

The Peril and Promise of SCOTUS Resignations

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ABSTRACT: Federal judges’ discretionary power to resign creates a problem and an opportunity. The problem is that judges and justices can renege on their resignation decisions for capricious, manipulative, or partisan reasons. Yet that discretionary power to resign also points toward a new opportunity for reform: “opt-in term limits,” that is, term limits that are established through judges’ voluntary but binding resignation announcements.

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I. INTRODUCTION

Justice Stephen G. Breyer’s recent manner of effectuating his retirement points out both a problem and an opportunity. The problem is that there is no settled understanding, much less governing law, as to what a justice’s resignation decision means or does.¹ As a result, a justice might renege on a

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1. To illustrate the lack of clear authority in this area, consider two recent commentaries. First, Ed Whelan has posted an Office of Legal Counsel opinion stating “that ‘a resignation to take effect in the future may be withdrawn prior to its effective date, especially where, as here, it had not been accepted prior to that time.’” Ed Whelan, *More on Status of Breyer Retirement*, NAT’L REV.: BENCH MEMOS (May 2, 2022, 12:49 PM) (quoting a linked Office of Legal Counsel opinion entitled “Retirement of Judge,” dated March 1, 1974), <https://www.nationalreview.com/bench->

resignation decision or engage in other undesirable forms of resignation creativity. Supporting that worry, it seems that at least two federal circuit judges have recently retracted their resignations out of disaffection for the people the president intended to nominate as their successors.² The simplest way to solve that problem is to make resignation letters formally binding. And, it turns out, that reform brings with it a major benefit: it provides a new, auspicious means of achieving federal judicial term limits, a widely desired reform that has so far eluded achievement.³ The idea, in short, is to establish “opt-in term limits,” that is, term limits that are set through judges’ voluntary—but binding—resignation announcements.⁴

Making judicial resignations binding isn’t the type of court reform that you hear about a lot these days. But it should be.

II. WHAT MAKES JUSTICE BREYER’S RESIGNATION LETTER SPECIAL

Let me start with a little background on recent Supreme Court resignation or retirement letters, with an eye to explaining why Breyer’s letter is uniquely creative and important. Justice Anthony M. Kennedy provided a date certain for his “decision” to resign, essentially giving one month’s notice.⁵ Justice David Souter said he “intend[ed] to retire” at the end of the Court’s term, which was likewise about a month away.⁶ Justice John Paul

memos/more-on-status-of-breyer-retirement [https://perma.cc/B59H-WVMJ]. That opinion could support an almost unlimited power to renege, depending on how “especially” is read. Second, Professor Stephen L. Carter has argued that “when a judge’s resignation becomes binding is a question best resolved by the law of contract” and that a resignation cannot be rescinded “[w]hen a successor has been confirmed.” Stephen L. Carter, *Ketanji Brown Jackson Won’t Lose Her Seat If Breyer “Unretires,”* WASH. POST. (Apr. 25, 2022, 5:57 PM), https://www.washingtonpost.com/business/ketanji-brown-jackson-wont-lose-her-seat-if-breyer-unretires/2022/04/25/4ff6c178a-c4a4-11ec-8cff-33b059f4c1b7_story.html [https://perma.cc/F7PV-8TA2]. But it is far from clear that contract principles extend to the constitutional law at issue—or even how those principles would apply.

2. See *infra* note 21–22 and accompanying text.

3. E.g., Seung Min Kim & Robert Barnes, *Supreme Court Term Limits Are Popular — and Appear to Be Going Nowhere*, WASH. POST. (Dec. 28, 2021, 6:00 AM), <https://www.washingtonpost.com/nation/2021/12/28/supreme-court-term-limits> [https://perma.cc/Q56C-CELC]; Chris Kahn, *Most Americans Want to End Lifetime Supreme Court Appointments*, REUTERS (Apr. 18, 2021, 5:03 AM), <https://www.reuters.com/business/legal/most-americans-want-end-lifetime-supreme-court-appointments-2021-04-18> [https://perma.cc/9GLZ-AQC8] (reporting a poll indicating “that 63% of adults supported term or age limits for Supreme Court justices”). Proponents of other reforms acknowledge the popularity of judicial term limits. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 173 (2019) (“Perhaps the most popular reform proposal involves setting term limits for Supreme Court Justices.”); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1724 (2021) (noting “popular support” for term limits).

4. I will focus on the Supreme Court, but most of my discussion applies to all federal judges.

5. See Letter from Justice Anthony Kennedy to President Donald Trump (June 27, 2018), https://www.supremecourt.gov/publicinfo/press/letter_to_the_president_june27.pdf [https://perma.cc/S677-7DNY].

6. See Letter from Justice David Souter to President Barack Obama (May 1, 2009), <https://www.supremecourt.gov/publicinfo/press/DHSLetter.pdf> [https://perma.cc/F3VQ-36

Stevens's letter was similar but allowed for about three months.⁷ More creatively, Sandra Day O'Connor reported her "decision to retire . . . upon the nomination and confirmation of my successor."⁸

Breyer's letter is different. After stating that he had "decided to retire from" active service and continue to serve as a retired justice, Breyer added the following sentence: "I intend this decision to take effect when the Court rises for the summer recess this year (typically late June or early July) assuming that by then my successor has been nominated and confirmed."⁹

That sentence makes Breyer's resignation letter distinctive in at least two ways. First, he explained that he "intend[ed] [his retirement] decision to take effect" at the end of the term, which was then about five months away.¹⁰ Thus, Breyer created a significant period of continued service. By comparison, O'Connor was replaceable as soon as her successor was confirmed.¹¹

Second, Breyer added a potentially meaningful reservation: "assuming that *by then* my successor has been nominated and confirmed."¹² This phrase may simply mean to imitate O'Connor's "upon . . . confirmation of my successor" idea.¹³ In context, however, that reservation seems more pointed. At the time of the letter, many people were pressuring Breyer to retire because the Democratic Party had such a slim hold on the Senate and faced daunting election prospects later that year.¹⁴ So, if Breyer's would-be replacement

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7. See Letter from Justice John Paul Stevens to President Barack Obama (Apr. 9, 2010), https://www.cbsnews.com/htdocs/pdf/JPS_resignation_letter.pdf [<https://perma.cc/F953-JH4Z>].

8. See Letter from Justice Sandra Day O'Connor to President George W. Bush (July 1, 2005), <https://www.supremecourt.gov/publicinfo/press/oconnor070105.pdf> [<https://perma.cc/Z4YE-HCEY>].

