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Life Tenure and the Dynamic of Judicial Independence in the Federal System

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I. An Early History of Life Tenure

155. To the astonishment of few and the disbelief of fewer, the Constitutional provisions that provide for the life tenure of judges do not do so explicitly. This Constitutional language grants that judges, particularly those Article III judges of the Supreme Court of the United States and of its inferior courts, shall “hold their Offices during good behavior.”² A historical examination of English law will show that, for quite some time, it was standard practice for a judge to serve for a duration of time dictated by the Crown, or at the pleasure and the will of the Crown, to be terminated at any time thereafter by the Crown.³

156. Any governing principle or ideology comes with a spectrum of opinions as to its validity. The debate surrounding life tenure of judges is no exception. Perhaps the most prominent proponents of life tenure for our judiciary were the Federalists,

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2 U.S. Const. [art. III, § 1](#).

3 William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, [35 Vill. L. Rev. 1063, 1067](#) (1990).

of whom Alexander Hamilton was arguably the most vocal. Hamilton, joined by fellow Federalist thinkers, opined on this issue within the published works that would be known as the Federalist Papers. In Federalist No. 78, Hamilton authored that permanency of judicial tenure would provide the judiciary with “firmness and independence.” Hamilton believed that the inherent effect of life tenure on the workings of the judiciary was “the citadel of the public justice and the public security.”⁴ Another prominent devotee to the concept of life tenure, Thomas Jefferson zealously advocated for the position until the latter portion of his career, in which he experienced a paramount shift in many of his political positions and ideologies. As a supporter of life tenure initially, Jefferson provided some of the most direct opinions on the matter, stating that judges should “hold estates for life in their offices.”⁵

157. The Anti-Federalists of the day, as sure as the laws of nature might dictate, presented an equal and opposite reaction to the notion of life tenure. The most notable of whom was arguably Benjamin Gale. Gale, a staunch opponent of life tenure, took to public forum to express his distrust for the permanence of the judiciary. Gale and many Anti-Federalists alike believed that the federal judiciary would witness a degree of power so as to allow it to impinge on the very liberty of society.⁶ It is important to note that, at the onset of these debates, the active courts were comprised of judges which the legislature appointed on an annual basis. Gale stated that the new courts as proposed by the Federalists would “eat up [their] courts, of which [their] representatives [had at the time] the right of appointing judges annually.”⁷ On the whole, the Anti-Federalist viewpoint stressed that a truly independent judiciary by virtue of life tenure was a danger in that it saw no policing authority, while the proponent viewpoint of the Federalists held that life tenure would allow the judiciary to be, ipso facto, this exact authority to the remnant branches of government. This check on the remaining two branches was of greater import to the Federalists, and remains of greater concern to the supporters of life tenure today.

158. Thomas Jefferson, formerly a staunch advocate of life tenure, became an advocate against his prior positions soon after his assumption of office as the President of the United States.⁸ The landmark decision of *Marbury v. Madison* provided precedent and justification, by way of Chief Justice John Marshall, to the function and responsibility of the judiciary to interpret the meaning of the Constitution. Marshall

4 Alexander Hamilton, *The Federalist No. 78*.

5 EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 93 (1944).

6 Benjamin Gale, *Speech Before the Connecticut Convention Election* (Nov. 12, 1787), reprinted in 3 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 428 (1976).

7 EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES* 93 (1944).

8 See Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 *U. Chi. L. Rev.* 665, 694–95 (1969).

wrote of this function to be “the province and duty of the judicial department.”⁹ Jefferson would later convey his belief that the opinion of the Court in *Marbury* gave way to a precarious doctrine that would place the greater society “under the despotism of an oligarchy.”¹⁰ In many ways, this decision was viewed by the Anti-Federalists as the very thing they had come to fear.

II. The Contemporary Dynamic Surrounding Life Tenure

159. The notion that the language of the Constitution calls for life tenure is by no means a novel interpretation. Documents from the drafting era of our country illustrate this interpretation of, and intention by, the language of the Constitution, none more candid than Alexander Hamilton’s *Federalist No. 79*, stating that if judges behaved properly in their positions, they would be “secured in the places for life.”¹¹ Recorded discourses during the ratification conventions discuss the term of the Presidency as a four-year term, while juxtaposing it with the terms of federal judges who may “continue for life” in their terms if they continue to show good behavior.¹² Thus, the tradition that we have collectively followed when appointing and confirming judges to federal courts has been one of life tenure or, as described in a more particular manner, a tenure that allows a judge to be secure in their position for the remainder of their legal career so long as they demonstrate good behavior.

160. Naturally, those opposed to the tradition of life tenure within the judiciary remained vocal in their concerns. However, they were contained in their efforts for quite some time between the onset of the debate and the issuance of the opinion in *Marbury*, and again between that opinion and future opinions of the High Court.¹³ The *Marbury* decision saw the Supreme Court define its power and authority, but federal law would not again be stricken down in a manner that mobilized the Anti-Federalists until the Court deemed a federal statute unconstitutional in the disreputable *Dred Scott* decision.¹⁴ Thereafter, the flame of disagreement was reignited as opposition to life tenure was reintroduced in search of solutions for what some

9 *Marbury v. Madison*, 5 U.S. 137 (1803).

10 Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820).

11 Alexander Hamilton, *The Federalist No. 79*.

12 Thomas McKean, *Speech before the Pennsylvania Convention* (Dec. 10, 1787), reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1976); EVAN HAYNES, *THE SELECTION AND TENURE OF JUDGES 540–41* (1944).

13 Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665, 694–95 (1969).

14 See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

viewed to be a problematic judiciary structure. With this renewal came equal push for term limits on one side and for an elected judiciary on the other.

