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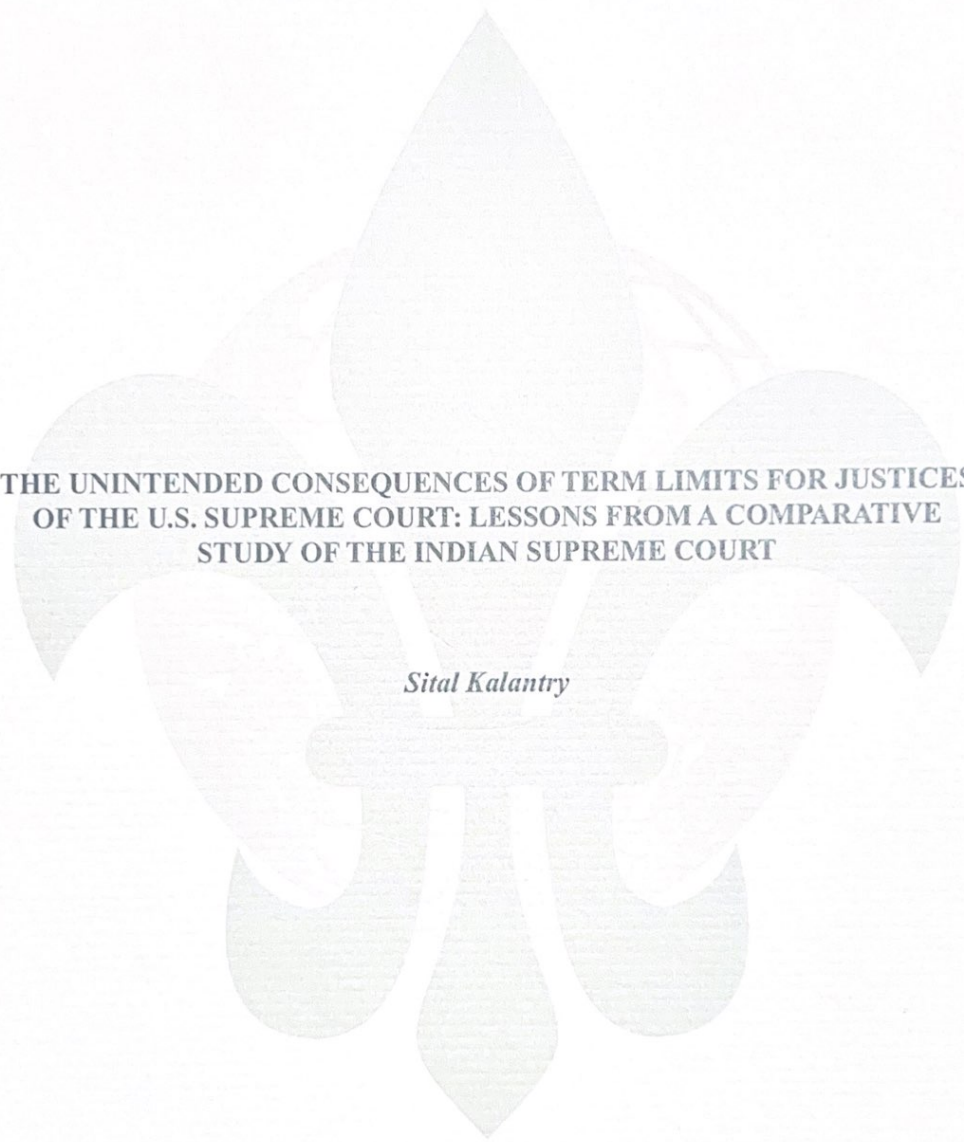
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THE UNINTENDED CONSEQUENCES OF TERM LIMITS FOR JUSTICES  
OF THE U.S. SUPREME COURT: LESSONS FROM A COMPARATIVE  
STUDY OF THE INDIAN SUPREME COURT

*Sital Kalantry*

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# The Unintended Consequences of Term Limits for Justices of the U.S. Supreme Court: Lessons from a Comparative Study of the Indian Supreme Court

Sital Kalantry\*

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I.	INTRODUCTION	

Calls to reform the United States Supreme Court (“SCOTUS”) to adopt term limits rather than life tenure reemerged when Justice Ruth Bader Ginsburg died on the bench when Trump was near the end of his term.<sup>1</sup> Trump appointed Amy Coney Barrett, a conservative judge, to replace Justice Ginsburg, a liberal judge.<sup>2</sup> Mandatory term limits appealed to liberals because it would have forced Justice Ginsburg to retire—perhaps when a Democrat was in power.<sup>3</sup> However, arguments for term limits also find support among conservative scholars and organizations.<sup>4</sup>

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1. See Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html>.

2. Noah Feldman, *Republicans Would Regret Replacing Ginsburg Before Election, Forcing through a New Supreme Court Nominee Could Produce a Democratic Backlash None of Us Want to See*, BLOOMBERG OPINION (Sept. 22, 2020, 7:30 AM), <https://www.bloomberg.com/opinion/articles/2020-09-22/republicans-would-regret-replacing-ginsburg-before-election>; Eugene Robinson, *Democrats, It's Time to Get Mad—and Even*, WASH. POST (Sept. 22, 2020), [https://www.washingtonpost.com/opinions/democrats-its-time-to-get-mad-and-even/2020/09/21/f918d092-fc3d-11ea-8d05-9beaaa91c71f\\_story.html](https://www.washingtonpost.com/opinions/democrats-its-time-to-get-mad-and-even/2020/09/21/f918d092-fc3d-11ea-8d05-9beaaa91c71f_story.html).

3. See Feldman, *supra* note 2; Robinson, *supra* note 2; Eric Bradner, *Here's What Happened When Senate Republicans Refused to Vote on Merrick Garland's Supreme Court Nomination*, CNN (Sept. 20, 2020), <https://edition.cnn.com/2020/09/18/politics/merrick-garland-senate-republicans-timeline/index.html>.

4. See Calabresi, *supra* note 1; *Conservative Thinkers Renew Their Support for SCOTUS Term Limits*, FIX THE COURT (Dec. 5, 2019), <https://fixthecourt.com/2019/12/conservative-thinkers-endorse-scotus-term-limits/>; Stuart Taylor, Jr., Remarks at the 2019 National Lawyers Convention in Washington, titled *Is It Time to End Life Tenure for Federal Judges?* (Nov. 14, 2019) (transcript available at <https://fedsoc.org/conferences/2019national-lawyers-convention#agenda-item-is-it-time-to-end-life-tenure-for-federal-judges>); John Fund, *It's Time for Term Limits*

President Biden recently appointed a judicial commission to study term limit proposals (among other things) for SCOTUS judges (the “Commission”).<sup>5</sup> One year prior to that, a bill was introduced in the U.S. House of Representatives that would introduce staggered terms of eighteen years for judges on SCOTUS.<sup>6</sup> This would give every President the ability to appoint two judges for every term he or she is in office.<sup>7</sup> The House Bill largely tracks the proposals put forward by Professors Calabresi and Lindgren.<sup>8</sup> In their view, eighteen-year staggered term limits for SCOTUS judges will increase democratic accountability, decrease politicization of the appointment process, and ensure that judges who are no longer mentally capable do not remain on the bench.<sup>9</sup> Although term limit proposals have gained prominence recently, several law scholars proposed similar ideas decades ago.<sup>10</sup>

In their final report, the Commission rightly pointed out that apex courts of most countries in the world either mandate term limits or require judges to retire at a certain age.<sup>11</sup> Other than cursory data, the Commission, however, did not consider any in-depth comparative studies that examine how term limits or mandatory retirement ages have played out in

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on the Supreme Court, NAT. REV. (Nov. 24, 2019, 6:33 PM) <https://www.nationalreview.com/2019/11/supreme-court-term-limits-have-bipartisan-support/>; Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020, 4:00 AM), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/>; *Dozens of Legal Scholars Demand Term Limits for Supreme Court Justices*, FIX THE COURT (July 8, 2019), <https://fixthecourt.com/2019/07/dozens-legal-scholars-demand-term-limits-supreme-court-justices/>.

5. Tyler Pager, *Biden Unveils Commission to Study Possible Expansion of Supreme Court*, WASH. POST (Apr. 10, 2021, 5:37 PM), [https://www.washingtonpost.com/politics/biden-to-unveil-commission-to-study-possible-expansion-of-supreme-court/2021/04/09/f644552c-9944-11eb-962b-78c1d8228819\\_story.html](https://www.washingtonpost.com/politics/biden-to-unveil-commission-to-study-possible-expansion-of-supreme-court/2021/04/09/f644552c-9944-11eb-962b-78c1d8228819_story.html).

6. H.R. 8424, 116th Cong., 2nd Sess. (2020).

7. *Id.*

8. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769 (2006); Calabresi, *supra* note 1.

9. Calabresi & Lindgren, *supra* note 8, at 809; Calabresi, *supra* note 1.

10. See generally Calabresi & Lindgren, *supra* note 8; Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121; James E. DiTullio and John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90(4) VA. L. REV. 1093, 1096, 1122 (2004).

11. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 112 (Dec. 2020), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>. See also Ryan C. Black & Amanda C. Bryan, *The Policy Consequences of Term Limits on the U.S. Supreme Court*, 42 OHIO N.U.L. REV. 821, 826 (2016); Calabresi & Lindgren, *supra* note 8, at 819-22.



practice.<sup>12</sup> Significant scholarship has made claims about the consequences of term limits based either on policy preferences or simulated empirical models, but few have drawn from in-depth case studies of courts of other countries. An examination of the design and functioning of other courts can point to problematic consequences that we would not otherwise expect. Through a deep analysis, we might also learn about the laws countries have adopted to mitigate potential negative consequences that occur when, for example, judges retire when they are relatively young.

In this Article, I examine how the structure and functioning of the Indian Supreme Court can provide insight into the potential consequences of a U.S. Supreme Court with term limits for judges. There is an increasing need for comparative studies of Global South countries, including India, which shares a common law heritage with the United States. Though there are a number of differences in the institutional design, political context, and democratic traditions between India and the United States, the experience of the Indian Supreme Court ("ISC") is relevant to evaluating the term limits proposal for SCOTUS judges. Much like the potential term-limited SCOTUS, judges of the ISC do not have life tenure and retire when they are relatively young.<sup>13</sup> As a result, most judges seek post-retirement employment.<sup>14</sup> The ISC does not have term limits, but the

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12. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 112 (Dec. 2020), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>. See also Ryan C. Black & Amanda C. Bryan, *The Policy Consequences of Term Limits on the U.S. Supreme Court*, 42 OHIO N.U.L. REV. 821, 826 (2016); Calabresi & Lindgren, *supra* note 8, at 819-22.

13. INDIA CONST. Art. 124 § 2 (stating that Indian Supreme Court Judges shall hold office until the age of sixty-five years).

