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## **SHOWCASE PANEL II: JUDICIAL TENURE: LIFE TENURE OR FIXED NON-RENEWABLE TERMS?**

### **PANELISTS:**

**Prof. Stephen B. Burbank**, *University of Pennsylvania Law School*  
**Hon. Charles J. Cooper**, *Cooper & Kirk, PLLC*  
**Prof. James Lindgren**, *Northwestern University School of Law*  
**Prof. David R. Stras**, *University of Minnesota Law School Law*

### **MODERATOR:**

**Hon. J. Harvie Wilkinson III**, *United States Court of Appeals, Fourth Circuit*

### **PROCEEDINGS**

**MR. MEYER:** Good morning. I'm Eugene Meyer, President of the Federalist Society, and in addition to welcoming all of you, I want to welcome our C-SPAN audience this morning.

To most of you, this won't be a surprise. I have a good report from last night. As you know, we were very honored to have Attorney General Mukasey addressing our banquet. As you also know, very unfortunately, he collapsed toward the end of the speech. He had a good night in the hospital. Everything looks very good. He's expected to be discharged today. So, I wanted to let you all know that.

(Applause.)

**MR. MEYER:** I also want to call on Judge J. Harvie Wilkinson, who's been a longtime friend of the Federalist Society and a longtime judge on the U.S. Court of Appeals for the Fourth Circuit, to moderate this panel.

Judge Wilkinson.

(Applause.)

**JUDGE WILKINSON:** Good morning. I'm delighted to be here. We've got a very serious topic to cover today, and that is whether Supreme Court Justices should continue to enjoy life tenure or whether they should be subject to staggered, non-renewable 18-year terms. I hope nobody broaches the subject of abrogating life tenure for Court of Appeals judges.

(Laughter.)

**JUDGE WILKINSON:** But if they do, that's fair game, too.

Though it's a serious topic, we're going to have a lot of fun with it because we've got a great group of panelists here. I really congratulate the Federalist So-

ciety for assembling some of the people that have given the most thought, their best thoughts on the topic.

It's a pleasure to introduce as our lead-off speaker, Chuck Cooper, who's a founding partner of Cooper and Kirk, and he's certainly one of the premiere Washington attorneys of his generation. You don't have to just take my word for it. The *National Law Journal* named him as one of the ten best civil litigators in the Capital.

Chuck and I first met shortly after his clerkship with Chief Justice Rehnquist, and we served together in President Reagan's Justice Department in the Civil Rights Division. And the issues there were challenging and volatile, and it was there that I became very impressed with Chuck's legal acumen and his marvelous way of dealing with people. Chuck and I became fast friends, and we've just been that way ever since.

Chuck went on from the Civil Rights Division to great things. He served under President Reagan as Assistant Attorney General for the Office of Legal Counsel, and he's a nationally renowned litigator and a principled conservative who has the gift of appreciating and respecting a worth[y] adversar[y] with whom he might not always agree. And whatever topic Chuck addresses, he will do so in a very thoughtful and stimulating fashion.

And Chuck, it's just great to have you here, and thanks for leading off our panel.

(Applause.)

HON. MR. COOPER: Well, thank you very much, Judge Wilkinson. It's an honor, as always, to be reunited with you here on this panel and to join such a distinguished group of scholars.

The title of this panel presents us with a choice, but I don't favor either alternative. Life tenure was designed to free the Supreme Court from the coercive influence of the federal government's more powerful political branches, and it did. But, it also freed the Justices to become tyrants, and in recent times, some of them have. These modern judicial tyrants have, notwithstanding Hamilton's assurances in *The Federalist Number 78*, exercised will instead of judgment, and they have now even come to claim that it is their right and responsibility under the Constitution to do so.

Fixed nonrenewable terms are addressed primarily to concerns stemming from the fact that modern Justices are living longer, and they're serving far longer than the average fifteen-year tenure that prevailed before 1970. But the real problem of life tenure isn't old or infirm Justices; it's willful, activist Justices. And while any limit on the tenure of a bad judge would be an improvement, a fixed nonrenewable term would throw out the good with the bad, cutting short the tenures of the Rehnquists as well as the Brennans.

"The basis on which the whole American fabric was erected" is that the Constitution embodies the "supreme will" of the people and is, accordingly, "a superior, paramount law unchangeable by ordinary means". Therefore, "a legislative act contrary to the Constitution is not law". And to ensure that this "paramount" and

“permanent” law “may not be mistaken or forgotten, the Constitution is written”, and it establishes “a rule for government of courts, as well as of the legislature”.

Now, these words from *Marbury v. Madison* efficiently capture the constitutional rule of law that lies at the heart not only of the doctrine of judicial review, but of our constitutional order. Chief Justice Marshall was echoing Hamilton’s observation in *Number 78* that the Constitution embodies “the intention of the people”, and therefore “must be regarded by the judges as a fundamental law” binding “until the people have, by some solemn and authoritative act, annulled it or changed it”.

The Framers understood that enforcing the rule of law would not be easy. The judiciary would, as Hamilton put it, “be in continual jeopardy of being overpowered, awed or influenced by its coordinated branches”, and “it will require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution.” And so, life tenure was designed to supply the “complete independence”, as they put it, thought necessary to enable the judges to faithfully and firmly enforce the will of the people over the contrary will of legislative majorities.

The problem is that the judiciary’s “complete independence” also enabled the judges to impose the will of the judges over the contrary will of the legislative majorities. The Framers were well aware of that danger. Indeed, Brutus, writing in the *Anti-Federalist*, warned in a famous passage that a life-tenured judiciary would be independent not only of the legislature but of the people too, and in due time “even of heaven itself.”

This independence would enable the judges to interpret the Constitution, as he put it, “according to the reasoning spirit of it without being confined to the word or letter”. And if the power of construing the Constitution “is lodged in the hands of men independent of the people and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to control them but with a high hand and an outstretched arm.”

Hamilton answered that while particular misconstructions may now and then happen, judicial willfulness need not be feared, for Congress’s impeachment power would provide a “complete security against a series of deliberate usurpations”. Well, the threat of impeachment turned out to be no check at all, and everything that Brutus predicted, and more, has come to pass now.

Deliberate judicial usurpations of legislative power occur annually, with each Supreme Court term adding new cases to the bill of particulars. But what Brutus and the Anti-Federalists did not foresee was some unchecked, unaccountable Justices not only would exercise legislative power under cover of constitutional interpretation but would openly claim that doing so is within the legitimate constitutional authority of their judicial office. The original meaning of the words and phrases of the written Constitution are not, according to these judges, binding on courts but rather must give way to the judges’ own notions of “evolving standards of decency” or the “ideal of human dignity” or some similar slogan licensing the judge to impose his will.

Now, this is a relatively recent phenomenon. It began, I think, with Chief Justice Earl Warren. He coined the marvelously liberating phrase “evolving standards of decency.” It was unknown to the U.S. Reports before his time. Warren would often interrupt oral argument with the impatient query, “Yes, yes, counsel, but is it right? Is it good?” And there’s simply no doubt that this was the sole standard that guided his constitutional decisions. Did Chief Justice Warren write a single opinion, or even cast a single vote, that one might have reason to suspect was contrary to the way he would’ve cast it as a legislator?

Now, the same question could be asked of Justice William Brennan, who in a famous 1985 speech ridiculed the search for the Constitution’s original meaning as “little more than arrogance cloaked in humility”. “It is arrogant to pretend,” said Brennan, “that from our vantage, we can gauge accurately the intent of the Framers on application of principle to specific contemporary questions.” He continued, “The ultimate question must be, what [do] the words of the text mean in our time? ... What the Constitution meant to the wisdom of other times cannot be their measure to the vision of our time”. And in our time, the meaning of the constitutional fundamentals is measured, according to Brennan, “by a sparkling vision of the supremacy of the human dignity of every individual”, a vision which can be discerned only through, in his words, “a personal confrontation with the wellsprings of our society.” It was in obedience to that sparkling vision, and in open defiance of the plain text of the Constitution, that Justice Brennan often opined that capital punishment is, under all circumstances, prohibited by the Eighth Amendment.

The situation has not improved much since then. In *Lawrence v. Texas*, the activists on the Court finally got the fifth vote to formally announce that the moral values of the people would no longer constitute a legitimate state interest on which to base social legislation. This is what they said. “The fact that the governing majority in a state has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” The moral values of the Justices, you see, are what matter.

This truth was brought into sharp and searing focus just last term, when five Justices ruled that “evolving standards of decency” required them to outlaw the death penalty for the crime of child rape. The majority’s decision ultimately turned on its “own independent judgment” -- I repeat, its own independent judgment -- that justice, in its words, would be “better served by confining the rapist, and thus preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense.” So, the question of where justice lies, where morality lies, on this issue was not for the people of Louisiana. The Justices will tell them where it lies. Nor is this predicament likely to get any better for quite a while, given what President-elect Obama has said he will be looking for in the judges he will appoint. He has cited Earl Warren as his model judge.

