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Till Death Do Us Part: Chief Justices and the United States Supreme Court

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TILL DEATH DO US PART: CHIEF JUSTICES AND THE UNITED STATES SUPREME COURT

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I. INTRODUCTION

The past several years have witnessed an extensive debate over the prospect of changing the institutional architecture of the Supreme Court.¹ Spurred by, among other things, a dramatic increase in the

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1. See, e.g., REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006) [hereinafter REFORMING THE COURT] (collecting essays from a wide range of prominent scholars); Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009); Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313 (2007); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000); Patrick E. Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington & Cramton*, 94 CORNELL L. REV. 637 (2009); Daniel J. Meador, *Reining in the Superlegislature: A Response to Professors Carrington & Cramton*, 94 CORNELL L. REV. 657 (2009); Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006); Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551 (2006); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007); David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791 (2007); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397 (2005); Edward T. Swaine, *Hail, No: Changing the Chief Justice*, 154 U. PA. L. REV. 1709 (2006); Joshua C. Teitelbaum, *Age and Tenure of the Justices and Productivity of the U.S. Supreme Court: Are Term Limits Necessary?*, 34 FLA. ST. U. L. REV. 161 (2006); Kevin T. McGuire, *Are Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, JUDICATURE, July–Aug. 2005, at 8.

Justices' length of tenure,² a substantial decrease in the number of cases decided by the Court each term,³ and perhaps a general sense of dissatisfaction with the Court's institutional self-conception,⁴ the debate has centered on the possibility of imposing term limits on the Justices. But there are other possible reforms on the table as well, including most notably the "Four Proposals for a Judiciary Act of 2009," which was spearheaded by Professors Roger Cramton and Paul Carrington⁵ and endorsed in whole or in part by at least fifty-four prominent lawyers and law professors.⁶ In addition to calling for Congress to create what would in effect be a term limit for Justices, the Act would create a Certiorari Division empowered to certify cases for the Court to hear, a term limit for the Chief Justice, and a mechanism for dealing with Justices who become unable to perform their duties.⁷

2. See Calabresi & Lindgren, *supra* note 1, at 771 ("We believe the American constitutional rule granting life tenure to Supreme Court Justices is fundamentally flawed, resulting now in Justices remaining on the Court for longer periods and to a later age than ever before in American history." (footnote omitted)); Paul D. Carrington & Roger C. Cramton, *Reforming the Supreme Court: An Introduction*, in REFORMING THE COURT, *supra* note 1, at 3, 3 [hereinafter Carrington & Cramton, *An Introduction*] ("The undisputed factual predicate [for the symposium that produced the collection of essays in their book] is that justices today serve much longer than they did throughout our history.").

3. See Letter from George Alexander et al., to Hon. Joseph B. Biden, Jr., et al., at 13–14 (Oct. 6, 2009), available at http://128.164.132.13/News/20092010Events/Nov09_Conference/Documents/Supreme%20Court%20Proposals%20with%20signatoriesas%20of%2010-6-09.pdf [hereinafter Four Proposals for a Judiciary Act] (basing its proposal for reform of the certiorari process on the claim that the Court's use of discretion to set its docket and thereby reduce the number of cases it hears "has resulted in a decline in the Supreme Court's participation in the basic judicial tasks of judging cases, reconciling conflicts in interpretations of Congressional legislation in lower courts, and assuring adherence to proper procedures in mundane criminal cases").

4. See Burbank, *supra* note 1, at 1549 (noting "the tendency toward 'posterity worship' and institutional self-aggrandizement of the current Court"); Carrington & Cramton, *An Introduction*, *supra* note 2, at 5. Carrington and Cramton noted as follows:

Every informed observer, whether of the left, the right or the center, recognizes that the Court is now an institution exercising extraordinary power. It is not surprising that justices relish the exercise of the great power the Court now possesses. The celebrity that now renders sober justices as famous as rock stars, is flattering, enjoyable, stimulating, and provides many opportunities for travel and influence.

Carrington & Cramton, *An Introduction*, *supra*, at 5.

5. See Four Proposals for a Judiciary Act, *supra* note 3, at 3.

6. See *id.* at 2–3.

7. *Id.* at 5–6, 8, 11, 13–15.

In this Essay, we identify and explore an additional institutional difficulty, which bridges these last two components of the proposed Act. Prior commentary has chronicled the phenomenon of Justices serving beyond the point at which they are able to perform their duties.⁸ It has also addressed the unique powers and responsibilities of the Chief Justice, with some arguing that the administrative aspects of the role should be divorced from the effectively life tenure associated with a position on the Court.⁹ We wish to highlight a connection. The unique powers and responsibilities of the center chair may make Chief Justices even more likely than Associate Justices to take their lifetime appointments literally, while at the same time increasing the potential consequences of a Chief Justice's decision to do so in the face of physical or mental disability.

Our analysis begins with the case of Chief Justice William H. Rehnquist, whose final illness is portrayed in detail in a recent book, Herman J. Obermayer's *Rehnquist: A Personal Portrait of the Distinguished Chief Justice of the United States*.¹⁰ The image that emerges is of a proud and devoted man who remained dedicated to his job and the institution of which he was a part. But Obermayer's portrayal, considered alongside the press coverage as Rehnquist battled thyroid cancer, also raises the possibility that a Chief Justice with declining health might not be aware of or willing to acknowledge the extent to which his capacity to meet the demands of his job has diminished. And while that potential exists for any Justice, we contend that the nature of the Chief Justice's role creates not only greater cause for concern, but also an increased likelihood that the dynamic will arise. The history of Chief Justices at the end of their tenure, which we survey, is consistent with this thesis. Although the numbers are small (there have been only seventeen Chief Justices), history suggests that occupants of the center chair are more likely to remain on the Court until the literal end of their life tenure.¹¹ Whether a product of the job's allure, the lack of anyone with clear responsibility for pressuring a Chief

8. See generally Garrow, *supra* note 1 (providing a historical overview of mental decrepitude in the United States Supreme Court).

9. See *infra* text accompanying notes 137–142.

10. See HERMAN J. OBERMAYER, *REHNQUIST: A PERSONAL PORTRAIT OF THE DISTINGUISHED CHIEF JUSTICE OF THE UNITED STATES* (2009).

11. See *infra* Part III.

Justice to resign, or other factors, the phenomenon provides further support to proposals to modify the nature of the office.