9. See Letter from Justice Stephen Breyer to President Joseph Biden (Jan. 27, 2022), https://www.supremecourt.gov/publicinfo/press/Letter_to_President_January-27-2022.pdf [<https://perma.cc/24PV-EZRH>].

10. See *id.*

11. See Letter from Justice Sandra Day O'Connor to President George W. Bush, *supra* note 8. If Chief Justice William H. Rehnquist hadn't passed away, O'Connor probably would have been replaced in about three months, which is when John G. Roberts, initially nominated to succeed her, was confirmed as Chief Justice. See *Judge John G. Roberts – Nominee to Replace Chief Justice William H. Rehnquist (Confirmed)*, GEO. L. LIBR.: SUP. CT. NOMINATIONS RSCH. GUIDE, <https://guides.ll.georgetown.edu/c.php?g=365722&p=2471099> [<https://perma.cc/8SWA-49KS>].

12. See Letter from Justice Stephen Breyer to President Joseph Biden, *supra* note 9 (emphasis added). Breyer later wrote a second letter stating that, as of noon the next day, his retirement from active service "will be effective." Letter from Justice Stephen Breyer to President Joseph Biden (June 29, 2022), https://www.supremecourt.gov/publicinfo/press/2022-06-29_SGB_Letter.pdf [<https://perma.cc/PQK2-UT68>]. This letter may represent mere housekeeping and coordination, or it could bear out that Breyer's earlier letter was nonfinal.

13. See Letter from Justice Sandra Day O'Connor to President George W. Bush, *supra* note 8 and accompanying text.

14. Pete Williams, *Justice Stephen Breyer to Retire from Supreme Court, Paving Way for Biden Appointment*, NBC NEWS (Jan. 26, 2022, 8:43 PM), <https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042> [<https://perma.cc/W22S-LY8R>].

became stalled, the desired confirmation might not take place before the Democrats lost control of the Senate. At that point, Republicans might block all nominees until the next presidential election—potentially giving a Republican president the chance to pick Breyer’s successor.

Now, was that series of events ever likely? No. But it was possible, and there has been no shortage of surprising confirmation-related events in just the last several years, to say nothing of recent decades. The most recent example, of course, is the failed Supreme Court nomination of then-Judge Merrick Garland, whom the Senate refused even to consider until the next president took office (about 10 months later).¹⁵ Further back in time, Presidents Nixon and Reagan both had confirmation difficulties, requiring as many as three nominees for a single seat.¹⁶ Breyer, who once worked for Senator Edward M. Kennedy on the Judiciary Committee,¹⁷ is an astute observer of judicial politics and has of course lived through the foregoing events. So, it is plausible that he wrote his resignation letter with a view to the possibility that another surprise might take place. In anticipation of that risk, his letter gave him wiggle-room to say: “Since you haven’t picked my successor by the stated timeframe, I’ll just stay on.”

III. THE RISK THAT A RESIGNING JUSTICE MIGHT RENEGE

Setting Breyer’s letter and behavior aside, we should worry about how other justices might manage their retirements. Three scenarios stand out.

First, a justice who has announced retirement could later renege out of caprice or regret. It has been reported that Justice William O. Douglas tried to do something like this after suffering a debilitating stroke and regretting that he had brought about the end of his longtime Supreme Court career.¹⁸ The situation was managed, but that experience is hardly reassuring. This episode cannot be written off given that judges sometimes resign—and are expected to resign—precisely because they themselves realize that they are no longer medically well or of sound mind. This kind of event would be costly and embarrassing to the judiciary and all involved. More recently, one could imagine someone in O’Connor’s position trying to unwind her resignation (though of course she did not actually do so), given her stated regrets about having resigned based on false beliefs regarding her spouse’s medical

15. See Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), <https://www.scotusblog.com/2017/01/garland-nomination-officially-expires> [<https://perma.cc/PW7S-WARU>].

16. To wit, Justice Blackmun was Nixon’s third nomination for that seat, and Justice Kennedy was likewise Reagan’s third nomination for that seat. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 45–46, 188–89 (2005).

17. Jordan S. Rubin, *Breyer’s Time in U.S. Senate “Foundational” for Tenure on Bench*, BLOOMBERG L. (Jan. 26, 2022, 12:43 PM), <https://news.bloomberglaw.com/us-law-week/breyer-s-time-in-u-s-senate-foundational-for-tenure-on-bench> [<https://perma.cc/G8AD-AgTR>].

18. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 390–99, 433 (1979).

condition, her misapprehension of Chief Justice Rehnquist's continued ability to serve, and her expressed desire for a woman to replace her.¹⁹

Second, justices could renege, or threaten to renege, to influence the selection of their successors.²⁰ Unfortunately, this worry is no longer hypothetical. A few years ago, Seventh Circuit Judge Michael Kanne reportedly did something quite similar during the Trump administration: Basically, the judge wanted his own former law clerk to be nominated as his successor and so withdrew his resignation when the desired nomination did not take place.²¹ This incident could provide a precedent, effectively green-lighting federal judges' efforts to influence their replacements. And so it has. In 2021, Fourth Circuit Judge Robert B. King withdrew his resignation, reportedly because he disfavored Biden's intended nominee and preferred his own former clerk.²² So it appears that this behavior is becoming routine.

Retracted resignations are just the tip of the iceberg, for the mere threat or risk of renegeing could give judges undue influence over their own replacements. For instance, Justice Kennedy reportedly sought to influence the selection of his successor by recommending his former clerk, the ultimately successful nominee Judge Brett M. Kavanaugh.²³ While a recommendation is innocuous enough, the potential for future abuse is real. Kennedy reportedly recommended Kavanaugh to the Trump administration well before offering his own formal resignation, thereby creating an environment in which the administration would be tempted to make

19. In fact, O'Connor's ill husband was soon beyond her ability to care for, the Chief Justice almost immediately died, and she was replaced by Justice Samuel A. Alito. See EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR chs. 15–16 (2019).

20. Matthew Madden has termed this idea the “incumbent veto.” See Matthew Madden, Note, *Anticipated Judicial Vacancies and the Power to Nominate*, 93 VA. L. REV. 1135, 1137–38 (2007). Madden treated the incumbent veto as self-evidently bad, and he noted that there were then “few examples” of it, though he does discuss an interesting near-miss involving Justice Field near the end of the 19th century. See *id.* at 1162–63. Madden deserves great credit for taking this risk seriously before it became evident.