Ladies and Gentlemen, we have come to a time in which the Supreme Court Justices, life tenured and wholly unaccountable, have openly disavowed the constitutional rule of law in favor of the rule of the Justices. And the people have, in Lincoln’s words, “thus ceased to be their own rulers, having, to that extent, practi-

cally resigned their government into the hands of that eminent tribunal.” What manner of freedom loving, self-respecting, sovereign democratic people would abide that?

Reform is not going to come from the Justices themselves. Some measure of accountability must be imposed on them. Life tenure has to go.

Thank you.

(Applause.)

JUDGE WILKINSON: Chuck, thank you so much. And you were up to your usual standards of candor. It is a pleasure to have you here.

Our next panelist is Jim Lindgren, who’s the Benjamin Mazur Research Professor at Northwestern University School of Law. Jim has authored many distinguished writings, and he’s held a number of important academic posts. But for today’s purposes, he, along with Steve Calabresi, are authors of a very influential article, “Term Limits for the Supreme Court -- Life Tenure Reconsidered.” There’s been a lot on this entire subject, but if you’re looking for reasons why this whole topic has become such a hot one, you need to read Jim and Steve’s article. And anyone who enters this debate simply has to be prepared to deal with the arguments that they make.

I can’t resist injecting a personal note at this point. Jeff Oldham from Northwestern University was one of my very finest law clerks, and he graduated from Northwestern in 2003 and is thanked in the article for very substantial contributions that he made to it. And when Jeff came onboard as my law clerk, I asked him what it was like to work with two such academic luminaries. And he said, “Hey, those guys are really smart.” No kidding. Jim, we’re so delighted to have you today, and thank you for the thought that you and Steve have devoted to this topic.

(Applause.)

PROFESSOR LINDGREN: Thank you. Okay. Let’s have some fun with numbers here. So, the limitations on and [sic] Supreme Court tenure -- let’s see if this button will work. The proposal that we have -- and I have a very short time -- so this will be a bit of a forced march, is that we’re talking about a constitutional amendment, not statute -- eighteen-year terms. We’d [choose] a new Justice every odd year, so 2009, in summer; 2011; 2013; and so on. After sitting on your Supreme Court for eighteen years, you’d still have life tenure, but not on the Supreme Court. You could sit on lower courts if you wished.

There’s a phase-in period, which, during questions, I’ll be happy to talk about. If this had been apportioned since the beginning of time, we’d have four Clinton appointees now, four Bush forty-three appointees, and one Bush forty-one appointee who’d be leaving this summer. So, Justice Scalia would be long gone, and Justice Thomas would soon be stepping down, and we would have a different profile.

The length of tenure -- this shows length of tenure on the Court over time, and it shows every nine Justices. It’s a lagging average of nine Justices together, so it’s not in any particular period of time, and it shows some peaks early on, in 1830s and ‘40s and in the 1860s and ‘70s. In the 1830s or ‘40s, they added up two more Justices to come up to nine; in the ‘60s and ‘70s, they fixed permanently at nine Jus-

tices and added pensions. And so, each time that there was a peak, they dealt with the problem by reform.

The age of leaving office -- as you can see, there was a peak in the 1880s and then another one in the 1930s and '40s, the period that's usually pejoratively called the "Nine Old Men" in the '30s. And now we're at seventy-nine years is the age at leaving office. Of course, that's the average age; that's not the high age.

The mean years since the last court vacancy -- we're up over 3.3 on the last one, and the one before was 3.8 years between vacancies. And once they instituted pensions, the numbers stayed around 1.8 or 1.9, in that range for many, many decades, for over 100 years.

Now, this isn't an issue of being sworn in at earlier ages. As you can see, if you look at each of the swearings-in, except for the first period, it's been pretty much flat. This is not an issue that evolved with appointing younger Justices, something that we found when we looked at the data.

Now some of the arguments that are made -- my contribution to the piece is primarily on the statistical side, and Steve's [is] on the policy side. Only one state, Rhode Island, has life tenure. Steve's research assistants, including Jeff Oldham, did not find any other major Western democracy that has life tenure for its main constitutional court.

There's a problem of mental decrepitude, which you can read about in some of the histories of the Court. There's a loss of physical stamina. We had Justice Rehnquist, who was losing some of his ability to function in his last year, and we've had Justice Ginsburg, who has fallen asleep on the bench this year and another [year], while Court is meeting.

One of the things it would do is eliminate strategic retirement for political motives. I'll talk about that in a moment.

It should reduce animosity in confirmation, although the two people opposing this, I'm sure will disagree vigorously on this. If it becomes a regular function, then the stakes are lower. It's not like you're appointing someone for thirty-five years; it's for eighteen years, and it should lower the intensity of the fights over this.

And we would return to traditional levels of judicial independence. As Justices serve longer on the Court, they tend to get farther and farther away from public opinion. And every time in the past when tenures got very long, we did something about it. In the 1830s, we added two Justices; in 1870, pensions restarted; and in 1937, we added senior status, all of which dealt with the problem previously.

There's long been asserted that Justices time their retirement politically, strategically. I have a new article that just came out in *Demography*, the leading demography journal with Ross Stolzenberg, a methodologist at Chicago, on politicized departure. And the timing of resignations from the U.S. Supreme Court tend to be influenced by political as well as personal characteristics. Obviously, there are characteristics that are relevant, like pension and age and health and so forth.

This chart shows the trend smooth with the lowest, which is a Cleveland weight of regression. And what this shows, the bottom line, the black line shows the age at appointment. The middle line shows the age correctly. The purple line

shows the age at retirement. And green line shows age at death. And as you can see, they're getting wider between the black line, which is the age of retirement, and the age of death.

This particular one is not only smooth, but this looks at the current year Court. So, it basically says in a particular year, when will those Justices who are sitting that year die, retire, and so forth. It's a slightly different analysis, but it looks more at a mid-point rather than at the end.

So, Justices leaving the Court from 1789 to 1970 -- the average tenure was 14.9 years. Age at leaving office was 68 years. And the [time] between vacancies was two years. Now they're leaving the Court. Average tenures, twenty-six years, of those who've left the Court since 1970. Age at leaving office is seventy-nine years. And the years between vacancies is more than three years.

This is kind of a neat chart. This shows -- so let's say you serve a year on the Court and then you serve another year, another and another year. Each year you serve doesn't make you more or less likely to retire. Political scientists who've looked at this typically assume that the longer you serve on the Court, the more likely you are to retire. But it turns out that you're less likely to retire, the longer you serve on the Court, and the effect of additional years is most at age fifteen, fifteen years on the Court. Only at twenty-five years on the Court do you become more likely to retire for each year that you serve on the Court.

These slides just explain that.

Now pension eligibility -- not surprisingly, judges are rational Justices. When they're eligible for a pension, they're eight times more likely to, odds are, eight times higher for (inaudible) retire in a year in which they're pension-eligible than in years in which they're not. The odds of retirement increase by 168 percent when the sitting President is from the same political party as the President who nominated the Justice, and you're in the first or second year of a President['s] administration. So, there's a very political effect on strategic retirement.

We also found that there was an effect of dying in office. So, this is failed strategic retirement. The odds of death in office in any given year are significantly decreased when the sitting President [is] of the same party as the President who first nominated the Justice to the Court; the odds of death in office are only two-thirds as high. And if you're in the last two years, then your odds are only one-third as high.

You know, if the opposing party of the proposing President is in office, basically, if you want this robe, you're going to have to pry it from my cold, dead hands. And that's the essential idea there.

Okay, just to review, we see the trends are increasing over time. We see big jumps in length of tenure from fifteen years to twenty-six years. There [are] issues of stamina, decrepitude, [and] it's unusual to have life tenure in other societies. We've got strategic retirement, and we should return to traditional levels of judicial independence.

I would say that one argument that I think has been made against it, I do find meritorious, and that is I think it would increase strategic [sic] by Justices in choosing cases. Right now, there's a little bit of it when they expect someone [might]



leave or might join the court. But I think if they knew exactly when someone would be leaving, I think they could take it into account in choosing which cases to hear.

I'm sure we'll hear many other plausible and implausible arguments against it, but I just wanted to grant that I think that one actually does have some merit.

I guess that [the] only last point I'd make is that every time in the past when we've had very long tenures, long times between tenures, we've done something about it. I don't think we should be ostriches today. We should try to take some action on that in this area to ameliorate current problems as we have in the past.

Thanks.

(Applause.)

JUDGE WILKINSON: Thank you very much, Jim. We appreciate that so much.