161. While pushes existed by means of public discourse and introduction of bills in the legislative branch to secure either term limits for federal judges or a new, electoral system of appointing them, the push remained within the legislative body until the involvement of the executive branch some eras later under the administration of President Franklin D. Roosevelt. With what has come to be known as FDR's "court-packing" plan, Roosevelt's tactical attempt at overcoming the system of checks and balances presented by the judiciary was far more intricate in design than anything that preceded it. Roosevelt, who was determined to usher in the "New Deal" ideology and combat the ravaging effects of the Great Depression, was resolute in his desire to have a cooperative judiciary in place as statute after statute of proposed legislation transitioned the very structure and function of the federal government. Roosevelt's proposed methodology was as follows: a new law would allow each sitting President of the United States to appoint a single supplementary justice to the Supreme Court for every current justice of the Court that was both on the bench for longer than ten years and refused to resign from the Court within a period of six months after they reached seventy years of age.¹⁵

162. Either conveniently or methodically, the proposed statute would allow a sitting president to appoint such justices and grow the size of the Court by up to six additional justices, meaning a potential total of fifteen justices could have assumed the bench simultaneously.¹⁶ This moment in history was to the independence of federal judges what the Bay of Pigs incident under President John F. Kennedy was to the possibility of nuclear war. It is widely regarded as the closest we have come to seeing life tenure in true jeopardy, as the introduction of bills in the legislative body (to limit the terms of judges, to force their retirement by certain ages, or to elect them by way of traditional elections) and the agenda of packing the court through the means of the executive body seemingly burned the candle of life tenure at both ends.¹⁷

15 WILLIAM E. LEUCHTENBURG, *SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 85–160 (1996).

16 WILLIAM E. LEUCHTENBURG, *SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 85–160 (1996).

17 Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 *Gonz. L. Rev.* 131, 132 (2004), citing David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 *U. Chi. L. Rev.* 995, 996 (2000).

a. Life Tenure & State Judiciaries

163. The debate regarding life tenure for the judiciary is not limited to the realm of the federal government. It is only natural that those very legislators that introduced bills in favor of term limits, forced retirement, and judicial elections in the federal legislature were either representing the will of their constituents, who favored such actions and intentions, or were inducing the legislatures of their home states to strive for similar legislative actions “on the home front,” so to speak. Representatives from Florida were among those who, with high hopes, introduced such legislation in the federal legislature during its 1907 session, calling for federal judges (inclusive of Supreme Court Justices) to be elected to terms of eight years in length.¹⁸

164. Florida is perhaps itself the greatest substantiation of the notion that such ideologies regarding life tenure have resonated in the realm of the governments of the states that brought them to the floor on the federal stage. In 2017, exactly 110 years after the introduction of the legislation by Floridian representatives in the federal legislature, the representatives of its own State House introduced legislation that would limit the terms of state judges that preside over appellate courts, namely the state’s District Courts of Appeal and the Florida Supreme Court itself. At the time of writing, the ultimate fate of this bill has not been decided upon by Florida’s Senate, but the bill remains the first of its kind introduced by any state in the country as it would forbid Florida Supreme Court Justices and judges on the state’s various District Courts of Appeal from serving in their positions upon the expiration of their terms.¹⁹

165. Examining Massachusetts, it is noted that deference is given to the tradition of life tenure. While life tenure is observed, the Massachusetts Supreme Judicial Court does see a limitation regarding age, as a Justice of the Court cannot serve past the age of seventy.²⁰ A mandatory retirement at the precise age of seventy was among those amendments proposed in the federal legislature during the twentieth century, as well as the implied age of retirement by the proposed “court packing” plan of President Franklin D. Roosevelt.²¹ In the State of New York, the Justices of the highest state court, the New York Court of Appeals, serve fourteen-year terms upon their appointment and confirmation by the New York State Senate. Upon the end of their terms, they may reapply for appointment and are considered among other candidates in the running to be appointed. The judges of appellate courts in New York see a limitation of five-year terms, upon which they, too, become eligible

18 H.R.J. Res. 226, 59th Cong. (1907); H.R.J. Res. 50, 60th Cong. (1907).

19 H.R.J. Res. 1 (Fla. 2017).

20 National Center for State Courts, *NCSC Backgrounder: Most States Require Judges to Step Down After 70* (2010).

21 See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

for reappointment in an identical manner. In Washington State, the Justices of the Supreme Court and judges of its various state courts of appeal are elected by general elections and serve six-year terms, while lower, Superior Court judges serve terms of four years — all of whom are eligible for reelection upon expiration of their terms, should they desire to continue their tenure.²²

166. Those who oppose life tenure are often quick to point out that the general scheme of tenure throughout state courts in our country has long abandoned the absolute style of life tenure that our federal courts maintain. Moreover, opponents imply that federal courts are obsolete in their scheme of tenure because the state courts have all but abandoned such strict interpretation of the language. Of the fifty states, only one state employs an absolute policy of life tenure for its Supreme Court: the Rhode Island Supreme Court.²³ The majority view amongst the states, that absolute life tenure is an outdated and flawed scheme for judiciary structure, is a prime case to be made by advocates against life tenure.