21. See Eliana Johnson, *Why Pence Spiked a Trump Judge*, POLITICO (July 12, 2019, 5:03 AM), <https://www.politico.com/story/2019/07/12/mike-pence-kanne-judge-trump-1411915> [<https://perma.cc/G8FJ-HHDDV>].

22. See Chris Dickerson, *King Steps Back from Moving to Senior Status, Might Have Been Unhappy with Replacement Plan*, W. VA. REC. (Nov. 30, 2021), <https://wvrecord.com/stories/613723024-king-steps-back-from-moving-to-senior-status-might-have-been-unhappy-with-replacement-plan> [<https://perma.cc/LRS9-Q2TV>]; David Lat, *Judicial Notice* (11.27.21): “The System Works”, ORIGINAL JURISDICTION (Nov. 27, 2021), <https://davidlat.substack.com/p/judicial-notice-112721-the-system?s=r> [<https://perma.cc/5KSR-TXHY>]; Josh Blackman, *Judges Who Rescind Their Senior Status Announcement Because They Don't Like Their Replacements*, REASON: VOLOKH CONSPIRACY (Nov. 28, 2021, 10:05 AM), <https://reason.com/volokh/2021/11/28/judges-who-rescind-their-senior-status-announcement-because-they-dont-like-their-replacements> [<https://perma.cc/CJB4-3S3T>].

23. See Robert Barnes, *Justice Kennedy Asked Trump to Put Kavanaugh on Supreme Court List, Book Says*, WASH. POST (Nov. 21, 2019, 3:03 PM), https://www.washingtonpost.com/politics/courts-law/justice-kennedy-asked-trump-to-put-kavanaugh-on-supreme-court-list-book-says/2019/11/21/3495f684-0b0f-11ea-8397-a955cd542doo_story.html [<https://perma.cc/C44D-NYTJ>] (citing RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER (2019)).

assurances.²⁴ The next time that a justice recommends a successor and then retires, the recommendation might be rejected. Would the incumbent justice then feel entitled to withdraw their resignation? Or would he threaten to do so—and so exert influence on the president’s selection?²⁵

These questions are alarming because the idea that judges would exert control over their successors is inimical to the role of federal courts and at odds with the constitutionally delineated process for selecting officials, including the justices.²⁶ Federal judgeships aren’t, and shouldn’t be, either dynasties or inheritances.²⁷ That point fully applies to former clerks, whom judges seem to favor nepotically, almost as though they were the judge’s own children.²⁸

One way of framing this point is epistemic or quality-based. The normal process of nomination and confirmation involves vastly more information than can be available to an incumbent jurist and is far more democratically accountable to boot. Further, a judge who picks their own successor is probably biased by their familiarity with the person in question. It is easy to imagine a sycophantic relationship between the incumbent and their protégé. For these reasons, the normal selection process is likely preferable to one in which a judge picks their own successor, or significantly constrains the choice of successor.

Another frame would focus on the incumbent judge. A judge who attempts to select (or veto) their own successor is effectively biasing themselves by becoming enmeshed in a thoroughly political activity. The selection of judges, particularly justices, is an important part of political debate and campaigning. That form of politics could easily seep into the work of being a judge. If the president resisted the incumbent justice’s entreaties, for instance, would the judge feel stung? Could the judge issue rulings to obtain the president’s ear, or even engage in an implicit *quid pro quo*? Deal-making is normal among legislators and presidents, but those branches are

24. See *id.*

25. Kennedy greatly mitigated these risks by announcing his resignation just a month in advance of a date certain. See Letter from Justice Anthony Kennedy to President Donald Trump, *supra* note 5. However, a future justice might follow Breyer or O’Connor by scheduling his resignation further in the future or upon confirmation of a successor—thereby ensuring that he would see the president’s nominee, and even whether they are confirmed, before actually stepping down. See Letter from Justice Stephen Breyer to President Joseph Biden, *supra* note 9.

26. See U.S. CONST. art. II, § 2, cl. 2 (Appointments Clause).

27. See Laurie Lin & David Lat, *Federal Courts Aren’t Royal Ones*, WALL ST. J. (Dec. 8, 2021, 4:54 PM), <https://www.wsj.com/articles/federal-courts-arent-royal-ones-separation-of-powers-judicial-successor-appointee-biden-king-11638988111> [<https://perma.cc/3KBB-HU78>] (proposing both “irrevocable” retirement dates and revisions to the judicial Code of Conduct). A Code revision seems advisable but also difficult to enforce—making it worthwhile also to attempt term limits, which Lin and Lat posit would likely require an amendment. See text accompanying *infra* note 49.

28. Almost every example discussed in this paper, involving Judges Kanne, King, and Rawlinson, as well as Justice Kennedy, have involved judges trying to favor their former clerks. See *supra* notes 21–23 and accompanying text; see also *infra* note 42 and accompanying text. One wonders whether Justice Breyer put in a good word for his former clerk and successor, Justice Ketanji Brown Jackson.

political by nature. Similar interbranch bargaining is ill-suited to the assertedly independent federal judiciary.

Yet another way to frame this point focuses on democratic change. As someone selected for an indefinite term, a federal judge is supposed to be unmoved by political tides.²⁹ The political process of choosing successors operates as a check on that anti-democratic tendency, ensuring that the federal judiciary is only somewhat, and not painfully, out of touch with current mores and trends. By extending a prior generation's anti-democratic choice forward into a new era, the incumbent pushes too far the judiciary's anti-democratic power.

Third, a resigning justice might expressly leave open the option of staying on and then take advantage of that option for blatantly partisan reasons. This is the scenario that is closest to what Breyer has actually done. Again, Breyer's letter can be read as giving him the option to remain in office indefinitely in the event that Biden's nominee failed to win prompt confirmation.³⁰ The pressure on judges to engage in that sort of partisan maneuvering is likely to increase, given trends toward political polarization.³¹ To illustrate, imagine that Breyer's letter had stated that if there is no confirmed successor by November 8, 2022, his intended retirement would be cancelled. Such a letter would be partisan insofar as it would overtly aim to advantage a particular political party. A future judicial retiree might consider taking this fateful step.