It's now time to turn to the other side of the argument. David Stras is a Professor of Law at the University of Minnesota, and he's presently visiting at Washington University in St. Louis. In his short time in academia, David has become very much a rising star. He's received a number of teaching awards, and he's gaining distinction for not only thoughtful articles, but for public commentary on the federal courts. His excellent article, "Retaining Life Tenure -- the Case for [a] Golden Parachute," not only makes a powerful case for the continuation of life tenure, but also proposes incentives to encourage voluntary retirement at an appropriate time.

I also want to inject a note of personal appreciation and pleasure at having David here. He is a Fourth Circuit alumnus, and he clerked for my good colleague, Judge Mike Luttig. Among the many fine things that Judge Luttig did when he was on our court was to choose really stellar clerks and launch them into distinguished professional careers. And David is just a shining example of that, and David, we warmly welcome you to this panel.

(Applause.)

PROFESSOR STRAS: Well, I'd like to first thank Judge Wilkinson for that very generous introduction and to the Federalist Society for inviting me to come speak to you all about something that I've spent a little bit of time thinking about.

I come with the enviable position of defending the Constitution today because [the] Constitution, after all, sets forth that judges shall serve during good behavior. Good behavior -- this is in the retaining life tenure article -- means for life, essentially for life. That was the understanding when the Constitution was adopted.

Now, what I want to do is set -- I certainly cannot address all of Jim's very well reasoned arguments, but I want to address, at least, and put forward an affirmative case for life tenure because, after all, the Framers must have been thinking about something when they decided upon life tenure; and I would submit that it was a very careful process, and they deliberated about it quite a bit before they made their final decision.

So, one important aspect of life tenure is, I would argue, for a Burkean conservative in particular, it decelerates legal change. Jim and Chuck, I think both talked about the lack of democratic accountability, that as Justices grow older, they serve on the Court for lengthier period[s] of time, sometimes thirty, sometimes

thirty-five years. They become out of touch with public opinion. One of the effects, though, of having Justices serve for a longer period of time is that we don't see rapid fluctuations of the law back and forth. We see a relatively stable judiciary. Many political scientists and legal scholars have noted that once a judge takes a position on a particular issue, it is very rare when they reverse course on that position. So, I think it very much encourages judges to adhere to positions, and thus creates a very stable framework for judicial decision-making.

The other issue in terms of slow legal change is the issue of court capture. Under an eighteen-year non-renewable term plan, which Calabresi and Lindgren have put forward, it would allow a President essentially to capture the Court during a two-term presidency. I mean, granted they would only get four appointments, but with the balance of the Court often swinging on a single vote, it is very easy to imagine a scenario in which a single President serving two terms would be able to capture the Court. And certainly, in a presidency like FDR's or during three straight Republican presidencies, it's not that unusual to think that the Court would be radically changed by those appointment[s]. So, for somebody who's Burkean and really needs a good reason to change the Constitution, I'm a bit unsatisfied by the argument that's advanced in Calabresi and Lindgren's article.

The second really important aspect of life tenure is judicial independence. The Constitution sets forth essentially two pillars of judicial independence, the first being non-diminishment of salary, which really over the course of history hasn't been all that important. There haven't been very many congressional efforts to diminish salary. But the other is life tenure. That is a key pillar of judicial independence.

And Jim alluded to this, I find very persuasive -- he said it was meritorious -- I find very persuasive the final period problems that we have [with] Justices. Unlike now, under 18-year non-renewable terms, Justices would know with absolute certainty when their colleagues would retire; they'd know when they would retire. So, one can imagine a Justice two years before they're retiring saying, "Goodness, I solidify my legacy, the political opportunity has never been greater for us to advance a particular doctrine or to overrule a particular doctrine. Thus, I'm going to reach out and take a case that the Court otherwise wouldn't have taken." They may ignore justiciability concerns. They may ignore jurisdictional concerns. And so, I think it really sets a precedent in disrupting judicial independence.

And it's not only the fact that they know that they would retire, but they know when everyone else would retire. So, if they see that the political winds are changing and four years from now, say, it's a Republican-controlled Court and the Democrats look like they're going to win, then there's going to be every incentive for a Republican-dominated Court to take as many of the cases they think they can win on the front end. So, it really results in a lot of game-playing.

The other issue is eighteen-year non-renewable terms, unlike mandatory retirement ages, which is the other sort of proposal that's been advanced in the academy, really [do] present other issues of judicial independence. For example, a Justice who retires at, say, age sixty-one or sixty-two under the non-renewable term limits may try to curry favor with the political branches towards the end of their

term. Justice Thomas, my old boss -- although I don't think he would ever do this, but somebody like him who was appointed at the young age of forty-three, I could see making an attempt [to] become Ambassador to United Nations or whatever upon his forced retirement from the Court. I just highly doubt that Justices would find satisfying the prospect of sitting on the lower courts because after all, once they retire from the Court, they get to sit on a lower court. So, it just doesn't seem to me to be a real persuasive argument.

If we could throw up the PowerPoint real quick, that would be great.

I'm going to first show you the chart that Calabresi and Lindgren came up with. I call it the Calabresi and Lindgren chart because it's been relied upon so heavily by so many scholars. It shows a final period, average tenure of 26.1 years. When you look at that chart, it's extremely striking. It looks like there's been a fundamental change in life tenure. And again, I do want to compliment Steve Calabresi and Jim Lindgren on putting forth a very forceful case on life tenure.

Could we go to the next slide?

But there's another chart that I looked at. They look at it by date of retirement. If you look at it by date of swearing-in, you don't see the great advances in average tenure. In fact, the final period is around 19.6 years, which is lower than the period from 1811 to 1840. Now, one may ask, well, why would you choose swearing-in date? There's [sic] a couple of reasons. One is, to the extent that the proponents of life tenure are relying on democratic accountability on the front end when they're considering nominees, that's exactly when the democratic accountability happens. And so, those things like the age of the Justices, how long they might serve, those [are] things that are taken into account by the Senate when they're considering nominees.

The other issue is you could take the midpoint, you could take the three-quarters point, and graph it anywhere along there, and you won't see nearly the robustness of that final period that the Calabresi and Lindgren chart shows. And a truly robust trend would show up no matter how you measure it, whether it's ex ante or ex post.

I don't want to get too far into the numbers, and we can actually take the PowerPoint away, but I do want to say -- you know, I also think practically -- the only Justice who would retire in the next four years that would lengthen the 26.1 years [on] the Calabresi-Lindgren chart is Stevens. Scalia would come pretty close, but Steven[s] is really the only one that would lengthen the chart in terms of average tenure. But you look at all the Justices who might retire over the course of the next several years -- Ginsburg, Souter have been all speculated about -- all of those would reduce average tenure. So, the only sitting Justice that would lengthen average tenure during an Obama presidency is, in fact, Stevens.

So, I agree ultimately that term lengths are getting longer on the Supreme Court, but I would make another very fundamental originalist argument, and that is the Framers knew exactly what they were getting themselves into. You look at the *Anti-Federalist* and the *Federalist* papers, *Federal Farmer Number 15* for example, it complains -- *Federal Farmer* is one of the most famous *Anti-Federalist* papers -- in that, they complained that their life-tenured judges would serve thirty or forty

years. They knew what they were getting themselves into. *Federalist Number 79* criticized New York's mandatory retirement age. They considered mandatory retirement age because New York had it. And they rejected it. They rejected it outright because they thought that "the deliberating and comparing faculties generally preserve their strength much beyond that period in men who survive it."

So, the Framers carefully thought about that. And so, ultimately, I agree with some. I particularly agree with the Calabresi and Lindgren argument about mental infirmity. It's been there the whole existence of the Court. One Justice in particular, Justice Baldwin, suffered, from the 1830s, suffered incurable lunacy. He used to run up and down the corridors in his stocking feet while the Justices were deliberating and literally did not decide a case for several years. There's [sic] other examples -- Justice Douglas; his colleagues voted 7-1 to keep him from writing opinions and to hold over cases where he was the deciding vote. So, there is a long history of mental infirmity on the Court.

Now the question is, "What we do about that?" I think that the case has not been made to change life tenure. At bottom, I'm a fundamental Burkean conservative who believes that everything in the Constitution has very strong meaning and very strong reasons behind it. And so, I would favor something more incremental, making it more attractive for Justices when they retire to do things that complement or mirror what they do now, or better yet, change the pension reform system.

And so, those are some of my thoughts, and I will certainly be excited to hear your questions during a question-and-answer period.

Thank you.

(Applause.)

JUDGE WILKINSON: Our final panelist is Professor Stephen Burbank of the University of Pennsylvania. He is, by any measure, one of our country's foremost proceduralists. His expertise is internationally sought, and I don't think it would surprise you that the Third Circuit has turned to him to help tackle some of its challenging procedural problems, and it may not surprise you that the Congress has turned to him for testimony on numerous occasions. But what might interest you is that the National Football League has turned to Steve, and both the management and players have asked him to mediate and resolve certain categories of disputes under the collective bargaining agreement.