The remainder of this Essay proceeds as follows. Part II recounts the story of Chief Justice Rehnquist's final illness, drawing on Obermayer and press accounts. Part III draws on two distinct bodies of scholarship—that relating to the illness and disability of Supreme Court Justices, and that relating to the unique role of the Chief Justice—to suggest that the concerns associated with disability are more acute in the case of the Chief Justice. Part III further outlines reform proposals relating to the office of the Chief Justice, and suggests that our findings provide additional support to the contention that reform is in order. The case of the ailing Chief Justice Rehnquist is perhaps the best example of this much needed reform.

II. THE ILLNESS AND DEATH OF CHIEF JUSTICE REHNQUIST

A friend of the late Chief Justice for the last two decades of his life, Obermayer commenced his book project sparked by his impression that the news reports and obituaries written after the Chief Justice's death contained few details about "his personality or his personal life."¹² Obermayer absolves the media for failing to report about "Bill Rehnquist the man," admitting that the Chief Justice "had worked hard to keep his private life—including his friendship with me—out of the limelight,"¹³ and promises his readers that he will introduce them to the private and human side of the Chief Justice. Yet in doing so, Obermayer seeks to achieve more than adding to the store of amusing anecdotes: "Knowledge about the enthusiasms, biases, foibles and personal habits of the individuals who affect great events—including judicial events—contributes, often significantly, to understanding and evaluating them."¹⁴ Regardless of whether the tales of the late jurist's love of cigarettes, books, obscure quotations, small-stakes wagers, tennis, movies, crossword puzzles, geography, and the Green Bay Packers shed light on the Chief Justice's judicial philosophy or his voting record in key constitutional cases, Supreme Court scholars will find a treasure trove of information in Obermayer's tribute.¹⁵ For our

12. OBERMAYER, *supra* note 10, at ix.

13. *Id.* at ix-x.

14. *Id.* at x.

15. *Id.* at 5, 8-9, 49, 119, 145, 155, 171.

purposes, Obermayer's key contribution comes in the form of his detailing the Chief Justice's final illness, which in turn provides a new opportunity to consider why Supreme Court Justices (especially Chief Justices) decide to take their lifetime appointment so literally.

The story unfolds as follows. On October 22, 2004, Chief Justice Rehnquist checked in to the Bethesda Naval Hospital.¹⁶ Suffering from a sore throat and a hoarse speaking voice, the Chief Justice believed that he would be undergoing minor surgery to remove a growth on his thyroid.¹⁷ Three days later, however, the Public Information Office of the United States Supreme Court announced that the Chief Justice had been diagnosed with thyroid cancer, had undergone a tracheotomy, and would be receiving radiation and chemotherapy treatments. The statement added that the Chief Justice would be back at the Supreme Court for oral arguments scheduled on November 1.¹⁸ Although the type of thyroid cancer was never officially disclosed, many medical experts concluded that the Chief Justice had been diagnosed with inoperable anaplastic thyroid cancer—a rare type of thyroid cancer that is resistant to treatment and often fatal.¹⁹

The Chief Justice returned to his home in Arlington, Virginia, on October 29, 2004, and, after failing to return to the Court on November 1 as promised, issued a statement that “my plan to return to the office today was too optimistic.”²⁰ The Chief Justice reassured the public that he remained committed to carrying out his judicial responsibilities: “While at home, I am working on court matters, including opinions for cases already argued. I am, and will continue to be, in close contact with my colleagues, my law clerks, and members of the Supreme Court staff.”²¹ Chief Justice Rehnquist's promise to remain fully engaged in the business of the Court was further evidenced by the news that he

16. Linda Greenhouse & Katharine Q. Seelye, *Rehnquist Treated for Thyroid Cancer, Supreme Court Says*, N.Y. TIMES, Oct. 26, 2004, at A1.

17. OBERMAYER, *supra* note 10, at 215.

18. Greenhouse & Seelye, *supra* note 16.

19. See Lawrence K. Altman, *Extended Absence of Chief Justice Hints at More Serious Cancer than He First Indicated*, N.Y. TIMES, Nov. 2, 2004, at A25; Lawrence K. Altman, *Prognosis for Rehnquist Depends on Which Type of Thyroid Cancer He Has*, N.Y. TIMES, Oct. 26, 2004, at A16.

20. Linda Greenhouse & Katharine Q. Seelye, *Rehnquist Fails to Return, and Speculation Increases*, N.Y. TIMES, Nov. 2, 2004, at A1 (quoting directly a statement made by the Chief Justice).

21. *Id.* (quoting directly a statement made by the Chief Justice).

continued to review certiorari petitions and to participate in cases scheduled for oral argument by reviewing hearing transcripts and case briefs.²² Despite these reassurances, discussion of retirement and the selection of a possible successor preoccupied the media in the subsequent weeks.²³ The media also raised the question of how the Court should deal with the situation if Rehnquist were unable to perform his duties but refused to resign.²⁴

Although the aforementioned press releases gave the impression that the Chief Justice's daily life remained relatively unaltered by his illness, Obermayer reveals that the Chief Justice was far weaker than the public realized. Obermayer writes,

Following his surgery, Bill was too weak to climb the eight steps leading to his front door, so he lived in the basement of his Arlington townhouse. . . . [H]e never again sat at his dining room table, slept in his own bed, ate meals prepared in his kitchen or entertained family and friends in his tastefully decorated living room.

Only in this arrangement could he continue to live in his own home.²⁵

The Chief Justice, however, was more than merely weak. "He could no longer sustain himself. He needed health care professionals nearby at all times."²⁶ In the weeks following his surgery, the Chief Justice had a tracheotomy tube (to assist with breathing) as well as "additional tubes and devices protruding from his neck" that made it hard for him to talk on the telephone.²⁷ Moreover, the Chief Justice was fed through

22. Linda Greenhouse, *Chief Justice Won't Return to the Court This Year*, N.Y. TIMES, Nov. 27, 2004, at A11.

23. See, e.g., David Stout, *Rehnquist Delays Return to High Court, Raising New Questions*, N.Y. TIMES (Nov. 1, 2004), <http://www.nytimes.com/2004/11/01/politics/campaign/01cnd-rehn.html> ("The announcement, a day before the election, was a fresh reminder that the next president will in all likelihood have an opportunity to nominate at least one member of the high court, and perhaps several.")

24. See Richard Willing & Liz Szabo, *Illness a Delicate Issue for Court*, USA TODAY, Nov. 2, 2004, at A3. The first sentence of the article reads, "What if a Supreme Court justice became too sick to work, but didn't want to step down?" *Id.*

25. OBERMAYER, *supra* note 10, at 217.

26. *Id.* at 218.