Now, one might respond that justices, including Breyer, are already making partisan decisions by timing their retirements to moments in which their preferred political parties are in power.³² The evidence for that claim may not be as compelling as some believe, particularly given the number of justices who have recently died in office (including Scalia, Ginsburg, and Rehnquist)³³ or whose retirements were reportedly triggered, at least in part, by health problems (including Stevens³⁴ and Kennedy³⁵). Perhaps political factors are largely drowned out by two more basic considerations—namely, the justices' self-interested desire to stay in office and the practical limits of human mortality. At any rate, there are degrees of both confidence and magnitude when it comes to this kind of judicial partisanship, and the

29. See U.S. CONST. art. III, § 1.

30. See *supra* notes 9–10, 12–13 and accompanying text.

31. See *supra* Part I.

32. See ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 12 (2003) (noting trends that have “reduced the departure process to partisan maneuvering”).

33. See Josh Blackman, *Justices Who Died in Office*, REASON: VOLOKH CONSPIRACY (Sept. 18, 2020, 9:50 PM), <https://reason.com/volokh/2020/09/18/justices-who-died-in-office> [<https://perma.cc/8HVP-7S39>].

34. See Bill Barnhart, *A Conversation with John Paul Stevens*, ATLANTIC (Apr. 28, 2011), <https://www.theatlantic.com/national/archive/2011/04/a-conversation-with-john-paul-stevens/237984> [<https://perma.cc/VD3N-ESU4>].

35. See DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT IN THE AGE OF TRUMP 161–62 (2019).

scenario I have just described—canceling a resignation after election day—would leave little room for either doubt or minimization.³⁶

There is an obvious response to all these problems. Some rule, preferably a rule of law, should dictate a process for justices and other federal judges to communicate and effectuate their retirement. More particularly, an appropriate letter to the president should be understood to be an irrevocable decision to retire either at an identifiable point in time or pursuant to a publicly identified procedure. The submission of a resignation letter might guarantee that resignation must occur within, say, three months. Keying the resignation to the end of the Court's formal term, as some justices have recently done,³⁷ also seems reasonable.

By comparison, the open-ended “upon confirmation of my successor” formulation has become problematic in light of the very real risk of a Senate lock-out of all opposite-party nominees, possibly lasting for years. That scenario would create political pressure for a justice to continue serving—and casting votes—long after he or she thought it best to depart. Imagine, for instance, that Breyer chose to retire in part because he is losing a step. If President Biden had trouble getting a successor confirmed, then Breyer would feel enormous pressure to stay on until a Democratic president could do so. This problem is exacerbated by the fact that the justices are already likely to stay on longer than prudent, given their attachment to the job and the difficulty of fully recognizing, or accepting, one's own decline.

One might respond that a justice should have the option to await a successor, however long that takes, so that the Court isn't short-staffed. But why, exactly, is a short-staffed Court so bad? The Court has recently functioned with eight members for over a year, and it seems hard to say that that period was appreciably worse than the ones immediately before or after.³⁸ One might reasonably argue that a deadlocked Court is less able to afford clear guidance or set out on bold new initiatives.³⁹ However, some commentators have plausibly suggested that a short-staffed Court can actually be beneficial insofar as it can foster compromise to avoid 4-4 ties as well as caution in anticipation of a new justice.⁴⁰ How to weigh these tradeoffs is not

36. Notably, Chief Justice Warren did not retract his resignation after President Johnson failed to secure his replacement and so left the seat open to be filled by President Nixon. See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 502 (1997) (relating contemporary accounts suggesting that Warren viewed the prospect of withdrawing his resignation as “a crass admission that he *was* resigning for political reasons”). That episode reveals the felt impropriety of brazenly partisan judicial retirement decisions; yet, as the above discussion has shown, norms surrounding judicial resignations are already eroding.

37. See *supra* Part I.

38. See Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 27, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [<https://perma.cc/4PC4-7VM5>].

39. See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1556–63 (2021); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 2–5 (2009).

40. See Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve The United States Supreme Court*, 45 PEPP. L. REV. 547, 556–64 (2018); Barry P. McDonald, *Eight Justices Are Enough*, N.Y.

obvious and may largely depend on whether you support or oppose whatever a decisive Court majority would try to accomplish.

Perhaps the decision to retire upon confirmation of a successor can be defended on the ground that it prevents a recalcitrant Senate from engaging in obstructionism specifically to create a vacancy. If the retiring justice is ideologically similar to the new nominee, for instance, then the Senate might simply prefer to keep that sort of jurist off the Court. Similarity between incumbent and newcomer may be likely, given the possibility that justices will attempt to delay their retirements for friendly presidential administrations. The retirement-upon-confirmation formulation would stymie that Senate strategy. Yet an outgoing justice might not be able to hold out long, particularly if health issues precipitated the retirement decision. And other forms of Senate manipulation are both more likely and more troubling. In particular, the retirement-upon-confirmation formulation seems to legitimize the Senate's decision to await a later nominee. After all, the Court would still be functioning just as it had before the resignation letter, and the point of obstruction is primarily focused on the new justice, not the outgoing one. As with Garland's nomination, the Senate might well be content to await a new president and, correspondingly, a new justice.⁴¹

At any rate, my concerns about the retirement-upon-confirmation approach shouldn't distract from the main point: Given the risks of renegeing and related abuse, federal judicial resignations should bind their authors.

But are binding resignations enough? A judge might simply announce that they would issue a binding resignation letter only on the condition that their preferred successor is selected. The quid pro quo would thus move earlier in time, to the period before a letter is sent to the president. This problem, too, is no longer hypothetical. In April 2022, Judge Johnnie B. Rawlinson of the Ninth Circuit Court of Appeals declared that she would retire or accept senior status in the event that the administration promised to select her former clerk as her successor.⁴² While Rawlinson's offer might be rejected, others could be accepted. In general, presidents have strong reason to control the selection of their own nominees, but they also have an interest in encouraging judicial retirements, so as to strengthen their party's judicial representation. Thus, presidents will be tempted to accept and honor deals like the one put forward by Rawlinson, thereby fostering the trust of other judges considering similar bargains. These deals could be struck even when the incumbent judge has selected a weak candidate.

In some ways, Rawlinson's proposed deal is less troubling than threats to renege after announcing retirement plans. A judge who reneges late in the

TIMES (May 26, 2016), <https://www.nytimes.com/2016/05/26/opinion/eight-justices-are-enough.html> [https://perma.cc/7L7D-23MZ].