14. Vidhi Centre for Legal Policy, LAW IN NUMBERS: EVIDENCE BASED APPROACHES TO LEGAL REFORM 12, 14 (2016), [https://vidhilegalpolicy.in/wp-content/uploads/2020/06/VidhiBriefingBook\\_LawinNumbers.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2020/06/VidhiBriefingBook_LawinNumbers.pdf) ("We collected the following information for the last 100 retirees of the Supreme Court (see notes to data for cut-offs): the body to which the judges were appointed post-retirement, the appointing authority, whether the appointment of a retired judge to the position was required by the law, and the duration after their retirement within which the appointment was made. The most fundamental finding was that incidence of post-retirement employment of judges in government-appointed positions is high, with 70% of the last 100 retirees being appointed.") ("Notes to Data: The cut-off date for consideration of the last 100 retired judges from the SC is 12/02/2016. The data is restricted to post-retirement appointments made by Government, both Central and State."); see Shreeja Sen, *70 of Last 100 Retired Supreme Court Judges Took Post-Retirement Jobs*, MINT (Dec. 3, 2016, 12:07 AM), <https://www.livemint.com/Politics/FptQJ57Ifc9oET7HDxNPNJ/70-of-last-100-retired-Supreme-Court-judges-took-post-retire.html>.



mandatory retirement age of sixty-five effectively acts as a term limit.<sup>15</sup> A study by Abhinav Chandrachud found that the average term for ISC judges from 1985 to 2010 was six years on the court.<sup>16</sup> In examining the tenure of ISC judges who were appointed on or after April 2010, and who retired on or before April 2021, the duration of their tenure was around five years.<sup>17</sup>

The short period that judges spend on the ISC, and the fact that they are relatively young at retirement, results in a number of negative consequences. There is evidence that retiring judges of the ISC pander to future employers while on the court.<sup>18</sup> There is significant doctrinal instability due to, among other things, the short tenure of judges at the ISC.<sup>19</sup> This Article identifies three issues from the modern Indian Supreme Court's design and institutional practice that are relevant to the proposal for term limits of SCOTUS judges.

First, term-limited SCOTUS justices are likely to be relatively young when they retire, and as a result would seek post-retirement jobs. This incentivizes pandering behavior for future employment.<sup>20</sup> Any proposal for term limits should place appropriate constraints on employment after judges retire when their term has been completed. Second, staggered eighteen-year term limits will lead to a revolving door of judges on SCOTUS. As a result, the Court might change its position frequently on issues of national significance, which would create doctrinal instability for the lower courts. Third, while judicial appointments to the ISC are not politicized, it would be wrong to assume that the reason judicial appointments are not politicized is because there is no life tenure for ISC judges. Instead, the likely reason appointments are not politicized in India is because the Chief Justice of India, along with his four senior-most colleagues, appoint other judges to the ISC without any input from

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15. INDIA CONST. art. 124, § 2 ("Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years[.]"); Nick Robinson, *Judicial Architecture and Capacity*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 12 (Oxford Handbooks Online version).

16. Abhinav Chandrachud, *An Empirical Study of the Supreme Court's Composition*, 46(1) ECON. & POL. WKLY 71, 72 (2011) ("The average age of appointment to the Supreme Court between 1985 and 2010 was 58.9 years. The prototypic Indian judge over the last five years is appointed to the high court at age 45, and then to the Supreme Court at age 59.").

17. The data for this calculation was found on <https://main.sci.gov.in/chief-justice-judges>.

18. Madhav S. Aney et al., *Jobs for Justice(s): Corruption in the Supreme Court of India*, 64 J.L. & ECON. (2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3087464](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087464).

19. See generally *id.*

20. Aney et al., *supra* note 18, at 8-14, 40.



Parliament.<sup>21</sup> The nominations made by the Chief Justice of India are typically rubber-stamped by the executive. There are no confirmation hearings in Parliament.

Part II of this Article describes the various term limit proposals suggested by legal scholars over time and explains the views of those who oppose term limits. Part III provides background on the ISC while Part IV explains the consequences in India when judges do not have life tenure and retire when they are relatively young. Part V argues that the negative consequences of term limits for ISC judges could also manifest themselves if term limits were adopted for judges on SCOTUS. Part VI briefly concludes.

## II. THE CASE FOR AND AGAINST TERM LIMITS TO THE UNITED STATES SUPREME COURT

American legal scholar Philip D. Oliver first proposed term limits nearly thirty-five years ago.<sup>22</sup> Term limit proposals have received increasing interest in the American political stage in the last few years.<sup>23</sup> The most well-known proposal is the one articulated by Calabresi and Lindgren in 2006.<sup>24</sup> It forms the basis of the recent bill proposed in the U.S. House of Representatives.<sup>25</sup> This section examines the views of scholars both in favor of and against term limits for SCOTUS judges.

### A. Term Limits Proposals

In 1986, Philip D. Oliver was amongst the first proponents of term limits for U.S. Supreme Court Justices.<sup>26</sup> He proposed a staggered, fixed eighteen-year term for U.S. Supreme Court Justices.<sup>27</sup> He believed that term limits would “equalize the power of Presidents in shaping the Court.”<sup>28</sup> He argued that term limits would allow executives to focus on the merit of nominated judges rather than their age,<sup>29</sup> reduce the effect of

21. Apurva Vishwanath, *Explained: How Supreme Court Judges are Appointed*, INDIAN EXPRESS, (Sept. 9, 2021, 1:32 pm), <https://indianexpress.com/article/explained/explained-how-supreme-court-judges-are-appointed-7487796/>.

22. Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986).

23. Pager, *supra* note 5.

24. Calabresi & Lindgren, *supra* note 8, at 830.

25. *Id.* at 873.

26. Oliver, *supra* note 22.

27. *Id.*

28. *Id.* at 802.

29. *Id.* at 804.

strategic resignation decisions of Justices,<sup>30</sup> and protect the independence of judges.<sup>31</sup> A few years later Henry Paul Monaghan showed support for a fixed and unrenovable term of fifteen to twenty years for Supreme Court Justices.<sup>32</sup> For him, there were defects in justifications for retaining a life tenure system.<sup>33</sup> He found arguments that life tenure was indispensable to insulate the judiciary from the other branches of government to be unpersuasive.<sup>34</sup> For Monaghan, judicial independence was not achieved through “indefinite service,” but rather “the awareness that their continuation in office does not depend on securing the continuing approval of the political branches.”<sup>35</sup> Thus, he argued that because judges cannot work beyond their term limit, they have no reason to behave in a way to please the other branches of government.<sup>36</sup> The behavior of ISC justices discussed herein, however, suggests otherwise.

Others have proposed terms shorter than eighteen years. For example, Judge Laurence H. Silberman proposed a five-year term limit.<sup>37</sup> He suggested that justices be appointed for life but only for five-year terms on the U.S. Supreme Court, and thereafter for life on the Court of Appeals.<sup>38</sup> Under his proposal, judges could be elevated from the U.S. Federal Court of Appeals to SCOTUS or people outside of the judiciary could be newly appointed directly to SCOTUS.<sup>39</sup> But after five years, SCOTUS judges would have to sit on U.S. Federal Court of Appeals.<sup>40</sup> He opined that his proposal<sup>41</sup> would make “justices less susceptible of the notion that they are grand statesmen entitled to make policy.”<sup>42</sup>

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30. *Id.* at 808-9.

31. *Id.* at 816, 820-21.

32. Henry Paul Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202, 1211-12 (1988).

33. *Id.* at 1211.

34. *Id.*

35. *Id.*

36. *Id.* at 1211-12.

37. *Term Limits for Judges?* (1997) (transcript available in 13 J.L. & POL. 669, 687).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 686.



Calabresi and Lindgren renewed interest in term limits.<sup>43</sup> In 2006, they proposed eighteen-year staggered, non-renewable term limits.<sup>44</sup> They proposed retaining the size of SCOTUS at nine justices.<sup>45</sup> The terms would be staggered so that one seat would open up during the "first and third years of a president's four-year term."<sup>46</sup> Their proposal considered one-term Presidents two appointments, two-term Presidents four appointments, and each two-year Senate session a nominee.<sup>47</sup> Failure to confirm a justice by July 1st of a President's first or third year could lead to a salary and benefits freeze for all Senators and the President.<sup>48</sup> They would be confined together until a nominee was approved.<sup>49</sup> In such a situation, the Vice President would act as President and the Senate would be prohibited from taking action on any of its calendars.<sup>50</sup>

Under Calabresi and Lindgren's proposal, if a judge dies or retires before his or her term ends, the sitting President would nominate and the Senate would confirm a replacement to fill out the unexpired term with no possibility of reappointment.<sup>51</sup> Their proposal provided retired Supreme Court Justices salary for life so as to protect their independence during the eighteen years they were serving on the Supreme Court.<sup>52</sup> Retired Supreme Court Justices would be eligible to sit on lower federal courts if they so desired, but were not required to do so.<sup>53</sup>

Calabresi and Lindgren argue that their proposal would lead to a predictable and regular court turnover and in turn result into less politically polarized confirmation hearings.<sup>54</sup> They further argue that their proposal would help keep unelected judges accountable to the country's preferences rather than their own ideological preferences.<sup>55</sup> In addition, they point out

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43. Calabresi & Lindgren, *supra* note 8, at 830 ("Moreover, our specific proposal is a combination of the suggestions and plans advocated by Judge Silberman and Professor Oliver, and it also draws heavily on the plans put forth by other notable scholars, like Gregg Easterbrook and Professors McGinnis, Prakash, and Monaghan.") (An earlier version of their Harvard Article was presented at a conference at Duke Law School in the spring of 2005 and at the American Political Science Association Annual Meeting in September 2005.).

44. *Id.*

45. *Id.*

46. *Id.* at 824-25; see Calabresi & Lindgren, *supra* note 8.

47. Calabresi & Lindgren, *supra* note 8.

48. *Id.*; Calabresi & Lindgren *supra* note 8, at 824-25.

49. Calabresi & Lindgren, *supra* note 8.

50. *Id.*

51. *Id.*

52. Calabresi & Lindgren, *supra* note 8, at 843.

53. *Id.* at 825.

54. *Id.* at 813-14; see Black & Bryan, *supra* note 11, at 825.

55. Calabresi & Lindgren, *supra* note 8, at 809-13.



that term limits would prevent justices from serving until their death or with diminishing mental and physical capacity.<sup>56</sup>

While Calabresi and Lindgren argued that term limits could be imposed only by a constitutional amendment, Roger C. Cramton and Paul D. Carrington made the case that it could be done by statutory amendment.<sup>57</sup> In 2014, Erwin Chemerinsky joined the chorus of legal scholars favoring term limits.<sup>58</sup> He proposed imposing eighteen-year term limits for SCOTUS judges, with terms staggered to end every two years.<sup>59</sup> Through his proposal, Chemerinsky aimed to impose a term limit that was long enough for a judge “to master the job” but not so long as to enshrine “political choices from decades earlier.”<sup>60</sup>

In 2020, a bill was introduced in the U.S. House of Representatives to add term limits for SCOTUS judges.<sup>61</sup> The bill gives each President the ability to appoint a Supreme Court Justice every two years.<sup>62</sup> After eighteen years, a judge on SCOTUS must retire, but can continue to serve as a Senior Justice.<sup>63</sup> The bill states that Senate’s advice and consent authority would be deemed waived if the Senate does not act within 120 days of a Justice’s nomination.<sup>64</sup> Although not the subject of this Article, it is worth noting that other scholars have also made other proposals to address the problems of the current judicial appointment system.<sup>65</sup>

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56. *Id.* at 815-16.

57. Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 471 (Roger C. Cramton & Paul D. Carrington eds., 2006); see Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345 (Roger C. Cramton & Paul D. Carrington eds., 2006).

58. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT*, 310-311 (2014).

59. Sundby & Sherry, *supra* note 10, at 126-27; see CHEMERINSKY, *supra* note 58.

60. *Id.*

61. H.R. 8424, *supra* note 6.

62. *Id.*

63. *Id.*

64. *Id.*

65. For example, John O. McGinnis proposed “supreme court riding” where federal judges sitting on the inferior courts would be randomly assigned to SCOTUS for short periods, such as six months or one year. The aim of his shorter-term limit proposal was to create U.S. Supreme Court Justices who would interpret the Constitution according to its original meaning rather than engaging in policy making. John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541 (1999). In addition, Saikrishna B. Prakash has proposed fixed, renewable removable terms for U.S. Supreme Court Justices with the aim to overcome problems associated with life tenure and unaccountable judges, and to maintain a “healthy judicial independence.” Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 581, 582 (1999). Finally, Daniel Epps & Ganesh Sitaraman proposed a “balanced bench” proposal with the aim to “restore the notion that Supreme Court Justices are deciding questions of law, in ways that don’t invariably line up with their political



## B. Critiques of Term Limits

Legal scholars have raised several substantive and procedural critiques to the various term limit proposals.<sup>66</sup> Critics of term limit proposals have argued that term limits for judges do not solve the problems that proponents claim to address.<sup>67</sup> Other critics have gone beyond refuting arguments of term limit proponents to pointing out new problems that term limits would introduce.<sup>68</sup> The section below discusses both types of arguments.

### 1. Term Limits Do Not Solve the Problems Proponents Claim

#### a. Judicial Independence

One primary criticism of moving from life tenure to term limits for judges is the potential impact on judicial independence.<sup>69</sup> One empirical study by Graves and his co-authors compares the votes of recess-appointed courts of appeals judges during their temporary appointment tenure with a similar life-tenured period following their senate confirmation.<sup>70</sup> Their examination suggests that these judges lobbying to keep their jobs exhibit substantially different behaviors before their Senate confirmation than after.<sup>71</sup> They demonstrate there is a relationship between life-tenured judges and their voting outcomes.<sup>72</sup> Life-tenured judges tend to behave independently and vote in accordance with their own personal policy preferences, whereas the same judges sitting by temporary recess appointment do not vote according to their personal predispositions.<sup>73</sup> To the extent judicial independence means voting according to your own preferences rather than based on the party in power, Graves' study

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preferences in the biggest cases." Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 181, 193 (2019). Under their proposal, the Supreme Court would be composed of ten Justices—five Democratic and five Republican selected Justices, plus five additional Justices drawn from the circuit courts on whom the "partisan" Justices would have to agree unanimously. *Id.*

66. See Pager, *supra* note 5; McGinnis, *supra* note 65; Oliver, *supra* note 22; *Term Limits for Judges?*, *supra* note 37; Calabresi & Lindgren, *supra* note 8; Epps & Sitaraman, *supra* note 65; Black & Bryan, *supra* note 11, at 821; Calabresi, *supra* note 1.

67. See *id.*

68. *Id.*

69. Black & Bryan, *supra* note 11, at 827; Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 *U. ILL. L. REV.* 407, 411, 423-24 (2005).

70. Scott E. Graves, et al., *Judicial Independence: Evidence from a Natural Experiment*, 36 *U. DENV. L. & POL'Y* 68, 69 (2014).

71. *Id.* at 78, 83-84.

72. *Id.* at 83.

73. *Id.*

suggests that life tenure likely ensures greater judicial independence. Other critics of term limits believe that under a life-tenure system for SCOTUS, justices are unlikely to have political aspirations or motivations to advance their career once they leave the bench.<sup>74</sup> Thus, justices have the ability to make more independent decisions, and that may not be the case in a term limit system where judges eventually leave the court earlier in life.<sup>75</sup>

b. Democratic Unaccountability

Ward Farnsworth has argued against the claim that term limits would enhance democratic accountability of judges.<sup>76</sup> Black and Bryan's study provides evidence to support that claim.<sup>77</sup> They undertook an empirical study of a hypothetical term-limited court.<sup>78</sup> Black and Bryan studied the composition of SCOTUS from 1937 to 2016 as if it were term-limited and compared it to the actual composition of SCOTUS during that time period.<sup>79</sup> In comparing the actual composition of the life-tenured SCOTUS to a hypothetical term-limited court, they found that the term-limited hypothetical court would have been more out of step with public opinion than the actual SCOTUS was during the relevant time period.<sup>80</sup> Thus, they suggest that term limits are likely to create "a potentially less, not more, democratically accountable judicial system."<sup>81</sup>

c. Increased Politicization of the Court

For Farnsworth, in addition to failing to solve the problem of democratic unaccountability, term limits do not solve the problem of increased politicization of the court.<sup>82</sup> Instead, fixed terms are likely to make "the unappealing features of the confirmation process worse."<sup>83</sup> The reason being that such fixed term proposals attach nominating chances to presidencies and can create more natural cycles of revenge amongst political opponents to make confirmation hearing uglier and more

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74. Black & Bryan, *supra* note 11, at 827.

75. *Id.*

76. Farnsworth, *supra* note 69, at 418, 424.

77. Black & Bryan, *supra* note 11, at 824-25, 884.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 854.

82. Farnsworth, *supra* note 69, at 433.

83. *Id.*



frequently so.<sup>84</sup> Life tenure prevents anyone from knowing how many nominations a President will make or even what their exact term will extend to.<sup>85</sup> This uncertainty "signals to the Justices that they are expected to act like judges rather than politicians."<sup>86</sup>

Like Farnsworth, Daniel Epps and Ganesh Sitaraman believe that term limit proposals are likely to make the politicization of SCOTUS worse by increasing the Court's prominence in every election cycle.<sup>87</sup> Robert F. Nagel also argued that nominations are controversial essentially because SCOTUS justices routinely resolve highly controversial and important public issues and justices are going to continue to do so whether in a life tenure or term limit system.<sup>88</sup> Thus, stakes in "any particular nomination will, one would think, therefore remain high enough to trigger highly contentious, sometimes ugly, hearings."<sup>89</sup>

#### d. Justices Serving with Diminishing Capacity

In response to the claim of term limit proponents, such as Calabresi and Lindgren, that under a life tenure system SCOTUS justices tend to serve with diminished capacities,<sup>90</sup> Josh Teitelbaum examined the relationship between SCOTUS Justices' ages and their productivity on SCOTUS.<sup>91</sup> Teitelbaum, through his examination of a data set that spans from 1926 to 2001 and covers seventy-six terms of SCOTUS, found that there is no empirical relationship between age on the bench and productivity, as measured by the number of opinions produced or number of cases accepted.<sup>92</sup> Empirical findings from his examination of the

84. *Id.* at 433-44.

85. *Id.* at 438.

86. *Id.*

87. Epps & Sitaraman, *supra* note 65, at 173.

88. Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 127, 128-129 (Roger C. Cramton & Paul D. Carrington eds., 2006).

89. *Id.* at 129.

90. David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000). ([A] "survey of Supreme Court historiography reveals that mental decrepitude has been an even more frequent problem on the twentieth-century Court than it was during the nineteenth."). Calabresi & Lindgren, *supra* note 8, at 815 (Calabresi & James Lindgren citing David J. Garrow "Professor David Garrow, who recently provided a comprehensive account of the historical evidence pertaining to the cases of mental decrepitude on the Court, notes that 'the history of the Court is replete with repeated instances of Justices casting decisive votes or otherwise participating actively in the Court's work when their colleagues and/or families had serious doubts about their mental capacities.'").

91. See 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, 163 (2006).

92. See generally *id.* at 168-70, 181.



relationship between SCOTUS justices' ages and their productivity on SCOTUS have weakened the claims that term-limits will decrease the number of judges with diminished capacity on the bench.

## 2. Term Limits Introduce Other Problems

### a. Judge Will Become More of an Activist

Farnsworth argues that there is "special value of the [United States] Court as a slow lawmaker." A court that puts issues on a slower track "protects them from swifter currents of opinion is more likely to produce bad law."<sup>93</sup> For Farnsworth, it is a court whose judges are replaced infrequently that provides some insulation from the public will to prevent swift law and bad lawmaking.<sup>94</sup> Critics of term-limits, including Farnsworth, fear that term-limits will create more "activist judges" who are more responsive to politics and parties and less deferential to stare decisis.<sup>95</sup> They fear that if judges know that they are to serve for a limited time, they may use that time to enact new law and policy as soon as possible.<sup>96</sup> In contrast, they opine that life-tenured judges are more likely to allow law to develop gradually and help "test the durability of an idea" before validating it as law.<sup>97</sup>

### b. Supreme Court Appointees Could Reflect Only One Political Party

Another potential consequence of term-limits that Farnsworth points to is the possibility of "Supreme Court capture."<sup>98</sup> A "Supreme Court

93. Farnsworth, *supra* note 69, at 414.

94. *Id.*

95. Black & Bryan, *supra* note 11, at 827; see Abhinav Chandrachud, *Does Life Tenure Make Judges More Independent? A Comparative Study of Judicial Appointments in India*, 28 CONN. J. INT'L L. 297, 299-300 (2013).