27. *Id.* at 219.

a stomach tube and never able to again eat solid food.²⁸ “As if he were a baby, care providers fed him at set times each day.”²⁹ The impact of the stomach tube quickly became apparent to Obermayer:

From top to bottom, his weight loss became apparent. His face became gaunt and jowly. The skin below his chin, on either side of the tracheotomy tube, hung like a rooster’s wattles. He moved his belt buckle in a notch every few weeks. When the waist in a pair of trousers is four to five inches too wide, their ill fit tells a story in loud and clear tones. He was wasting away—rapidly.³⁰

As the Chief Justice slowly recovered from his surgery and underwent radiation and chemotherapy treatments, he struggled to maintain an active work schedule. Nonetheless, he was unable to perform all of his duties, electing not to vote in all the cases that had been argued before the Court, but rather to participate only when necessary to break a tie.³¹ Observers at the time questioned whether this was a sign that Rehnquist had slipped.³² Obermayer writes that the treatments left him feeling “miserable,” and that “he pushed himself to keep up with his job.”³³

His law clerks, secretary and chief of staff came to his townhouse basement on a regular basis. They reviewed with him transcripts, briefs[,] . . . court management questions[,] and his colleagues’ positions and opinions. Even though he found it painful to talk or write, he dictated his view on pending cases, as well as letters and memos related to his job as the federal judiciary’s CEO. This allowed him to participate in the Court’s work long before he was well enough to be driven to the Supreme Court Building and take his proper place at the center

28. *Id.* at 218.

29. *Id.*

30. *Id.*

31. See Charles Lane, *Rehnquist Won’t Vote in Every Case Heard This Term*, WASH. POST, Dec. 14, 2004, at A8.

32. *Id.*

33. OBERMAYER, *supra* note 10, at 220.

of the bench.³⁴

In Obermayer's opinion, what drove the Chief Justice in the first months after his diagnosis was his sense of duty and his love for the job.

He[, the Chief Justice,] approached it with diligence and gusto as well as affection. While duty was undoubtedly a factor in forcing himself to work hard[,] . . . probably more important was the fact that labor on court-related tasks was almost the only thing that brought joy into an otherwise dismal existence.³⁵

Because of the Chief Justice's illness, Obermayer found that their social interactions were sharply curtailed. While once the two friends freely visited over the phone and in person, they were now limited to short visits during the week and watched an hour of football together on Sunday. During their visits, Obermayer sought ways of accommodating the Chief Justice's struggles to talk without pain. When they watched football, the friends would speak only during commercials so that the Chief Justice "did not have to sustain a lengthy conversation."³⁶ And while the old friends once engaged in lengthy debates, now Obermayer brought the Chief Justice clippings from such magazines as *The Economist*, the *National Review*, *The New Republic*, *People*, and *Sports Illustrated*.³⁷ "It was another way of communicating in a manner that did not require him to take part in a lengthy conversation."³⁸

In January of 2005, the Chief Justice finished his radiation treatments but continued with chemotherapy.³⁹ The Chief Justice told Obermayer that the thyroid cancer "had been killed," and he hoped that the subsequent chemotherapy treatments would reduce the size of the dead tumor and permit doctors to remove it. "Much of the chemotherapy was unpleasant and debilitating, and it required a few

34. *Id.*

35. *Id.*

36. *Id.* at 219.

37. *Id.* at 220.

38. *Id.*

39. It is unclear whether the Chief Justice underwent radiation and chemotherapy simultaneously, although a close reading of Obermayer's book indicates that likely the treatments were initially taken together, followed by another round of chemotherapy alone.

overnights in the hospital,” recounts Obermayer.⁴⁰ While the Chief Justice “talked candidly about the chemo’s side effects,” Obermayer writes that “he believed that chemotherapy . . . would pay off. I [felt] certain that he believed his tracheotomy tube would be removed during the summer and that by October he would be a whole person once again.”⁴¹

Despite the ravages of his illness and the side effects of the chemotherapy, in January the Chief Justice slowly resumed some of his public duties. Reports indicated that he was attending the regular conferences at the Supreme Court, but he did not attend oral arguments in either January or February because “the side effects of a tracheotomy and radiation therapy made it difficult for him to be on the bench for prolonged periods.”⁴² On January 20, 2005, the Chief Justice made a much publicized (but brief) appearance on the steps of the United States Capitol to swear in President George W. Bush. Writing that it was impossible to determine whether the Chief Justice’s appearance at the inauguration “signified a last hurrah or a re-emergence after three months of intensive treatment for thyroid cancer,” *New York Times* reporter Linda Greenhouse stated that the Chief Justice walked with a cane, was “obviously not in robust health,” and spoke with “a firm if somewhat husky and unfamiliar-sounding voice.”⁴³ The Chief Justice was one of the last individuals to arrive on the specially built inaugural platform, and Greenhouse reported that “[t]here was a slight smile on his face as he walked down the steps to his seat, whether from embarrassment at suddenly being the center of attention or from satisfaction at having accomplished a goal that some had speculated would be out of reach.”⁴⁴ The Chief Justice departed immediately after administering the oath.⁴⁵

The Chief Justice finally returned to the Supreme Court bench in March of 2005, approximately five months after he was diagnosed with

40. *Id.* at 227.

41. *Id.*

42. See Linda Greenhouse, *Rehnquist Will Miss Tuesday Session*, N.Y. TIMES, Feb. 19, 2005, at A12.

43. Linda Greenhouse, *Ailing Chief Justice Makes Good His Promise*, N.Y. TIMES, Jan. 21, 2005, at A11.

44. *Id.*

45. *Id.*

thyroid cancer.⁴⁶ Reports varied on the Chief Justice's appearance. While the *Associated Press* described the Chief Justice as "frail,"⁴⁷ Greenhouse wrote that the Chief Justice appeared "quite fit" and was an active participant during oral argument.⁴⁸ "The only noticeable indication of the thyroid cancer for which the [eighty]-year-old [C]hief [J]ustice has been treated since October was the unfamiliar quality of his voice, by turns reedy and husky," reported Greenhouse.⁴⁹

On Monday, June 27, the Supreme Court ended its term. Journalists present at the final session of the Court reported that the Chief Justice presided over the session with efficiency and humor, but had some trouble speaking.⁵⁰ With the end of the Court's term, the speculation over the Chief Justice's possible retirement once again reached a fevered pitch.⁵¹ Reporters and politicians were not the only individuals awaiting a sign from the Chief Justice. Faced with caring for an ailing spouse, Justice Sandra Day O'Connor wanted to retire, but not if doing so would create multiple vacancies on the Court.⁵² Writes Greenhouse: "Finally, [Justice O'Connor] said, 'I asked him, and he told me he really wanted to go another year and thought he'd be O.K.'"⁵³ Based on the Chief Justice's decision to postpone his retirement, on July 1, 2005, Justice O'Connor announced that she was leaving the Court.⁵⁴