41. See Howe, *supra* note 15.

42. See Nate Raymond, *9th Circuit Judge Urges Biden, Nevada Senators to Pick State AG's Wife as Successor*, REUTERS (Apr. 14, 2022, 12:48 PM), <https://www.reuters.com/legal/litigation/9th-circuit-judge-urges-biden-nevada-senators-pick-state-ags-wife-successor-2022-04-14> [https://perma.cc/6K3K-X3ED].

day could leave someone who has been named—or even confirmed—high and dry, to say nothing of the Senate and the administration. Because the jurist who reneges at the eleventh hour threatens greater collateral damage, she also exerts greater pressure on the administration.⁴³ Unless resignations are binding, moreover, there will always be a risk of erratic reneging as a jurist's departure date approaches. For these reasons, making resignation letters binding would be a real improvement. Still, the problem of judicial dynasticism would remain—and might better be addressed through a more ambitious approach.

IV. SCOTUS RESIGNATIONS AS TERM LIMITS

Maybe Breyer-esque resignation creativity is actually a solution—and to problems even bigger than the ones just outlined. In particular, Breyer's resignation letter suggests a novel way to effectuate federal judicial term limits.

Recall that Breyer, unlike other recent justices, created a significant window of guaranteed service before his retirement decision went into effect.⁴⁴ Moreover, that window was rather long—about five months.⁴⁵ If that kind of creativity is possible, why not a lot more? What if, upon taking office, a new justice wrote the president a letter saying: “I intend to resign in 18 years”?

If we assume for the moment that these letters are *not* binding, then promising to resign after a fixed term could usefully contribute to a norm, convention, or tradition of federal judicial term limits.⁴⁶ The justice, after all, would probably be reluctant to renege on such an open and notorious promise—for reputational reasons, if not moral ones. Observers, realizing

43. And, in a regime of binding judicial resignations, it is the president who could renege—a fact that might deter some judges from entering into these deals in the first place.

44. See Letter from Justice Stephen Breyer to President Joseph Biden, *supra* notes 9–10 and accompanying text.

45. See *id.*

46. See Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST (August 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limit-s-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c> [<http://perma.cc/94R7-UJV8>] (“[T]he Senate could insist that all future court nominees publicly agree to term limits, or risk nonconfirmation. Though such agreements would be legally unenforceable, justices would feel honor-bound to keep their word.”); see also Scott Bloomberg, *Reform Through Resignation: Why Chief Justice Roberts Should Resign (in 2023)*, 106 IOWA L. REV. ONLINE 16, 16–19 (2021). In a later work with a different coauthor, Calabresi abandoned this suggestion because such pledges might: (1) undermine judicial independence from political influence; (2) alienate incumbent justices and so “compromise [the new] justice’s ability to function in his job”; (3) and fail to be uniformly followed, making a “mockery” of the very idea of term limits. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 94 (Roger C. Cramton & Paul D. Carrington, eds., 2006). See generally Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006) (expanding on the book chapter). But judicial independence is only strengthened when justices openly adopt a deeply principled retirement practice; incumbent justices would have every reason to work with a new colleague with voting power; and perfection should not be the enemy of the good.

that public commitments matter, would likely treat the justice's promise as at least somewhat credible. If this experiment proved popular, then the justice's example could inspire her colleagues at the Court—or prospective nominees—to follow suit, yielding a tradition of voluntary term limits.

The question is more interesting if we instead assume that the justices' resignation letters are indeed binding—a key premise that I will return to. On that assumption, a justice who formally declares their intention to resign by a specific date would essentially have opted into a binding term-limits regime. That is, everyone would know that there is both an identifiable outer limit to the justice's actual length of service and a default date on which that service will in fact end.

That conclusion is truly remarkable. Today, federal judicial term limits have broad, bipartisan support because they would help regularize, democratize, and depoliticize the Court.⁴⁷ If each presidential term generated roughly the same number of judicial appointments, then the bench would more closely mirror democratic trends—and depend less on the arbitrary happenstance of precisely when a justice falls ill or dies. Justices serving fixed terms would also be less likely to remain in office through periods of mental decline or ill-health. In addition, the justices would be less tempted to consider the political ramifications of their departures. And justices enjoying only fixed terms would generally lose bargaining power vis-à-vis the president, reducing the risk of judicial dynasties.⁴⁸

The problem is that term limits are thought difficult to achieve without going through the onerous process of amending the Constitution.⁴⁹ Even optimistic term-limit supporters generally believe that a complex federal

47. See Kim & Barnes, *supra* note 3 and accompanying text. See generally PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT, 111–145 (2021) (discussing the pros and cons of term-limit proposals). There is a huge literature on Supreme Court term limits. See generally, e.g., Calabresi & Lindgren, *supra* note 46 (collecting many astute essays); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 3–8 (2022); Rosalind Dixon, *Why the Supreme Court Needs (Short) Term Limits*, N.Y. TIMES (Dec. 31, 2021), <https://www.nytimes.com/2021/12/31/opinion/supreme-court-term-limits.html> [<http://perma.cc/KTT6-UK7K>]; Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–25 (2007); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 641 (2005); James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096–98 (2004); Saikrishna B. Prakash, *American's Aristocracy*, 109 YALE L.J. 541, 568–84 (1999) (book review).

48. Perhaps worrisome bargaining power could still exist. Imagine that a justice foresees that their favored party will lose power shortly before the justice's term will end. The justice might then offer to resign early in exchange for a promise that they could pick their replacement. But the president might not be able to reliably commit to this sort of unenforceable deal, especially if it is a one-off. In any event, this scenario would be rare, and a term limits regime can be designed to discourage it. See *infra* note 51.

49. See Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere> [<https://perma.cc/RM88-75M7>].

statute would be required.⁵⁰ Yet a resignation-based system of term limits might proceed without any statute, and certainly without a constitutional amendment.

Still, a resignation-based approach faces a different kind of obstacle: Why would any single justice make this kind of commitment, if none of the others have already done so? Maybe to do the right thing, set an example, and become an inspiration for one's colleagues, thereby paving the way toward a better judicial system. If that reasoning isn't enough, the imagined justice could build on Breyer's letter by adding a condition, such as: "I intend to resign in 18 years, barring an earlier incapacity to discharge my office,⁵¹ *provided that* that the next confirmed justice makes a similar commitment upon taking office." This maneuver could be likened to fashioning a chain, in that each justice has the ability to ratify, and join, their predecessor's decision to bring about term limits. On this picture, no justice would be a chump, since each participating justice's promise to retire would become binding only when their successor likewise chooses to opt in. The hoped-for result would be a growing tradition of voluntary judicial term-limits, somewhat like the tradition, initiated by George Washington, that presidents would not seek a third term of office.⁵² Alternatively, a justice could commit to serving a fixed term, provided that some or all sitting justices, preferably forming a cross-ideological coalition, do the same.⁵³ Other justices might then join in that pledge.