I think that while he's distinguished in so many areas, Professor Burbank has gained a reputation for his candor and insight on questions involving judicial independence. And suffice it to say that he's brought a vigorous skepticism to the proposition that life tenure is responsible for all the ills ascribed to the judicial system and skepticism as well to the notion that changing life tenure is some kind of magic bullet lurking in the background.

So, Steve, thank you so much for your contributions to this area, and it's a great pleasure to have you with us this morning.

PROFESSOR BURBANK: Thank you very much, Judge. I have long been interested in questions of judicial administration, particularly those that implicate judicial independence and accountability. In the 1990s, I realized that there was a rich political science literature that could and should inform consideration of such

questions, and I began to read in that literature and reflect its fruits in my scholarship.

In 2001, my friend and colleague, Barry Friedman, and I became persuaded that scholars in different disciplines who were writing about judicial behavior were like ships passing in the night. We, therefore, organized a conference at Penn Law that brought together scholars from the law, political science, history, and economics to discuss judicial independence. That conference led to our book, *Judicial Independence at the Crossroads: An Interdisciplinary Approach*.

Thus, the questions I had about proposals to replace life tenure for Justices with non-renewable eighteen-year terms when the authors of one of those proposals first asked me to support it were largely the sorts of empirical and strategic questions to which study of political science had exposed me. I was concerned that most proponents of change relied on unsupported normative arguments about the supposed costs of the current system and that they ignored potential costs of the alternatives they promoted. As my article, which is on the website I understand, reflects, my research persuaded me that those concerns are justified.

From my perspective, an overarching weakness of the work of those advocating change is the failure to take seriously the importance of bringing empirical work to the consideration of questions of public policy, coupled with what I call, perhaps uncharitably, historical tone-deafness.

To be sure, Calabresi and Lindgren marshal and manipulate a lot of data about the Justices, but their use of those data, in my view, is wooden, lacking in historical perspective and, because they do not seem interested in existing studies bearing directly on the questions they considered, tendentious. For example, they ignore both logic and evidence in arguing that life tenure, as currently practiced, provides an unacceptable incentive for Presidents to appoint very young Justices. The evidence indicates, to the contrary, that this is an incentive of life tenure itself, that it was more compelling when life expectancies were short, and that whether a President yields to it depends upon his agenda in making appointments (as it may be constrained by the Senate).

The same is true of the claim that the current system of life tenure is responsible for increased contentiousness of the appointment process for Justices, a claim that sometimes sweeps within it the appointment of lower federal court judges as well. Again, the evidence strongly suggests that the cause is not lengthening tenure, but rather the appointment agenda of the President and reaction thereto on the part of the Senate.

With respect to Justices overstaying the time when they are up to the work of the Court -- so-called "mental decrepitude" -- proponents of change fail to acknowledge that this was a much more serious problem in the nineteenth century, before the advent of adequate retirement arrangements, and that recent manifestations have been of relatively short duration.

The phenomenon of strategic partisan retirement behavior, another supposed cost of the current system, has been studied by a number of political scientists. Almost all of those studies find that it has not been a significant problem if only because Justices do not control the larger political environment in which their re-

retirement decisions must be made, and the desire of some of them to time their retirement strategically has yielded to personal considerations; chiefly those of health.

Another overarching weakness of many proposals for change, or so it seems to me, is that they are predicated on a theory of democratic accountability that is seriously impoverished. One problem is that proponents of change assume or assert that the appointment process is the only means by which federal judges can be held accountable, which a consideration of history demonstrates to be demonstrably false as to formal powers potentially constraining judicial behavior; and which ignores perhaps the most important current research on courts in political science, work that takes account of the strategic incentives to moderate the single-minded pursuit of preferences.

Indeed, a forthcoming article by a prominent political scientist, Jeffrey Segal, who has previously denied that Congress constrains the Supreme Court's constitutional decision making, finds -- to his chagrin as an attitudinalist, but to his credit as a scholar --- robust evidence that, indeed, the Justices pay attention to Congress, curbing their sincere preferences in the interest of what Segal calls "institutional maintenance."

A more fundamental problem is that proponents of change take a view of judicial independence and judicial accountability that is both dichotomous and monolithic. Recent interdisciplinary work reveals that, to the contrary, judicial independence and accountability are different sides of the same coin and that there is no one right mix. Thus, it is no comfort that, viewed solely from the perspective of judicial independence, non-renewable eighteen-year terms would seem to auger adequate independence. We need to know what they portend in terms of judicial accountability and whether the resulting mix is well suited to yield what we want from the Supreme Court today. Data on high courts of other countries or of the states of the United States -- by the way, judges are elected in most of the states, and I don't understand that any proposal calls -- actually, there is one -- for electing the Justices of the Supreme Court -- in fact tell us very little unless we know what those polities seek from their courts and whether the mix their systems yield would be appropriate for the Supreme Court of the United States in 2008.

Proponents of change also promote non-renewable eighteen-year terms on the ground that the Court is insufficiently legitimate. Now, this is a very slippery term both in law and political science, but a great deal of theoretical and empirical work has been done in the latter field that seeks to bring it to ground. That work, which distinguishes between specific support -- that is, support for individual decisions -- and diffuse support -- that is support for the institution as a whole -- tells us that the public knows precious little about the work of the Court, that most of what they know comes from the mass media, and that it is only controversial or high-salience cases that are likely to register.

Moreover, studies of public support for the Supreme Court in the wake of *Bush v. Gore* simply do not support the notion that there is currently a crisis of legitimacy. The Court continues to enjoy a fairly deep reservoir of diffuse support, and it fares better in terms of both diffuse and specific support than does the President or

Congress. Of course, these findings also call in question the argument that the appointment process is a suitable means to translate public values to the Court.

Finally, in my article I consider the other side of the coin, largely ignored by proponents of change. What is the quantum and quality of judicial accountability likely to flow from a system in which, when fully operational, each four-year presidency would see two appointments to the Court? In order to answer that question, I explore the political science literature on interest groups, which have become prominent players in the federal judicial appointment process, which are here to stay, and the incentives and tactics of which do not bode well for the claim that non-renewable eighteen-year terms will yield a less contentious process.

Indeed, when one combines the insights of the interest group literature with those of the legitimacy literature exploring what the public knows about the Court and how it knows it, a most disturbing prospect emerges, For, at least to the extent that the messages that interest groups and their patrons send to the public concern decisional results -- for example, what will this appointment do to *Roe v. Wade* -- a system of frequent and predictable appointments seems likely to hasten a crisis of legitimacy, one that would cement the worst tendencies of modern politics.

The public would be encouraged to regard courts not just as part of the political system, but as part of ordinary politics. If this were to occur, and there are already worrisome tendencies in that direction because some politicians, interest groups, and journalists have chosen to portray judges as the policy agents of those who point or elect them, either judicial independence would become the junior partner of judicial accountability or the partnership would be dissolved.

I used to be somewhat defensive about Richard Posner's characterization of traditional legal scholarship as epistemically shallow, although I always hoped that my own attention to history and to empiricism preserved me from his indictment. Posner was right, but this work on term limits for the Supreme Court persuades me that the object of his criticism today should be not just and not primarily traditional doctrinal scholarship, but the normative navel-gazing that continues to preoccupy so many in the legal academy, particularly those who write about constitutional law.

(Applause.)

JUDGE WILKINSON: I'm going to pose several questions to each group of panelists. And Chuck and Jim, it seems to me that the most serious of the arguments against your position is that your proposal is really going to increase strategic behavior on part of the Justices at the Supreme Court, that they're [going to] look down the road, they're going to be granting cases that they ordinarily wouldn't grant, they're going to be trying to reach results before somebody favorable [on] their side steps down, that they're going to be somebody who knows they're going to have to retire in two years, who's going to be slamming dicta into an opinion in order to get it done before he or she has to step down; the Justices are going to be thinking about second careers.

In other words, a fairly serious argument has been leveled against your position, which is that you're really increasing political and strategic behavior on the

part of the Supreme Court with your proposal. And I think you have to meet that. So, what's your response?

PROFESSOR LINDGREN: Well, as I said in the presentation, part of what you said I would absolutely grant. I think that in terms of choosing cases, I think that there's likely to be some strategic behavior. But the strategic behavior is eliminated in terms of retirement, I think would be quite substantial. And given the criticisms that were raised on the panel, I'd like an opportunity to respond if I might.

JUDGE WILKINSON: Sure.

PROFESSOR LINDGREN: As far as -- could you pull up Stras' slides please. Go to his second slide that he had up.

The responses -- so that was one of the charts, not one I showed you. I showed what [sic] you one with no periodization at all, so there's no grouping of, how to group it. And then let's go to the next one of his.

Okay, so if you look over there on the right column where this one supposedly makes the effect go away, first of all, he does this on the basis of appointments. The problem isn't that people are staying too long on the day they're appointed. The problem is they're staying too long after they're appointed. You don't pick basic dates of appointments to assess this.

