HAIL, NO: CHANGING THE CHIEF JUSTICE

EDWARD T. SWAINE

Whatever his substantive accomplishments, the late William Rehnquist’s tenure as Chief Justice of the United States reinforced that office’s distinctive character. Prone to admonish advocates who addressed him merely as “Justice” Rehnquist,\(^1\) he designed spiffy new robes for himself—inspired, apparently, by the character of the Lord Chancellor in *Iolanthe*\(^2\)—that were on display during the impeachment trial of President Clinton. This reflected, however idiosyncratically, a widely shared understanding of the importance of the office and the glory of holding it. Life tenure is a key part of its appeal. William Howard Taft famously preferred being Chief Justice to being President,\(^3\) and John Quincy Adams noted that while “the power of constructing the law is almost equivalent to the power of enacting it[,] the office of Chief Justice of the Supreme Court is held for life, that of the President of the United States only for four, or at most for eight, years.”\(^4\)

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\(^1\) Associate Professor of Legal Studies, The Wharton School, and Associate Professor of Law, University of Pennsylvania Law School.

\(^2\) Tony Mauro, *Rehnquist Is the Chief*, LEGAL TIMES, Dec. 3, 1990, at 15 (noting that when an advocate addressed Rehnquist as “Justice Rehnquist” for a second time, “Rehnquist leaned forward to interrupt and, shaking his finger, reminded [him], ‘I am the chief justice.’”). Rehnquist reportedly went so far as to write a letter to the Court clerk, suggesting that lawyers be cautioned against that particular mistake. *See Morning Edition: Relationship Among Supreme Court Justices, as Reflected in Justice Harry Blackmun’s Notes* (NPR radio broadcast Mar. 5, 2004) (describing the contents of Justice Blackmun’s files, which included a copy of this letter).


The means by which Chief Justice Rehnquist’s term began and ended also evidenced the singular nature of the job. His promotion to succeed Warren Burger was hard fought, but it also diverted attention from the nearly simultaneous appointment of Antonin Scalia, who was nominated to assume Rehnquist’s just-vacated seat as Associate Justice—and who might otherwise have attracted closer scrutiny. Rehnquist’s death this past summer also illustrated the peculiar character of promotion. John Roberts had already been nominated to Sandra Day O’Connor’s seat as Associate Justice, but the nomination was withdrawn so that he could be renominated instead to succeed Rehnquist. This reinforced the disjunction between the two positions, and suggested that prior appointment to the Court would no more have resolved the question of appointment as Chief Justice than would prior appointment as White House Counsel.

Is this etched in stone? Rehnquist’s robes, at once innovative and a throwback, hinted not. Gilbert and Sullivan’s Lord Chancellor, who claimed to “embody the Law,” inhabited an office that American Chief Justices have regarded enviously. But the Lord Chancellor’s powers have waxed and waned over time, and the House of Lords only recently thwarted a proposal to abolish the office entirely. Traditionally, it was even possible for others—including a commoner or a committee—to be assigned some of the Lord Chancellor’s duties instead.

Just so for the office of the Chief Justice, where the appointment process is also a matter of tradition not immune from reconsideration. Although the office has always been treated as a separate lifetime appointment, subject to Senate confirmation, that does not seem to be required by the Constitution, and Congress might change things alto-

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5 See Peter G. Fish, The Office of Chief Justice of the United States: Into the Federal Judiciary’s Bicentennial Decade, in THE OFFICE OF THE CHIEF JUSTICE 1, 16-17 (1984) (citing remarks by William Howard Taft and Warren E. Burger). Others, though, have expressly rejected the Lord Chancellor as a model, and have criticized what they perceived as a growing resemblance. See Phillip B. Kurland, The Lord Chancellor of the United States, TRIAL, Nov.-Dec. 1971, at 11, 11, 28 (noting the administrative character of the lord chancellorship in Britain and arguing that such duties should not be the task of the American Chief Justice).

6 Patrick Wintour, Peers Vote Against Plans to Abolish Lord Chancellor’s Traditional Role, GUARDIAN (London), Mar. 16, 2005, at 8.

7 Technically, potential assignees include the Lord Keeper and the Lord Commissioners of the Great Seal, respectively. EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW 213-14 (2d ed. 1920); see also Note, The Lord High Chancellor and the Great Seal, 27 HARV. L. REV. 70, 70 (1913) (noting that the Lord High Chancellor had entrusted the Seal to three appointed commissioners).
The U.S. Constitution only indirectly advert to a Chief Justice. Article III provides simply that there will be “one supreme Court” and various “Judges” to populate both it and the lower courts.\footnote{U.S. Const. art. III, § 1.} Article I, however, mentions the Chief Justice as the person presiding when the Senate is trying a case of impeachment against the President.\footnote{Id. art. I, § 3, cl. 6.} That’s it. Section 1 of the Judiciary Act of 1789 elaborated that “the supreme court of the United States shall consist of a chief justice and five associate justices.”\footnote{Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73, 73.} One member of the House objected that the title “Chief Justice” was “a concomitant of royalty,” but retreated when a colleague pointed out that the term was already employed in the Constitution.\footnote{1 Annals of Cong. 783 (Joseph Gales ed., 1834) (recording the remarks of Representatives Burke and Benson during the debates over the Judiciary Act of 1789).}

