1995

Old People and Good Behavior

L. A. Scot Powe

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Just what was wrong with the Nine Old Men? Their votes? Not taken as a whole, for those included Brandeis.[1] That their judicial philosophies were without redeeming social value? Again it can't be, for those philosophies ran the gamut from Brandeis to Hughes to Sutherland to McReynolds. No, what was wrong with them is that they were old, that they had not left the Court, and that they intended to outlast the new political order. Butler, the youngest of the group over seventy, had been born the year after Appomattox. Their understanding of government and economic collapse stemmed from their experiences as adults with the depression of 1893.[2]

If the Court was aged in 1936, it was more so in 1984, with five Justices having been born during the Roosevelt Administration—that's Theodore. Brennan, Burger, Powell, Marshall and Blackmun knew radio via the crystal set[3] and reached adulthood during either the Coolidge or Hoover Administrations. As the oldest quintet in Supreme Court history, their votes could have (had they not split) determined the Constitutional rules and aspirations for late twentieth century America. What allegedly rational system could place individuals of that age in positions of influence and authority? The answer, straight from the text, is a Constitution that allows judges to continue until they are ready for their graves.

Life tenure (or "during good Behavior" as Article III words it) creates the real possibility of imitating a society like China, where power is wielded by the oldest among it. Even if their minds are every bit as good as they were years before when they

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1. One might (though I would not) condemn him for his vote in *Schecter Poultry Co.* invalidating the National Industrial Recovery Act of 1933.

2. See Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 Harv. L. Rev. 909 (1923) reprinted in Philip B. Kurland, ed., *Felix Frankfurter on the Supreme Court, Extrajudicial Essays on the Court and the Constitution* 119-20 (1970) ("[T]he 'Constitution' which the [Justices] 'interpret' is to a large measure the interpretation of *their own experience* . . . ." (emphasis in original)).

3. So, too, did White, who was born during World War I.

were appointed,[4] there is no good reason in a democracy to vest so much power in a people who are so close to departing the society.

We cannot hold the Framers entirely to blame. Life tenure was the way they defined an independent judiciary (which is the correct objective). For their generation, life expectancy was shorter, and people who viewed public service as a job[5] rather than an opportunity, internalized their own term limits by willingly retiring from public life. Even for the initial generations, however, the Supreme Court was different. Of the first sixteen appointees to the Court (this includes Jefferson's), fully ten stayed on the bench until death. Excluding the flukes of Goldberg and Fortas, the two shortest tenures since the Kennedy presidency were those of Burger and Powell, each of whom stayed until he was almost 80.

No wonder; today Justices enjoy a job that has good pay, high prestige, manageable hours, great vacation opportunities, and no heavy lifting,[6] so they can last longer and longer. And as they age, their formative experiences grow ever more distant from those of the 250,000,000 people whose Constitution they interpret and whose lives they periodically affect. Their age and their views (whether good or not)[7] are costs that we the people ought not and need not bear in order to maintain an independent judiciary. Life tenure is the Framers' greatest lasting mistake.[8]

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4. A highly unlikely (although possible) occurrence. Word processors and ample law clerks can better maintain consistency for Justices than in earlier days, when they had to do their own work.

5. They would have referred to "a sacrifice."

6. Nor circuit riding.

7. Sandy Levinson, who has articulated similar views, observed that Brennan and Marshall held on too long. See Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging"*, 49 Wash. & Lee L. Rev. 339, 341 (1992). In making that claim, which I believe more strongly than he does, Levinson acknowledged that the two were among his heroes. That, I think, is part of the problem. When judicial liberalism can only be defined by octagenarians, something forward-looking has been lost. One would think that someone under seventy might be able to articulate successfully what a judicial liberal should do. And if no one under seventy can, then maybe the breed *should* be extinct.

8. It is, of course, not their only one. Guns, grand jury indictments, and civil juries (the explanations why Black's incorporation theory could not get five votes) are mistakes anyone can find in the Bill of Rights. And even more egregious is giving people living in areas smaller than a respectable Texas ranch two United States Senators. See *The Big Country*, Texas Monthly, Feb. 1985 at 103 ("When a Texas ranch is respectably large, it is invariably likened to Rhode Island. A ranch of 671,360 acres has exactly as much land as Rhode Island; therefore its area should be expressed as 1 RI." The XIT Ranch came to 4.78 RIs.) All the postage-stamp-sized States should be combined into a single real State that could then elect two Senators or, alternatively, if they wish to remain small, they should be limited to a single Senator.

There are at least three interrelated problems with life tenure. First, in Sandy Levinson's words, Justices "have stayed too long at the fair."[9] Their formative adult experiences took place forty years earlier in a society often unrecognizable in the present. It is one thing to elect such individuals to govern, it is another to have them govern because elected individuals approved of them twenty or thirty years earlier. Second, the political order that created their ascendancy (and for which they may have some fond feelings) may also be receding into history. Yet like the Four Horsemen or, alas, Brennan and Marshall, they try to live and serve until that old political order can somehow restore itself (and therefore replace them with younger lawyers of similar ideology). Third, as shown by the Reagan and Bush Administrations, there are incentives for a current governing coalition to appoint youthful justices such that those appointees will have at least thirty probable years of service on the Court. This virtually guarantees that the first and second problems will occur later.

All of the above is likely. None of it is necessary.

If life tenure is the problem and an independent judiciary the goal, then any number of solutions are possible, but the one that jumps out is a nonrenewable eighteen year term[10] with vacancies occurring every two years.[11] The turnover would remain roughly the previous average (2.2 years), but would be less random. A two term president would get four appointments and the Court could not be packed[12] with appointees of a single party unless that party were able to win three consecutive presidencies.

Eighteen years is long enough to learn the job and then do it well, to give independence from the elected branches, and short enough to avoid the unseemly problems that life tenure creates.

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9. Levinson, 49 Wash. & Lee L. Rev. at 341 (cited in note 7).

10. With salary continuing on retirement.

11. Sandy Levinson offered this solution earlier, though he noted that he had borrowed the 18-year notion, and its rationale, from an essay that appeared in the *Wall Street Journal*. He might have offered further reflections on lifetime tenure in this symposium had he not believed it an even greater failing that the electorate does not know who the Secretary of Housing and Urban Development (and his or her cohorts) will be prior to casting a ballot for presidential electors. Is it unfair to wonder why, if the Vice President does not matter to voting behavior, the identity of the cabinet will?

12. I admit that I am assuming no deaths and few unexpected retirements. It is arguable that some Justices might view eighteen-year terms the way John Jay, John Rutledge, and Thomas Johnson viewed their "life" appointments in the 1790s and thus be more willing to exit what might be perceived as a less prestigious Court than has been our experience. It goes without saying that I would run this risk.