Second, our thesis is that there's been an increase since 1970. Look at the last group there. It's 1961, I believe, if I can read it, on. That includes Goldberg and Fortis. You can't test the thesis that there'[s] been a change since 1970 by including people who were appointed and resigned after. Further, you can't really pick appointments since 1970 because there've been so few appointments that -- I went to college in the fall of 1970. I think since then, there've only been three Justices who have been appointed and left the Court since then -- Rehnquist, Powell, and O'Connor.

The comment about, this would lengthen tenure, is absolutely false. Every Justice with the exception of -- by next summer, I think every Justice with the exception of Breyer in the last two appointments would be beyond what had been average tenure up through 1970.

And as far as Steven Burbank's comments, which were in some cases quite strongly worded, I guess I'd like to say that I found them -- she's [sic] really quite incredible, because this idea that he's pointing to, political science literature, there's one thing to see if you read his article is a complete tone deafness about what's going on in these theses. Not being an empiricist, he can't tell good work from bad work. He cites with approval work that says there's no trend in the relationships. We've done statistical analysis with dozens of miles. Every single one finds a time trend. And he cites with it as if it's plausible work by a political scientist.

Well, I've gotten data from some of the political scientists that he favors. Re-run the numbers. One of the reasons that they tend not to find effects is because their models are incompetently fit. Most of them treat the "death and retirement," leaving office for either reason, is what they're trying to model, the same outcome. But we show that there's [sic] two effects and there's crosscutting. You tend to die



if the President [is] of the opposing party; you tend to retire when the President is of your party. Those effects cancel them out if you're only modeling whether someone leaves during a presidency for political reasons, and that's not the kind of thing, unless you understand statistics, you're likely to see.

We got data and reran them on some of them. Some of them were [so] incompetently run by political scientists that they found no effect for pension. We found eight times greater pension effect when we ran the numbers. Even when people -- there's one person who's contributed to the literature who's just an eminent statistician. And talking to one of his co-authors, she [sic] said, "Well, but that's not one of his best pieces." One of the things that he did was that he modeled how many Justices leave in a particular year based on politics. Well, again, the Republicans might be more likely to leave during one year and the Democrats, more likely to stay. You're going to have cross-cutting effects.

So, also [in] some of the things that he cites, it does not mention when the evidence cuts against his position. He cites to a piece talking about trends under either the Burger or Rehnquist Court in terms of following the public opinion and doesn't mention that it shows that the longer time you serve on the bench, the farther away you get from public opinion, from modeling public opinion.

I'll stop there. I understand --

JUDGE WILKINSON: I wanted to leave time for questions, too.

PROFESSOR LINDGREN: That's fine. Sure. I'll stop there.

JUDGE WILKINSON: Okay, thanks.

One of the things -- I'm going to give you a chance to respond for sure, but I don't want this just to become a battle of empirical studies, and my statistician versus his statistician and that kind of thing, but we can debate that for a long time --

PANELIST: And bore the entire audience.

(Laughter.)

JUDGE WILKINSON: But what I do want to ask you, there is a pretty persuasive case that there's a dramatic increase in length of tenure, from 14.9 historically [to] 26.1 today.

And the argument has been made that Supreme Court Justices are the closest thing we have to royalty and that they live in a world that may be out of touch increasingly with either current trends or with the broader spectrum of society, that it's an insular lifestyle with -- they're in court and attend their bar meetings and give their law school speeches and their courthouse dedications. But the argument is made that it's sheltered, and [when] you increase it from fifteen to twenty-five years, that increases the danger of a Court that's out of touch and that has no regular democratic accountability.

So, this is pretty serious criticism of your position, and I'd like to hear what you say about it.

PROFESSOR BURBANK: Actually, I was in sympathy with a lot of the arguments that were made by the people who asked me to support their proposal. It wasn't Steve and Jim; it was Roger Cramton and Paul Carrington. I would frame the problem (as I see it) a little bit differently. Recall that Brandeis said that I can do a year's work in eleven months, but not in twelve. I don't think most of the

Justices of the Supreme Court are even working close to eleven months now, and they're not cloistered. They're off in Europe lecturing.

When I clerked for Warren Burger, the Court was deciding 150 cases a year. Last year, they decided -- depending on how you count -- either sixty-nine or seventy or seventy-one. I don't think they're working very hard. I think they've become Poobahs. I think that we have a serious problem in having only -- sparing your presence, Judge -- former Court of Appeals judges on the Supreme Court. I think we have a lack of variety of experiences.

Moreover, in terms of the concern that I just articulated == if some of them are acting like Poobahs, then this would resonate with some of the things that Chuck was saying. It may be because for somebody who has been a judge before, being on the Supreme Court of the United States is the be-all and end-all. That's not true for everybody.

A young political scientist named Justin Crowe, with a co-author, wrote a wonderfully titled article, which is also a very interesting article, "Where Have You Gone, Sherman Minton? The Demise of the Short-Term Justice." We don't have short-term Justices anymore, but when we did, you would find that most of them came from other careers, and they didn't necessarily regard being on the Supreme Court as the capstone of their life. Obviously, it's a tremendously important position, but one of the reasons that people don't want to retire these days, I take it, is precisely because they can't let go. This is, you know, I was a judge and I've been a judge for a long time; this is what I want to do.

I'd like to see more politicians. I'd like to see a lot more different sorts of experience on the Supreme Court. And that would address some of the problems. But I cannot agree that the fundamental weakness of the proposals here is possible strategic behavior. I think that's a weakness. I think the fundamental weakness is that the case has not been made for changing a very important part of our Constitution, recognizing how difficult it is [to] change the Constitution and the risks that we run. I just don't think that the case has been made for it, certainly not in terms of democratic accountability and the problems of democratic accountability.

So, I guess -- you know, I think there are some problems, but I just don't think the case has been made for fundamental constitutional change.

PROFESSOR STRAS: The one thing I would add to Steve's remarks, as well, is that while they're not perfectly at odds, democratic accountability and slow legal change are at odds. If you take --, if you want democratic accountability, basically what you're saying is that Justices need to be sympathetic or they need to be more cognizant of the particular political arguments at the time. We shouldn't have people who reflect the viewpoint that are thirty years in the past.

Well, what that means oftentimes is that you're going to have courts changing their minds. And in fact, in a study that was done of state courts -- Jeffrey [Rense], I think, did it -- where he looked at Rhode Island and New Hampshire; Rhode Island has pure life tenure and New Hampshire's pretty close. They reversed themselves only six or eight times over a ten-year period, and those were the two lowest states in the study, as opposed to elections and various other methods, where you had as many as 109 overrulings in Montana during that same period. And so, I

think what you see is, yes, you may have a little greater democratic accountability, but you have it very much at the cost of stability and legitimacy.

So, one thing I would throw out is, you know, a court that is viewed as wholly political would not have legitimacy, for example, for the American public to accept a case like *Bush v. Gore* or to accept a case like *Brown v. Board of Education*, both of which were, you know, not well accepted by a large segment of the society at the time they were decided. And so, I think that legitimacy is a very important part of life tenure. It may have been a result, and they may not have even foreseen it -- the Founders, Framers may not have foreseen it, but I think that's very important.

So, what I want to stress is that there's definitely a tension between democratic accountability and stability.

JUDGE WILKINSON: I want to turn it over for questions after just one final comment. And that is, the case against life tenure seems to be built on mental decline and decrepitude. And I'm not sure that that premise is altogether correct. Might it not be that people actually become more reflective, more seasoned, and even more creative, in their old age?

Law is a profession that rewards seasoned judgment. It's a little bit different from mathematics and music and physics, which tend [to] reward prodigies. And if you look, for example, in fields outside of law, very senior people have done very marvelous things. Milton wrote *Paradise Lost*. Monet painted the *Cathedrals* and *Water Lilies* at a very advanced age. Chaucer wrote *The Canterbury Tales* at [a] relatively advanced age for his time. And Oliver Wendell Holmes served productively in his 80s, and some would make the argument that Justice Hugo Black's opinions in the later phases of his career were far richer and more powerful than some of the opinions earlier in his career. And people would make the argument that Justices get better with time in many instances, rather than declining. I know Justice Powell felt that way, that he became better as the years went on.

If we have eighteen-year terms, are we not sacrificing the advantages that come with reflection, seasoned judgment, experience, and a whole lot of other things that actually may make very senior Justices very creative and powerful forces on the Court? Do we really want to go without that? Isn't that what you're proposing, Chuck?

MR. COOPER: Judge, I appreciate your turning to me because in your initial question, you associated me with the defense of the Lindgren-Calabresi eighteen-year proposal, which I do not favor. I agree with many of the predictive judgments that my friend Steve Burbank has articulated against it. I agree it would eliminate the problem of strategic retirements. But I think that's a very marginal problem, frankly. It clearly doesn't go to the heart of what I think is the core problem of life tenure: complete independence and lack of judicial accountability. And I think even eliminating the strategic retirement problem would likely beget the concern that I haven't heard raised here, which is strategic Senate behavior. I think the Senate could frustrate this by simply refusing to confirm a presidential nomination until another presidential election.