The title—and the position—has since transcended its constitutional roots. By tradition, the Chief Justice presides over the Court’s public proceedings, chairs the Justices’ conferences, and assigns opinions in those cases in which she is in the majority. The Chief Justice also oversees the Court’s administration and lobbies on the Court’s behalf on matters involving its docket and jurisdiction.\footnote{See Robert J. Steamer, Chief Justice: Leadership and the Supreme Court 159-213 (1986) (chronicling the Chief Justice’s role in leading the judiciary outside the courtroom, with emphasis on the political nature of the job); Fish, supra note 5, at 37-74 (recounting both the internal administrative duties and external representative duties of the Chief Justice); Peter G. Fish, Office of the Chief Justice, in The Oxford Companion to the Supreme Court of the United States 140, 140-41 (Kermit L. Hall et al. eds., 1992) (summarizing the Chief Justice’s role as “public advocate[] and defender[] of the Court” to both the national government and the public); Felix Frankfurter, Chief Justices I Have Known, 39 Va. L. Rev. 883, 903-04 (1953) (discussing the importance of the Chief’s duty to assign authorship of Court opinions).}

But the position has also evolved to take on responsibilities beyond the Court. While the first Chief Justices were each commis-
sioned as “Chief Justice of the Supreme Court of the United States,”\textsuperscript{13} Presidents and Chief Justices began to use broader terms like “Lord Chief Justice”\textsuperscript{14} and “Chief Justice of the Union,”\textsuperscript{15} and Congress eventually endorsed their use of “Chief Justice of the United States.”\textsuperscript{16} The position’s national responsibilities grew apace. At Chief Justice Taft’s urging, Congress created the Judicial Conference of the United States, chaired by the Chief Justice,\textsuperscript{17} and later created the subordinate Administrative Office of the United States Courts.\textsuperscript{18} The Chief Justice has also been made responsible for assigning sitting and retired judges to serve assignments outside of their normal jurisdictions\textsuperscript{19}—which Chief Justice Taft allegedly used to direct judges favoring Prohibition toward “wet” judicial districts, and Chief Justice Burger allegedly used to tilt the Foreign Intelligence Surveillance Court\textsuperscript{20}—and the office has gradually accrued statutory, legislative, and public relations functions.

The growth in the Chief Justice’s powers has been controversial. The position’s increasingly diverse responsibilities may, for example, distract from judging, raise accountability problems owing to life tenure, or endanger the Court’s perceived independence from politics.\textsuperscript{21}

\begin{footnotes}
\footnotetext[14]{STEAMER, supra note 12, at 5.}
\footnotetext[15]{Fish, supra note 5, at 9.}
\footnotetext[16]{Daniel, supra note 13, at 111. Chief Justice Salmon P. Chase was a particularly ardent lobbyist for a broader mandate, at the same time urging a reduction in the number of Justices so as to increase the salaries for those remaining. \textit{Id}. In his view, reportedly, “the Chief Justice was separate and distinct from the court, that, as he stated it, ‘the court was built up around the Chief Justice.’” William A. Richardson, \textit{Chief Justice of the United States, or Chief Justice of the Supreme Court of the United States?}, 49 NEW ENG. HIST. & GENEALOGICAL REG. 275, 278 (1895).}
\footnotetext[17]{28 U.S.C. § 331 (2000).}
\footnotetext[18]{Id. § 601.}
\footnotetext[19]{See id. §§ 291-297 (allowing temporary assignment of circuit judges, district court judges, judges of the Court of International Trade, and retired Justices or judges).}
\footnotetext[21]{See Daniel J. Meador, \textit{The Federal Judiciary and Its Future Administration}, 65 VA. L. REV. 1031, 1041-45 (1979) (discussing the problems created by the present administrative structure).}
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These missions also raise accountability concerns: government officials often accrete powers for their offices, but mission creep is surely more troubling when the powers vest in someone with lifetime tenure.

The point for immediate purposes, however, is that Congress could radically alter this situation. Changing the Chief Justice’s role in presidential impeachment would seem to require constitutional amendment, but nothing else rises to that level. The non-adjudicative functions are of relatively recent vintage, and, if anything, are weakly contraindicated by the Framers’ failure to adopt proposals that would have involved the Chief Justice in the legislative process. The Chief Justice’s responsibilities within the Court may seem worthier of constitutional protection, but the Constitution, recall, only mentions the Chief Justice in connection with the Senate, and has left Congress (and, at least in its absence, the Court) free to resolve the Chief Justice’s more routine adjudicative role. There seems to be nothing that would prevent the other Justices, acting individually or collectively, from running the show—a point to bear in mind as we turn to the appointment process.