The unanticipated retirement of Justice O'Connor pulled away the media spotlight, but not for long. In the weeks that followed the end of October Term 2004, journalists took up permanent positions outside of

46. See Charles Lane, *Rehnquist Returns to the Bench*, WASH. POST, Mar. 22, 2005, at A1.

47. Hope Yen, *Ailing Rehnquist Returns to Bench After Five Month Absence*, SE. MISSOURIAN, Mar. 22, 2005, at 5A.

48. Linda Greenhouse, *After Five Months' Absence, Rehnquist Is Back in Court*, N.Y. TIMES, Mar. 22, 2005, at A20.

49. *Id.*

50. See, e.g., Todd S. Purdum, *Anticipation of a Vacancy, But Silence Says Not Yet*, N.Y. TIMES, June 28, 2005, at A16.

51. See, e.g., Lawrence K. Altman & Linda Greenhouse, *Suspense Builds and Rumors Fly as Rehnquist Remains Silent on His Health and Plans*, N.Y. TIMES, July 9, 2005, at A9.

52. Jan Crawford Greenburg, *Rehnquist's Stay on Court Forced O'Connor Out*, ABC NEWS (Jan. 23, 2007), <http://abcnews.go.com/Politics/story?id=2816090&page=1>.

53. Linda Greenhouse, *News Was Surprising to Colleagues on Court*, N.Y. TIMES, Sept. 5, 2005, at A19.

54. Greenburg, *supra* note 52; Richard W. Stevenson, *O'Connor to Retire, Touching Off Battle over Court*, N.Y. TIMES, July 2, 2005, at A1.

the Chief Justice's home—often yelling questions at the Chief Justice as he left for work.⁵⁵ In response to one question shouted by a reporter regarding his retirement plans, the Chief Justice shot back, “[T]hat’s for me to know and for you to find out.”⁵⁶ The media firestorm only increased in intensity after the Chief Justice was briefly hospitalized for a fever, resulting in the Chief Justice releasing a press statement on the evening of July 14 that was designed to end speculation that Rehnquist would be retiring shortly.⁵⁷ “The statement said: ‘I want to put to rest the speculation and unfounded rumors of my imminent retirement. I am not about to announce my retirement. I will continue to perform my duties as [C]hief [J]ustice as long as my health permits.’”⁵⁸

It is unknown whether, at the time of his announcement, the Chief Justice knew that he was losing his battle with cancer. Only two weeks later, however, Obermayer learned the grim news. During a visit to the Chief Justice's home on July 30, the Chief Justice told his long-time friend that his doctors had “discovered [that] the growth is coming back” and that he was stopping his chemotherapy treatments because of their ineffectiveness.⁵⁹ “Bill’s matter-of-fact demeanor and terse statements could not hide his disappointment,” writes Obermayer.⁶⁰ “He had fought valiantly and painfully. But he had failed.”⁶¹

On August 4, the Chief Justice returned to a local hospital to be treated for a fever.⁶² According to Greenhouse, there were other hospitalizations during August that were not publicly disclosed.⁶³ The end was near. Obermayer paid his last visit to the Chief Justice on August 19.⁶⁴ Only three weeks had passed since he had last seen Rehnquist, but Obermayer found himself facing a “visibly deteriorated” man whose voice had weakened and who now relied upon a walker to

55. Linda Greenhouse, *Despite Rumors, Rehnquist Has No Plans to Retire Now*, N.Y. TIMES, July 15, 2005, at A10.

56. *See, e.g., id.*

57. *Id.*

58. *Id.*

59. OBERMAYER, *supra* note 10, at 225.

60. *Id.* at 227.

61. *Id.*

62. Lawrence K. Altman, *Rehnquist Treated for Fever*, N.Y. TIMES, Aug. 5, 2005, at A11.

63. Greenhouse, *supra* note 53.

64. OBERMAYER, *supra* note 10, at 227.

move across the room.⁶⁵ The two men spent a half hour talking about books and politics as well as Obermayer's upcoming trip to Reykjavik.⁶⁶ As they parted, the Chief Justice reminded Obermayer to send him a postcard.⁶⁷ With that, the friends said goodbye for the final time.

The Chief Justice died at home, his family at his side, on September 3, 2005. He had so successfully hidden his terminal diagnosis that his colleagues were shocked by the news.⁶⁸ The *New York Times* reported that the "[J]ustices indicated that they were as surprised as the rest of the country to learn late Saturday night that the [C]hief [J]ustice had died."⁶⁹ Retired Justice O'Connor referred to the Chief Justice's death as "an earthquake for the court," while Justice David Souter was "flabbergasted" at the news.⁷⁰ "[Justice Souter] said that while Chief Justice Rehnquist had appeared extremely weak when he returned to the bench in March after an absence of more than four months—and . . . wonder[ing] whether he would be able to finish the term—the [C]hief [J]ustice's health had then appeared to turn around."⁷¹ Added Souter: "He had an amazing few months and his decision at the end of the term not to retire had not seemed unreasonable."⁷² What might have explained the Justices' surprise at the Chief Justice's death was the fact that he had never talked about his illness or treatment with his fellow Justices.⁷³

On September 6, 2005, the late Chief Justice returned to the Supreme Court for the final time, when his former law clerks carried his pine casket into the Court's Great Hall and carefully placed it on the Lincoln Catafalque.⁷⁴ His funeral was held the next day at St. Matthew's Cathedral in Washington, DC. Eulogies were delivered by President George W. Bush, long-time friend and fellow Justice Sandra Day

65. *Id.* at 228.

66. *Id.*

67. *Id.* at 229.

68. Greenhouse, *supra* note 53.

69. *Id.*

70. *Id.*

71. *Id.* (internal quotation marks omitted).

72. *Id.*

73. *Id.*

74. Jan Crawford Greenburg, *A Pine Coffin and Tearful Last Respects*, CHI. TRIB., Sept. 7, 2005, http://articles.chicagotribune.com/2005-09-07/news/0509070214_1_chief-justice-william-rehnquist-roberts-justices-antonin-scalia.