167. It should be noted, however, that this argument for judicial tenure reform in the federal realm is inherently flawed. Simply put, the similarities between the structures and functions of state courts and federal courts end after a prima facie examination of the two. Though these two very different judicial systems (defining the federal as one and the collective state courts as another) adjudicate in the same manner, save for the civil structure of Louisiana, they adjudicate vastly different matters with vastly different consequences for vastly different constituencies. Moreover, those who are quick to point out that almost every state in the country has abandoned absolute life tenure for its higher courts, neglect to discuss that, although states have done away with the strict schematic of life tenure that the federal judiciary still has in place, they have kept in place various systems by which judges may continue to serve in their positions. Whilst some state courts have opted for both reelection requirements and age limitations for judges, other states' courts have provided for their judges and justices the opportunity to serve by way of reelections, preserving the importance of allowing respected and learned members of the judiciary to be of service in their gained wisdom while simultaneously preserving a system of accountability to be utilized in the event that a judge is no longer deemed capable of the functions of their office.²⁴

168. The attempted actions of various state legislatures show that even in the states that have mandatory retirement ages in place, the debate is still far from settled. Multiple states have attempted to amend their mandatory retirement policies by

22 H.R.J. 1 (Fla. 2017).

23 THE COUNCIL OF STATE GOVERNMENTS, 37 THE BOOK OF THE STATES 309, TABLE 5.1 (2005).

24 National Center for State Courts, *NCSC Backgrounder: Most States Require Judges to Step Down After 70* (2010).

either increasing the retirement age of judges on their respective state courts, or eliminating the requirement completely. Alabama, Arizona, and Massachusetts saw actions in their respective legislatures to increase the mandatory retirement from seventy to seventy-two, seventy-five, and seventy-six years of age, respectively. New Jersey and Virginia saw legislative attempts to increase the retirement age from seventy to seventy-five and seventy-three, respectively. New Hampshire, New York, Washington, and Wyoming have all seen legislative proposals that call for elimination of a mandatory retirement age. Although these various attempts were generally unsuccessful in amending their state's practices, they exemplify the fact that a dissonance exists in many of the states that have installed a system contrary to the life tenure schematic of the federal judiciary.²⁵ A dissonance that has arisen possibly after witnessing the unintended consequences of removing strict life tenure privileges within their respective judiciaries.

169. The policies of life tenure within the courts of some states are as distinct and distinguishable from one another as the cultures of the states themselves. The collective commonality found between a vast majority of states and the structure of the federal judiciary, preserved up until now, is that both realms at the very least provide judges with the opportunity to serve on their respective benches for a term of good behavior. While their tenure may require an exerted effort of reelection or reappointment in a particular state, the chance at continuing to serve is still somewhat present. The differentiations in policies are observed within the mechanics of the means by which — and frequency by which — good behavior is measured. Whether their behavior is deemed good by a state governor or state appointing committee, or deemed good by the electorate directly, their opportunity to continue in service on the bench is present, and their continued service, if attained, is legitimized by the very same.

b. The Crisis Judicial Tenure in Poland

170. Recent events outside of the landscape of the American Constitution provide an even more expansive canvas for the issue of life tenure and the role it plays in judicial independence. At present, the government of Poland, by way of parliament, has passed a bill that seeks to remove all the nation's supreme court judges by mandatory retirement. The passing of this legislation has led to eruptions in protest, with a majority of Polish citizens urging their president to veto the bill, which would effectively allow the country's Justice Minister to appoint replacement judges across the board.

²⁵ National Center for State Courts, *NCSC Backgrounder: Most States Require Judges to Step Down After 70* (2010).

171. The issue of judicial independence is now at the forefront of the Polish crisis. The European Union has stated its position on the matter as one of grave concern as it would effectively remove any independence within the Polish judiciary and place the entire branch of government under the umbrella of the remaining branches.²⁶ Tasked with appointing all replacements, the Justice Minister would have full authority under their laws to appoint qualified judges, which presents a problem when one considers that the person tasked with appointing these judges is affixed to a political party. To contextualize the crisis in Poland, it would be similar to a situation where the President of the United States appointed seven Justices to the Supreme Court with the assumption that all seven were confirmed in their respective appointments.

172. This would surely eviscerate the very function of our High Court, as it would all but guarantee that the influence of that current president's appointments would be witnessed in unanimity time and time again. Although the crisis in Poland seems like a far cry from the consequences that we might see from a departure from life tenure, they may not be too far removed from one another. The ultimate consequence of the legislation in Poland would be an evisceration of the integrity and independence of their judiciary. Similarly, the ultimate consequence of a departure from life tenure in our federal judiciary would be, at worst, the same evisceration and, at best, a grave and observable decline in the judiciary's active and intended check and balance functions.

173. Perhaps the most striking intersection of Poland's recent protests and our own ongoing debate in America came in the form of the United States Department of State taking an official position on the matter. Its official position has been to urge Poland to respect judicial independence and to avoid weakening the rule of law.²⁷ Although the position of the Department of State should not be taken out of context, it does reaffirm the importance of maintaining the rule of law and acting in the best interest of an uninhibited, independent judiciary. Thus, the proposed direction in our own government would be best situated if it fervently and efficiently endeavored to maintain the independence of our own judiciary.

c. Judicial Independence

174. The Constitutional language granting life tenure exists beyond the rhetoric of good behavior discussed supra, to wit: Article III, Section 1 providing language outlining the circumstances under which a federal judge shall retain their position.

²⁶ President Donald Tusk, European Council President, *Statement to the Council of the European Union on the situation in Poland* (2017).

²⁷ U.S. Department of State, Poland: Independence of the Judiciary, [Press Release](#) (July 21, 2017).