II. APPOINTING THE CHIEF JUSTICE

Had the Chief Justice’s modern responsibilities been anticipated at the nation’s founding, they might have provoked greater deliberation about the appointment process. The records of the drafting and ratification of the Constitution are silent as to what the founding generation contemplated. To be sure, chief judges were scarcely foreign to them. Colonial and state judiciaries provided them with a wealth of experience—for example, half of the first Supreme Court had held an

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22 Although, that role has been expanded and contracted without such an amendment. The Senate rules provide that the Chief Justice shall also take responsibility for presiding over the impeachment of a Vice President serving as acting President. S. COMM. ON RULES & ADMIN., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. DOC. NO. 104-1, at rule 103 (1995). On the other hand, Congress by statute provided for an alternative to the Chief Justice. See 28 U.S.C. § 3 (2000) (empowering an Associate Justice to assume the duties of a Chief Justice who becomes disabled); see also infra note 74 and accompanying text (discussing the potential conflict between the statute and the Constitution).

23 But cf. Russell Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 SUP. CT. REV. 123, 127-30 (arguing that the failure of proposals for a Council of Revision and a Council of State is not inconsistent with an expectation that that the Justices would perform some extrajudicial tasks).
analogous office on their states’ highest courts— but it may be doubted whether these variegated schemes cohered or were mastered by any one of the Framers, and whether they saw much likeness to the Supreme Court they were creating.

Three themes might have been apparent. One was that the chief justice was widely treated as a separate appointment, hierarchically superior to others of the same tribunal. Second, the chief justice’s role was often substantively and procedurally dissimilar to any that might have been contemplated in the U.S. Constitution—for example, because he participated in legislative councils, or served in more than one office at a time. Third, colonial and state courts and their

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24 The Fourth Provincial Congress of New York had elected John Jay to be chief justice of New York’s Supreme Court of Judicature in 1777. The DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 5 (Maeva Marcus & James R. Perry eds., 1985). William Cushing served twelve years on Massachusetts’ highest court, first as an associate justice of the Massachusetts Superior Court of Judicature, then as its chief justice, then as chief justice of the successor Supreme Judicial Court. Id. at 26. John Rutledge was chief judge of South Carolina’s first court of chancery. GEORGE J. LANKEVICH, THE FEDERAL COURT, 1787-1801, at 239 (1986).

25 The possibility that they did not cohere was noted by Max Farrand, in comments on Hamilton’s proposal. See 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 618-19 (Max Farrand ed., 1911) (noting the possibility that Convention participants may not have felt “perfectly acquainted with the judicial systems of all the States, and therefore could not in advance of discussion decide what phrase should be used to cover the case of States which did not precisely have a chief judge” for purposes of fleshing out a proposal for trying impeachments).


27 Cf. supra text accompanying notes 4-5 (noting evidence of a perceived distinction between the roles of Chief Justice and Associate Justice).

28 In 1779, for example, John Blair, Jr., became chief justice of the Virginia General Court, served as an ex officio member of the first Court of Appeals of Virginia as of its creation that year, and was elected as one of the three chancellors of the High Court of Chancery. He was elected a member of a supplemental committee of legislative revisors in 1786, and elected a member of the new Supreme Court of Appeals of Virginia in 1789, sometimes holding more than one judicial post at a time, while also serving as a representative to the constitutional convention and to Virginia’s ratifying convention. J. Elliot Drinard, John Blair, Jr., in PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING: THE VIRGINIA STATE BAR ASSOCIATION 436, 439-42 (C.M. Chichester ed., 1927). The powers of the General Court relative to the High Court of Chancery, to the several courts of appeal, and to the courts of trial jurisdiction—not to mention to the legislature—fluctuated considerably. See R.G.H. Kean, Our Judicial System: Some of Its History, and Some of Its Defects, in REPORT OF THE FIRST ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 139, 142-43 (Richmond, Va., Everett Waddey 1889); Francis H. McGuire, The General Court of Virginia, in REPORT OF THE SEVENTH
judges were generally subject to political control—only the number of judges, means of initial appointment, and tenure were fixed by state constitutions—and details like the appointment of chief justices were often left unresolved. The Constitution, likewise, guaranteed judges’ tenure during “good Behaviour” and prevented reductions in salary, but without inhibiting Congress from changing the Court’s work or the number of Justices.

Neither the colonies nor the states had many chances to address how anyone comparable to an Associate Justice might be promoted to become chief justice, and the initial experience under the Constitu-
tion was a blur. When President Washington appointed the first slate of Justices, he simply had to designate one, John Jay, as the Chief Justice. When Jay resigned to assume the governorship of New York, Washington faced the first test of how to replace a Chief Justice. It was a debacle. He first selected former Justice John Rutledge, who had left previously to become a state court judge. Rutledge served briefly with a recess appointment before being rejected by the Senate following a vituperative political speech (against, of all things, the Jay Treaty) that gave rise to rumors that he was mentally unstable. Washington then delayed nominating a replacement in order to gauge the interest of Patrick Henry, who failed to provide the President with a timely response. With just weeks before the next sitting, and having lacked a properly confirmed, sitting Chief Justice for nearly two years, Washington nominated then-Associate Justice William Cushing. The Senate confirmed Cushing the next day, but he resigned his commission one week afterward, on health and age grounds, after serving as Chief Justice for perhaps one dinner party. Washington finally succeeded with Senator Oliver Ellsworth, though he served only three years as Chief Justice.