O'Connor, and several family members; and then the sixteenth Chief Justice of the United States was laid to rest in Arlington National Cemetery next to his late wife.⁷⁵

III. WHAT LESSONS CAN WE LEARN FROM THE DEATH OF THE CHIEF JUSTICE?

The final illness of Chief Justice Rehnquist, and his decision to not retire in the face of a terminal illness, is undoubtedly a poignant story of an individual who gave his last full measure to an institution that he loved. There is, however, another dimension. Placed into historical context, the episode illuminates an additional troubling aspect of lifetime tenure, namely, the lack of institutional norms regarding when Chief Justices should release the reins of power.

Article III, Section 1 of the United States Constitution states that all federal judges “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”⁷⁶ In short, judges can be removed from office only by impeachment. Alexander Hamilton explained in *The Federalist Papers* that such judicial independence is necessary if federal judges are to fulfill the critical role of protecting the Constitution from overreaching by the other branches of government and to protect minority rights from the momentary whims of the majority.⁷⁷ It has proven to be an effective shield. Since the ratification of the Constitution, only one Supreme Court Justice has been impeached: Associate Justice Samuel Chase, who was impeached by the House of Representatives in March of 1804, but later acquitted by the United States Senate.⁷⁸ While House Republicans threatened to hold impeachment hearings for Associate Justice William O. Douglas (mainly due to the Justice’s messy personal life), no hearings ever materialized.⁷⁹

75. See OBERMAYER, *supra* note 10, at 231, 233, 237, 239.

76. U.S. CONST. art. III, § 1.

77. THE FEDERALIST NO. 78, at 494 (Alexander Hamilton).

78. See generally WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 15–134 (1992) (providing a historical background of the impeachment of Justice Samuel Chase).

79. See Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 606–07 (2010). As Samahon notes, “congressional surrogates” also threatened impeachment in the case of Justice Abe Fortas. *Id.* at 605–06.

Historically, the primary danger associated with the substantial independence of the federal judiciary resulting from life tenure is a lack of accountability.⁸⁰ Reduced to its essence, the strong form of this argument runs that the independence engendered by lifetime tenure in turn empowers federal courts to substitute their own policy preferences for those of duly-elected legislators.⁸¹

Yet, as developed in the debates referenced above,⁸² lifetime tenure also raises concerns about the competence and ability of aging jurists. Indeed, the history of the United States Supreme Court is filled with examples of Justices who remained on the bench as their physical health deteriorated and their mental acuity declined.⁸³ These concerns about judicial competency should be greater when it comes to Chief Justices. The Chief Justice bears a host of responsibilities beyond those of an Associate Justice, which increases the potential consequences of an inability to serve. What is more, when compared to Associate Justices, Chief Justices show even a greater reluctance to leave the Supreme Court.

Political scientist David N. Atkinson has documented Supreme Court Justices “at the end,” and his accounts offer an important warning that lifetime tenure comes with the additional cost of judicial infirmity.⁸⁴ Moreover, a close examination of the history suggests that the dangers of infirmity are more likely to arise with respect to Chief Justices. According to Atkinson’s research, only four of the last sixteen Chief Justices have retired from the Supreme Court while in good health: John

80. Professor Saikrishna Prakash makes the point quite colorfully:

Professors might be thought part of a conspiracy of silence regarding life tenure. We favor life tenure so much for ourselves that we are unwilling to confront its drawbacks for judges. Indeed, no one should doubt that the conventional wisdom regarding life tenure is quite strong. In rather bulky and recent law reviews dedicated to ‘Judicial Independence and Accountability,’ no academic seriously questioned whether life tenure serves any purpose. Instead, most assumed the value of life tenure and noted its tension with accountability.

Saikrishna Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 580 n.171 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

81. *Id.* at 579.

82. See *supra* notes 1–7 and accompanying text.

83. See generally Garrow, *supra* note 1.

84. DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (1999).

Jay (Chief Justice from 1789 to 1795), Charles Evans Hughes (1930 to 1941), Earl Warren (1953 to 1969), and Warren Burger (1969 to 1986).⁸⁵ Historically, the norm has been for the Chief Justice to die on the bench. John Marshall (1801 to 1835), Roger Taney (1836 to 1864), Salmon Chase (1864 to 1873), Morrison Waite (1874 to 1888), Melville Weston Fuller (1888 to 1910), Edward Douglass White (1910 to 1921), Harlan Fiske Stone (1941 to 1946), and Fred Vinson (1946 to 1953) all died while still holding the position of Chief Justice, while William Howard Taft (1921 to 1930), who was battling multiple health problems, resigned shortly before his death and Oliver Ellsworth (1796 to 1800) left the bench while facing a chronic health condition.⁸⁶ While the second Chief Justice of the Supreme Court, John Rutledge (1795), was only a recess appointment, there is evidence to suggest that the Senate voted against confirming him based on concerns about his sanity.⁸⁷

Of the Chief Justices who died while on the bench, only the deaths of Harlan Fiske Stone and Fred Vinson were sudden and unexpected.⁸⁸ The remaining Chief Justices suffered from significant health problems over a sustained period of time, and their physical decline was known to Court insiders. Oliver Ellsworth submitted his resignation after developing a painful kidney disorder.⁸⁹ The last three years of John Marshall's life saw the legendary Chief Justice battle what was likely liver cancer.⁹⁰ Shortly before he died, friends described the seventy-nine-year-old Marshall as “very emaciated, feeble [and] dangerously low,” but alert and clear-headed.⁹¹ Two years before his death, a sickly Roger Taney had a “premonition of death” and said goodbye to his fellow justices.⁹² Still alive one year later, Roger Taney told a friend that he “hope[d] to linger along to the next term of the Supreme Court.”⁹³ Linger he did, remaining on the Court until his death on October 12, 1864, at the age of eighty-eight. A stroke rendered Chief Justice Salmon Chase “barely able to function” during October Terms 1871 and 1872,

85. *Id.* at 12–13, 113–15, 138–40, 150–52.

86. *Id.* at 19–20, 28–31, 39–40, 51–54, 62–63, 79, 89, 96–97, 116–17, 120–21.

87. *Id.* at 13–15.

88. *Id.* at 116–17, 120.

89. *Id.* at 19–20.

90. *Id.* at 30–31.

91. *Id.* at 30.

92. *Id.* at 39–40.

93. *Id.*

but a colleague noted that Chase's daughters—including the politically ambitious Kate Sprague—"will never consent to his retiring to private life."⁹⁴ In a letter written shortly after October Term 1872, Chase wrote that "I am too much of an invalid to be more than a cipher. Sometimes I feel as if I were dead, though alive."⁹⁵ Chase, who had once served as Abraham Lincoln's Treasury Secretary and whose transparent political ambition resulted in his banishment to the Supreme Court, died two days later at the age of sixty-five.

