Regularizing Supreme Court Appointments

By Daniel J. Meador

The uneven allocation of appointments to the United States Supreme Court is striking. In one term President Taft appointed six Justices, while Carter in one term appointed none. Taft in one term made twice as many appointments as Reagan did in two terms. Other high appointing presidents were Harding with four, Truman four, Eisenhower five, and Nixon four. Some presidents appointed as few as one or two. Not surprisingly, in view of his long tenure, Franklin Roosevelt appointed eight. He and Eisenhower and Taft each appointed a majority of the Court. The upshot of this disparity is that some presidents exert strong, even controlling, influence over the Court for many years, far beyond their own terms, while others exert little or none. This is neither jurisprudentially nor politically desirable.

The disparity comes about because a president can make an appointment only when a vacancy on the Court occurs through a Justice's death or voluntary retirement. This is so because the Constitution guarantees the Justices tenure "during good behavior," thought to mean life tenure, although the meaning of "good behavior" has never been authoritatively decided. The number and timing of presidential appointments thus depends on unpredictable and unregulated events.

Another undesirable consequence of unregulated life tenure is the infrequent turnover in the Supreme Court's membership. This in turn results from a combination of greatly lengthened life spans and the Justices' reluctance to retire. The first five presidents appointed a total of 19 Justices. Thirteen did not reach their seventieth birthday, and three did not even live to 60. The average age at death was 67.8 years.

That picture of longevity is the backdrop against which the Constitutional framers provided for tenure “during good behavior.”

It contrasts sharply with the late twentieth century picture. The five post-World War II presidents appointed a total of 17 Justices. Their average age at death was 79, more than 11 years longer than that of the earliest Justices. The 1954 Term is illustrative of that period. No member of the Court that year died before the age of 72. Two-thirds of those earliest Justices died at an age before any one of the 1954 Justices died. The average age at death was 82.1, over 14 years longer than the average for those early Justices.

Lengthened life spans have meant lengthened service on the Court. Among the 19 earliest Justices, the average length of service was 15.6 years. Among the Justices in the 1954 Term, the average service was 20.1 years. By the 1970 term, The average length of service was 26.3 years, more than 10 years longer than the average of the early Justices.

Lengthened life spans result in lengthened service because of the Justices’ reluctance to retire. Within the Court there appears to be a culture of non-retirement, a zeal to cling to office as long as possible. Justice Souter’s recent retirement at 69 is a rare exception. The combination of longer life and unwillingness to retire means that “good behavior” has stretched out in time to a point well beyond what could have been foreseen in 1787.

This points to another problem—the real possibility of diminished capacity, either mental or physical or both, that comes with advancing age. This has occurred and no doubt will recur among Supreme Court Justices, just as it does among the population in general. Justice William O. Douglas is the most conspicuous late twentieth century example. Advancing age would not be a problem if the Justices took retirement in line with the general American pattern. According to government statistics, the average retirement age for American men and women is approximately 63; it has been getting younger. The trend is just the opposite on the Supreme Court. The average age of the six Supreme Court Justices who retired during the 1980s and 1990s (Blackmun, White, Marshall, Brennan, Powell, Burger), at the time of retirement, was 81 years, nearly 20 years beyond the average for their fellow citizens. Even terminal illness at age 80 did not lead Chief Justice Rehnquist to retire; he died in 2005, still in office. This tendency to remain in office regardless of the Justice's condition makes it likely that mental slippage will have begun, sometimes progressing to a serious stage. A problem of this sort has occurred in every generation throughout the Court's history.

Impairment is made even more likely in the future by two aspects of working conditions in the Court today that are different from those of a few decades ago. One is the Court's reduced workload. Over the last two decades there has been a substantial decrease in the number of cases the Court annually decides. The changed picture is vividly painted by Phillip Lacovara, in the December 2003 issue of *The American Lawyer*. As pointed out there, the Court in the 1976 Term issued 154 opinions. After the 1980s the number of dispositions on the merits began steadily to decline. In the 1992 Term The Court decided 107 cases. The number dropped to 92 in the 1997 Term. Then it dropped to well below 90 per term and then to below 80. Lacovara says the Court today is deciding barely 20% of the cases it once decided.

While decisions on the merits have substantially decreased, the amount of help provided the Justices has doubled. Each Justice now has four law clerks, up from two. With Justice Black in the 1954 Term, my one co-clerk and I prepared a memorandum on every certiorari petition. Now that work is performed for seven Justices in a "cert pool," relieving most of the clerks in those chambers of that work. Justice Black himself wrote the original draft of his opinions. His clerks came into the opinion-writing process only as research assistants and editors. Today, at least in several chambers, it is common practice for clerks to prepare initial opinion drafts, with the Justices doing the editing, a reversal of roles.