Washington’s travails provide only a fleeting and imperfect illustration of how a sitting Justice could be promoted, though some involved tendered their views as to how succession should be managed. Attorney General Bradford opined that the “principle of Rotation

ture, had been senior associate justice beforehand—and acted as chief justice in Adams’ absence, the latter never having served his appointment. Arthur P. Rugg, William Cushing, 30 Yale L.J. 128, 131 (1920).

Prior national experience, needless to say, was not extensive. One example, however, was the Continental Congress’s Court of Appeals in Cases of Capture, the presidency of which was apparently selected by lot. 1 Hampton L. Carson, The History of the Supreme Court of the United States 56-57 (1902).

See 1 Charles Warren, The Supreme Court in United States History 33-36 (1922). Even at this early stage, the role of Chief Justice was viewed as distinct from that of the other Justices. John Rutledge, who had left a position as an Associate Justice of the United States Supreme Court to take a position as chief justice of the South Carolina Court of Common Pleas, later lobbied Washington for the chance to succeed Jay, and his correspondence makes clear that the position as Chief Justice of the Supreme Court was the most prestigious of the three. Id. at 127-28 (quoting Letter from John Rutledge to President George Washington (June 12, 1795)); see also John Anthony Maltese, The Selling of Supreme Court Nominees 24-25 (1995) (noting newspaper editorials lobbying for and against candidates to be the first Chief Justice).


Id. at 393-94.

Id. at 394.

Id. at 396-97.
would be the least exceptionable,” because it reduced the judiciary’s
dependence on the President, but added that the prospect of an in-
appropriate senior-most Associate Justice—he adverted specifically to
Justice Cushing—made such a system untenable. 39 The Associate Jus-
tices, for their part, seemed to expect that one of their number would
become Chief; Thomas Jefferson, writing before Cushing’s selection,
speculated that the initial Rutledge nomination “seems to have been
intended merely to establish a precedent against the descent of that
office by seniority, and to keep five mouths always gaping for one
sugar plumb.” 40 Following the appointment of Cushing, one Federalist
worried “that the promotion . . . will form a precedent for making
Chief Justices from the eldest Judge, tho’ other candidates may be
much better qualified.” 41

Afterward, a practice developed that no Associate Justice should be
promoted to Chief Justice. Lincoln and Grant reportedly turned
against internal candidates on principle, 42 and President Cleveland seri-
ously offended Justice Stephen J. Field by looking outside the Court
to select Chief Justice Melville W. Fuller. 43 President Taft, trying to
entice Charles Evans Hughes into becoming Associate Justice, con-
fided that he did not “regard the practice of never promoting associ-

39 Letter from William Bradford, Jr., to Samuel Bayard (June 4, 1795), in 1 THE
DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800,
supra note 24, at 755. Cf. Letter from Tench Coxe to Richard Henry Lee (Apr. 11, 1792), in 1 THE
DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, supra note 24, at 735 (noting personal conviction that the office of
the Chief Justice, and those of the cabinet secretaries, “should be put on such a footing
that when vacant they should be unclog’d by the pretensions of any subordinate officer
whatever,” preferring the “man of first abilities,” so that “dull seniority and length of
service should be considered as nothing”).

40 Letter from Thomas Jefferson to James Monroe (Mar. 2, 1796), in THE DOCU-
MENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, supra
note 24, at 841; see also WARREN, supra note 34, at 128-29 (providing the context of Jef-
ferson’s statement).

41 Letter from William Plumer to Jeremiah Smith (Feb. 19, 1796), in 1 THE
DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, supra
note 24, at 838; see also WARREN, supra note 34, at 139-40 (providing the context of Plumer’s statement).

42 Mason, The Chief Justice of the United States, supra note 3, at 51-52. The evidence
as to the latter, at least, seems weak; Lincoln appears to have made his selection as a
matter of political pragmatism, after giving serious consideration to Justice Swayne.
See DAVID M. SILVER, LINCOLN’S SUPREME COURT 197-202 (1956) (discussing the political
pressures on Lincoln to nominate Salmon P. Chase).

43 JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at
17 (1995); CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 319 (Ar-
ate justices as one to be followed” (without, he added in a postscript, promising Hughes the promotion outright). Taft did not in fact promote Justice Hughes, and rejected the aspirations of senior Associate Justice John Marshall Harlan, exclaiming that “I won’t make the position of chief justice a blue ribbon for the final years of any member of the court.” But Taft did ultimately break tradition by promoting sitting Associate Justice Edward Douglas White. Then-Associate Justice Stone was promoted subsequently (immediately following Chief Justice Hughes, who had been nominated after a period away from the Court), as was Justice Rehnquist. All told—but excluding Justice Cushing—three of the sixteen Chief Justices who have served to date have been promoted from within the Court, all of them during this century.