Moreover, this language provides consideration not only for the tenure of a judge, but also for their compensation, which it dictates both to be due to the judge and that it not be diminished during their tenure.²⁸ The Federalist Papers discussed with fervor the belief that a judiciary not entirely independent and starved of the pressures, burdens, and similar external influences seen in the remaining branches of government would be incapable of performing its most crucial and sensitive function — guarding the rights and privileges granted to the people by the law. Alexander Hamilton’s thoughts with regard to absolute judicial independence went so far as to suggest that the guarantee of judicial compensation was as fundamental to the independence of a judge as was the actual granting of a judge’s tenure for life. Hamilton stated that allowing room for control or influence over a judge’s subsistence would surely “amount to a power over [a judge’s] will.”²⁹

175. Where the Constitution provides a foundation for the importance of judicial independence and the publications of the era provide context and analytical guidance, cases before the High Court have since then expounded upon the importance of judicial independence by discussing it in contexts beyond that of life tenure or compensation. *Bradley v. Fisher* allowed the Court to discuss judicial independence in the context of judicial immunity, stating that judges being free to act upon their own convictions without apprehension of consequences to themselves is “a general principle of the highest importance to the proper administration of justice.”³⁰ Although the context is one regarding the immunity of judges against liability, the message is merely another instance in which the judiciary has communicated the imperativeness of independence to its function and, accordingly, the imperativeness of any underlying variable that is vital to that independence itself.

176. In the contemporary, the steadfast advocates of life tenure frequently note that the Supreme Court of the United States and its Circuit Courts of Appeal have only recently (in the “grand scheme” of things) begun to serve their vital purposes in the purest sense of the phrase. Put another way, the Courts in the modern era have ruled on the constitutionality of laws and regulations much more frequently than during earlier eras in our country’s history, undoubtedly due to the growing population, the increasing resources for litigation, and the ever-evolving complexities of life in the modern era which give way to increased opportunities for judicial review. While the Courts have served their purpose since their inception, it is without question that now, more than ever before, the judiciary serves as an unwavering guardian of our existence as a nation of laws, regardless of the subjectivity of political viewpoints; the reproductive rights of women³¹ and the rights of employers with respect to the

28 U.S. Const. art. III, § 1.

29 Alexander Hamilton, *The Federalist No. 78*; Alexander Hamilton, *The Federalist No. 79*.

30 *Bradley v. Fisher*, 80 U.S. 335, 347 (1871).

31 *Roe v. Wade*, 410 U.S. 113 (1973).

same,³² the rights of individuals to enter into same-sex marriages,³³ and the rights of citizens to be secure against warrantless searches and seizures³⁴ are but few in the long list of landmark decisions that the Courts of the modern era have ruled on.

177. Another instance of the significance of judicial independence to our institutions — and importance of life tenure to that independence — is the role of the federal courts in keeping executive actions within the due bounds of the Constitution. It is of great ease for those opposed to posit that the federal judiciary usurps the power of the executive if it sets precedent that narrows the authority that the Constitution grants the executive, but it is far more difficult for those opposed to accept the reality that the federal courts operate not to remove power from the executive, but rather to prevent it from infringing upon the rights of the people.

178. For example, at present, various United States District Courts and Circuit Courts of Appeal have ruled upon the executive actions of the current presidential administration of Donald J. Trump with regard to immigration policies, with the Supreme Court following by granting writ of certiorari as well. Executive Order 13769, signed by President Donald J. Trump and infamously referred to as the “travel ban,” saw actions brought against it in federal courts in nearly fifty different times and on behalf of various parties, many of them states.³⁵ The United States Court of Appeals for the Ninth Circuit issued a temporary restraining order on the executive action. The United States District Court for the Eastern District of Virginia ruled in another instance that the executive action violated the Establishment Clause of the Constitution, which would be the first of many federal rulings finding solace in a similar interpretation of the law. A revised version of the order, Executive Order 13780, was met with opposition when both the United States District Court for the District of Hawai’i and the United States District Court for the District of Maryland issued temporary restraining orders against the action and in favor of suing parties based upon similar reasoning.

179. To prove, empirically, that the course of action taken by federal judges would not have been taken in the absence of strict life tenure is, admittedly, a fruitless endeavor. The holdings and collective rationale of Courts can be studied only in retrospect, and not by anticipatory analysis of any sort. However, it can be argued that one may validate this premise by the virtue of applied logic alone, as follows: first, that federal judges do, at this moment, maintain a schematic of strict life tenure granted to them by the Constitution. Second, that the actions of federal

³² *Burwell v. Hobby Lobby*, 573 U.S. 22 (2014).

³³ *Obergefell v. Hodges*, 576 U.S. __ (2015).

³⁴ *Riley v. California*, 573 U.S. __ (2014).

³⁵ *Int’l Refugee Assistance Project v. Trump*, 883 F. 3d 233, 250 (4th Cir. 2018), as amended (Feb. 28, 2018), petition for cert. filed (U.S. Feb. 23, 2018) (17–1194).

judges in the context of these executive orders were in conflict with the intentions of the executive. Third, that these actions by the judiciary — irrespective of personal political belief and assured by rigorous congressional scrutiny upon the judicial appointments of its officers — resulted from the courts interpreting the Constitution to the best of their respective wisdom and legal ability.

180. We add to this line of logic the following: first, that the voting constituency of the jurisdictions in which these judges decided the positions of their Courts, could potentially, in this instance and in future instances, be in majority support of the decisions of the executive branch, and, by default, would place a minority of that voting constituency in favor of the judicial actions against and in conflict with the executive agenda. Second, that the decisions of these judges, however justified in their own Courts and by their own judicial interpretations, are opposed by prominent members of not only the legal, political, or academic communities, but various communities in our society as a whole — the same legal, political, or academic communities that these judges would, in many instances, need to gain meaningful position in during their post-judicial tenure.

181. These circumstances would present complications of the greatest magnitude to the functions of the judiciary. In the instance of the former, assuming either the presence of elected judicial processes or the presence of term-limits, those judges interpreting the law in a manner that ultimately conflicts with the executive orders of President Trump (or any sitting president at any given time in history, for that matter) would, *ad minimum*, risk upsetting a majority of the voting population that they, themselves, would have to face in the instance of re-election for their current offices, election for higher judicial offices, or election in non-judicial offices of political influence in their post-judicial careers. In the instance of the latter, even assuming term-limitations in absentia an election-oriented judiciary, these judges could potentially face equal difficulties in the realities of a world where personal political opinions may very well inhibit their employability or quality of life upon their departure from the bench.

