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## There goes the judge: How do we get rid of whacked-out judges?

February 9, 2007

Dear Cecil:

Many judges, including U.S. Supreme Court justices, are given lifetime appointments. This presents obvious issues since judges can do a lot of damage if they go off the deep end. How do we get rid of whacked-out judges? Looking at it from the other side, what happens if a Supreme Court judge is greatly disliked by, say, the president and Congress -- can they do something to give him/her the boot?

— Frauendorfer, via email

Touchy question. On the one hand, sure, you want to be able to do something about a judge who shows up for work in a gorilla suit or gives the chair to excise-tax protesters. On the other hand, only frothing partisans (of whom admittedly this country has no shortage) want judges getting the heave for not toeing the party line.

Lifetime appointments aren't just for Supreme Court justices but for all federal judges. Under Article III of the Constitution, they "hold their offices during good behavior." For the most part that means till death, resignation, or retirement, but judges who misbehave badly enough can be removed from office by impeachment, same as for the president and "all civil officers of the United States." To judge from the impeachment record, such misbehavior is pretty rare. To date only 17 federal officeholders have had impeachment proceedings started against them in the House of Representatives; of the 15 tried by the Senate (the other two bailed first), only seven were convicted and removed from office. Thirteen of the seventeen impeachments (and all seven convictions) were of federal judges. Only one Supreme Court justice has been impeached: Samuel Chase, in 1804. Historians agree the charges against Chase were politically motivated; in any case he was acquitted by the Senate.

The fact that impeachment is a time-consuming and expensive process deters abuse, and lifetime appointment is likewise meant to prevent political meddling. The downside is that some judges remain on the job long after they've begun to lose it mentally. Attempts to legislate a mandatory judicial retirement age have gone nowhere. Historically the most effective way to remove an incapacitated Supreme Court judge has been for the other justices to try to get him to quit. According to Cambridge historian David Garrow, Oliver Wendell Holmes, arguably the most distinguished justice the court has had, was convinced by the other judges to retire at age 90 after he became unable to follow cases.

Out-of-it judges, particularly at the highest level, aren't unusual. "The judiciary is the nation's premier geriatric occupation," Judge Richard Posner observed in 1995. Garrow, in a 2000 article bluntly entitled "Mental Decrepitude on the U.S. Supreme Court," finds 18 cases of mental deterioration, stroke, or other forms of mental impairment - just under 20 percent of all Supreme Court justices. Examples: Chief Justice (and former president) William Howard Taft, who served on the court from 1921 to 1930, "really lost his grip" at the end, according to Louis Brandeis. Frank Murphy (1940-1949) was hooked on sleeping pills, hospitalized several times, and thought to be regularly securing illegal drugs. William O. Douglas (1939-1975), had a stroke toward the end of his career, could no longer follow arguments, and spoke in non sequiturs; the other justices reputedly set up an informal arrangement to nullify or ignore his vote. Even after his eventual resignation, he continued showing up at the court building, evidently believing he was still on the payroll. Thurgood Marshall (1967-1991) became disengaged in the 1980s, spending afternoons watching TV and letting his clerks do his work. A 1990 TV interview left some wondering if he'd lost it, and he retired the next year. Chief Justice William Rehnquist (1972-2005) for years took strong medication for back pain that caused him to slur his speech. Hospitalized in 1981, he had hallucinations and other withdrawal symptoms and tried to escape in his pj's. In 2004 he announced he had thyroid cancer but continued to serve as chief justice even though he was clearly not strong enough physically or mentally. The other justices knew he couldn't read the



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materials but continued to pretend he was participating.

Why do justices hang on so long? Partly because they can, and partly because, let's face it, nobody wants to give up one of the world's coolest jobs. Also one of the cushiest - the caseload's lightened considerably over the last few decades, Garrow says, and being surrounded by fawning sycophants must make it easy to think you can still hack it. Some justices - like Marshall, reportedly - also try to wait until their own political party holds the Presidency. The brethren's success in covering up for their doddering peers no doubt largely explains Congress's failure to address the situation, but come on. If Roman Catholic cardinals can't vote for pope after 80, there's no reason to risk having near-senile judges deciding a presidential election.

— Cecil Adams

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