III. CHANGING THE CHIEF

At present, then, a sitting Justice may neither count on nor exclude the possibility of promotion. This is arguably meritocratic, but the resulting uncertainty may be the worst of both worlds. The reasons for maintaining the promotion option are probably self-evident. Experience on the Court (to a point) may be helpful in leading it. That is the premise, presumably, of making the senior Associate Justice the Court’s second-in-command, and the basis for some criticisms of inexperienced outsiders becoming Chief Justice. There are also incentive effects to consider. Reducing the odds that able Associate Justices may be considered for Chief Justice may make it harder to retain them; it is human nature to grow dissatisfied when those less experienced are brought in at a higher position, at least where later advancement seems foreclosed. In theory, it may even make it harder

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44 Daniel S. McHargue, President Taft’s Appointments to the Supreme Court, 12 J. Pol. 478, 488-89 (1950).
45 Id. at 492.
46 See 28 U.S.C. § 3 (2000) (authorizing the senior Associate Justice to assume the Chief Justice’s powers when the Chief Justice is incapacitated or the office is vacant). The succession is also traditional in character. See Sandra L. Wood, In the Shadow of the Chief: The Role of the Senior Associate Justice, J. Sup. Ct. Hist., July 1997, at 25, 26-29 (noting the various instances in which the senior Associate Justice has presided over the Court).
47 See, e.g., 1 Merlo J. Pusey, Charles Evans Hughes 278 (1951) (citing criticisms of the inexperience of Chief Justices Waite and Fuller). One may view the same cases differently, of course, see Jeffrey B. Morris, Chief Justice Edward Douglass White and President Taft’s Court, 1982 Y.B. Sup. Ct. Hist. Soc’y 27, 39 (describing Waite and Fuller as comparatively more successful Chief Justices than Edward Douglass White), and there are certainly inexperienced but accomplished Chief Justices, such as Earl Warren.
to recruit Associate Justices in the first place—witness Taft’s felt need to reassure Hughes in recruiting him to the Associate ranks—though it is unlikely to be too dissuasive.

On the other hand, the prospect of promotion may make sitting Justices solicit political favor—something that led former Justice Owen Roberts, later Dean of the University of Pennsylvania Law School, to urge that Associate Justices ought never be considered for Chief Justice. The specter of political advantage risks relations within the Court as well as the Court’s standing. Justice Field’s disappointment at losing out was nothing compared to the stunning episode in which Justice Jackson publicized Court feuds in a fury over Justice Black’s supposed plotting against Jackson’s aspirations to be Chief Justice. Subsequent charges of presidential cronyism also helped to derail the promotion of Justice Fortas and tarnished the Warren Court (though it seems unlikely that Fortas’s political activities were intended to advance his judicial career). The close and continuing relationships many Presidents have had with their Chief Justices—including instances in which Chief Justices White, Taft, Vinson, Warren, and Burger advised on political matters—raise at least an appearance of a cooperative relationship beforehand as well, undermining the perception of judicial independence.

To bar or discourage promotions, however, is a serious over-correction if the problem stems from the need for Associate Justices to run the nomination and confirmation gauntlets. Why is it, exactly, that a sitting Justice, imbued with life tenure on the Court, must be nominated and confirmed anew in order to become Chief Justice? Clearly, separate appointments are not unconstitutional—the uncontroversial promotions of Justice Cushing and Justice White look like proof positive. If Congress wishes to create a separate office of the Chief Justice, and to make any would-be occupant subject to confirmation, it is at liberty to do so.

48 But see Morris, supra note 47, at 35 (speculating that had Charles Evans Hughes declined an appointment as Associate Justice, “he probably would have been named Chief Justice”).
49 Owen J. Roberts, Now Is the Time: Fortifying the Supreme Court’s Independence, 35 A.B.A. J. 1, 2 (1949).
52 Fish, supra note 5, at 131-33.
53 See KALMAN, supra note 51, at 335; Perry, supra note 35, at 394.
What is less clear, however, is whether promotions need to take this form. Tradition, certainly, would have it so, and deserves some deference. But the relevant tradition is really a longstanding political practice, rather than some purer constitutional understanding, since the practice of separately confirming candidates for Chief Justice has been overdetermined. Prior to the Taft administration—the glancing instance of Cushing aside—separate confirmation was always necessary so that a newcomer could become a “judge” on the Supreme Court. Because the Judiciary Act of 1789 and successor statutes failed to distinguish between internal and external candidates for Chief Justice, it was inevitable that the rare nomination of a current Justice for promotion would be subjected to the same process. The question is open, accordingly, whether a statute might instead differentiate candidates for promotion and provide for their elevation by some other means—and some of the possible mechanisms turn out to be surprisingly traditional.

A. A Seniority Carousel

Presidents have always been able to choose (or avoid choosing) a Chief Justice based on seniority. But could Congress instead dictate that the senior-most Associate Justice automatically serve as Chief? The obvious risk would be promoting Justices who are past their prime, and unduly encouraging longer service on the Court. Recent scholarship has documented numerous instances of decrepitude on the Supreme Court and noted repeated proposals to amend the Constitution in order to establish a retirement age for Justices.54

Reforming the Supreme Court through a constitutional amendment is not a very likely prospect, whatever its merits, but age or term limits for Chief Justices could be imposed without going down that cumbersome path—since those are not, after all, matters addressed in the Constitution. One model is provided by the statute governing the

federal courts of appeals, which designates as chief judge the seniormost judge under the age of sixty-five with at least one year of service and without a prior stint as chief judge—and which limits terms to seven years. Following suit for the Supreme Court would not only limit the age of any Associate Justice upon promotion, and limit the length of service as Chief, but it would also have subtler effects. For example, this kind of seniority carousel may actually reduce the Justices’ mean age by establishing a natural juncture for exit: a senior Associate Justice’s promotion to Chief Justice might serve as a nice way to “round out” a judicial career (as Associate Justice John Marshall Harlan once wistfully remarked), or at least make returning to the rank and file unappealing.