That sort of gradual and relatively individualistic approach could lead to, or simply be skipped in favor of, a comprehensive solution that would again be modeled, albeit more loosely, on Breyer's resignation letter.⁵⁴ At any given time, the Court's presently serving justices could publish a joint resignation letter establishing a reasonable schedule for their retirements in advance. In this way, almost any existing term-limits proposal could be substantially operationalized. To give just one example, the senior justice might give

50. See, e.g., Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 467–68, 471 (Roger C. Cramton & Paul D. Carrington, eds., 2006); see also Resnik, *supra* note 47, at 637–41.

51. The "incapacity to discharge" language would make it harder—or more embarrassing—for a justice to strategically resign earlier than scheduled in order to advantage a political party. A more ambitious solution would borrow a page from existing term-limits proposals: a justice who replaces an early retiree might commit to resigning upon completing the retiree's original term of service. At any rate, justices nearing the ends of their terms would be reluctant to walk away much earlier than necessary. Lower-court judges are a different story, given that they can continue serving on panels as "senior judges."

52. See Richard Albert, *The Constitutional Politics of Presidential Succession*, 39 HOFSTRA L. REV. 497, 561 (2011).

53. Or perhaps the two most junior justices—namely, Barrett and Jackson, a cross-ideological pair—might begin this process by jointly committing to term limits. See Richard M. Re, *Here's a Way for Justice Jackson to Reform the Supreme Court on Her First Day*, BOS. GLOBE (Apr. 28, 2022, 2:59 AM), <https://www.bostonglobe.com/2022/04/28/opinion/heres-way-justice-jackson-reform-supreme-court-her-first-day> [<https://perma.cc/MP65-LL7L>].

54. See generally Letter from Justice Stephen Breyer to President Joseph Biden, *supra* note 9.

himself two continued years of service, whereas the junior justice would commit to stepping down in 18 years. The retirement dates for the remaining justices could then be staggered every other year, consistent with leading term-limit proposals. Notably, this effort could involve incumbent justices and so be fully operationalized immediately; by comparison, some statutory proposals envision only prospective effect.⁵⁵

What about new justices? That is, what guarantee would there be that a freshly confirmed justice would opt into this regime by agreeing to resign in (let's say) 18 years? One version of the question would focus on unscheduled vacancies, such as those resulting from a justice's death. For example, a justice nearing a binding deadline for resignation could unexpectedly pass away and then be replaced by a new justice with no intention of acquiescing to any term limit at all.

These sorts of eventualities are possible, but they are either unlikely or desirable. In a world where the justices have been inspired or persuaded to create their own term-limits regime, new nominees to the Supreme Court would likely be interested in following suit. The same arguments that worked on the incumbents, after all, are likely to work on the newcomers, too. That point is especially powerful because new nominees can of course be screened or asked about their views of the matter. Again, a comparison might be made to the longtime tradition of presidents seeking only two terms of office.⁵⁶ Politicians sometimes confirmed their approval of that norm—and those who were elected generally went on to adhere to it.⁵⁷

Of course, one president, Franklin D. Roosevelt, did not adhere to that tradition,⁵⁸ and that point leads to a second response. Today, Supreme Court term limits are quite popular.⁵⁹ However, there are certain qualms about them, including that they might encourage justices to showboat in order to get final-act careers as TV pundits and the like after their judicial terms have expired.⁶⁰ These qualms caution against pursuit of the term-limits proposal via constitutional amendment.⁶¹ After all, an amendment is a huge

55. See Kim & Barnes, *supra* note 3 (noting the two main impediments to a judicial term-limit system: (1) the potential need for a constitutional amendment; and (2) the delay before they have bite).

56. See generally Albert, *supra* note 52 and accompanying text.

57. See, e.g., DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* 531 (2013). Teddy Roosevelt later construed his pledge to allow for a third *non-consecutive* term. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 434–35 (2005).

58. AMAR, *supra* note 57, at 435–36.

59. See Kim & Barnes, *supra* note 3 and accompanying text.

60. See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 47, at 118–19 (noting worries about sitting justices “curry[ing] favor with political constituencies” or law firms with an eye to post-judicial careers). Another stated worry is that regularizing judicial vacancies would make them a routine part of political campaigning.

61. See *id.* at 117–121.

undertaking,⁶² and any regrets about one would be extremely difficult to unwind.

By comparison, the term-limits-by-resignation idea is easy to unwind. A negative turn in public sentiment against term limits, perhaps because it does turn out to warp justices' behavior, would erode the norm's appeal and lead some or all new nominees to repudiate it. More modestly, nominees could begin to propose tweaks to the existing regime, such as by suggesting that they would commit to retiring in, say, 27 years instead of 18, so as to reduce the temptation to become TV pundits after retirement. The president and Senate might agree with and ratify those sorts of deviations from the previously established pattern—much as the American people agreed during World War II that FDR had good reason to stay on for a third (and then fourth) term.⁶³

Of course, the resignation and amendment-based approaches aren't necessarily in competition with one another. Traditions and practices sometimes give rise to formal amendments. Presidential term limits are again an apt example, as the nation's experience with FDR, though obviously approved via repeated election, precipitated a formalization of the preexisting two-term cap.⁶⁴ Similarly, a resignation-based approach, if successful and popular, could make it easier to achieve a formal constitutional amendment. Or a justice who bucks a resignation-based tradition, or tries to do so, might provoke an amendment.

When designing this sort of term-limits scheme, the justices should avoid creating a different kind of problem—namely, inviting the immediate nomination and confirmation of their eventual successors. We might imagine that, just after the Court collectively announces a resignation schedule, the president nominates nine successors who quickly obtain Senate confirmation.⁶⁵ True, each of these individuals would have to await a vacancy in order to assume the bench. But if these nominations and confirmations were constitutional, then a single period of united government could

62. See Desilver, *supra* note 49 and accompanying text.

63. See generally Stephen W. Stathis, *The Twenty-Second Amendment: A Practical Remedy or Partisan Maneuver?*, 7 CONST. COMMENT. 61, 64–65 (1990).

64. See U.S. CONST. amend. XXII. See Calabresi & Lindgren, *supra* note 46, at 874–75 (noting that a “tradition” or “practice [of judicial term limits] might even be formalized by passage of a constitutional amendment much as the two-term tradition for Presidents was eventually formalized by constitutional amendment”). The authors worry, however, that a “collective-action problem” among the nine justices would prevent the formation of any such tradition, whereas no similar problem troubled individual presidents. *Id.* at 875. This concern is met by my various proposals regarding resignation-based mechanisms for fostering coordination.