A nervous breakdown in 1885 started a downward spiral for Chief Justice Morrison Waite, and during one of his last appearances on the bench Attorney General Alexander Garland observed that "[i]t was evident to the observer death had almost placed its hand upon him."⁹⁶ Chief Justice Melville Weston Fuller remained in fairly good health until October Term 1909, when the diminutive jurist's own declining health and the illnesses of other Justices made it difficult for him to carry out his duties. After his death by heart attack on July 4, 1910, Justice Oliver Wendell Holmes wrote that the seventy-seven-year-old "Chief died at just the right moment, for during the last term he had begun to show his age in his administrative work."⁹⁷

Less than a week after the Court ended October Term 1921, an obese, seventy-six-year-old Edward Douglass White died after undergoing gallbladder surgery—thus fulfilling William Howard Taft's dream of becoming the next Chief Justice.⁹⁸ While Taft had lamented the fact that the aging and infirm White would never vacate the center chair, eight years later Taft would be bemoaning his own physical decay. Describing himself as "older and slower and less acute and more confused," Taft wrote to his brother that he "must stay on the court in order to prevent the Bolsheviki from getting control."⁹⁹ Plagued with cardiac disease, high blood pressure, insomnia, and anxiety during the last year of his life, William Howard Taft reluctantly resigned his position on February 3, 1930—only to die approximately one month

94. *Id.* at 53.

95. *Id.* at 54.

96. *Id.* at 63.

97. *Id.* at 79.

98. *Id.* at 89.

99. *Id.* at 96.

later.¹⁰⁰ While his successor, Charles Evans Hughes, would leave the Court in good health,¹⁰¹ Hughes' successor, Harlan Fiske Stone, suffered a fatal cerebral hemorrhage while reading an opinion from the Supreme Court bench.¹⁰² The man selected to replace Stone, Fred Vinson, died of a sudden heart attack at the age of sixty-three.¹⁰³

As noted above, the clear historical pattern of dying while holding the center chair was broken by Earl Warren and Warren Burger, who both left the Court while in good health. Ironically, it would be an avid student of Supreme Court history, William Rehnquist, who would re-establish the controversial tradition of Chief Justices holding onto power after illness had clearly rendered them unable to perform their duties.

When it comes to the Associate Justices, a slightly different pattern emerges, and it suggests that they are less likely to continue to serve despite faltering abilities. In the nineteenth century, the majority of Associate Justices died in office. But the numbers change dramatically in the twentieth century, during which only four Associate Justices died on the bench despite battling significant physical or mental infirmity (Rufus W. Peckham, Joseph R. Lamar, Benjamin Cardozo, and Robert H. Jackson).¹⁰⁴ In contrast, a relatively large number of Associate Justices were forced from the bench due to illness or cognitive decline, including Horace Gray, Henry Billings Brown, William Moody, William R. Day, Mahlon Pitney, Joseph McKenna, Oliver Wendell Holmes, Jr., Sherman Minton, Harold Burton, Charles Whittaker, Felix Frankfurter, Hugo Black, John Marshall Harlan II, William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall.¹⁰⁵ In addition, and in further contrast to the Chief Justices, a substantial number of Associate Justices have left the bench while in relatively good health. In the twentieth century, these Justices include George Shiras, John H. Clarke, Willis Van Devanter, George Sutherland, Louis Brandeis, James C. McReynolds, Owen J. Roberts, James Byrnes, Stanley Reed, Arthur Goldberg, Tom Clark, Abe Fortas, Potter Stewart, Lewis Powell, Byron

100. *Id.* at 97.

101. *Id.* at 113–15.

102. *Id.* at 116–17.

103. *Id.* at 120–21.

104. *Id.* at 77–78, 87–88, 107–11, 121–22.

105. *Id.* at 75–76, 80, 92–94, 100, 122–24, 126–33, 146–49, 154–60.

White, and Harry Blackmun.¹⁰⁶ We can now add Sandra Day O'Connor, David Souter, and John Paul Stevens. All in all, fewer than thirty percent of the Associate Justices who have served in the twentieth century have died in office.

Although the numbers involved are too small to permit certain conclusions, their patterns nonetheless invite consideration of whether Chief Justices are more likely to die in office than Associate Justices, and what factors might lead to such a differential. Of course, the decision to leave the Court is complex. Atkinson suggests that there are a host of reasons why the Justices hang onto the bitter end:

Supreme Court [J]ustices do not voluntarily leave office for the following reasons: (1) financial considerations; (2) party or ideology; (3) a determination to stay; (4) a sense of indispensability; (5) loss of status; (6) a belief that they can still do the work; (7) not knowing what else to do; and (8) family pressure to stay in office.¹⁰⁷

Political scientist Artemus Ward believes that politics primarily explains the retirement choices of modern Supreme Court Justices. Ward writes that while Justices' retirement decisions were once "primarily concerned with institutional and personal factors" (including how to survive without a judicial pension, which would explain why so many Associate Justices died in office in the nineteenth century), that "generous retirement benefits coupled with a decreasing workload have reduced the departure process to partisan maneuvering."¹⁰⁸

This does not explain, however, the tendency for more Chief Justices to die in office (or remain until illness forces their hand) than retire. The answer may lie in the unique role and powers of the Chief Justice. As we explore below, the Chief Justice role has evolved to encompass a much greater range of responsibilities than possessed by the Associate Justices,¹⁰⁹ which may add to the allure of the job to such an extent that

106. *Id.* at 75–76, 89, 104–06, 111–12, 115, 117–18, 125, 133, 136, 140–41, 149, 152–54, 160–62.

107. *Id.* at 7–8 (footnote omitted).

108. ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 11–12 (2003).