Longevity effects aside, such a scheme would also diminish the opportunity for strategic behavior by the Justices. Predetermining promotion would substantially reduce the incentives for any Justice to show favor to those in (or soon to be in) political power—for example, in cases involving fundamental presidential or senatorial prerogatives. It would also diminish the occasions for alleging such favoritism and, more generally, for the politicized examination of the Court’s work. Promotions are the least attractive species of judicial appointment. Every Associate Justice was confirmed by the Senate, of course, before joining the Court, so the only question is further review—review of a kind that is more intrusive and less deferential than would have been expected in 1789. Justice Cushing was confirmed the day after his surprise nomination, and the Senate confirmed the promotions of Justice White and Justice Stone while honoring their submission that it would be inappropriate for them to testify. Justice Fortas, however was not so lucky, nor was Justice Rehnquist—although, despite close scrutiny, the Fortas hearings actually failed to expose the

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55 28 U.S.C. § 45(a) (2000); see also id. § 258 (providing for seniority-based promotion of the chief judge of the Court of International Trade). This method is not ubiquitous. See id. § 171(b) (authorizing presidential appointment of the chief judge of the Court of Federal Claims).
56 Wood, supra note 46, at 32.
57 Perry, supra note 35, at 394.
58 Kalman, supra note 51, at 335. To the extent that judicial independence was being honored, one would expect nominees from the lower federal courts to be granted the same leeway, as has sometimes been the case. See Charles M. Lamb, Chief Justice Warren E. Burger: A Conservative Chief for Conservative Times, in The Burger Court: Political and Judicial Profiles 129, 132 (Charles M. Lamb & Stephen C. Halpern eds., 1991) (noting that Burger’s testimony during confirmation hearings was short and friendly).
scandal that later drove him from the Court, and the Rehnquist hearings pretermitted sensitive questions regarding his previous ill health. The virtual certainty that modern sitting Justices would be examined on their Supreme Court records poses, at the very least, the risk of reducing the immunity and independence of the Court.

Compared to the alternatives, a seniority-based system doesn’t look so bad. Its main hurdle may be a perceived inconsistency with the Constitution. For one, the President would lose the right of initiative, which may have certain tactical consequences. For example, the Reagan administration’s experience, as noted above, supposedly demonstrated the wisdom of a two-nomination strategy: that is, reacting to a vacancy at Chief Justice by first attempting to promote a controversial (but confirmable) Associate Justice, then following with a more polarizing candidate for the resulting vacancy after the political opposition has been exhausted. It is doubtful, though, that such gambits are constitutionally protected.

The weightier objection is that a seniority carousel would reduce the role of both political branches in selecting the next Chief Justice—not only controlling the selection from among the Associate Justices, but also excluding the possibility of nominating someone from outside the Court. That concern is substantial, but its constitutional basis is not unassailable. While the strongest textual basis for a permanent, separately appointed office of the Chief Justice is its brief mention in the Impeachment Clause, a countervailing consideration is the legislative authority to regulate the meaning of the “judges” mentioned in Article III. The latter authority has clear relevance here. Conceptually, any seniority proposal effectively reconceives all appointments as being to the position of “Justice, eligible for succession to Chief Justice,” rather than to the position of “(non-chief) Associate Justice.” In other words, Congress might decide that being Chief Justice is simply a potential, latent attribute of being a Justice—manifested through

59 See Kalman, supra note 51, at 359-76 (discussing the subsequent exposure of Fortas’s involvement with a financier who was under investigation by the SEC).
60 See Garrow, supra note 54, at 1066-69 (describing the Senate’s conscious avoidance of questions regarding Rehnquist’s previous use of pain medication).
details to the position of Chief Justice—a rather than a discrete office requiring political supervision on a piecework basis.

The idea is not as radical as it may sound. As presently structured, the Chief Justice looks like an “officer” of a kind requiring appointment pursuant to Article II. But case law holds that those already commissioned as officers per the Appointments Clause do not necessarily require a separate appointment in order to assume additional duties, thus redeeming the statutory assignment of military officers to be military judges or members of a commission on public parkland. Such transfers are permitted so long as those duties are germane to the original office (which is plainly true for movement within the Court) and so long as Congress is not “trying to both create an office and also select a particular individual to fill the office” (and the premise of a seniority carousel, of course, is that political control of Chief-designation is, if anything, diminished). The Court’s decision upholding the constitutionality of the Sentencing Commission, and its recognition that Congress may subject Article III judges to an additional appointments process before giving them new responsibilities, does not suggest that it must do so, and the Court cited instances in which such responsibilities had been assigned without any such hurdle. Indeed, the Court cited the Chief Justice’s own ex officio duties, which are an embarrassment to any appointments objection to a seniority carousel; some of these assignments, like the Chief Justice’s inclusion in the Sinking Fund Commission established in 1806, are deeply rooted in the constitutional tradition and were not regarded as