96. Black & Bryan, *supra* note 11, at 827-28.

97. Farnsworth, *supra* note 69, at 414; Black & Bryan, *supra* note 11, at 827-28.

98. Farnsworth, *supra* note 69, at 416 ("A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust. And as the lengths of the proposed terms get shorter, the risks become greater that a burst of political sentiment will take the slower law along with it as well as the faster-or rather that the slower law would not be much slower after all."); Calabresi & Lindgren, *supra* note 8, at 813, 845 (Calabresi & Lindgren referring to Calabresi's conversation with Professor Charles Fried and to Farnsworth: "A second big objection that could be raised against our proposal is that it could lead to 'Supreme Court capture.' . . . Accordingly, Professor Charles Fried has suggested to us that our proposal could cause the Supreme Court to become like the National Labor Relations Board, which is always captured by labor under Democratic administrations and by management under Republican rule. Farnsworth adds that because a 'two-term President may reflect a single national mood . . . there may be value in a court that cannot be remade by one such gust."); Black & Bryan, *supra* note 11, at 828.



capture” can happen if one political party wins four consecutive elections.<sup>99</sup> This would allow one party the ability to nominate eight judges to SCOTUS, thus making SCOTUS unanimously liberal or conservative.<sup>100</sup> Such a capture defeats the benefit of a relatively even ideological split court that ensures that no decision is made too easily and that represents minority voices through dissents.<sup>101</sup>

c. Institutional Instability

Vicki C. Jackson points to the broader judicial infrastructure and the institutional instability that is likely to emanate from a term-limited Supreme Court.<sup>102</sup> Under the current life-tenure system, Supreme Court Justices with their degree of independence can freely review and balance out judgments of lower court judges who are elected.<sup>103</sup> However, according to Jackson, under a term-limited system, Supreme Court Justices are likely to lose their anchoring and balancing role given the reduced degree of their independence.<sup>104</sup>

Many scholars writing on term limits make predictions about the consequences of term limits based on their own policy preferences. Those who use empirical methods typically create models or simulations and draw conclusions based on those hypothetical scenarios. A comparative study of courts with term limits, or mandatory retirement ages, provides a different insight into the term limits debate in the United States. It provides a real-world example of the consequences that result when judges do not have life tenure. The next Part provides a background on the Indian Supreme Court to better explain the consequences when judges are on a court for a short period of time.

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99. Black & Bryan, *supra* note 11, at 828.

100. *Id.*

101. *Id.*

102. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007-08 (2007).

103. See *id.* at 49.

104. *Id.* at 1007-08.



### III. BACKGROUND ON THE INDIAN SUPREME COURT AND CONSEQUENCES OF A LACK OF LIFE TENURE

The world's oldest democracy and world's largest democracy have a lot in common.<sup>105</sup> They both derive their legal heritage from the British.<sup>106</sup> India and the United States are both multi-religious and diverse societies.<sup>107</sup> Both countries have faced and responded to national security concerns in the last few decades in ways that have sometimes impinged on human rights.<sup>108</sup> Each country has increasingly witnessed authoritarian governments that have narrowed human rights, including religious freedom, reproductive freedom, privacy, and immigrant rights.<sup>109</sup> The apex court of both countries is authorized to review both constitutional and non-constitutional matters.<sup>110</sup> Despite these similarities, India has not gained significant prominence in the comparative law literature in the U.S. legal academy. This Article seeks to shed light on the Indian judicial system for purposes of analyzing the potential consequences of imposing term limits on SCOTUS judges.

This Part provides general background on the ISC. Where relevant, it also compares the relevant features of the Indian and U.S. Supreme

105. Jeff Desjardins, *Mapped: The World's Oldest Democracies*, WORLD ECON. FORUM (Aug. 8, 2019), <https://www.weforum.org/agenda/2019/08/countries-are-the-worlds-oldest-democracies>; Nate Barksdale, *What is the World's Oldest Democracy?*, HISTORY (Oct. 28, 2018), <https://www.history.com/news/what-is-the-worlds-oldest-democracy>; Dhruva Jaishankar, *India Rising: Soft Power and The World's Largest Democracy*, BROOKINGS (July 17, 2018), <https://www.brookings.edu/articles/india-rising-soft-power-and-the-worlds-largest-democracy/>; see Center for American Progress Task Force on U.S.-India Relations, *The United States and India: Forging an Indispensable Democratic Partnership* (Jan. 14, 2018, 5:00 PM), <https://www.americanprogress.org/issues/security/reports/2018/01/14/444786/united-states-india-forging-indispensable-democratic-partnership/>; Beryl A. Radin, *USA and Indian Federalisms: Similarities and Differences*, 63(4) INDIAN J. PUB. ADMIN. 685-89 (2017).

106. See Kern W. Craig, *What Do the United States and India Have in Common (Besides Indians): Enough for a Strategic Alliance?*, 9(2) ASIAN SOC. SCI. 70, 73 (2013).

107. *Id.* at 76.

108. See COMMONWEALTH HUMAN RIGHTS INITIATIVE, NISDA SECURITY CONFERENCE, CONCEPTUALISING IMPEDIMENTS TO NATIONAL SECURITY: THE NEED TO RECONCILE SECURITY AND HUMAN RIGHTS (Oct. 2006), [http://humanrightsinitiative.org/old/publications/chogm/chogm\\_2007/docs/the\\_need\\_to\\_reconcile\\_security\\_&\\_human\\_rights.pdf](http://humanrightsinitiative.org/old/publications/chogm/chogm_2007/docs/the_need_to_reconcile_security_&_human_rights.pdf); C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195 (2005); William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249 (2004); Amnesty International, *National Security & Human Rights*, <https://www.amnestyusa.org/issues/national-security/>; *United States Events of 2019*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/united-states#>.

109. See *India Events of 2019*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2020/country-chapters/india#b81764>; *United States Events of 2019*, *supra* note 108.

110. See Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 175 (2013).



Courts. In particular, this Part describes the jurisdiction of the ISC, its size, its method of decision-making, the judicial appointments process, and the retirement age of judges.

#### A. Jurisdiction

The Indian judicial system differs from that of the U.S. in one very significant respect—India has a unified system of courts, while there is a dual system of state and federal courts in the United States.<sup>111</sup> In the U.S. dual system there is a federal judiciary with the Supreme Court at the top, along with a separate and parallel judicial system in each state. On the other hand, in India, state courts and other courts constitute a single, unified, judiciary and the ISC has jurisdiction over all cases arising under any law whether enacted by Parliament or a State Legislature.<sup>112</sup> The Indian Constitution provides that both state court judges as well High Court and ISC judges interpret law under a single national constitution.<sup>113</sup> There are no separate state constitutions like there are in the U.S., but states in India do have their own laws.<sup>114</sup>

In addition to appellate jurisdiction from the high courts, and advisory jurisdiction at the behest of the President, the ISC exercises original jurisdiction to issue writs to protect fundamental rights of the common people guaranteed in the Constitution of India, including equality, speech and assembly, personal liberty, and religious freedom.<sup>115</sup>

Unlike SCOTUS, the ISC hears a significant number of cases.<sup>116</sup> The ISC grants full hearings to about 10,000 cases per year; this is only after it has conducted a court hearing for every single petition presented to it—which is more than 68,000 petitions per year.<sup>117</sup> It issues about 1,000

111. M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 9-18 (7th ed.), available at LexisNexis; Robinson, *supra* note 15, at 2.

112. JAIN, *supra* note 111; Robinson, *supra* note 110, at 193.

113. Robinson, *supra* note 15, at 2, 4.

114. *Id.* at 2.

115. Burt Neuborne, *The Supreme Court of India*, 1 *INT'L J. CONST. L.* 476, 478, 479 (2003).

116. Andrew Green & Albert H. Yoon, *Triaging the Law: Developing the Common Law on the Supreme Court of India*, 14 *J. EMPIRICAL LEGAL STUD.* 683, 690 (2017); Robinson, *supra* note 110, at 176.

117. Aparna Chandra, et al., *The Supreme Court of India: A People's Court?*, 1(2) *INDIAN L. REV.* 145, 8-9 (2017), <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/2/7529/files/2017/05/The-Supreme-Court-of-India-A-Peoples-Court-2m3odf8.pdf> (“The Supreme Court conducts a staggering number of hearings. While it grants full hearings to about 10,000 cases per year, this is only after it has conducted a court hearing for every single petition presented to it—which is more than 68,000 petitions per year. Further, each case on average involves at least 2 hearings”).

opinions per year.<sup>118</sup> From 2010 to 2014, the Supreme Court of India admitted 14% of the petitions presented to it.<sup>119</sup> On the other hand, SCOTUS admits about 1% of all cases seeking admission.<sup>120</sup>

*B. Size and Decision-Making*

The Constitution of India, which was adopted in 1950, established a Supreme Court of India consisting of eight judges, including a chief justice.<sup>121</sup> The Constitution vests power in the Parliament to determine the size of the Court.<sup>122</sup> Over the past years, the Parliament has increased the number of judges that can be appointed to the Supreme Court, and its most recent legislation has set the number to a maximum of thirty-three judges, which includes the judicial position of the chief justice of India.<sup>123</sup>

In the early years of the Supreme Court of India, given the small size of the court, all judges would sit together to hear the cases presented before them.<sup>124</sup> But as arrears of cases began to cumulate before the court and the number of judges on the court kept increasing,<sup>125</sup> judges began to sit in smaller benches of two to three judges or larger benches of five or more when a difference of opinion on a point of law or constitutional question

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118. Judis is the official e-reporter of the Supreme Court of India that recorded 900 judgments for 2014. Aparna Chandra, et al., *The Supreme Court of India: An Empirical Overview*, in *A QUALIFIED HOPE: THE INDIAN SUPREME COURT AND PROGRESSIVE SOCIAL CHANGE* 1, 4 (The Supreme Court “entertains over 60,000 appeals and petitions and issues approximately 1,000 judgments per year.”).

119. Chandra, et al., *supra* note 117, at 15 (“Indeed, of the 342,417 admissions decisions by the Court from 2010 to 2014, 47,806 were admitted for regular hearing. While, in the absence of a benchmark, it is difficult to know whether this admission rate is high or low, it is instructive to note that by comparison the U.S. Supreme Court—an avowedly norm elaborating court—admits about 1% of all cases seeking admission while the Supreme Court of India admits 14% of its petitions”).

120. *Id.*; *Frequently Asked Questions (FAQ)*, SUPREME COURT OF THE UNITED STATES <https://www.supremecourt.gov/about/faq.aspx> (answering “How many cases are appealed to the Court each year and how many cases does the Court hear?” with “The Court receives approximately 7,000–8,000 petitions for a writ of certiorari each Term. The Court grants and hears oral argument in about 80 cases.”); Green & Yoon, *supra* note 116, at 684.

121. INDIA CONST. art. 124, § 1; *History*, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20People>.

122. *Id.*

123. The Supreme Court (Number of Judges) Amendment Bill, 2019, <https://www.prsindia.org/billtrack/supreme-court-number-judges-amendment-bill-2019>.