But you know, my bottom line here is that life tenure has to be changed, and I welcome Steve's and Jim's proposal and applaud their work on bringing forward in a very sharp way some of the problems.

But I agree with much of what you have just said Judge and think the problem with mental decrepitude is not sufficient reason to amend our Constitution. I think sufficient reason to amend the Constitution was offered by those – the Antifederalists -- who were opposed to life tenure in the first place. In fact, those who favored life tenure – the Federalists -- were concerned about activist, willful judges. But, they just thought that impeachment, that impeachment would be protection enough, and that clearly hasn't been.

JUDGE WILKINSON: Yet any proposal to modify life tenure would have to be on neutral principles, and you might find yourself having a lot of restrained judges removed under these principles and a lot of very activist judges put in, and you would worsen the condition you decry, wouldn't you?

MR. COOPER: No, I don't think so. Again, this isn't my proposal. I favor some different proposals. I even prefer Jefferson's proposal to this, which was, five- to six-year renewable terms, when a Justice's body of work could be brought forward and examined in a new reappointment process. But the proposal I favor, Judge, and this perhaps may even shock Steve Calabresi, is one that combines Jefferson's proposal with the method used by that great laboratory out there among the states -- California. You will probably recall that a few years ago, California Supreme Court Justice Rose Bird and two of her colleagues --

PANELIST: You're showing your age, Charles -- twenty-two years ago.

(Laughter.)

MR. COOPER: Has it been twenty-two? That's a long damn time ago --

(Laughter.)

MR. COOPER: -- but Justice Rose Bird and two of her colleagues reversed sixty-one out of sixty-one death penalties. Now, the people of California in their core understood that something other than the rule of law was being applied there, and they exercised the power they had reserved to themselves to throw off tyrants in a retention election. I would like serious consideration given to six-year staggered, renewable terms for Supreme Court Justices, renewable on the condition of an affirmative vote of the people. I'd like that idea considered even though it would, I think, more or less concede the proposition that the Supreme Court is a political institution, because I think that's the reality we face.

And I also think that the people, in their basic gut, understand what the rule of law is even though that eludes the vast bulk of legal academics. They understand that. And so, I don't really fear the judgment of the people when a Justice body of work is brought forward for their judgment. That's what I'd like to see considered.

JUDGE WILKINSON: But Chuck, some of the great decisions of the Supreme Court have been those that people roundly disapproved of at the time.

MR. COOPER: That's true, and some of them, they quite promptly roundly disapproved of and should have visited the consequences of those decisions upon the Rose Birds who decided them.

JUDGE WILKINSON: All right. We need to hear from Steve Calabresi because he's been standing patiently at the microphone, and he is one of the co-authors of this very interesting study.

So Steve, give us your thoughts and then ask a question.

AUDIENCE PARTICIPANT: Thank you, Judge. I actually have two questions, one for Steve and one for David.

My question for Steve is, you called for more empiricism and for looking at what actually works. And I wonder how you would respond to the argument that we make that life tenure is an institution, which no other court seems to use. No other modern Western democracy has life tenure for its highest court judges -- not England, not France, not Germany, not Canada, not Japan, not South Africa, not Australia. And forty-nine out of fifty states have rejected life tenure.

And so, I guess the question is if this is such a good thing, why are the federal courts the only place in the world essentially where it's used, particularly since we know the reasons life tenure were favored by the Framers were primarily because they wanted to make sure that seventeenth century English history, where kings fired judges who were deciding cases lawfully, wouldn't repeat itself? And we don't face that problem today. We face different problems instead, and every modern democracy that has addressed those problems has thought the way to solve it is with a constitutional court with fixed terms.

My question for David is, don't all the arguments you make against term limits for Supreme Court Justices also suggest that we shouldn't have a two-term limit for the President? You could say, you know, if you have a two-term limit for the President, there will be terrible final period problems in the second term. We made a judgment as a people that the danger of abuse of power and lack of accountability and of someone being perpetually reelected was sufficient to outweigh those problems.

What Jim and I are arguing here is simply that because the average tenure on the Court has gone from fifteen years to more than twenty-six years, which is a huge increase due in part to the fact, as Steve pointed out, that the Justices lead a very coddled existence, that that has become a serious issue, and it's made the Court less accountable than it used to be. So, just as we needed a two-term limit on the President to restore the tradition that Presidents would leave after eight years, maybe we need to run this out.

JUDGE WILKINSON: Steve.

PROFESSOR BURBANK: Thank you. One of the problems with taking a minute to discuss the world is that you may not have heard what I had to say on it, but I did actually mention my views on that, and I do in the article. My response, Steve, relates to the concern that you and Jim and Roger and Paul and others who have been advocating this take a view of judicial independence that I call both dichotomous and monolithic. That is to say, you treat independence as completely separate from accountability when they are joined at the hip, and you treat judicial independence, dichotomously treat it as if it were the same in all parts of the world, in every polity, in the United States and internationally. It seems to me not a good way of proceeding.

If you look at an eighteen-year term, and particularly if you understand that the median or mean length of service for Justices over time has been a little bit short of eighteen years, from the point of view of judicial independence, it looks pretty good. But what I want to know is, what is the quantum of judicial accountability that a particular system will bring about? And without knowing about the legal system of France or Germany or the United Kingdom, and knowing a lot about it -- not just superficially -- I don't know whether the fact that they have chosen not to go with life tenure tells me what I need to know in order to predict what a Supreme Court would look like under your proposal, which is why I spent so much of my article trying to figure out what the quantum of judicial accountability would be in a system where, once it was fully operational, you'd have two appointments in every four-year term.

My study of the legitimacy literature in political science and the literature on interest groups persuaded me that the quantum of accountability that you would get would be unacceptable for the United States because it would, as I say, confirm the worst tendencies of modern politics, which is to persuade the people -- and there are a lot of people who want to do this -- to persuade people that courts are part of ordinary politics, that judges are merely policy agents of a President if you're talking about a federal judge, or of the people, if you're talking about a state judge. And I don't think that that's what we should want from our Supreme Court. So, to me, it's almost irrelevant that other nation-states have chosen not to have life tenure.

Moreover and finally, Ward Farnsworth has pointed out, at least with respect to the European experience, that it may be quite a different thing, when you are constructing a judiciary in 1930 or 1980 or for the new post-Soviet countries after 1990, to say we're not going to have life tenure. It's one thing to do that and another thing to change a Constitution that has worked tolerably well for more than 200 years.

JUDGE WILKINSON: I wanted to get David into this, so Steve, you had a question for David.

PROFESSOR STRAS: Yes. I'll go ahead and address that. You know, we do have a sort of a little bit of disagreement with the 26.1 years, but I don't want to touch that. But if you want to read more about the empirical stuff, you certainly can refer to Jim and Steve's article, but you can also refer to a paper I co-authored with Ryan Scott, a former student, which is in the *Harvard Journal of Law and Public Policy*. So, I'll leave that alone for now.

But your question is a difficult one. And I probably think no matter what answer I give you, you're probably not going to be satisfied given that you know so much about the presidency, and I am by no means an executive power scholar. But you know, the short answer is that the presidency and the legislature, they're political branches, and fundamentally, the judiciary is not. The judiciary is constrained, at least arguably although political scientists have disputed it, they're constrained by *stare decisis*. And sure, there's custom and there's culture in the political branches, and there's prior opinions of prior Presidents, but they're not constrained

in the same way that judges are. And so, my argument would be that these are fundamentally different branches.

And furthermore, you know, just if you go back into the *Federalist Papers* and early American history, it is highly suggestive of the fact that the judiciary is meant to be a[n] anti-majoritarian institution, particularly the Supreme Court. I don't think anyone can make an argument for the presidency, which is elected every four years, or the House, which is elected every two years, or the Senate, every six years, is meant to be anti-majoritarian. In fact, it's quite the opposite. They're not meant to be anti-majoritarian.

So, while you're absolutely right that some of those arguments would transfer to the presidency, I just think they're fundamentally different institutions and have different roles in the government.

JUDGE WILKINSON: Lino, let's hear your question.

AUDIENCE PARTICIPANT: I think that unfortunately, proposals eliminating are a very indirect way, and almost surely an inadequate way, of addressing the problem.

The problem is, as Chuck said, the judge[s] are running the country. The judges are making the policies. We are in a situation at the moment where, whether or not Louisiana can have the (inaudible) rate depends on how Kennedy votes that day. Whether or not there's habeas corpus for alleged terrorists, whether or not there's a right to own a gun, whether or not you can take race into account, all of these things depend on how Kennedy votes. Clearly, he's the most powerful man in the country. Now, that's the problem.