109. *See infra* text accompanying notes 122–136.

its holders are more reluctant to leave. But it may be another aspect of the Chief Justice role that is primarily responsible for the seeming differential in the likelihood that Justices will serve beyond their ability to do so effectively. At various points in history, it has been the Chief Justice—often with the consensus of the Court—who has approached ailing Justices and suggested retirement.¹¹⁰ “The [C]hief [J]ustices have traditionally borne the principle burden of dealing with incapacitated colleagues, which has all too frequently proved to be trying,” observes Atkinson.¹¹¹ “They have been least successful when a [J]ustice is reluctant to leave or determined to stay. Although the [C]hief [J]ustice is *primus inter pares*, or first among equals, his principal power is that of persuasion.”¹¹²

Atkinson provides three examples of the Chief Justice’s power of persuasion at work. He writes that Chief Justice William Howard Taft felt “great consternation” about Justice Joseph McKenna’s dwindling mental acuity, and that the poor quality of Justice McKenna’s work product forced Taft to approach McKenna’s family (and eventually McKenna himself) in hopes of persuading him to resign.¹¹³ The Chief Justice, however, did not rely upon tact alone in pushing McKenna off the Court. The Justices themselves had secretly decided to not decide any cases in which McKenna was the deciding vote. Chief Justice Charles Evans Hughes paid a similar visit to a ninety-year-old Oliver Wendell Holmes, Jr., but Holmes—unlike McKenna—graciously accepted the gentle nudge.¹¹⁴ Approximately fifty years later, Chief Justice Warren Burger followed Taft’s lead and used a similar tactic, when he convinced the other Justices (save a protesting Byron White) to allow him to schedule for re-argument cases in which ailing and confused Justice Douglas cast the deciding vote.¹¹⁵ Similar steps were taken to guarantee that Douglas would not determine on which cases

110. See, e.g., Garrow, *supra* note 1, at 1018 (noting that once-Chief Justice Hughes acknowledged his “highly disagreeable duty” to approach Justice Holmes and suggest that he retire).

111. ATKINSON, *supra* note 84, at 3.

112. *Id.*

113. *Id.* at 93–94.

114. See Garrow, *supra* note 1, at 1017–18 (noting that “even what may have been the single most distinguished career in the entire history of the United States Supreme Court ended in an explicitly requested retirement because of increasing mental decrepitude”).

115. ATKINSON, *supra* note 84, at 148–49.

the Court would grant cert.¹¹⁶

Consider now Chief Justice Rehnquist's decision to remain in office. The standard explanations do not apply. Clearly, partisan considerations cannot account for his decision: President George W. Bush had just been reelected to office, and the Chief Justice had several years in which to retire from the Supreme Court with the assurance that a Republican President would pick his successor. Given the Chief Justice's length of service, he could have retired at full salary—so monetary considerations cannot explain his behavior. Moreover, Obermayer's description of his late friend's love for the Court,¹¹⁷ and his loneliness at the death of his wife,¹¹⁸ suggest that Rehnquist enjoyed his status as Chief Justice and did not relish the notion of retirement. Finally, the Chief Justice's own press releases demonstrate that he felt that he was still capable of performing his duties.

Yet Atkinson's comments about the role of the Chief Justices in pushing colleagues to retire suggest another answer—there are no norms or historical precedent dictating that Associates Justices can, or should, approach a disabled Chief Justice and urge him to resign. Granted, the fact that the Chief Justice's own colleagues did not know the extent of his illness meant that they did not have the relevant information necessary to make such an overture. Even if they had, however, they would have faced several hurdles in doing so. Because none of them had a formal administrative role, they would have faced a coordination problem in deciding to act, especially if they did not all agree that action was warranted. Moreover, even if the Associate Justices were willing to discuss the Chief Justice's disability with him, they lack the institutional levers to give the Chief Justice a necessary push. Unlike Chief Justices Taft and Burger, the Associate Justices cannot schedule cases for re-argument or suspend the "rule of four" in order to divest an ailing Chief Justice of his vote. Without such institutional norms and powers, the Associate Justices do not have the wherewithal to make a Chief Justice candidly and objectively assess his own disability.

For all this, one might still ask whether judicial disability is that pressing of a concern. To be sure, as Atkinson aptly demonstrates,

116. *Id.* at 174–75.

117. OBERMAYER, *supra* note 10, at 220.

118. *Id.* at xiii, 169.

history is filled with examples of disabled Justices. David Garrow has argued that the problem of “mental decrepitude” occurred more frequently during the twentieth century than the nineteenth and that it remains “a persistently recurring problem that merits serious attention.”¹¹⁹ Yet, as Ward Farnsworth has observed, the periods of time in the twentieth century during which Justices worked while suffering from some degree of mental deterioration constituted at most two percent of the aggregate service time of all the Justices during that century.¹²⁰ Farnsworth further contends that the effects of disability are mitigated by the presence of the other Justices, as well as by the presence of a disabled Justice’s law clerks, “who generally can keep a chambers running without a drop-off in quality remotely commensurate with the [J]ustice’s drop-off in functionality.”¹²¹

We are inclined to side with those who view mental and physical deterioration among the Justices as a matter of concern. Even were we to accept the arguments of those who maintain that the problem is not significant, however, we believe that the Chief Justice presents a different case. The reason why we should be concerned about the variation in retirement rates between the Associate and Chief Justices, and about the corresponding increase in the likelihood that a Chief Justice will continue to serve while disabled, has to do with the unique powers of the center chair.

A Chief Justice has dual roles.¹²² The first, which is most visible, is his adjudicative role. In this sense he is, as it is often expressed, “first among equals.”¹²³ Although he enjoys some enhanced authority relative to his colleagues on the Court, primarily in the form of his opinion assignment power, he possesses only a single vote and accordingly can achieve little without the agreement of at least half of his colleagues.¹²⁴ As Theodore Ruger summarizes the matter, “The Chief Justice’s

119. Garrow, *supra* note 1, at 995; *see also* Calabresi & Lindgren, *supra* note 1, at 771–72 (citing Garrow, *supra*).

120. Ward Farnsworth, *The Case for Life Tenure*, in REFORMING THE COURT, *supra* note 1, at 251, 262.

121. *Id.*

122. *See* Ruger, *supra* note 1, at 1551–53 (distinguishing between the adjudicative and administrative roles of the Chief Justice); Judith Resnik & Theodore Ruger, Op-Ed, *One Robe, Two Hats*, N.Y. TIMES, July 17, 2005, at A13.