124. INDIA CONST. art. 124, § 1; *History*, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20People>.

125. *Id.*; The Supreme Court (Number of Judges) Amendment Bill, *supra* note 123.



arose.<sup>126</sup> An empirical study of every published decision of the ISC from 2010 to 2015 found that decisions by two-judge benches account for 90% of all published judgments.<sup>127</sup> A bench consisting of a larger number of judges is bound by the decision of a bench consisting of fewer judges.<sup>128</sup>

On the judicial side, the chief justice is *primus inter pares*—first amongst equals,<sup>129</sup> and his vote counts only as much as the vote of other judges.<sup>130</sup> In his administrative role, the chief justice acts as the “Master of the Roster.”<sup>131</sup> This means that he determines which type of cases will be heard by which set of judges.<sup>132</sup> It is not uncommon for different two-judge benches that have been appointed by different chief justices to issue conflicting opinions.<sup>133</sup>

On SCOTUS, the chief justice does not wield nearly as much power as the chief justice of India. The chief justice of India presides over the Court’s public sessions and also presides over the Court’s private conferences, where the justices decide what cases to hear and how to vote on the cases they have heard.<sup>134</sup> The chief justice of SCOTUS, however,

126. INDIA CONST. art. 124, § 1; *History*, THE SUPREME COURT OF INDIA, [127. Chandra, et al., \*supra\* note 118 \(“In this paper we provide a descriptive account of the functioning of the Court through an empirical analysis of all cases decided by the Supreme Court between 2010 and 2015. . . . Our approach is quantitative and comprehensive, based on a data set of information drawn from all judgments rendered by the Supreme Court during the years from 2010 through 2015. Our dataset contains information on judgments in over 6,000 cases, decided in over 5,000 separate, published opinions issued during this time period. Each of the Court’s opinions was hand coded for information on a wide range of variables, allowing us to compile the largest and most detailed data set on the Court’s judgments ever collected.”\) \(“Nearly 90 percent of cases in our data set were decided by a two-judge bench and nearly all the rest were decided by three-judge benches. Only 91 cases out of 6,856 in our data were decided by a five-judge bench—and in this six-year period there were no benches larger than five judges.”\).](https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20peopl.;Robinson,supra note 110, at 198 (“As such, circuit riding in some ways shares similarities to the many panels of the Indian Supreme Court. Both are used to perform a democratic school master role; bring the Court closer to everyday citizens’ problems, increasing its populist image; and actively monitor the judgments of lower courts.”).</a></p>
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128. Robinson, *supra* note 15, at 9 (“A Supreme Court bench’s precedent is binding not just on the rest of the judiciary, but also on smaller or equal-sized benches of the Court, making much of the typical work of a Supreme Court judge resemble that of a High Court judge, unable to overrule previous Supreme Court decisions.”).

129. *Asok Pande v. Supreme Court of India*, (2018) 5 SCC 341; 2018 SCC Online SC 361 at ¶ 15.

130. *Shanti Bhushan v. Supreme Court of India*, (2018) 8 SCC 396; 2018 SCC 396, 418.

131. *State of Rajasthan v. Prakash Chand*, (1998) 1 SCC 1 at ¶ 59; *Shanti Bhushan v. Supreme Court of India*, Writ Petition (Civil) No. 789 of 2018 at ¶¶ 3, 12-15.

132. *Id.*

133. Robinson, *supra* note 15, at 2.

134. Steven R. Shapiro, *The Role of Chief Justice*, ACLU (Sep. 12, 2005, 3:15 PM), <https://www.aclu.org/blog/speakeasy/role-chief-justice>; *Chief Justice*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/chief\\_justice](https://www.law.cornell.edu/wex/chief_justice).

has the power to decide who writes the Court's majority opinion if, but only if, he has voted with the majority.<sup>135</sup> Otherwise, the power to assign the majority opinion shifts to the member of the majority who has the most seniority on the Court.<sup>136</sup>

While the President selects the chief justice in the United States, in India a judge becomes chief justice if he or she is the senior most judge on the court as determined by the date of his or her appointment.<sup>137</sup> Bert Neuborne notes the practice of appointing the senior most judge as chief justice "results in a revolving-door chief justiceship."<sup>138</sup> Indeed, there have been forty-seven chief justices from 1950 to 2020.<sup>139</sup> The longest serving chief justice was Y.V. Chandrachud who was chief justice for seven years and four months until 1985, and the shortest serving chief justice was Kamal Narain Singh for seventeen days in 1991.<sup>140</sup> The tenure of chief justices has decreased over time.<sup>141</sup> Prior to 1993, the tenure of a chief justice was twenty months on average and after 1993, that decreased to just twelve months.<sup>142</sup>

### C. Appointment Process of Indian Supreme Court Justices

When India emerged from British colonial rule, the judges of the Supreme Court were appointed by an executive-led process.<sup>143</sup> In 1993, however, the ISC declared the Indian Constitution requires that the ISC should have exclusive authority over judicial appointments.<sup>144</sup> The Indian Constitution states that "[e]very Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after

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135. Chief Justice, *supra* note 134.

136. *Id.*

137. Robinson, *supra* note 15, at 16.

138. Neuborne, *supra* note 115, at 483.

139. See *Term of Office of Former Chief Justice and Judges*, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/chief-justice-judges>.

140. See *Term of Office of Former Chief Justice and Judges*, *supra* note 139; Suchita Shukla, *Remembering the Longest Serving Chief Justice of India, Justice YV Chandrachud*, SCC ONLINE BLOG (July 14, 2020), <https://www.sconline.com/blog/post/2020/07/14/remembering-the-longest-serving-chief-justice-of-india-justice-yv-chandrachud/>.

141. See *Term of Office of Former Chief Justice and Judges*, *supra* note 139.

142. *Id.*

143. Apama Chandra et al., *From Executive Appointment to the Collegium System: The Impact on Diversity in the Indian Supreme Court*, 51 VERFASSUNG UND RECHT IN ÜBERSEE 273, 276 (2018).

144. INDIA CONST. art. 124, § 3; *History*, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20People,;Chandrachud,> *supra* note 95; Supreme Court Advoc's on Rec. Ass'n v. Union of India, AIR 1994 SC 268.



consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years.”<sup>145</sup> It further states that the Chief Justice of India “shall always be consulted” while appointing a Judge other than the chief justice.<sup>146</sup>

From 1950 to 1993, the Indian Constitution was interpreted to give the chief justice the power to propose names of potential judges to the Prime Minister.<sup>147</sup> If the Prime Minister agreed with the suggested name, the chief justice, with the concurrence of the Prime Minister, would advise the President, who would make the appointment.<sup>148</sup> If the Prime Minister did not agree with the chief justice’s picks, he or she could seek the views of other judges and consult with the chief justice or suggest another nominee.<sup>149</sup> In 1981, a case was brought against the executive-led appointments process, but the Supreme Court rejected any changes to the executive-led system of appointments in what is now known as the *First Judges Case*.<sup>150</sup>

Under the backdrop of several court-packing schemes by the government, in a case known as the *Second Judges Case*, the Court reversed course just over a decade later in 1993 and declared the executive-led system to be against the basic structure of the Constitution.<sup>151</sup> The Court held that the opinion of the chief justice was binding on the President who could now only appoint the chief justice’s judicial nominees to the ISC.<sup>152</sup> The Court also held that in making his recommendation to the President, the chief justice had to consult the two most senior judges on the Court.<sup>153</sup>

Then, in the *Third Judges Case* in 1998, the Court clarified some aspects of the appointment process.<sup>154</sup> The Court decided that the chief

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145. INDIA CONST. art. 124, § 2; *History*, THE SUPREME COURT OF INDIA, [https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20people;Chandrachud,supra note 95, at 306](https://main.sci.gov.in/history#:~:text=On%20the%2028th%20of%20January,the%20House%20of%20the%20people;Chandrachud,supra%20note%2095,at%20306).

146. INDIA CONST. art. 124, § 2.

147. Chandra et al., *supra* note 143, at 276.

148. *Id.*

149. *Id.*

150. S.P. Gupta v. President of India and Ors., AIR 1982 SC 149.

151. Supreme Court Advoc’s on Rec. Ass’n v. Union of India, AIR 1994 SC 268; Chandrachud, *supra* note 95, at 307.

152. *Id.*

153. *Id.*

154. In re Special Reference No.1 of 1998 (1998) 7 SCC 739.

justice should consult the four most senior judges on the Supreme Court before making a nomination for judicial appointment to the President.<sup>155</sup>

In 2015, in the *Fourth Judges Case*, the ISC found a law creating a commission (comprising of executive and judicial officers) that would have been responsible for declaring judicial appointments unconstitutional.<sup>156</sup> The ISC argued that judicial independence would be impaired if a commission was empowered to propose judicial nominees.<sup>157</sup> In summary, today's judges are appointed to the ISC by the Chief Justice of India in consultation with the four most senior judges on the court. This group is known as the "collegium."<sup>158</sup>

The collegium does not explain why it chose certain candidates and rejected other potential candidates.<sup>159</sup> The appointments process is conducted in secrecy.<sup>160</sup> Parliament is not involved in the process at all and the Prime Minister and President essentially rubber stamp the judges suggested by the collegium.<sup>161</sup> But to be sure, this does not mean that the judicial appointments process is free of problems. Indeed, many have noted that the judicial appointments process is marked by nepotism, favoritism, and sexism.<sup>162</sup> The reason the judicial appointments process in India is not the subject of political theater is because the process rests largely within the judicial branch.

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155. *Id.*

156. Supreme Court Advoc's on Rec. Ass'n v. Union of India, 2016 (5) SCC 1.

157. Chandra et al., *supra* note 143, at 278-79, 283-85.

158. In re Special Reference No.1 of 1998 (1998) 7 SCC 739 at ¶¶ 9 and 14; Chandrachud, *supra* note 95, at 307.

159. Chandrachud, *supra* note 95, at 308.

160. *Id.*

161. Chandra, et al., *supra* note 143, at 274; Robinson, *supra* note 110, at 190; Robinson, *supra* note 15, at 15.

162. Chandra et al., *supra* note 143; see a recounting of these criticisms in the opinion of Justice Kurian (concurring) and Justice Chelameshwar (dissenting) in Supreme Court Advoc's on Rec. Ass'n v. Union of India, 2016 (5) SCC 1; Mehal Jain, *Justice Gita Mittal Is An Example of Failure of Collegium System: Justice AK Sikri On Her Non-Elevation To SC*, LIVE LAW (Feb. 9, 2020, 12:59 AM), <https://www.livelaw.in/top-stories/justice-gita-mittal-is-an-example-of-failure-of-collegium-system-justice-ak-sikri-on-her-non-elevation-to-sc-video-152507>; Shishir Tripathi, *Supreme Court Yet to Acknowledge Nepotism in Judicial Appointments, Even as Centre Seems Intent on Curbing It*, FIRST POST (Aug. 1, 2018, 10:46 AM), <https://www.firstpost.com/india/supreme-court-yet-to-acknowledge-nepotism-in-judicial-appointments-even-as-centre-seems-intent-on-curbing-it-4871401.html>.