182. In summary, the issue is understood to be this: a judge may rule in any manner that they please, without fear of repercussions solely based on the way that they ruled. It is thought that subjecting a judge to further checks than the current remedy of impeachment, such as forced reelection or limited tenure, would at most discourage the judge from abusing their power and at the very least guarantee that the damage of an abusing judge upon the landscape of the law is mitigated by limiting the length of time they preside. In reality, this is a logical fallacy. Such an amendment to the schematic of life tenure would only introduce foreign variables into a once-sterile environment, presenting no benefits in the way of increasing judicial accountability while resulting in a multitude of unintended consequences that inhibit the most sacred functions of our courts.

183. Since the clear majority of federal judges does not preside over a court of last resort (all but nine of them are in this category), their potential abuse is already in check. Namely, by the very nine of them that do preside over our Court of last resort. Ergo, if erroneous holdings are at the heart of the argument for those opposed to life tenure, these holdings exist only to be overturned. If erroneous holdings of the High Court itself are at the heart of the argument, one might urge those in opposition to present any contemporary instances in which the Court has ruled erroneously. To attempt to argue that such a holding exists without relying on subjective interpretations of law and relying only on procedural or substantive errors that we look to in the body of legal rationale presents a task far more difficult than it is credited for.

d. Judicial Accountability

184. The crux of the debate surrounding life tenure is as simple in ideology as it is complex in argument. The independence of the federal judiciary, a body that is appointed and not elected, is either viewed as the column that supports the weight of safeguarding our democratic republic, or the branch whose selection sees the least public involvement and exerts the most public power. It is important to note, however, that federal judges are appointed by an office that is itself elected, to then be confirmed by offices that are also themselves elected. Accountability of the federal judiciary to the public is at the heart of the debate for those that oppose life tenure. For opponents, the federal judiciary does not see a degree of accountability high enough to preserve the democratic ideals of governance by the people. Consequently, we examine the procedures afforded with regard to federal judicial accountability.

185. The Constitution provides that the House of Representatives alone shall maintain the power to impeach.³⁶ It further provides that "[t]he Senate shall have the sole power to try all impeachments. . . And no person shall be convicted without the concurrence of two thirds of the members present." Definitively, impeachment in the context of government is the removal of a civil officer from their office, and is not a remedy that provides either for discipline that exceeds the removal from office or removal for offenses that fail to live up to the standard of impeachable offenses.³⁷ At present, life tenure provides that federal judges may serve in their offices during good behavior without limit. Good behavior would most certainly be violated by an offense while in office that results in impeachment from office. Misconduct by a judge that does not live up to the standards of an impeachable offense does not have a remedy in impeachment. The definition of misconduct, however, is not equal on both sides of the debate. One might go as far as to say that those

36 U.S. Const. [art. I, § 2](#).

37 U.S. Const. [art. I, § 3](#).

opposed to life tenure are opposed solely because of the possibility of "erroneous" decisions by a Court that would effectively "legislate from the bench," or create law outside of the legislative body. It is of the utmost importance to accept that there is a serious possibility that one side of this issue defines "erroneous" decisions as those that are legally incorrect and require rectification, while the other side of this issue defines "erroneous" decisions as those with which they subjectively disagree in terms of ideology and opinion.

186. The principles of logic would require that we step back and examine the fact that a federal court striking down a law or executive action, for example, does so by interpreting the Constitution and other applicable law and applying their interpretation of the law. It is of no surprise that the decision will either be agreed with or opposed, as the opinions of the public can only fall on either one side of the pitch or the other. This begs the question of what "erroneous," "misconduct," or "poor behavior" ought to mean, in the eyes of the law. If these actions are to be met by simply reaching a decision that half of the public will disagree with, by interpreting the law in a manner that half of the aisle will deviate from, then surely every judge in every court is guilty of erroneous holdings, misconduct, and poor behavior each time they issue a ruling. Put another way, those that oppose life tenure because they find that it inhibits judicial accountability fall victim to the fallacy that, absent life tenure, federal judges would interpret the Constitution and federal laws in a manner completely different than they currently do. Moreover, those that oppose life tenure for any other reason are likely void of the benefit of a meaningful understanding of the function of the federal judiciary, and perhaps even the mechanics of the judiciary's selection and confirmation processes.

187. It is a mistaken belief that a court, choosing to deviate from precedent in a particular instance and under a particular set of facts, is automatically engaging in judicial activism or legislating from the bench. As a society, we ask of our federal judiciary to interpret and apply the laws. We supply our President, whom we have democratically elected, with the power to appoint judges to the federal courts, and we supply our elected representatives in Congress with the power to confirm (or deny) the decisions of our Executive.³⁸ Those in support of life tenure ask for the judiciary to interpret and apply the laws. Those opposed to life tenure ask of the judiciary something entirely different: to interpret and apply the laws, provided that their interpretations deviate not with the interpretations of previous instances, and present no conflict with the intentions of the legislature, however different the facts and circumstances may be, and to whatever extent the rights of the people may be infringed upon.

³⁸ U.S. Const. [art. II, § 2](#).