The combination of a reduced docket, lightened opinion drafting, and more help makes it possible for a member of the Court to carry on into a more advanced age than would have been likely with a heavier workload and less help. The problem will become more pronounced. Life expectancy is now 78 years (up from 47 in the founding generation), and predicted to increase three months every year. Advances in medical science make it it ever more possible for a person to continue functioning minimally even though in substantial physical or mental decline. One can imagine a future Justice, someone like the late Senator Strom Thurmond, continuing to sit until his 100th birthday, propped up by modern medicine, with four law clerks writing his opinions.

It is worth noting that in other western democracies devoted to the rule of law judicial tenure for life does not exist. On the Austrian Constitutional Court, judges hold office until the age of 70. On the Italian Constitutional Court, the judges serve terms of nine years; on the Federal Constitutional Court of Germany the terms are 12 years. On the newly established Supreme Court of the United Kingdom judges are to serve 12 year terms. If there is value in lifetime service , one would think that at least one other nation would be attracted to the idea, but none has been. Nor have 49 states in the American Union. Life tenure is characteristic of royalty, not of governing institutions in a democratic society.

Apart from the problem of mental or physical impairment, there is something unseemly about decisions affecting the lives and fortunes of American citizens being made by persons nearly all of whose contemporaries, if not deceased, are disengaged from the active workforce. Between the ages of 75 and 79, only 7% of men and 3% of women in the United States are actively employed. The symbolism is not good, even if no Justice is in fact impaired. There is something to be said for having governmental decision makers more closely connected in age to the bulk of the active population governed by their decisions.

Detachment from society is a constant threat for the Justices. In the seclusion of their marble palace, surrounded by an abundance of near sycophantic help, the real world can seem far away. That sense of detachment is likely to increase as time passes in that environment and the Justices grow older and ever more distant from the employed generations and from the political forces that put them on the bench.

Continuity and stability in the membership of a court of last resort are, of course, important, but so is a gradual infusion of new blood. An appropriate balance needs to be maintained by the rate of turn-over among the judges. A turn-over rate of some 26 years, approaching almost twice that of the Court in its early years, is, in the view of many Court observers, too protracted, carrying the Court too far away from the country's active generations and allowing too infrequent infusions of fresh blood.

Currently pending before the country for discussion is a proposal to deal with all three of these problems: unequal distribution of appointments among presidents, infrequent turn-over in the Court's membership, and mental or physical decrepitude. The proposal is that Congress enact a statute requiring the appointment of a Justice every two years, i.e., one in every Congress. If this results in more than nine Justices, the nine most junior in service would act to decide cases on the merits. Those more senior would continue in office to serve with the decision makers when one is recused or unable to act, to participate in the Court's procedural rule making for the lower federal courts, and to sit on the courts of appeals. Once in place, this arrangement would mean that a Justice would serve eighteen years in a case-deciding role and then move into a senior role. Life tenure is assured but with shifting duties. In the view of many Court observers, eighteen years strikes an appropriate balance between a desirable continuity and rotation of decision makers more often than every quarter century. Judicial independence is unaffected.

Contrary to what is asserted by some, this arrangement would not require a Constitutional amendment. It would simply be an exercise of Congressional authority to define the duties of the office of Justice, an authority Congress has exercised from the beginning. In the first Judiciary Act, passed in 1789, Congress specified that the Justices sit on the trial courts in all the circuits and come together from time-to-time to act in an appellate capacity. Those duties lasted for more than a century and then were changed by Congress to provide that the Justices act only as an appellate tribunal. So now Congress, without disturbing life tenure, can redefine the Justices duties to fit the circumstances of our time.

By regularizing appointments, this proposal would insure that every president could place at least two Justices on the Court, thus evening out appointments across administrations, preventing any president from having a disproportionate impact on the Court's composition. It would provide a gradual infusion of fresh talent. It would almost certainly obviate the problems of decrepitude, as it is unlikely that a Justice would become incapacitated within an eighteen year span. If that did occur, there would loom a finite limit to the Justice's service as a case-decider.

There is yet another benefit the proposal would have: it would remove the incentive of presidents to look for nominees as young as possible. Presidents have been doing this in recent times with the hope of perpetuating their influence long into the future. The result has been the foregoing of more mature prospects for the Court, persons who would have been excellent Justices but were deemed too old. With no more than eighteen years in a case-deciding role, that consideration would no longer be paramount.

That limited eighteen-year prospect might also have the effect of dampening to some extent the intense partisanship that has infused the Senatorial confirmation process in recent times. No longer would the ominous incantation of "thirty years or more" be heard from the opposition. Also, opponents of the nominee would know that the next president—perhaps one of their own—would have at least two appointments. With confirmation hearings every couple of years, becoming more routine, they just might be less likely to be the kind of overly dramatic, once-in-a-decade show that they have become.

Congress has not focused attention on the Supreme Court's functioning since the ill-fated "court packing" plan more than seventy years ago. It needs to do so now.