(Laughter.)

AUDIENCE PARTICIPANT: I mean do -- we talk about it, we're following the Constitution and so on --

(Applause.)

AUDIENCE PARTICIPANT: -- you know, so much of this is so unrealistic, that is -- in fact, I agree with Jefferson first of all, unlike Stras, that the Constitution is not Holy Scripture. There's a lot there that could be very much improved. But far more important, it's got nothing to do with constitutional law. That's our problem. The problem is the judges have assumed the ability to take any decision they wish, any (inaudible) they wish, out of the public process and assign it to themselves. That's what you have to deal with. None of this is going to -- if the judges can only serve for eighteen years, that's not going to change this situation. In fact, they may feel that you have to expedite their making the public policy decisions.

JUDGE WILKINSON: Doesn't Lino make a really good point, Chuck and Jim? Because you all are talking about changing the system with either Jeffersonian ideas or plebiscites or renewable terms or eighteen-year terms, and you think that changing the systems is going to cure the problem? Lino's question suggests it's not.

The problem is, you've got to win the war of ideas, not tinker with the system. You've got to convince the American public that judging requires restraint, that the rule of law matters, that personal policy preferences are illegitimate, and you're

going at it by circumlocution and indirectly by tampering with the system, when we ought to be out winning the war of ideas about what judging is all about.

(Applause.)

MR. COOPER: Judge, excuse me one second if you would. I don't have to convince the public of that. The public understands that. It's the Justices that we haven't convinced of that.

(Applause.)

MR. COOPER: And it is their champions on the legal faculties and on the editorial pages and in the fashionable salons right here in Washington, D.C., that we haven't convinced of that. The people understand that. They understand that in the basic core of their being. So, that idea is won. That's why I wouldn't mind at all submitting that judgment to the people on a regular basis.

My answer to Lino is, well done, my friend.

AUDIENCE PARTICIPANT: Well, nothing could be more misleading than saying the Constitution was meant to be majoritarian, so it's go [sic] that we don't have democracy. And we have an improvement here. Let the people vote. We'll let the Supreme Court make the public final decision -- exactly the function performed by the Ayatollah in Iran is performed here.

(Applause.)

AUDIENCE PARTICIPANT: Now, the only way to fix this is that we have to repeal the Fourteenth Amendment or at least --

(Laughter.)

AUDIENCE PARTICIPANT: Well, without that, we wouldn't have constitutional law to speak of. And the Supreme Court has made that something that they can -- they can decide any issue they choose. Or make the Fourteenth Amendment mean what it was supposed to mean, basic civil rights for blacks, or enhance it to no race discrimination, or make it mean anything specific. The problem is there's no specific --

JUDGE WILKINSON: Lino, Steve has asked for one minute, and he's going to get a minute, and Jim has asked for a minute, and he's going to get his minute.

PROFESSOR BURBANK: I simply wanted to point out that in an unsigned editorial in the *New Republic* in 1924, Felix Frankfurter, as he then was, advocated repeal of the Fourteenth Amendment because of the activist judges who happened, then, to be conservatives, who were using it to strike down state legislation and --

AUDIENCE PARTICIPANT: It's the only sensible approach to this problem. That's true.

(Laughter.)

PROFESSOR BURBANK: I just wanted to point out that it's not a new idea, and you're in good company.

JUDGE WILKINSON: All right. Jim, you make a comment, and then we're going to go to David.

PROFESSOR LINDGREN: Okay. Our proposal is designed simply to return to prior levels of these problems. We're not trying to cure all of this problem. What we're trying to do is to remove the incremental effect of having these lengthening tenures on this. And one of the articles that Stephen Burbank cites but



doesn't describe the findings of, actually says that not only do Justices become farther away from public opinion as they are on the bench, but they become more liberal. So, for those who are concerned about that, reducing judicial tenure would have [a] positive effect.

And the other -- well, I'll stop there. Thank you.

JUDGE WILKINSON: David, you said you wanted to make a comment.

PROFESSOR STRAS: Yeah. You know, I have faith in our activist judiciary in that if we repealed the Fourteenth Amendment, I'm quite sure they would find some other penumbra of rights that would do everything the Fourteenth Amendment would do.

(Laughter.)

PROFESSOR STRAS: The Privileges and Immunities Clause in particular. So, I don't think that would solve the problem, just like I don't think Calabresi and Lindgren solve the problem. But I do take your point.

The one thing I would add is I'm familiar with that study that you talked about. It's Lee Epstein, etc., and it shows -- is that the one you're -- okay. Then I'll stop there. Great.

JUDGE WILKINSON: Next question.

AUDIENCE PARTICIPANT: This is going to be a question for Professor Lindgren. But I'd like to preface it by pointing out something which I think is very important, which is that obviously when we're looking at the data about the Supreme Court Justices, we're not looking at a sample of some larger population of millions of Supreme Court Justices; we're looking at, actually, every Supreme Court Justice who has in fact served. And so, if we group the data either, you know, smoothed it over time or in thirty-year blocks, we're not looking at something which is representative of a larger group, but rather what every actual Justice in fact ended up doing.

Now, I read the Lindgren-Calabresi article with great interest, but one of the things that struck me -- and this is what my question's about -- is why you chose to fixate so much on the date of 1970. And for comparison, I would like to point out -- so, you've made the statement about what's happened in the last thirty-eight years, and I believe, and I don't have the numbers handy --

JUDGE WILKINSON: All right. Let's get to your question.

AUDIENCE PARTICIPANT: -- I'm getting there quickly.

If I were to try to make this argument in 1849, I could look over the last thirty-eight years of the period since 1811 or 1810, pick whichever one you want, and make basically all of the same claims. I could say in the last thirty years, the Justices have started serving an average length of twenty-five years on the Court, and it's so much longer than it was in the time of prior, and so --

JUDGE WILKINSON: So you're making the argument that the time periods are arbitrary?

AUDIENCE PARTICIPANT: No, I'm asking -- you know, if I wanted to explain that, I could point out that what happened in 1810 was that Marshall had been on the Court for a while [and] had been able to group power --

JUDGE WILKINSON: I'm going to ask Jim to respond because we want questions here.

PROFESSOR LINDGREN: Okay, very briefly --

AUDIENCE PARTICIPANT: What does 1970 mean?

PROFESSOR LINDGREN: Well, 1970 -- there's two ways to look at it. Does the pattern seem to shift in 1970? Yes. But that somewhat overstates the abruptness of it because we have Justices like Douglas who'd been on the Court for a long period of time, who had to make decisions in 1950s and '60s to stay on the Court. So, one of our charts actually does it based on the, every year of the Court when that Justice would eventually retire, so that smoothes out that particular issue.

As far as the 1840s, if you looked at it in the 1840s, in 1837, they added two Justices, so it took a while to work out to the [sic] and the positive effect of that reform..

AUDIENCE PARTICIPANT: If I could --

JUDGE WILKINSON: So, no, we're going to get some other people involved because it's only fair that everybody gets to ask their question.

Come forward and ask your question.

AUDIENCE PARTICIPANT: I am Ralph Tokie from New York. My question is for Charles Cooper and for James Lindgren. And it basically is that most of your arguments for this eighteen-year tenure for the Supreme Court would likewise seem to apply for the court of appeals. And if you wish to amend the Constitution, wouldn't that also be worthwhile to have the same amendment apply to the court of appeals as well?

MR. COOPER: Not on this panel it wouldn't, no.

(Laughter.)

PROFESSOR LINDGREN: We don't propose it for a number of reasons. One is that there doesn't seem to be a longevity problem on the court of appeals, and second, we have unfilled slots on the court of appeals so we don't have the same problem.

JUDGE WILKINSON: I knew you guys were going to say something I agreed with.

All right. Next question.

AUDIENCE PARTICIPANT: I'm John from Ohio State, and this is [for] Professor Lindgren and Mr. Cooper.

Your position is very interesting to me, but I don't see how it solves the problem that you started out with saying it's judicial activism. It seems to me it would increase that because they know their time is shorter and they would get more done. And doesn't it also kind of endorse the evolving standards thinking? Because, if they're going to be subject to what the majority wants them to do, then it seems to me the Bill of Rights is just simply written off because they are a bulwark against what the majority wants to do. And if the Court can no longer legitimately say, Congress, you cannot ban free speech, but the majority wants to, it seems to me that their function is just done and they can't do what they really have the constitutional obligation to do.

MR. COOPER: I credit your point, especially with respect to your concern, which I share, about an eighteen-year effective lease on the federal government that this proposal would provide. My concern is that it doesn't address the question of willful activism.

I also think you make a fair, a very fair objection, which would require very deep consideration. I can't pretend that I've put the kind of thought into this that my colleagues in academia here have, but a very fair concern about the proposal of which I am suggesting consideration, that of genuinely allowing the people to make a judgment about the body of work of three Justices every two years. And I understand that's a dramatic idea, but I am very attracted to how it appears to work at least in California, where it's not exercised frequently at all; perhaps not frequently enough.