123. Ruger, *supra* note 1, at 1551.

124. *Id.* at 1551–52.

adjudicative power is structured and channeled in ways very much like the other eight Justices on the Court, and, in a more general sense, is much like the authority of any judge on a multimember appellate tribunal.”¹²⁵ Were this the sole component of his role, then we would have no greater reason to be concerned about disability of the Chief Justice than of Associate Justices.¹²⁶

It is the Chief Justice’s second role, as an administrator, that provides greater reason for concern. As is widely appreciated, the Chief Justice has general administrative responsibility for the Supreme Court itself.¹²⁷ That is no small job, for the Court employs over 450 people and has an annual budget in excess of sixty million dollars.¹²⁸ But the role extends far beyond One First Street to encompass the entire federal judiciary and a number of committees, commissions, and other related entities.¹²⁹ As Judith Resnik and her colleagues have shown, “the judiciary functions in many respects like an administrative agency, seeking to equip itself with the resources needed to provide the service—adjudication—that the Constitution and Congress require.”¹³⁰ As the head of this entity, the Chief Justice is, to outline just a sampling of his duties, responsible for overseeing the budget of the federal judiciary, conducting relations between the judiciary and Congress, appointing judges to some specialized courts, and authorizing requests for lower court judges to sit by designation on other courts.¹³¹

These powers are considerable. They also require a substantial investment of a Chief Justice’s time. Indeed, in 1978, Chief Justice Burger remarked, “If the burdens of the office continue to increase as

125. *Id.* at 1551.

126. Some have indeed suggested that this is the most significant component of the Chief Justice’s role. See, e.g., Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, in REFORMING THE COURT, *supra* note 1, at 203, 216 (“In its single most important aspect, being [C]hief [J]ustice has no significance because the [C]hief, like all other [J]ustices, has one and only one vote. There are ways in which the [C]hief exercises more power than his colleagues, but in the most important aspect of the job, he is only the first among equals.”).

127. See Resnik & Dilg, *supra* note 1, at 1588–91.

128. *Id.* at 1588.

129. See Alan B. Morrison & D. Scott Stenhouse, *The Chief Justice of the United States: More than Just the Highest Ranking Judge*, 1 CONST. COMMENT. 57, 59–62 (1984).

130. Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT, *supra* note 1, at 181, 190.

131. *Id.* at 187–93.

they have in the past years, it may be impossible for the occupant to perform all of the duties well and survive very long.”¹³² Regardless of whether Burger was right about the capacity of a healthy Chief Justice to meet the obligations of the role, his comment underscores the potential significance of even a partial incapacitation. The Chief Justice does not share his administrative responsibilities. The institutional structures and mechanisms that might work to mitigate the effects of disability with respect to a Justice’s adjudicative role do not apply.¹³³ The Chief Justice as administrator need not persuade four of his colleagues in order to get his way. Nor must administrative decisions be explained in written opinions released to the public and subject to critique. In short, “the administrative powers of the [C]hief [J]ustice are neither officially shared nor constrained by obligations of accounting.”¹³⁴ The Chief Justice differs from most holders of executive power only in the extraordinary sense that the Chief Justice can, if he chooses, retain his powers for life.¹³⁵ If he retains them into a period of disability, there is a substantial risk that they will be performed poorly, if they are performed at all.¹³⁶

Given the evidence concerning the risks of disability among Supreme Court Justices generally, coupled with an even greater risk that Chief Justices will serve beyond their full capacity to do so, reform is in order. Several varieties have been proposed. These include term limits,¹³⁷ the creation of economic incentives to induce a Chief Justice to step down,¹³⁸ and restructuring and reducing the administrative powers granted to the Chief Justice.¹³⁹ As noted in the Introduction, the Four Proposals for a Judiciary Act of 2009 would impose a seven-year term

132. Morrison & Stenhouse, *supra* note 129, at 58 (quoting a transcript of Justice Warren E. Burger’s Address to the Conference on the Role of the Judiciary in America on December 14, 1978).

133. See Resnik, *supra* note 130, at 193–94.

134. *Id.* at 194.

135. *Id.* Professor Resnik points out that the Chief Justice’s lifetime tenure and “many grants of power contrast sharply with the authority of other executive officials. Presidents have term limits. Heads of independent agencies generally do as well.” *Id.*

136. See Garrow, *supra* note 1, at 995 (noting that the history of the Court “is replete with repeated instances” of justices participating in the work of the Court when colleagues and families of those same justices “had serious doubts about their mental capabilities”).

137. See Resnik & Dilg, *supra* note 1, at 1645–46.

138. See *id.* at 1646–47.

139. See *id.* at 1647–48; Swaine, *supra* note 1, at 1711–13.

limit on the office of the Chief Justice.¹⁴⁰ A separate provision would expressly impose a duty on all of the Justices “to voluntarily retire when [they are] no longer able fully to perform the duties of the office held.”¹⁴¹ In the case of the disability of the Chief Justice, the Act would place a duty on the Associate Justices to report the disability to the Judicial Conference of the United States, which would in turn be obligated to start a process in which the chief judges of the circuit courts of appeals consider whether there is “substantial evidence” that the Chief Justice “is not able to perform the duties of the office” and, if they so find, to “report that finding to the Judiciary Committee of the United States House of Representatives.”¹⁴² Detailed consideration of the appropriateness and constitutionality of these proposed reforms is beyond the scope of our mission in this Essay, and in any event has been extensively debated elsewhere.¹⁴³ We seek instead simply to underscore the point that consideration of reform is necessary in the specific context of the Chief Justice.

IV. CONCLUSION

Lifetime tenure comes with several costs. The case of Chief Justice William H. Rehnquist illustrates both a familiar and an overlooked aspect of those costs. The familiar costs arise out of the phenomenon of Justices who “linger” after their physical or mental health has failed them. The overlooked costs are specific to the office of the Chief Justice. When combined with the fact that the Associate Justices have neither the formal power nor the support of institutional norms to

140. See Four Proposals for a Judiciary Act, *supra* note 3, at 11. Section 5 of the proposed Act provides as follows:

A Chief Justice appointed after the date of this enactment shall be appointed and may be reappointed by the President with the consent of the Senate for a term of seven years and an additional time until the next opportunity for the President to appoint a new Justice arises or until resolution of any pending impeachment over which the Chief Justice must preside.

Id.

141. *Id.* at 8.

142. *Id.* The Act would impose a similar obligation on the Chief Justice to report an Associate Justice’s disability to the Judicial Conference. But in that case the Chief Justice would also have an independent obligation to advise the disabled Associate Justice to retire. *Id.*

143. See generally, e.g., REFORMING THE COURT, *supra* note 1.

nudge the Chief Justice into retirement, we should not be surprised to find that almost all Chief Justices die in office—many long after their physical or mental powers have waned. Whatever one’s view on the significance of declining performance amongst Associate Justices, the problem is undoubtedly more acute for Chief Justices. We take no position here on the question of how best to counter the enduring allure of the center chair. But we are confident of this: Given the important role that the Chief Justice plays, not only as the head of the Supreme Court but as the leader of the federal judiciary, the historical practice of Chief Justices dying with their proverbial boots on should end.