65. The question of when nomination and confirmation may occur is more difficult and important than generally recognized. See Madden, *supra* note 20, at 1147. Clearly, a successor may be nominated and confirmed whenever a jurist dies in office or leaves office. And, especially after O'Connor and Breyer, conventional practice now appears to treat a judge's announced intention to resign in the future as at least sometimes capable of authorizing the nomination of a successor. See Nominations for Prospective Vacancies on the Supreme Court, 10 Op. O.L.C. 108, 108 (1986) (noting that “[a] prospective vacancy on the Supreme Court arises when a Justice announces his or her intention to retire on a specific date, or upon the qualification of a successor”) (footnote omitted); see also *infra* note 69 (further exploring this point).

generate potential replacements for all nine justices.⁶⁶ We could even imagine “pre-appointments” that catapult a new justice into office as soon as an incumbent leaves office for any reason.⁶⁷ These maneuvers may be too costly to implement, given the investment of resources required to nominate and confirm persons for spots that may not be filled for many years. But partisanship has unpredictable consequences, and, where feasible, it is sensible to guard against even improbable contingencies.

One way to forestall the pre-appointment problem is to qualify the retirement guarantee.⁶⁸ For instance, the justices’ collective resignation letter could provide that, until the last year of a justice’s effective term, the justice’s scheduled resignation date could be extended by a unanimous vote of the Court. Only then would the resignation be guaranteed to occur by a certain date, rendering an anticipatory nomination proper.⁶⁹ Such a provision would counter certain arguments that a nomination-eligible vacancy exists as soon as the resignation letter is submitted.⁷⁰ Further, it would allow the judiciary to extend incumbents’ terms in response to shenanigans by the political branches, such as attempts to make anticipatory confirmations many years in advance. This provision would also have the added benefit of allowing the Court to adjust course in light of unanticipated events. We might imagine that a terrorist attack could make it practically difficult to nominate and confirm a replacement jurist during a particular period of time, justifying a few months’ extension.

66. For example, single-party control of the presidency and Senate at the start of a presidential administration could lead to confirmed nominees for every judicial office; then, if a vacancy later arose during a period of divided government, the same president—in her first or second term—could appoint those confirmed nominees. Moreover, a later president (presumably of the same party) might attempt to take advantage of her predecessor’s pre-appointment. *But see infra* note 67 (noting OLC authority to the contrary).

67. Biden has arguably paved the way for springing pre-appointments by conferring a commission on Justice Jackson months before Breyer departs from the Court. In approving that commission, however, the Office of Legal Counsel suggested that, while a president may grant a commission in anticipation of a vacancy, the commission essentially expires when the president leaves office. *See Authority of the President to Prospectively Appoint a Supreme Court Justice*, 46 Op. O.L.C. __ at 4 (2022) (slip opinion). Even if OLC is wrong on that point, a new president might still be empowered to rescind any pre-appointments upon taking office.

68. Later, I will propose a legislative solution. *See infra* Part VI.

69. Consistent with recent practice, I here assume that actively serving justices have substantial authority to designate when the president’s nomination power may be exercised in anticipation of a vacancy. *See supra* note 65. Such a principle may be required to prevent the inevitability of a jurist’s eventual death from authorizing an anticipatory nomination and confirmation at any time after the jurist takes office. Another way of avoiding that problem would be to require the incumbent judge’s actual departure from office before the successor’s confirmation, if not nomination. That formal principle was arguably followed in connection with O’Connor’s resignation, if a successor’s confirmation can lawfully occur at the very same moment as the incumbent’s resignation. But Breyer’s anticipatory resignation is clearly to the contrary, as Judge Jackson was in fact confirmed well before Breyer left office.

70. This argument draws on Madden’s suggestion that a judicial vacancy does not arise when a judge’s date of resignation is contingent on a future event. *See Madden, supra* note 20, at 1137. Madden also argues that revocable resignations effective on a specified future date do not allow for a nomination. *Id.*

The most fundamental implication of the foregoing analysis has to do with the all-important question: “Who decides?” The existing debate over Supreme Court term limits focuses almost exclusively on the constitutional amendment process and, secondarily, on Congress. But if Supreme Court resignations are binding, then the Court’s lack of term limits is a problem that the justices themselves can solve.

V. MAKING RESIGNATIONS CLEARLY BINDING

At this point, we need to circle back to the question of whether these resignation letters are really binding on their authors. If the justices’ resignation letters *aren’t* binding, then we have to worry about capricious, manipulative, and otherwise objectionable decisions to renege on retirement.⁷¹ If they *are* binding, then we have the prospect of reaching a judicial solution to the widely recognized but intractable problem of indefinite judicial terms.⁷² For either and both of these reasons, the question of bindingness is of great importance.

And that question can be definitively answered. The Supreme Court could adopt an internal rule establishing the bindingness of these letters.⁷³ Alternatively, the president and Congress could enact a statute rendering these letters binding. Moreover, the rule or statute could establish a default framework for writing resignation letters. For example, justices may be allowed to opt into a regime in which they retire after 18 years, barring an earlier incapacity to discharge the office.⁷⁴ A statute might further provide that, once a justice has entered the last year of her de facto term, the president may nominate a successor for the relevant seat.⁷⁵

The resulting system of opt-in term limits would be constitutional. Already, the idea that federal judges “hold their Offices during good Behaviour” is understood to be compatible with service until a judge’s voluntary resignation.⁷⁶ So while the good-behavior rule may prohibit *compelled* term limits, Article III poses no obstacle to term limits that are accomplished through voluntary, even if binding, resignations.⁷⁷ Making resignations binding would simply afford each justice a new prospective option or power—namely, the ability to commit to resign.⁷⁸ That result would

71. See *supra* Part III.

72. See *supra* Part IV.

73. Some commentators have proposed internal court rules that directly impose a resignation schedule without framing it as a Breyer-esque commitment to resign or retire, but those commentators acknowledge that such a regime “would not be legally binding.” Calabresi & Lindgren, *supra* note 46, at 95.