188. Judicial accountability is not and has never been damaged or inhibited by life tenure. To date, there have been over sixty attempts to impeach federal judges. While it can be argued that this number is incredibly low when compared to the number of federal judges that have served and continue to serve on the bench, it can be rebutted by the notion that this low ratio of impeachment attempts is perhaps more a testament to the rigor of judicial confirmation processes than it is a disparagement to the effectiveness of the impeachment process. Many of the attempts were successful in impeachment, while other instances saw judges resign after the House Judiciary Committee stated that an impeachment would surely follow otherwise.³⁹ In the few instances where the Senate tried a judge for impeachment and a member of the federal judiciary remanded the holding back to the Senate, the Supreme Court itself held that the federal courts have no jurisdiction over Senate impeachment hearings and related proceedings, and vacated the judgment to remand.⁴⁰

189. It should also be noted that all judges are lawyers, while not all lawyers are judges. Put another way, it tends to be forgotten any person holding the office of a federal judge (or a state judge, for that matter) is required to be a lawyer in good standing with their respective bar. With this, comes an initial level of accountability that is often overlooked: a judge is subject to discipline under the rules of conduct governing his or her bar, as is every other lawyer similarly situated. To that end, consider the following logic: all bars govern their member lawyers by rules of professional conduct. All judges are simultaneously lawyers by definition of being members of their respective bars (inclusive of state bars and federal bars) and are subject to said rules. Violation of said rules in certain cases may lead to that member being disbarred. A disbarred member is no longer able to practice law, and is therefore no longer able to hold judicial office. Thus, a federal judge that violates the rules of conduct governing them under their respective bar membership could be cause to be disbarred, which would render them unable to preside on the bench. Moreover, consider the following logic in supplement: most, if not all, actions that warrant impeachment by the House of Representatives simultaneously violate rules governing the respective bar. If the threshold of impeachment is not reached, this does not necessarily mean that the threshold of being disbarred cannot be reached.

190. Admittedly, the most notable instances of disbarment come from the executive branch. President Bill Clinton, who was famously impeached by the House of Representatives in 1998 after being found guilty of perjury, was also disbarred

39 Warren S. Grimes, *Hundred-Ton Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 U.C.L.A. L. Rev. 1213, note 21 (1991), citing J. BORKIN, *THE CORRUPT JUDGE* 219–58 (1962); see also Elizabeth B. Bazan, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, CONG. RESEARCH SERV. 98–186 (Feb. 14, 1995).

40 See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993).

for his actions. In 2000, Clinton's license to practice law Arkansas was suspended pending disbarment and ultimately led to him agreeing to an extended term of suspension along with a monetary fine to avoid permanent disbarment. In 2001, the Supreme Court Bar suspended his license to practice pending full disbarment absent a successful appeal by Clinton within forty days. Clinton opted to resign from the Supreme Court Bar and forego a formal contest of the pending disbarment.⁴¹ To state that Clinton would have been disbarred had he not been impeached would be speculation, but the statement that the processes by which he was disbarred were in place and did function properly would maintain its verity. The processes in place to remove federal judges exist and function as intended. The circumstances under which a judge may violate good behavior, this is the area which those opposed to life tenure truly find to be lacking. The definition of good behavior to some could mean that one does not violate the law in a criminal manner, violate the oath of their office, or fail to provide the services which they have sworn to provide and are compensated for providing. For others, good behavior could just as easily be violated by interpreting the laws in a manner that is inconsistent with what is popular. This precarious expansion of what violates good behavior jeopardizes the independence of the judiciary.

191. That a federal judge may serve for life unless impeached is proposed to be problematic, as though the instances in which judges commit unimpeachable offenses exist in such high number that they threaten the function of our democracy. It is conceded that instances have occurred where impeachment has been brought against a federal judge, and has been brought rightfully so, but the judge impeachment failed and the judge continued to serve. On May 19, 1993, Rep. Jim Sensenbrenner introduced H.R. Res.177, impeaching Judge Aguilar, who had been indicted in the late 1980s for racketeering and was convicted in a 1990 retrial. It was referred to the House Judiciary Committee, who left it in limbo while the Judge's appeals played out. In 1994, the conviction was overturned, and the resolution was left to die. The Judge retired in 1996.⁴² These instances, however, highlight deficiencies not with the remedy of impeachment for federal judges that violate the doctrine of good behavior, but with the processes of impeachment within the legislature. To say that life tenure inhibits the accountability of the federal judiciary by the people is to say that an effortless, swift method of judicial review to be used when the decisions of a court deviate from the majority or popular opinions of the times outweigh the importance of the function of the federal judiciary as the ultimate check and balance of our republic.

41 JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* (2006).

42 H.R. Res. 177, 103d Cong. (1993).

e. Judicial Impeachment

192. As discussed *supra*, the House of Representatives holds the sole power of impeachment, the process by which a civil officer of the United States will be removed from his or her office. At present, impeachment is the sole check on the judiciary by any branch of government.⁴³ Absent the circumstances under which a judge might become disbarred and ineligible to hold his or her office under the conduct rules of a bar, impeachment is the only remedy. As this remedy is the sole check upon the officers of the Supreme Court and its inferior courts, the Court itself emphasized the importance of it remaining solely in the hands of the legislative body, noting that important concerns about the separation of powers would be had if the final review in impeachment matters was placed before the Supreme Court, “the same body that the impeachment process is meant to regulate.”⁴⁴ The power to impeach federal judges lies with the judiciary committee of the House of Representatives, which has set out the actions and circumstances that warrant impeachment proceedings against an officer of the judiciary.⁴⁵ What our judicial history shows thus far are instances in which the judiciary has been asked to review impeachment proceedings, to which it has responded with a respectable rejection justified by impropriety and the violation of constitutional principles.⁴⁶ What our legislative history shows us are instances in which Congress has set out to cement the processes by which it carries out its duty to impeach with uniformity against the judiciary, serving as the sole check upon the branch. The Congressional Research Service provides a particularly striking analysis of the mechanics of impeachment with regard to officers of all three governmental branches:

[While some] might find some support for the notion that the “good behavior” clause constitutes an additional ground for impeachment in early twentieth century practice, the “modern view” of Congress appears to be that the phrase “good behavior” simply designates judicial tenure. Under this reasoning, rather than functioning as a ground for impeachment, the “good behavior” phrase simply makes clear that federal judges retain their office for life unless they are removed via a proper constitutional mechanism. For example, a 1973 discussion of impeachment

43 U.S. Const. art. II, § 4.

44 *Nixon v. United States*, 506 U.S. 224 (1993); Warren S. Grimes, *Hundred-Ton Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 U.C.L.A. L. Rev. 1213, n. 21 (1991), citing J. BORKIN, *THE CORRUPT JUDGE* 219–58 (1962); see also Elizabeth B. Bazan, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, CONG. RESEARCH SERV. 98–186 (Feb. 14, 1995).

45 See JUSTICE WILLIAM O. DOUGLAS, FINAL REPORT BY THE SPECIAL SUBCOMMITTEE ON H. RES. 920 OF THE COMMITTEE ON THE JUDICIARY, 91ST CONG. 31–39 (1970).

46 *Nixon v. United States*, 506 U.S. 224 (1993); JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* (2006).

grounds released by the House Judiciary Committee reviewed the history of the phrase and concluded that the “Constitutional Convention . . . quite clearly rejected” a “dual standard” for judges and civil officers. The “treason, bribery, and high Crimes and Misdemeanors” clause thus serves as the sole standard for impeachable conduct for both executive branch officials and federal judges. The next year, the House Judiciary Committee’s Impeachment Inquiry asked whether the “good behavior” clause provides an additional ground for impeachment of judges and concluded that “[i]t does not.” It emphasized that the House’s impeachment of judges was “consistent” with impeachment of “non-judicial officers.” Finally, the House Report on the Impeachment of President Clinton affirmed this reading of the Constitution, stating that impeachable conduct for judges mirrored impeachable conduct for other civil officers in the government.

Nevertheless, even if the “good behavior” clause does not delineate a standard for impeachment and removal for federal judges, as a practical matter, one might argue that the range of impeachable conduct differs between judges and executive branch officials due to the differing nature of each office. For example, one might argue that a federal judge could be impeached for perjury or fraud because of the importance of trustworthiness and impartiality to the judiciary, while the same behavior might not constitute impeachable conduct for an executive branch official. However, given the wide variety of factors at issue — including political calculations, the relative paucity of impeachments of non-judicial officers compared to judges, and the fact that a non-judicial officer has never been convicted by the Senate — is uncertain if conduct meriting impeachment and conviction for a judge would fail to qualify for a non-judicial officer.

The impeachment and acquittal of President Clinton illustrates this difficulty. The House of Representatives impeached President Clinton for (1) providing perjurious and misleading testimony to a federal grand jury and (2) obstruction of justice in regards to a civil rights action against him. The House Judiciary Committee report that recommended articles of impeachment argued that perjury by the President was an impeachable offense, even if committed with regard to matters outside his official duties. The report rejected the notion that conduct such as perjury was “more detrimental when committed by judges and therefore only impeachable when committed by judges.” The report pointed to the impeachment of Judge Claiborne, who was impeached and convicted for falsifying his income tax returns — act which “betrayed the trust of the people of the United States and reduced confidence in the integrity and

impartiality of the judiciary.” . . . In addition, the report continued, both Judge Claiborne and Judge Nixon were impeached and convicted for perjury and false statements in matters distinct from their official duties. Likewise, the report noted the President’s perjurious conduct, though seemingly falling outside of his official duties as President, nonetheless constituted grounds for impeachment.⁴⁷

193. In its analysis, the Congressional Research Service discusses two matters of interest: first, the simultaneous employment of the "good behavior" provision of the Constitution as both a foundation by which to justify impeachment of judges and an instructive provision that secures life tenure for judges. Second, the notion that the House of Representatives, by way of subcommittee reports solidified during impeachment proceedings against a sitting President of the United States, has stated that the conduct for which judges can be impeached mirrors the conduct for which other civil officers can be impeached.⁴⁸

III. Conclusion

194. In the modern era, citizens’ rights and the mechanics of a complex society come to intersections at a steady pace, with the support for the interests of multiple parties being consistently advocated for before the members of congress and through newer outlets such as political "super-pacs." It is of paramount importance to maintain, in the face of this evolved and complex mechanic of democracy that we have before our society today, a judiciary whose collective conscience rests not upon the tide of external influences, but upon its internal judgment and interpretation of the law. The arguments regarding life tenure for the judiciary in the federal system as well as the state system span an attenuated spectrum.

195. At one end, there exists the desire for a judiciary that answers to the body politic of America directly by way of limitations placed upon the extent to which its members may serve on the bench. At the opposite end, the desire for the judiciary to be as independent from the body politic as possible, for the purpose of executing more freely the duty that has been placed upon it by the Constitution and arguably the intent of the framers themselves. This article has discussed at length the history of these opposed viewpoints, the manifestation of the debate at the state level, and the arguments posited for judicial accountability and judicial independence alike.

47 Jared P. Cole & Todd Garvey, *Impeachment and Removal*, [CONG. RESEARCH SERV., R44260 9–11](#) (October 29, 2015).

48 Jared P. Cole & Todd Garvey, *Impeachment and Removal*, [CONG. RESEARCH SERV., R44260 15–16](#) (October 29, 2015).

This article will now posit a varied approach to a solution that aims to secure a greater accountability on the part of the judiciary while maintaining the schematic for life tenure, which, in the view of this article, is of the greatest importance to the independence of the judiciary and, consequently, to the function of the judiciary during the most trying times of crisis within our republic.