I think the California Supreme Court has recently given the people of that state another occasion to seriously consider using the power they have reserved to themselves to throw off tyrants wherever they may be. But my proposal leaves open the possibility that the people could effectively throw off a judge for genuinely doing his job. I think I'd be willing to run that risk.

JUDGE WILKINSON: Thank you.

Next question.

AUDIENCE PARTICIPANT: Michael O'Connor from the Penn chapter of the Federalist Society. A question for Professor Lindgren, just a brief clarification of one of your slides. As I read one of your slides, it said that there was 168-percent increase in the likelihood of retirement when the President is both of the same party and it was in the first two years of the presidency. I was wondering about the confounding effect of the two-year, your examination of the time within the presidency and what the statistic is with regard specifically to pardons.

PROFESSOR LINDGREN: The effects for death in office apply both when you just look at, by party and when it's concentrated in [the] last few years. The effect for retirement is significant if you use statistics, but for reasons suggested, that this is an actual description of what Justices do, it's significant when it's concentrated in the first two years. The effect is there, but it's not; [it] doesn't meet significance levels for overall, for just party alone. I think that's the answer to your question.

AUDIENCE PARTICIPANT: Yes.

JUDGE WILKINSON: Thank you.

Next question.

AUDIENCE PARTICIPANT: Lester O'Shea, San Francisco. And I'll address the question to those who are concerned about willful activism. Considering the practical realities of actually changing the Constitution, wouldn't it be more practical to zero in on the culprits and recognize willful activism, in extreme cases, at least, as failure of good behavior and impeach the judges? We impeached Justice, Judge Hastings in Florida. Isn't that the answer, to focus only [on] the guilty parties instead of trying to get the Constitution changed so drastically?

MR. COOPER: I despair that that is the solution. I think it was actually unfortunate that Justice Chase was not convicted in the Senate. I think it was unfortu-

nate. I disagree with my mentor and former boss, Chief Justice Rehnquist, on that. But Judge Hastings was impeached for the only reason that judges have ever been impeached this country: He was behind bars. No --

JUDGE WILKINSON: He was acquitted.

MR. COOPER: -- okay, but he shouldn't have been acquitted, and everybody else is actually been behind bars holding on to their commission. So the Senate has no --

PROFESSOR BURBANK: But I think the point that Mr. Cooper is making is that because of the failure of the Senate to remove Justice Chase in 1805, a constitutional norm against initiating impeachment proceedings on the basis of the content of decisions is a very strongly entrenched norm. Norms can change, but it would be extremely difficult, I think, and probably very dangerous, certainly on the basis of one or two decisions.

Rose Bird -- I don't bleed for Rose Bird, but it should be pointed out that she took with her some of her colleagues who had not evinced the same extreme behavior. She did not vote -- she could not find it in herself to vote -- to affirm a capital conviction in sixty-five cases, notwithstanding the fact that both the Constitution of the United States and the Constitution of California permitted the death penalty. That was not true of the two colleagues that she took down with her. So, that's a potential cost of the system of retention elections. As Penny White, who was non-retained in Tennessee, said "it's like shooting fish in a barrel." At least if you run against somebody, you know who your opponent is. In a retention election, you don't necessarily know who your opponent is.

JUDGE WILKINSON: Yes, sir.

AUDIENCE PARTICIPANT: Steve Fein from the Ave Maria chapter. I just have a quick question for Professor Lindgren. Under the eighteen-year term, how would you address the position of Chief Justice? Would there be an eighteen-year Chief Justice? Would everyone get a crack at it in two years or neither, and why?

PROFESSOR LINDGREN: The proposal is that there, is that the slot of Chief Justice could be someone appointed for 18 years to that slot, or it could be someone who's appointed from the, from an existing slot, that they would not get additional time. So, essentially you could serve all or part of your eighteen years as Chief Justice.

As far as why, I'm not sure that I understand why. It's essentially the same reasons we have Chief Justices now. There's no particular reason why they ought to change that.

JUDGE WILKINSON: Roger.

AUDIENCE PARTICIPANT: Yes. Thank you, Jay.

In listening to the debate, it strikes me that both sides are trying to guard against a set of errors, and you've got a classic situation where, type one and type two errors and how to best guard against them; and it seems to me, and I invite your comment on this, that what Steve and Jim have proposed is just another measure to sort of take the human element out of it. After all, the Constitution is a measure to take some of the human element out of government. Term limits for president is an effort to do that. It seems to me term limits for Justices would do

that too. It would give us a kind of mechanical process because nobody knows which one of the errors -- we can't sit here today and say, is it better to guard against decrepitude or is it better to guard against the kind of thing that Jay raised, of people removed from the bench who should be allowed there because they're so qualified?

None of us [can] determine that, and it seems to me, a mechanical process would allow us to guard against, or at least give us a way to address, the type one/type two problem that is what, really, you're debating here today.

JUDGE WILKINSON: Do some of you have a comment on Roger's point?

PROFESSOR STRAS: You know, I agree with you that there are problems on both sides. I guess my reaction is I just don't find the overall case convincing; in fact, I find it very unconvincing. And as somebody who's studied the Constitution and teaches constitutional law, I see the Constitution as a cohesive whole, and certainly, you make amendments to that. But usually, you have pretty strong reason to do so. And here, I just don't think that the burden has been met.

And I think there's [sic] some other things that we didn't get a chance to talk about. One thing I would point out is I think confirmation battles would probably become more contentious. I know that Steve and Jim disagree with that, but what I think would happen is if you know each President is going to have two appointments and, say, Justice O'Connor's or Justice Kennedy's seat were at issue, I think people would gear up for that battle two or four years in advance, knowing that the entire Court hangs in the balance.

Now, we have a retire[e], there's a flurry of activity three weeks later, you know, we're already commencing confirmation hearings. And so, I actually think it certainly depends; I mean, but you know, things move relatively quickly. There are certainly exceptions. I know my boss's confirmation took quite a while, my former boss's. I do think that you're right, but I would fall on the Burkean side.

I would say let's make incremental moves, and that's why there's [sic] things like pension reform that Jim concedes has been very effective in the past. So maybe we need to do more with pension reform. Maybe we need to make the office of Senior Justice or Retired Justice much more attractive so that they don't feel like they're going to be ostracized from their colleagues and that their only judicial experience is going to be to sit on the circuit. And so, I think there are ways we can encourage Justices to retire or to resign without looking for a constitutional change.

JUSTICE WILKINSON: But will all of those things, even put together, really persuade someone to give up the influence that comes with being a Supreme Court Justice? David?

PROFESSOR STRAS: And that's a question that's hard to answer. I mean, the empirical data would suggest that the answer is probably yes, but we don't know for sure, because all we have is data on the pension, on what judges do once they reach pension eligibility.

PROFESSOR LINDGREN: I'm not so sure even about that. If you're a senior judge on the courts of appeals -- and one of the answers to the problem, why not do this for the court of appeals, is that the data show that eighty percent of courts of

appeals judges take senior status within one year of their eligibility [to] do so. But presumably, one of the reasons they do is that -- and this depends upon the court, and there could be better empirical work done looking at these factors -- because the courts of appeals have different rules about what senior judges are allowed to do. But one thing they surely are allowed to do everywhere is sit on cases, and to the extent that that's what gives the judge satisfaction, as your question, Judge, suggests, then courts of appeals judges get to do that.

Moreover, they get, to a great extent, to pick and choose which cases they sit on. If you don't like criminal cases, you don't have to sit on criminal cases. They get to visit other parts of the country. So I think the two situations are very, very different.

PROFESSOR LINDGREN: Real quickly, one thing that I threw around when I was writing my initial paper, but didn't decide on ultimately was what would happen if you allow senior Supreme Court Justices when one or more of the active Justices are recused. And I thought that that might go a long way towards incentivizing Justices to retire because they would still have that power --

PANELIST: They'd have to refuse.

PROFESSOR LINDGREN: Yes. So -- but I throw that out.

JUDGE WILKINSON: Can we make one real quick comment because I've been given really strict instructions by my bosses at the Federalist Society to end this on time.

PANELIST: I just want to say that on pension reform is one area in which we're in agreement. I think the problem is that the golden parachute would have to be awfully golden because in the past, all we had to do was make the pensions available, which are at full pay, including increases in salary. We've got to do much more. And if we're worried that there's just some possibility that even after many years on the bench, someone might go into private practice of some kind. We might want to offset any further earnings if we make a very golden parachute.

JUDGE WILKINSON: I want to thank the members of the audience for coming today and for being so engaged.

And I want to tell my fellow panelists how much I've enjoyed them, and what great ideas, and what a stimulating debate we've had, so thanks for a wonderful start to the morning everybody.

(Applause.)