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63 Cf. Weiss v. United States, 510 U.S. 163, 171-72 (1994) (citing examples in which military officers are detailed to separate, statutorily created positions without the requirement of a separate appointment).
64 See, e.g., Freytag v. Comm’r, 501 U.S. 868, 881 (1991) (indicating that when a judicial office is “established by Law,” and the duties, salary, and means of appointment for that office are specified by statute, individuals occupying that position are likely to be viewed, at a minimum, as “inferior Officer[s]” subject to Article II confirmation) (citation omitted).
67 Id. at 301.
68 Weiss, 510 U.S. at 169-76.
70 Id. at 400 n.24.
raising Appointments Clause problems. Any constitutional infirmity would also call into question the statute designating chief judges for the courts of appeals, which must be premised on the distinction between the tenure of a federal judge and the tenure of her stint as chief judge.

One might nevertheless insist that the express constitutional mention of the Chief Justice (and not, say, the chief judge of the D.C. Circuit) makes all the difference. This could be resolved by retaining a “Chief Justice,” selected as at present, to do the only thing mentioned in the Constitution—preside over impeachment of the President—and creating a different officer (say, the “Principal Justice”), selected on seniority, to discharge all the other responsibilities presently assigned to the Chief. Even doing that would do more than the Impeachment Clause requires. It seems unlikely that the Framers designated the Chief Justice in order to avoid having other members of the Supreme Court preside; the idea, presumably, was to designate some member of the brethren to serve in lieu of the Vice President, who otherwise might affect whether he would succeed to the Presidency. (If anything, the Clause’s general theme—to reduce the role of executive branch politics in the impeachment process—would favor employing a Justice selected with the least amount of presidential intervention.) Finally, if the Impeachment Clause means that only a person confirmed as Chief Justice will do, it would condemn the existing law that allows the senior Associate Justice to serve if and to the extent that the Chief Justice becomes disabled. Whatever the merits of the present scheme, and however steeped in tradition it may be, it is difficult to defend as a constitutional necessity.

B. A College of Cardinals

Once liberated from the confirmation process, the position of Chief Justice might be filled from among the sitting Justices in a num-

72 See Wheeler, supra note 23, at 139-44 (discussing the Chief Justice’s early service on the Sinking Fund Commission); 15 ANNALS OF CONG. 929 (1852) (statement of Rep. Randolph) (suggesting that Commissioners on the Sinking Fund Commission “are not, strictly speaking, officers,” since “[t]he duties they discharge are ex officio . . . and, as Commissioners, they receive no salary”).

73 Letter from Chief Justice Salmon P. Chase to the Senate of the United States (Mar. 4, 1868), in JOURNAL OF THE SENATE, at 256.

74 28 U.S.C. § 3 (2000) (“Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the associate justice next in precedence who is able to act . . . .”)
ber of ways, not just by seniority. For example, a statute could provide that the Justices themselves could elect their Chief, not unlike the way the College of Cardinals chooses the Pope (though the Pope, it turns out, need not have been a Cardinal).

Like the seniority carousel, such an approach has legal antecedents. The State of Florida, for example, lets a majority of its justices decide on the chief justice—by tradition, for a two-year term. The consistency with the U.S. Constitution is certainly less clear, but still compelling. Under Article II, Section 2, Congress is free to “vest the Appointment of such inferior Officers, as they think proper” in, among others, “the Courts of Law.” Accordingly, the Supreme Court has held that the chief judge of the U.S. Tax Court—acting as one of those “Courts of Law” despite its non-Article III status—may be statutorily assigned the power to appoint special trial judges who exercise substantial discretion, including the power to decide certain cases and to propose findings in others. By comparison, vesting an entire Article III court with the power to select a Chief Justice from among the Justices seems unexceptionable, at least so long as the statute delineates the duties of a Chief Justice additional to those powers already possessed by virtue of prior appointment.

A College of Cardinals system would also recognize the degree to which the Court is already self-regulating. The practice of letting the Chief Justice assign opinions, for example, is a substantial power, but exceeding its traditional bounds risks a fierce backlash, at least by the Court’s mavericks. This self-regulation has, in fact, sometimes touched on questions of tenure. Justices have advised their elderly

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75 Interestingly, John Paul II regarded it as “an indisputable principle that the Roman Pontiff has the right to define and adapt to changing times the manner of designating the person called to assume the Petrine succession in the Roman See.” John Paul II, Apostolic Constitution, Universi Dominici Gregis (Feb. 22, 1996), pmbl., available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/ (follow “Universi Dominici Gregis” hyperlink). So why not the Chief Justice?


