Congress to seek revision of some of the statutory charters that run to that office. The chief justice could also voluntarily step down from that position, thereby opening the slot for another sitting justice.

## Democratic Principles and Limited Terms

In many parts of the world, debate is underway about how to select judges; both Canada and Great Britain are examples of old countries making new rules about their processes. In those discussions, it has become plain that as principles of democracies themselves evolve, methods for selection of judges that were once perceived to be legitimate have to be revisited. Over recent decades in the United States and elsewhere, judicial selection processes have begun to intersect with an emergent theme in democracy theory—that all kinds of people are entitled to participate as political equals and that access to judgeships ought to be more fairly distributed across groups of aspirants. In eras when only men had juridical authority and in countries in which only whites had legal standing, judges were drawn exclusively from those pools.

In the contemporary world, where democratic commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary—if all-white or all-male or all-upper class—becomes a problem of equality and legitimacy.<sup>60</sup> Given the history of exclusion, diversity has recently become a dimension of contemporary selection concerns, worldwide. For example, by statute, Canada has a set-aside to ensure that its highest court includes three justices from Quebec and hence has experts on the civil law, as well as some justices likely to be francophones.<sup>61</sup> Conventions have also developed in Canada that assume some geographical diversity, with more justices coming from the provinces with the highest populations than from other provinces.<sup>62</sup> Similarly, the Treaty of Rome that created the International Criminal Court calls for countries nominating judges to “take into account”

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60. Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *Has Liberalism Failed Women?: Assuring Equal Representation in Europe and the United States* 19–38 (Jytte Klausen & Charles S. Maier eds., 2001).

61. See Supreme Court Act, R.S.C. 1985, S-19, s. 6 (Can.).

62. The expectation is that three of the Supreme Court judges come from the Province of Ontario, with one coming from the Western and Northern Provinces and the other from

that among the judges serving should be individuals expert in either criminal law or relevant bodies of international law, that those selected provide “representation of the principal legal systems of the world,” “equitable geographical representation,” and “a fair representation of female and male judges.”<sup>63</sup> Moving inside the United States, the Constitution of Alaska requires that a Judicial Council solicit and screen applicants and that consideration be given to “area representation.”<sup>64</sup>

Parallel concerns require revisiting the question of the length of service of judges. Not only would shorter terms enable a more diverse set of individuals to serve but renewed sensitivity to longstanding democratic premises about the concentration of power in individuals requires cabining the length of service of jurists. Built into adjudication is the capacity for revision through the case law method. As the composition of judiciaries changes, the wisdom of a particular rule of law can be tested, in that new members of high courts may not adhere to its premises. But that very capacity to generate change depends on limiting the length of service of individual, and potentially too-powerful, justices. The chief justice is one such position that demands special attention, but as is demonstrated throughout this volume, the problem of serving too long spans the entire Article III system.

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the Maritimes. See About the Supreme Court of Canada <<http://www.scc.csc.gc.ca/About-Court/judges/curjudges>>.

63. See Art. 36, §8(a) of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (entered into force July 1 2002). The Treaty requires that the Court consist of at least eighteen judges, (see Art. 36(1)) with no two being “nationals of the same State.” *Id.* at Art. 36 (7). Article 36(3) calls on state parties to nominate persons either with “established competence in criminal law and procedure” or with “established competence in relevant areas of international law such as humanitarian law and the law of human rights.” Nominees are then put onto two lists, representing criminal law and international law (a nominee can be listed on both). Art. 36(5). Then, the “Assembly of State Parties” makes selections through secret ballots. Art. 36 (6). In addition to calling on state parties to take into account the need for “fair representation of female and male judges,” the Treaty also calls for taking into account the need for judges with “legal expertise on . . . violence against women or children.” But no enforcement mechanism is specified. See generally Cate Steins, *Gender Issues*, in *The International Criminal Court: The Making of the Rome Statute* 357–390 (Roy S. Lee ed., 1999).

64. Alaska Const., Art. 4, §§5, 8.