196. The House of Representatives of the United States takes it upon themselves, by way of proper committees, to reform the circumstances under which it impeaches civil officers of the government. The precedent logic of the House itself dictates that the circumstances under which impeachment may be brought against the officers of the judiciary should not differ from the those under which other civil officers may see impeachment, the president and the executive branch being the primary example in the context of the aforementioned research. Therefore, under the simplest notions of *modus ponens* logical inferences, if the reasoning for impeachment of a judge undergoes the needed reform in the House, the reasoning for impeachment of all civil officers will have undergone the same reform. This applies to the legislative as well as to the judicial and the executive branches. It is posited, now, that greater judicial accountability can be attained while also maintaining life tenure for its own important purposes. By way of reform, the House, with home the sole power of impeachment sits, is implored to reformulate the offenses, be they lesser than criminal or any existing offenses, under which impeachment can be brought.⁴⁹

197. The body politic maintains a great check and balance over the legislature: it is election by which the body politic assigns power to the legislature, and election by which the legislature maintains said power. The power to check the judiciary and the executive arms of government are in the hands of the legislature and, indirectly, in the hands of the body politic. By way of civil discourse between itself and its respective constituents, the House (and the Senate, for that matter) must collectively decide on a more specific set of circumstances under which it brings impeachment and, subsequently, must remain consistent in its efforts to impeach when it sees fit. The High Court has already held that the final review of impeachment sits with the executive, meaning that the Court will not strike down the lawful, proper impeachment of any civil officers by the House, including its own officers in the federal judiciary.⁵⁰

198. If it is truly a matter of judicial accountability being threatened by life tenure, then the House should reform its impeachment policies. It should entertain the notions discussed by the Congressional Research Committee findings that point to the “good behavior” clause as a means by which impeachment is brought, and isolate

49 Jared P. Cole & Todd Garvey, *Impeachment and Removal*, CONG. RESEARCH SERV., R44260 15–16 (October 29, 2015).

50 *Nixon v. United States*, 506 U.S. 224 (1993).

key instances that it collectively finds ought to constitute impeachment. It should be careful to apply these changes broadly, so that officers of all branches of our government are held to these newer, higher standards of behavior, so as to secure the justification of acting for the good of the republic and inhibit the views that the legislature has commenced a power-grab of sorts.

199. Judges who violate the code of behavior, set out by the House, would be held accountable and removed from the bench. That is, of course, if judicial accountability is the core of the matter for those opposed to life tenure. If it is a veiled truth that those opposed to life tenure wish to revoke the ability of a judge to enjoy his or her station for life simply to limit the amount of time that a judge interprets the law in a manner that is unpopular, then those opposed to life tenure for this reason will find no solace in this, or any other solution. Those who oppose life tenure despite its necessity to the function of our federal judiciary, and do so because they find issue with judicial opinions with which they disagree, have little standing to partake in this debate. They seek not to hold the judiciary accountable, but rather to increase the turnover rate in the judiciary with the hopes that judges to follow will interpret the laws in a manner that is more aligned with the views that they, themselves might hold.

200. Where some seek to increase the accountability of the judiciary and some seek to maintain its independence and function, successful compromise is to be had. To amend the constitutionally guaranteed life tenure of the federal judiciary would inhibit the judiciary's ability to carry out its function. It would render the judges and justices of the federal system susceptible to the influences that the framers had so ardently warned us about. Although not susceptible at once, they would be at some point. Whether it be repercussions that might affect a judge when he or she transitions careers, runs for office in another branch, or even in the course of their day-to-day interactions post-judicial service, the removal of life tenure would risk these influences finding their way into the judiciary. More than imperative to the rulings that a judge does make from the bench, life tenure is imperative to the rulings that a judge does not make from the bench, namely the rulings that the body politic may have felt justified but that the judge, in his or her interpretation and discretion, ruled upon in the alternative.

201. As the importance of the courts to the constitutional protections of all American citizens (including entities) grows in our modern era, the judiciary, now more than ever, must function as independently as is reasonably possible. History dictates that when the Supreme Court was offered an opportunity to essentially usurp authority over final review of impeachment, it rejected and held that it would violate the Constitution.⁵¹ The fear that the judiciary will "answer to none," the fear that

⁵¹ *Nixon v. United States*, 506 U.S. 224 (1993)

was at the heart of the Anti-Federalist movement during the era of the framers, has not come to fruition. When given an opportunity to truly answer to none, the judiciary declined to expand its power. Yet, the fear of the Federalists — that in losing its independence the judiciary cannot function as intended — sees the risk of coming to fruition each and every time a judge must rule on the application and interpretation of law, should the security of life tenure be vacated. Judges exist to interpret and apply the law to best of their ability. To draw a line where one must be drawn, often by the purposeful availment of the parties themselves. That they may arrive at conclusions met with disagreement by some is a given. That the buck must stop and a decision be made at some given point is a given.

202. The mechanics for judicial accountability are present. Federal judges are appointed by a civil officer that answers directly to the body politic, they are confirmed by civil officers that answer directly to the body politic, and they can be removed by civil officers that answer directly to the body politic. Those who wish to hold judges accountable more frequently or for a broader list of violations need not look to the judiciary, but rather to the executive and the legislative bodies. Those who wish to disarm the judiciary of its constitutionally vested means of maintaining independence and carrying out its functions as intended for the fear that its officers — whom have dedicated their lives to the rule of law — may arrive at unpopular interpretations of law and subsequently unpopular holdings for a period of time that is indefinite: take heed that although cutting the chains of a knotted anchor is a swifter method to freeing a ship than the meticulous process of unknitting and salvaging it, the anchorless ship once still in calm waters may become impossible to stop when the tides turn volatile.