74. See *supra* note 51 and accompanying text.

75. A less definitive end date might avoid triggering the president’s nomination power. See *supra* notes 64–66.

76. U.S. CONST. art. III, § 1; see also *infra* note 83 and accompanying text.

77. See U.S. CONST. art. III.

78. Cf. JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000).

enhance judges' existing resignation power by creating a surer option for justices who seek to bind themselves. A rule or statute that rendered resignations binding would thus strengthen the judiciary by providing it with a new tool to solve its own problems, for the good of the nation.⁷⁹

Perhaps Article III is best viewed as ambiguous on this point; but, if so, any uncertainty should be resolved based on structural considerations. Opt-in term limits would promote the federal judiciary's independence from politics, a core Article III value.⁸⁰ The justices currently have ample discretion as to when they resign. Resigning in advance only renders that discretion more apolitical, since a justice cannot predict the political circumstances that will arise many years later. Moreover, the resignation decisions imagined here (and that would be recognized under any rule or statute) would not be linked to a partisan strategy.⁸¹ In fact, one major reason for implementing this scheme is to *reduce* the risk of objectionable political entanglements. Allowing for advance resignations would also fully preserve the decisional independence of the resigning justices, who would still enjoy tenure in office, as well as a salary in retirement. On balance, legislation that renders resignations binding is far less threatening to the judiciary's independence than many legislative measures that are widely viewed as constitutional, such as politically motivated changes to the Supreme Court's size or jurisdiction.⁸² Those reforms, after all, would aim to change the Court's ability or willingness to rule in particular ways.

One might worry that a formal rule of bindingness could be defied. A fickle justice might claim that the rule is itself unconstitutional under Article III and therefore insist on staying in office despite their resignation. But either a Court rule or a federal statute could have teeth. A justice who tries to renege might discover that no judicial or federal funds can any longer be spent on his clerks, assistants, transport, food, or other perks. Moreover, a judge who reneges on an independence-enhancing, statutorily binding promise might not be exhibiting "good Behaviour."⁸³ In any event, the renegeing justice

79. Like other legislation governing the filling of vacant offices, legislation addressing the timing of judicial nominations may be authorized by the Necessary and Proper Clause, in relation to both Article II and Article III powers. See generally Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533 (2020) (discussing aspects of the Vacancy Reform Act of 1998).

80. See U.S. CONST. art. III, § 1.

81. Under this logic, politically entangling judicial commitments would *not* be binding. See *infra* note 83. The problem of strategic resignations ahead of schedule is addressed at *supra* note 51.

82. PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 47, at 84–94 (noting those measures are widely viewed as lawful).

83. U.S. CONST. art. III, § 1. By contrast, a federal judge who ignores a politically entangling promise—such as a promise to rule against a disfavored right in exchange for confirmation—would be engaged in "good Behaviour" and so be protected from sanctions. Notably, even commentators who view statutory term limits as unconstitutional generally agree that Congress can cut non-salary funding, thereby "'encouraging' early retirements." William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 385, 391 (Roger C. Cramton & Paul D. Carrington,

would struggle to claim the high ground or avoid looking absurd. A similar point would apply to a reneging jurist who sought to litigate the matter.⁸⁴ To the extent that current law and practice is unclear, it is so largely because there is no focal rule to point to. The main point of creating a rule or statute here is to provide a formal basis for calming any troublesome doubts. The possibility that reneging might precipitate funding cuts or other conflict either within the judiciary or between the branches would only sharpen the justices' minds, reducing the risk that defiance ever occurs.

Ultimately, the force of this proposal (if there is any support for it) would largely stem from public debate. Presidents and senators should ask both judicial nominees and incumbent justices if they would join an effort to create term-limits-by-resignation. And, if not, why not? The most obvious reason for refusing is that the justices personally enjoy holding on to power for as long as possible. The next most obvious reason is that members of the Court's current majority coalition would not want to give up their voting power any sooner than they have to (and the minority block would not want to unilaterally disadvantage themselves). Neither of these reasons is very attractive from the standpoint of either public policy or judicial principles. True, there are some public-minded qualms about judicial term limits,⁸⁵ and perhaps the justices just happen to be unusually sensitive to those worries. Yet we have also seen that the flexible proposal advanced here mitigates those qualms, and there may be still other ways of addressing those concerns.

At any rate, the public should know what the justices think about these issues. And the public certainly has a right to know if the Court itself is what stands in the way of the most popular court-reform proposal now on the table. Realizing as much might inform the public's view of other reform proposals, such as by making jurisdiction-stripping or court-expansion seem more attractive. The prospect that Congress might dole out stronger medicine should help self-interested justices see the virtue of opt-in term limits.

VI. CONCLUSION

I have identified two basic problems and proposed several solutions and reforms. The first problem, in brief, is that judicial resignations may not be binding and so invite at least three forms of abuse: capricious, manipulative, and partisan reneging (or threatened reneging). The second problem is the widely lamented lack of federal judicial term limits.

eds., 2006). The legislature's power over funding can also operate as a carrot. See David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1439-45, 1447-49 (2005); Marin K. Levy, *The Promise of Senior Judges,* 115 NW. U. L. REV. 1227, 1240-44 (2021). Perhaps Congress could legislate a special retirement bonus for justices who opt into a resignation schedule.

84. Once the justices have closed ranks, legal challenges are unlikely to be heard, much less successful. Cf. William Baude, *The Unconstitutionality of Justice Black,* 98 TEX. L. REV. 327, 328-29 (2019).

85. See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 60 and accompanying text.

The basic solution, I have argued, is that either a Supreme Court rule or, better, a federal statute, should provide that a justice's formal resignation letter is binding. The rule or statute might also provide a framework for resignation letters, such as by providing that a letter to the president promising retirement must result in the justice's actual resignation within 90 days.

In addition, I have suggested a variety of strategies for effectuating Supreme Court term limits. Here is a list of some increasingly attractive options:

- A justice could publicly promise to step down no later than an appointed date, thereby fostering an informal tradition of federal judicial term limits.
- A justice could submit a formal resignation letter communicating a promise to resign, say, 18 years after taking office, barring an earlier incapacity to discharge the powers and duties of the office, provided that a similar commitment is undertaken by the next justice upon her confirmation, a cross-ideological group of sitting justices, or all sitting justices.
- The justices as a group could submit a formal resignation letter that establishes a retirement schedule—perhaps with a proviso that, until the last year of a justice's effective term, a justice's scheduled resignation date may be extended by a unanimous vote of the Court.
- A federal statute could establish a schedule for judicial retirements and corresponding presidential nominations, with the justices effectively opting in by submitting appropriate formal resignation letters.

Finally, I have argued that court reformers should view the third branch not just as a set of problems but also as a source of solutions. Instead of moving immediately to legislative or constitutional proposals, reformers should consider the possibility that the courts might be able to improve themselves, either through unilateral action or by cooperating with the political branches.