D. *Mandatory Retirement of Indian Supreme Court Judges*

The Indian Constitution states that judges on the ISC must retire when they reach the age of sixty-five.<sup>163</sup> In some U.S. states, judges also have a mandatory retirement age; however, that age is much higher than in India.<sup>164</sup> The retirement age set forth in the Indian Constitution tracks the retirement age of the Federal Court of India, which was the apex court of the British colonial government.<sup>165</sup> A study of debates of the Constituent Assembly, the body that drafted the Indian Constitution,<sup>166</sup> indicates that there was extensive debate about the retirement age of judges. Some suggested lowering the retirement age from sixty-five, while others suggested increasing it. Given the lack of consensus in the Constituent Assembly, it appears that the retirement age of sixty-five was retained simply because of path dependence on the colonial system.<sup>167</sup>

One proposal favored setting the retirement age to sixty-eight.<sup>168</sup> Shibban Lal Saksena, looking to England and America, argued that in those countries, judges of the highest court "have no age of retirement. They go even up to ages of eighty and ninety and they have been very good judges even at these ages . . . These are very great advantages that contributes to their independence in giving judgments."<sup>169</sup> B. Pocker Sahib Bahadur added that the existing retirement age means that some judges retire "who are very energetic and who are well fitted to discharge the duties for a number of years more."<sup>170</sup> Other members supported raising the retirement age on the basis of a report submitted by the judges of the

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163. INDIA CONST. art. 124, § 2 ("Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years[.]").

164. See, e.g., *Mandatory Judicial Retirement*, NATIONAL CENTER FOR STATE COURTS (Sep. 30, 2020), <https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/mandatory-judicial-retirement> (showing that around thirty states set a mandatory retirement age for their judges, with the average mandatory retirement age ranging from seventy to seventy-five. Vermont has the highest mandatory retirement age at ninety.).

165. Abhinav Chandrachud, *The Need to Have a Uniform Retirement Age for Judges*, 47(46) ECON. & POL. WKLY 24-25 (2012).

166. Constituent Assembly Membership, Rajya Sabha, [https://rajyasabha.nic.in/rsnew/constituent\\_assembly/constituent\\_assembly\\_mem.asp](https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly_mem.asp).

167. Chandrachud, *supra* note 165, at 25.

168. *Id.* at 126.

169. *Constituent Assembly Membership*, RAJYA SABHA, [https://rajyasabha.nic.in/rsnew/constituent\\_assembly/constituent\\_assembly\\_mem.asp](https://rajyasabha.nic.in/rsnew/constituent_assembly/constituent_assembly_mem.asp); Constituent Assembly of India Debates (Proceedings), October 12, 1949 Debate, Volume X, ¶10.149.126 (October 12, 1949).

170. October 12, 1949 Debate, *supra* note 169, at Volume VIII ¶ 8.90.24.



Federal Court and High Courts supporting a retirement age of sixty-eight for the Supreme Court and sixty-five for the High Courts.<sup>171</sup>

Another proposal favored lowering the age of retirement of the ISC to sixty.<sup>172</sup> Jaspal Roy Kapoor suggested three reasons to lower the age of retirement.<sup>173</sup> Firstly, he noted that the age of retirement of government civil servants is fifty-five and High Court Judges is sixty, so he saw no reason to extend the age of retirement of Supreme Court Judges to sixty-five.<sup>174</sup> He thought “[t]hey must, after putting in long years of service, retire and make room for others to come in.”<sup>175</sup> Secondly, he believed that a retirement age of sixty-five would be unsafe based on the proposal that “very often a person who has gone beyond the age of sixty is not very fit and is not mentally alert to perform the strenuous duties of a judge of the Supreme Court.”<sup>176</sup> He believed that a retirement age of sixty would be unsafe.<sup>177</sup> Lastly, he proposed that judges should be prepared to serve society in an honorary capacity from the age of sixty.<sup>178</sup>

A final proposal was to let the legislature decide the retirement age instead of crystallizing it in the Constitution. Satish Chandra noted that “[t]he question of age is one which can be left safely to the future parliaments to be decided and fixed, in particular circumstances, according to the needs and exigencies of the time.”<sup>179</sup>

Some members of the Constituent Assembly were dissatisfied with the retirement age of sixty-five. M. Ananthasayanam Ayyangar, for example, said that the age of sixty-five is young enough to ensure that those on the Court are still of a “balanced mind” but high enough to ensure that justices have “sufficient experience” to “judge calmly and coolly.”<sup>180</sup> Some drafters of the Indian Constitution believed that judges were not able to be fully functional after the age of sixty. K.M. Munshi noted that “at the age of sixty most of the judges of the High Court—I do not say all—

171. Memorandum Representing the Views of the Federal Court and of the Chief Justices Representing All the Provincial High Courts of the Union of India, March 1948, in B SHIVA RAO, *The Framing of India's Constitution: Select Documents*, Vol IV 198–99 (1968).

172. See October 12, 1949 Debate, *supra* note 169, at Volume VIII ¶ 8.90.46.

173. See Constituent Assembly of India Debates (Proceedings), May 24, 1949 Debate, Constituent Assembly Debates, Vol III.

174. *Id.*

175. *Id.*

176. *Id.* at ¶ 8.90.47.

177. *Id.* at ¶ 8.90.49.

178. *Id.* at ¶ 8.90.50.

179. *Id.* at ¶ 8.90.52.

180. *Id.* at ¶ 8.90.141.



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171. Memorandum Representing the Views of the Federal Court and of the Chief Justices Representing All the Provincial High Courts of the Union of India, March 1948, in B SHIVA RAO, *The Framing of India's Constitution: Select Documents*, Vol IV 198-99 (1968).

172. See October 12, 1949 Debate, *supra* note 169, at Volume VIII ¶ 8.90.46.

173. See Constituent Assembly of India Debates (Proceedings), May 24, 1949 Debate, Constituent Assembly Debates, Vol III.

174. *Id.*

175. *Id.*

176. *Id.* at ¶ 8.90.47.

177. *Id.* at ¶ 8.90.49.

178. *Id.* at ¶ 8.90.50.

179. *Id.* at ¶ 8.90.52.

180. *Id.* at ¶ 8.90.141.



become unfit for further continuance on the Bench.”<sup>181</sup> Another member, T.T. Krishnamachari, noted that “about thirty percent of the cases perhaps, people who attain the age of sixty become unfit for active work.”<sup>182</sup> Ultimately, none of the amendments to the initial draft prevailed and so the retirement age of the ISC tracks the retirement age of the Federal Court of India, which was created in 1937 and is currently fixed at sixty-five years.<sup>183</sup>

While the age of retirement has remained constant at sixty-five, the age at which judges are appointed has increased over time.<sup>184</sup> Indeed, between 1985 and 2010, a judge was appointed to the Indian Supreme Court at the average age of fifty-nine.<sup>185</sup>

With life expectancy increasing, judges now have more time in their life post-retirement than they did in when the Constitution was drafted. When the Federal Court of India was conceived in 1937, the life expectancy was around thirty years.<sup>186</sup> By 1960, the life expectancy at birth in India increased to 41.4; by 2018, it further increased to 69.4.<sup>187</sup> This life expectancy is influenced by wealth disparities. People who become judges of the ISC today are likely from the wealthier classes of society and their life expectancy is probably closer to the richest households in India. Recent data shows that life expectancy at birth is 65.1 years for the poorest fifth of households in India and 72.7 years for the richest fifth of households.<sup>188</sup> Thus, the mandatory retirement age of sixty-five means that many are likely to seek employment post-retirement.

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181. *Id.* at ¶ 8.100.50.

182. *Id.* at ¶ 8.100.12.

183. The Report of the Joint Committee on Indian Constitutional Reform (1934) proposed that the new Federal Court of India should have a retirement age of sixty-five. *See* Report of the Joint Committee on Indian Constitutional Reform, United Kingdom House of Commons, ¶ 323 (Nov. 1, 1934). Proposing a retirement age of sixty-five was a deliberate effort to have a higher retirement age for the Federal Court than for the Indian High Courts (which had a retirement age of sixty) so as to incentivize High Court judges to stay on as Federal Court judges: “We have suggested that in the case of the Federal Court the age should be sixty-five, because it might otherwise be difficult to secure the services of High Court Judges who have shown themselves qualified for promotion to the Federal Court . . .” *Id.* at ¶ 331.

184. Chandra et al., *supra* note 143, at 281-82.

185. Robinson, *supra* note 15; Chandrachud, *supra* note 16.

186. Bagsmrita Bhagawati & Labananda Choudhury, *Generation Life Table for India, 1901-1951*, 12 MIDDLE EAST J. AGE & AGING 3 (2015).

187. WORLD BANK, *Life Expectancy at Birth, Total (Years)-India*, (last visited May 15, 2020), <https://data.worldbank.org/indicator/SP.DYN.LE00.IN?locations=IN>.

188. Miqdad Asaria et al., *Socioeconomic Inequality in Life Expectancy in India*, BMJ GLOBAL HEALTH, 3, 5 (2019), <https://gh.bmj.com/content/bmjgh/4/3/e001445.full.pdf>.



#### IV. PROBLEMATIC CONSEQUENCES OF THE DESIGN AND FUNCTIONING OF ISC

Judges of the ISC are forced to retire at a relatively young age (sixty-five) but they are not appointed until their late fifties.<sup>189</sup> This means they spend relatively little time on the ISC. An examination of judges who joined the ISC on or after April 2010 and retired on or before April 2021 finds that on average those judges spent less than five years on the ISC.<sup>190</sup> There are two problematic consequences that flow from early retirement and the short duration of service on the court.

First, when judges retire at a relatively young age, they might pander to their future employer, which for the ISC judges, is the Indian Government. There is evidence suggesting that this happens with some retiring ISC judges.<sup>191</sup> Second, the ISC is marked by doctrinal instability, which is, in part, due to the short tenure of judges (including the chief justice) of the ISC.<sup>192</sup> This doctrinal instability has a number of negative consequences.<sup>193</sup>

##### A. *Judges that Seek Post-Retirement Employment Pander to Future Employers*

There is a perception that ISC judges might favor the government when it is a litigant in order to secure a job post-retirement. Indeed, the appointment of a former chief justice to the Rajya Sabha (The Upper House of Parliament)<sup>194</sup> recently sparked debate around independence of Supreme Court judges and brought to the forefront problems associated with the early retirement age for Supreme Court judges in India.<sup>195</sup>

189. The data for these calculations were found on <https://main.sci.gov.in/chief-justice-judges>.

190. *Id.*

191. See Aney et al., *supra* note 18.

192. *Id.* at 7.

193. *Id.* at 8-14, 40.

194. Sobhana K. Nair, *As Former CJI Ranjan Gogoi Takes Oath as Rajya Sabha Member, Opposition Walks Out*, THE HINDU (Mar. 19, 2020, 12:01 PM), <https://www.thehindu.com/news/national/former-cji-ranjan-gogoi-takes-oath-as-rajya-sabha-member/article31106321.ece>.

