Limited Tenure for Federal Judges

Philip B. Kurland

I am grateful to the Committee for its invitation to express my views on the proposed amendment to the Constitution that is presented in Senate Joint Resolution 106. With your permission, and in the hope of saving time, I should like first to read a short prepared statement and then to attempt to answer such questions as you may propound to me.

The Resolution being considered here offers a plan—reduction of judicial tenure to renewable eight-year terms—that has a long lineage. Dissatisfaction with particular or general federal judicial actions has not infrequently resulted in Congressional proposals to diminish judicial independence, whether by reducing the term of office, by providing less cumbersome methods of judicial removal, or by changing the method of appointment. Indeed, the essence of the present proposal may be traced back to no less an eminence than Thomas Jefferson.

Although Jefferson was, as revealed in Professor Haynes’s book, Selection and Tenure of Judges, once committed to judicial independence, he later changed his mind. His early position was encapsulated in his own words in this way: “The judges . . . should not be dependent upon any man or body of men. To these ends they should hold estates for life in their offices, or, in other words, their commissions should be during good behavior.” After engaging in battle with the Federalist judiciary led by John Marshall, however, Jefferson came to the view, again in his words: “A better remedy, I think, (than making the Senate a Court of Appeal on constitutional questions) would be to give future commissions to judges for six years (the senatorial term) with re-appointment by the president with the approbation of both houses. If this should not be independent enough, I know not what should be such, short of the total irresponsibility under which they are acting and serving now.”

The proposal for fixed, renewable terms of judicial office is not only ancient but contemporary. There have been a plethora of such proposals since the Supreme Court’s decision in Brown v. Board of Education. Thus, a quick glance at recent legislative history reveals that in each of the 89th, 90th, 91st, and 92nd Congresses there have been at least three proposed constitutional amendments to the same effect as S.J. Res. 106, although the proposed terms varied from six years to ten years. (See, e.g., H.J.R. 1077, 1140; cf. H.R. 14183.) This scanty survey also suggests that, with the exception of S.J. Res. 38, offered in the first session of this Congress, and the proposal before you, this form of restraint on the federal judicial authority has usually originated in the House of Representatives. It appears that, until these hearings, none of these proposals has received even committee consideration, no less the approbation of either House.

I think it is evident why this proposition has not met with success in the past and why it should not meet with this Committee’s approval now. There are few propositions more likely to reduce the in
dependence of the judiciary than to compel each judge to account for his judgments periodically to one part of what has been considered, until now, a coordinate branch of government. History reveals the grave constitutional defects that derive from a judiciary subordinate to either the executive or the legislature. The Declaration of Independence records as a grievance against King George III that: “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

I commend to your attention on this subject all of Hamilton’s Federalist No. 78, but I shall quote here just a few passages from it. He asserted that:

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenet of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing....

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

Certainly our history reflects an acceptance of these arguments and a commitment to them. However distasteful the actions of the federal judiciary may have been from time to time, the American people, through their legislatures, have opposed any incursions on that judicial independence that they have regarded as essential to the concept of American constitutional democracy. Thus, the most powerful leaders in our history have been thwarted in their attempts to curb judicial independence. Jefferson failed in his attempts to bring the judiciary to heel; Jackson in his. The Radical leaders of the Reconstruction Congress could not persuade of the desirability of limiting the judicial power. And Franklin Delano Roosevelt’s Court-packing plan met defeat in this very body.

In this era when government has, for better or worse, entered into control of, and participation in, so much of the lives of every American, the need for an independent judiciary becomes greater not less. It is in the judiciary that the individual and the minority can sometimes find succor from impositions that no governmental agency should have the right to impose. I do not mean by this, of course, that the judiciary alone is capable of protecting our liberties. But I do contend that it is only with the participation of an independent judiciary that the other branches of our government will assure the rights of the individual against the behemoth of government. An independent judiciary is a necessary if not a sufficient condition of our liberty.

A renewable term, as proposed in S.J. Res. 106, seems to me the most destructive of devices for limiting the independence of judges. For, it must be remembered, that such authority as the judicial branch of our government may have, vis-à-vis other branches of the government, is totally dependent on the force of public opinion. And so, whether or not judges would, under the proposed scheme, actually make their decisions with a concern for legislative approbation by way of reappointment, it is likely to become true that the public would regard this as the basis for their decision. Only if the purpose of the proposal is further to sap the strength of the judiciary should a renewable term be regarded as desirable.

There is some experience with judicial terms renewable at the will of the legislature, although it is
remote. In 1951, judges of the German Constitutional Court were given renewable eight-year terms, renewable at the decision of the legislature. After 19 years of experience with this system, it was abandoned in 1970 in favor of a fixed twelve-year term.

A short, fixed, nonrenewable term, would make more difficult the problem of securing men of appropriate talents to undertake the job. But at least those who did would not be performing it with the knowledge that they would some day be accountable to the political predilections of a majority of the Senate for their continuance in office.

Indeed, I am of the view that we already have too much of this problem by reason of the fact that we now permit "promotions" from within the federal judicial system. For there are some lower court judges who indulge their task with recognition that, if they please the appointing powers, they may receive a new or better position. If I had my way, I should provide that, in order to preserve the independence of the federal judiciary, a federal judge should be forever barred from any other post in national government, judicial or non-judicial, elected, or appointive.

I am, I think, sufficiently on record to show that I am not an unqualified admirer of the efforts of the federal judiciary. I am, by study and experience, committed to the desirability of and need for judicial restraint. But I am equally of the view that that restraint must be self-imposed; that the impositions of external restraints such as those contained in this Resolution would be far more disastrous in its effect than even the most headstrong judiciary.

In fact, the existent deficiencies of the judiciary, as I see them, are in no small measure attributable to the failure of this body to exercise the discretion

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that, from the beginning, the Constitution committed to it. Too often, the Senate has treated and continues to treat federal judicial appointments as though they were mere matters of patronage to be dispensed at the whim of the Senators from the state of origin of the appointee. A look at the records of this Committee will, I think, reveal how lightly most hearings on judicial competence of nominees are actually treated.

So long as you have given me the courtesy of this forum, I will impose one suggestion for change in judicial tenure that I think is appropriate. And I believe that it is one that will not interfere with the essential of judicial independence. I refer to the desirability of a compulsory retirement age for judicial personnel. For history has shown us that, so long as retirement is a matter of discretion with the individual jurists, there are some who will sit as judges long after they have lost the capacity to do so. The history of the Supreme Court is replete with examples of Justices whose mental or physical conditions precluded them from exercising the arduous functions that must be performed by federal judicial officers. I cannot, of course, deny that many of our judges—Learned Hand is certainly a sterling example—have continued to serve with distinction long after any arbitrary retirement age would have called for their departure. But I have reluctantly come to the view that the price of physical or mental debility among some judges is too high a price to pay for the continuance on the bench of those few whose excellence is not dimmed by age.

I conclude by exhorting you to reject S.J. Res. 106. Its benefits are dubious at best; its costs are likely to be exhorbitant. We cannot afford the strains on our constitutional system that this subordination of the judicial power would effect.

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