77 U.S. CONST. art. II, § 2, cl. 2.


79 Justice Douglas, for example, objected vigorously when he perceived that Chief Justice Burger was usurping the right of the senior Associate Justice in the majority to make the opinion assignment in cases in which the Chief Justice was dissenting. Wood, supra note 46, at 29. Justice McReynolds, in an earlier episode, supposedly told a messenger sent by Chief Justice Hughes, “Tell the Chief Justice that I don’t work for him.” Steamer, supra note 12, at 21.
colleagues that they are too old to continue serving, or even conspired to deprive them of their full authority—usually by limiting opinion-writing assignments. (The colleagues of Justice McKenna and Justice Douglas, however, went so far as to decide that neither of them should cast deciding votes.) Sitting and departing Justices have also advised Presidents regarding the best choice for a successor Chief Justice.

Making the Justices responsible for electing a Chief Justice would be somewhat more transparent. It is also more facile. As then-Justice Rehnquist admitted, judges have a tendency toward “pulling the wagons around” when it comes to matters of their health and competence. This reticence mainly marks their willingness to disclose their infirmities to the outside world, but it also tends to make them tardy in confronting colleagues with the need to retire. No Justice, moreover, needs to accept such advice. Allowing the Justices to determine their leader makes intervening on the basis of age and health easier: not only is demotion a less bitter pill than resignation, but the Justices’ action can be decisive rather than merely advisory. Judges have long recognized, in principle, the possibility of decrepitude—Charles Evans Hughes, between spells on the Court, urged a mandatory retirement policy, and Judge Richard Posner, limited to a term as chief judge, described the judiciary as “the nation’s premier geriatric

80 This occurred, for example, with Justices Grier, Field, McKenna, and Holmes. Garrow, supra note 54, at 1004, 1009, 1015-16, 1018.
81 WARD, supra note 54, at 116-19, 186-89; Garrow, supra note 54, at 1015-16, 1054-56.
82 WARD, supra note 54, at 118, 187-88; Garrow, supra note 54, at 1015, 1053. Ward and Garrow also report that Justice Rutledge (and possibly Justice Black) cast votes on behalf of an ailing Justice Murphy. WARD, supra note 54, at 148; Garrow, supra note 54, at 1027.
83 See WARD, supra note 54, at 170 (revealing Warren’s apparent intent to recommend a successor); Paul A. Freund, Charles Evans Hughes as Chief Justice, 81 HARV. L. REV. 4, 6 n.10, 8 (1967) (noting consultations prior to the nominations of Hughes and Stone); McHargue, supra note 44, at 492 (noting consultations between Taft and the entire Court prior to the nomination of Justice White); Morris, supra note 47, at 34 (describing advice presented by Justice Harlan to President Taft).
85 Garrow’s article, supra note 54, is essentially a criticism of prior opinion that the practice of collegial intervention was sufficient.
86 According to one well-known anecdote, Justice Harlan was sent to ask an aging Justice Field if he recalled his own intercession with Justice Grier some years before. Justice Field replied, “Yes! And a dirtier day’s work I never did in my life!” CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 76 (1928).
occupation”—and might be given better tools for self-help before any clumsier limits on judicial terms are hazarded.

CONCLUSION

Needless to say, upsetting the scheme for selecting Chief Justices after over 200 years is no mean feat, and less ambitious changes may be preferable. One compromise would be to combine a promotion mechanism with more traditional avenues for appointment. A statute might provide, for example, that the President may nominate any candidate for Chief Justice, but that if she does not—or if no candidate is confirmed—another promotion mechanism would kick in (yielding, for example, the promotion of the senior-most Associate Justice for a term of years). Better still, the statute might defer to a statutory promotion mechanism unless and until the President overrode that Chief Justice with a separately nominated candidate, having convinced the Senate that the new candidate was superior to the incumbent. Either method seems hard to criticize, particularly since existing law provides that the senior Associate Justice may serve in lieu of the Chief Justice, without even the safeguard of a limited term. Either would also allow nomination of a newcomer as Chief Justice, which may be a necessary option to preserve for coping with an aging or dysfunctional court. Of course, if the political branches genuinely feared losing control of the Court, they could always compensate by diminishing the Chief Justice’s statutory responsibilities.

In any event, having recently filled the position of Chief Justice—thus enabling a more dispassionate examination of the office, rather than of a particular nominee or nominator—the time is propitious for reconsidering it. Chief Justice Rehnquist recently presided over only the second impeachment of a President, receiving good marks. It is easy to see how only good fortune prevented the trial from being marred by allegations of favoritism—imagine the protests if President Clinton’s successful defense had been presided over by a Clinton-selected Chief Justice, or if Chief Justice Rehnquist had taken debatable positions that resulted in Clinton’s removal. Recent debates over the filibuster have shown the persistence of ideological rifts over judi-

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87 Garrow, supra note 54, at 997 (quoting Richard A. Posner, Aging and Old Age 180 (1995)).
88 See supra note 74 and accompanying text. For an account of some instances in which this has happened, none appearing to have exceeded six months, see Wood, supra note 46, at 26-29.
cial appointments, boding ill for future nominations to the Supreme Court. If we desire constructive, rather than destructive, political dialogue over the choice of a Chief Justice, it is better to consider the issue systematically, including consideration of the proper method for choosing, and not just the individuals as they arise.