195. *Id.*; Pratap Bhanu Mehta, *The Gogoi Betrayal: Judges Will Not Empower You, They Are Diminished Men*, THE INDIAN EXPRESS (Mar. 20, 2020, 12:04 PM), <https://indianexpress.com/article/opinion/columns/ranjan-gogoi-supreme-court-rajya-sabha-6320869/?fbclid=IwAR0UF5EfbZ0bgdg79a4BZWxIBMCh62zj5Jgc14AVwiKhwyUW-i-WAjLMOIU> (“We should be deeply grateful to Justice Ranjan Gogoi. His conduct has disabused us of any illusions we might harbour about the legitimacy of the Indian Supreme Court. The government, in a brazen contravention of all propriety, has given him a nomination to the Rajya Sabha. He has been shameless enough to accept it. In doing so, he has not just cast doubt on his own judgement, character, and probity; he has dragged down the entire judiciary with him.”); Chandra et al., *supra* note 143.



Empirical evidence also suggests that retiring judges do indeed pander to the government.<sup>196</sup>

ISC judges retire at sixty-five, which is a relatively young age given life expectancy today. Many judges work past their retirement from the ISC. They likely work to occupy themselves with productive work, but also because they need to earn money to maintain the lifestyle they had when they were judges. An ISC judge's salary is 2.5 lakhs (approx. US \$3,400 per month), but most of their compensation is in-kind. They are given a large residence in New Delhi.<sup>197</sup> However, after retirement, a judge on the ISC only receives a pension of 1.25 lakh (approx. US \$1,710) for each year he or she worked and does not receive a home.<sup>198</sup> Moreover, no housing is provided after retirement.<sup>199</sup> Thus, because the post-retirement benefits do not match the benefits while the person was a judge, he or she is likely to work after retirement from the Court to sustain him or herself.

The Indian Constitution prohibits judges from returning to private practice.<sup>200</sup> This typically leaves two options for most retired ISC judges—take a job provided by the government or work as an arbitrator for disputes between large companies. While retired ISC judges are increasingly becoming arbitrators, the government remains a desirous post-retirement employer, because, along with a position, it provides a sprawling estate in the heart of New Delhi.<sup>201</sup> These estates are simply not available for purchase and may not be affordable even on a private arbitrator's salary.

Today, there are even more government jobs available for retired judges than there were in the past with the growth of specialized tribunals and public commissions, some of which require that the members be former justices of the ISC.<sup>202</sup> Indeed, a significant number of judges do in fact take government jobs post-retirement.<sup>203</sup> A study has shown that of the

196. See Aney et al., *supra* note 18.

197. See The High Court and the Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2017, <https://www.prindia.org/billtrack/high-court-and-supreme-court-judges-salaries-and-conditions-service-amendment-bill-2017>.

198. *Id.*

199. *Id.*

200. INDIA CONST, art. 124 § 7 (“No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.”).

201. The High Court and the Supreme Court Judges (Salaries and Conditions of Service) Amendment Bill, 2017, <https://www.prindia.org/billtrack/high-court-and-supreme-court-judges-salaries-and-conditions-service-amendment-bill-2017>.

202. Robinson, *supra* note 15, at 16.

203. *The 'Honourability Index': A Look at Supreme Court Judges who Took Post-retirement Jobs*, THE PRINT (Mar. 19, 2020, 11:59 PM), <https://theprint.in/opinion/the-honourability-index-a-look-at-supreme-court-judges-who-took-post-retirement-jobs/383450/> (“A study by the think-tank



last 100 ISC judges who retired as of February 12, 2016, seventy took post-retirement jobs.<sup>204</sup> Of those who accepted jobs after leaving the court, 36% of them took jobs offered by the Indian Government.<sup>205</sup>

When a judge accepts a post by the government, there might be a perception that he favored the government when it was a party before the court.<sup>206</sup> This concern was even raised by one of the drafters of the Indian Constitution over seventy years ago who had suggested that High Court and ISC judges should be prohibited from working in the government.<sup>207</sup> The lure of post-retirement government jobs and the problem it creates for judicial independence has also been of concern in the modern court. To remedy this problem, a former Chief Justice of India, Justice Lodha, proposed that three months before they actually retired, Supreme Court and High Court Judges be given the option to either receive full salary (minus other benefits) for ten more years after their retirement or receive a pension as fixed under the law.<sup>208</sup> Only those who agreed to receive a full

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Vidhi Centre for Legal Policy has shown that 70 percent of judges in the Supreme Court get government jobs. Another study—Jobs for Justice(s): Corruption in the Supreme Court of India—states that the odds that a Supreme Court justice gets a post-retirement job is increased by 15-20 percent with every judgment that is favourable to the government.”)

204. Vidhi Centre for Legal Policy, LAW IN NUMBERS: EVIDENCE BASED APPROACHES TO LEGAL REFORM 12, 14 (2016), [https://vidhilegalpolicy.in/wp-content/uploads/2020/06/VidhiBriefingBook\\_LawinNumbers.pdf](https://vidhilegalpolicy.in/wp-content/uploads/2020/06/VidhiBriefingBook_LawinNumbers.pdf) (“We collected the following information for the last 100 retirees of the Supreme Court (see notes to data for cut-offs): the body to which the judges were appointed post-retirement, the appointing authority, whether the appointment of a retired judge to the position was required by the law, and the duration after their retirement within which the appointment was made. The most fundamental finding was that incidence of post-retirement employment of judges in government-appointed positions is high, with 70% of the last 100 retirees being appointed.”) (“Notes to Data: The cut-off date for consideration of the last 100 retired judges from the SC is 12/02/2016. The data is restricted to postretirement appointments made by Government, both Central and State”); see Shreeja Sen, *70 of Last 100 Retired Supreme Court Judges Took Post-Retirement Jobs*, MINT (Dec. 3, 2016, 1:37 PM), <https://www.livemint.com/Politics/FptQJ57Ifc9oET7HDxNPNJ/70-of-last-100-retired-Supreme-Court-judges-took-post-retire.html>.

205. Vidhi Centre for Legal Policy, *supra* note 204.

206. Robinson, *supra* note 15, at 16 (“While the salary of judges is fixed by statute and cannot be reduced during their tenure, some have claimed that judges become more sensitive to the concerns of the executive and corporate interests as they near retirement, as after retirement they may wish to be appointed to either positions on public tribunals or commissions (a decision made by the executive) or to arbitration panels (whose members are chosen by the—usually corporate—parties of the dispute”).

207. Abhinav Chandrachud, *Time Has Come to Ask: Should Judges Stop Accepting Post-Retirement Jobs Offered By Govt*, THE INDIAN EXPRESS (Mar. 18, 2020, 11:01 AM), <https://indianexpress.com/article/opinion/columns/former-chief-justice-india-ranjan-gogoi-rajya-sabha-nomination-bjp-6319321/> [hereinafter *Post-Retirement Jobs*].

208. Avishek G. Dastidar, *As CJI, I Told PMs of Way to Insulate Judges from Lure of Post-Retirement Jobs: Lodha*, INDIAN EXPRESS, (Oct. 25, 2015, 6:12 AM), <https://indianexpress.com/>



salary could be eligible for government positions.<sup>209</sup> By providing them with a salary that matches their current salary, “[t]he idea is to insulate judges from the lure of post-retirement jobs. Judges don’t have to run after politicians for lucrative posts after retirement if they get a salary while remaining on the panel,” according to Justice Lodha.<sup>210</sup>

The most concrete evidence that ISC judges pander to the government is from an empirical study by Professors Aney, Dam, and Ko.<sup>211</sup> The study of all ISC decisions from 2010 to 2014 compares the behavior of judges who retired close to an election to the behavior of judges who retired when an election was farther away (i.e., sixteen months after their retirement date).<sup>212</sup> The study finds that judges are more likely to issue pro-government decisions when there is not likely to be government turnover immediately after their retirement.<sup>213</sup> In other words, their data proves that judges are more likely to issue pro-government decisions when there is less risk that the government might turnover in an election for a period of time after their retirement.<sup>214</sup>

The study further found that ISC judges are less likely to rule in favor of the government when their retirement is closer to an election.<sup>215</sup> The study assumes that judges are uncertain about who the new government will be after an election and therefore, lack incentive to rule in favor of the existing government.<sup>216</sup> Thus, the authors found that judges are more likely to issue pro-government decisions if they retire farther away from an election than those who retire close to an election.<sup>217</sup>

The effect identified by Professors Aney and his co-authors was even greater in important cases.<sup>218</sup> The study determined if a case was important based on whether the Attorney or Solicitor General was listed on the case and the number of Senior Advocates.<sup>219</sup> Most remarkably, the study found

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article/india/india-news-india/as-cji-i-told-pms-of-way-to-insulate-judges-from-lure-of-post-retirement-jobs-lodha/.

209. *Id.*

210. *Id.*

211. Aney et al., *supra* note 18.

212. *Id.* at 12-13, 25-28.

213. *Id.* at 25-28.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 12-13, 19-21, 30-33.

219. *Id.* at 12-13; Guidelines to Regulate Conferment of Designation as Senior Advocates, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/pdf/seniorAdvocates/Desig/guidelines.pdf> (“All the matters relating to designation of Senior Advocates in the Supreme Court of India shall



that judges who author favorable judgments in important cases are likely to receive prestigious government jobs.<sup>220</sup> This suggests that the early retirement age has created incentives for decisions in favor of the government, which thereby compromises judicial independence.<sup>221</sup>

*B. Short Tenure of Judges Contributes to Doctrinal Instability*

The short tenure of judges on the ISC as well as other design features of the ISC contribute to doctrinal instability. The time ISC judges spend on the court has decreased over the years.<sup>222</sup> Gadbois, an early commentator of the court, in 1969, noted the average tenure of the Supreme Court judges to be 6.6 years.<sup>223</sup> From 1985 and 2010, it was six years.<sup>224</sup> ISC judges who were appointed on or after April 2010 and who retired on or before April 2021, spent, on average, less than five years in office.<sup>225</sup>

Chief Justices of India have even shorter tenures than other judges. A person becomes a chief justice if he or she is the senior most judge on

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be dealt with by a Permanent Committee to be known as 'Committee for Designation of Senior Advocates'" that includes the Chief Justice of India and two senior-most judges of the Supreme Court along with the Attorney General of India and a member of the Bar. An Advocate is eligible to apply for designation if they have been a Chief Justice or Judge of a High Court or have ten years of experience as an Advocate or a District Judge or a Tribunal Judge. The application is examined on a point system with points allocated to number of years of legal practice, judgments issued, publications, and interview).

220. Aney et al., *supra* note 18, at 28-29; but see Abhinav Chandrachud's argument that Indian Supreme Court judges are independent despite their short tenure, *supra* note 95.

221. Bingham Centre for the Rule of Law, *The Appointment, Tenure and Removal of Judges Under Commonwealth Principles: A Compendium and Analysis of Best Practice*, BRITISH INST. INT'L & COMPAR. L., ¶ 2.2.28 (2015) [hereinafter Bingham Centre Report] (This risk that judicial independence could be compromised when retirement ages are too low has also been noted by a study by the Bingham Centre for the Rule of Law at the British Institute of International and Comparative Law. The Centre finds that "[t]he level at which the age of mandatory retirement is set should be informed by the need to avoid conflicts of interest that may pose a risk to judicial independence." The report further notes "problems are likely to arise in situations where the retirement age is low and judges may be eligible for lucrative or prestigious post-retirement positions over which the government has a significant influence . . ." The Bingham Centre highlights the problems for judicial independence when the retirement age is set too low, and government is one of the largest post-retirement employers.).

222. George H. Gadbois Jr., *Indian Supreme Court Judges: A Portrait*, 3 L. & SOC. REV. 317, 328 (1969).

223. *Id.*

224. Robinson, *supra* note 15; Chandrachud, *supra* note 16.

225. The data for these calculations were found on <https://main.sci.gov.in/chief-justice-judges>.



the ISC, which is defined by the date he or she was appointed to the ISC.<sup>226</sup> Prior to 1993, the tenure of a chief justice was twenty months on average and after 1993, that decreased to just twelve months.<sup>227</sup> Bert Neuborne notes the practice of appointing the senior most judge as chief justice "results in a revolving-door chief justiceship."<sup>228</sup> Indeed, there have been forty-eight chief justices from 1950 to 2021.<sup>229</sup>

When judges frequently change on a court, the outcomes also change. Observing the doctrinal instability in the ISC, Rajeev Dhavan has described ISC judges as lacking "precedent consciousness."<sup>230</sup> Similarly, Upendra Baxi has noted ISC judges will misapply or simply overlook previous holdings,<sup>231</sup> and that "neither the value of certainty nor that of finality has a very strong appeal to justices of the Supreme Court of India."<sup>232</sup>

The short tenure of ISC judges is not the only reason for doctrinal instability, however. Doctrinal instability results not just because of the short time ISC judges spend on the court but also because of two other institutional design features.<sup>233</sup> First, it has become the practice for the ISC to hear cases in two-judge benches.<sup>234</sup> A study found that 90% of its judgments were written by two-judge benches.<sup>235</sup> Different two-judge

226. Abhinav Chandrachud, *Supreme Court's Seniority Norm: Historical Origins*, 47(8) ECON. & POL. WKLY, 26 (2012) ("[S]eniority is measured by length of service on the Supreme Court").

227. Chandra et al., *supra* note 143.

228. Neuborne, *supra* note 115, at 483.

229. See Term of Office of Former Chief Justice and Judges, THE SUPREME COURT OF INDIA, <https://main.sci.gov.in/chief-justice-judges>; *Justice N.V. Ramana Sworn in as 48th Chief Justice of India*, WIRE (Apr. 24, 2021), <https://thewire.in/law/justice-n-v-ramana-sworn-in-as-48th-chief-justice-of-india#:~:text=Justice%20N.V.,Ramana%20Sworn%20In%20As%2048th%20Chief%20Justice%20of%20India,office%20on%20August%2026%2C%202022.&text=New%20Delhi%3A%20Justice%20Nuthalapati%20Venkata,Ram%20Nath%20Kovind%20on%20Saturday>.

230. Robinson, *supra* note 15, at 10 (citing RAJEEV DHAVAN, *THE SUPREME COURT UNDER STRAIN: THE CHALLENGE OF ARREARS*, 450 (NM Tripathi 1978)).

231. Robinson, *supra* note 15, at 10 (citing Upendra Baxi, *The Travails of Stare Decisis in India*, in *LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE*, 38 (AR Blackshield ed., 1983)).

232. Robinson, *supra* note 15, at 10 (citing Upendra Baxi, *The Travails of Stare Decisis in India*, in *LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE*, 45 (AR Blackshield ed., 1983)).

233. See Robinson, *supra* note 15.

234. Robinson, *supra* note 15, at 7-11; Robinson, *supra* note 110, at 185; Green & Yoon, *supra* note 116, at 685-86; see Kawin Ethayarajh, et al., *A Rose by Any Other Name: Understanding Judicial Decisions That Do Not Cite Precedent*, 15 J. EMPIRICAL LEGAL STUD. 563 (2018).

235. Chandra et al., *supra* note 118, at 61 ("In this paper we provide a descriptive account of the functioning of the Court through an empirical analysis of all cases decided by the Supreme Court between 2010 and 2015. . . Our approach is quantitative and comprehensive, based on a data set of information drawn from all judgments rendered by the Supreme Court during the years from



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benches of the ISC often issue radically differing opinions given substantially similar facts.<sup>236</sup> For instance, in cases involving the death penalty, Justice Arijit Pasayat supported and upheld the death penalty for serious crimes such as rape and murder.<sup>237</sup> However, Justice S.B. Sinha, who also was a sitting judge on another bench, interpreted the Court's death penalty jurisprudence so that it could almost never be imposed.<sup>238</sup> Cases are not typically precedent-setting but involve bail applications or other determinations that might impact only the individual litigant. In an empirical analysis of ISC decisions from 1950-2010, Professors Green and Yoon found that in nearly half of its opinions, the ISC does not cite precedent.<sup>239</sup> Consequently, Nick Robinson labels the ISC a "polyvocal court" or "an assembly of empaneled judges."<sup>240</sup>

Another reason for doctrinal instability has to do with the power chief justices have to make case assignments to specific benches. The chief justice composes constitutional benches for specific cases and also assigns the subject matters on which judges will hear cases in two-judge benches.<sup>241</sup> While he does not assign the actual cases that are decided by the two-judge benches, he decides the subject matter that each judge will hear before it.<sup>242</sup> This gives him power to propound his ideology on the Court. For instance, when Chief Justice K. Subba Rao was a Supreme Court Judge, he dissented significantly to reflect his stark anti-government stance.<sup>243</sup> However, after he became chief justice during 1966-1967, the entire Supreme Court issued more anti-government decisions.<sup>244</sup> Some scholars suggest that he used his "bench-setting power" to affect cases in

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2010 through 2015. Our dataset contains information on judgments in over 6,000 cases, decided in over 5,000 separate, published opinions issued during this time period. Each of the Court's opinions was hand coded for information on a wide range of variables, allowing us to compile the largest and most detailed data set on the Court's judgments ever collected.") ("Nearly 90 percent of cases in our data set were decided by a two-judge bench and nearly all the rest were decided by three-judge benches. Only 91 cases out of 6,856 in our data were decided by a five-judge bench—and in this six-year period there were no benches larger than five judges.").

236. Robinson, *supra* note 15, at 8; Robinson, *supra* note 110, at 184-85.

237. Robinson, *supra* note 110, at 185.

238. *Id.*

239. Green & Yoon, *supra* note 116, at 710; see Ethayarajh, *supra* note 234. On the other hand, in constitutional cases, they find that the ISC does cite precedent.

240. Robinson, *supra* note 15, at 8.

241. *Id.* at 7.

242. Shanti Bhushan v. Supreme Court of India, Writ Petition (Civil) No. 789 of 2018 at ¶ 20 ("[I]t is [the Chief Justice's] prerogative to constitute the Benches and allocate the subjects which would be dealt with by the respective Benches.").

243. Robinson, *supra* note 110, at 187.

244. *Id.*



this manner.<sup>245</sup> Another example of doctrinal instability that results when chief justices on the ISC have short tenures can be seen in the case about the criminalization of sodomy.<sup>246</sup> A two-judge bench judgment that found that criminalizing intimate gay behavior was constitutional, but when a new chief justice was appointed, a larger bench found the exact opposite.<sup>247</sup>

There are several negative consequences of this doctrinal instability of the ISC. First, there is no incentive for lawyers to refrain from filing litigation on the basis of established precedent. This leads to more litigation. Uncertainty in the law also discourages private settlement, as parties are less certain about how a court would ultimately rule. Second, lower courts do not have appropriate guidance when there is conflicting doctrine in precedent-setting cases. For example, the Allahabad High Court in 2016 opined that personal laws are subject to constitutional challenge, whereas the Bombay High Court earlier in 1951 had opined that personal laws are immune from constitutional challenge.<sup>248</sup> The Supreme

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245. *Id.*; see George H Gadbois Jr., *Indian Judicial Behaviour*, 3(5) ECO. & POL. WKLY 149 (1970).

246. See *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

247. *Id.* at ¶¶ 10-12 (Dipak Misra, CJI for himself and A.M. Khanwilkar, J: "When the said Writ Petition was listed before a three-Judge Bench on 2 (2014) 1 SCC 1 3 (2009) 111 DRJ 1 08.01.2018, the Court referred to a two-Judge Bench decision rendered in *Suresh Koushal* (supra) wherein this Court had overturned the decision rendered by the Division Bench of the Delhi High Court in *Naz Foundation* (supra). It was submitted by Mr. Arvind Datar, learned senior counsel appearing for the writ petitioners, on the said occasion that the two-Judge Bench in *Suresh Koushal* (supra) had been guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality. The three-Judge Bench expressed the opinion that the issues raised should be answered by a larger Bench and, accordingly, referred the matter to the larger Bench. That is how the matter has been placed before us.").

248. *Personal Law Not Above Constitution: Read Allahabad HC Observation on Triple Talaq*, FIRST POST (Dec. 8, 2016, 2:53 AM), <https://www.firstpost.com/india/personal-law-not-above-constitution-read-allahabad-hc-observation-on-triple-talaq-3145992.html> ("Personal laws, of any community, cannot claim supremacy over the rights granted to the individuals by the Constitution"); *Allahabad High Court Terms Triple Talaq Unconstitutional, Says Practice is Violation of a Woman's Rights*, FIRST POST (May. 9, 2017, 4:15 AM), <https://www.firstpost.com/india/allahabad-high-court-terms-triple-talaq-unconstitutional-says-practice-is-violation-of-a-womans-rights-3433044.html> ("The Allahabad High Court has come down strongly on the issue of triple talaq, saying the rights of a person cannot be violated under the name of "personal law."); *State of Bombay v. Narasu Appa Mali*, AIR 1952 Bom 84 at ¶ 22 ("The personal laws prevailing in this country owe their origin to scriptural texts. In several respects their provisions are mixed up with and are based on considerations of religion and culture; so that the task of evolving a uniform civil code applicable to the different communities of this country is not very easy. The framers of the Constitution were fully conscious of these difficulties and so they deliberately refrained from interfering with the provisions of the personal laws at this stage but laid down a directive principle



Court of India had cited to the Bombay High Court case in its earlier judgment in 1997.<sup>249</sup> But in 2018, the ISC noted that the sixty-six-year-old Bombay High Court judgment was based on “flawed premises” as it “detracts from the notion that no body of practices can claim supremacy over the Constitution.”<sup>250</sup> Third, changing viewpoints creates uncertainty for national and state policies that might have to change to react to changing judgments.

#### V. LESSONS FROM THE INDIAN SUPREME COURT FOR PROPOSALS TO IMPOSE TERM LIMITS ON UNITED STATES SUPREME COURT JUDGES

This Part analyzes the lessons from the institutional design and practice of the ISC discussed above and explains how they are relevant to term limit proposals in the United States. Although Indian Supreme Court Judges are not term limited, the mandatory early retirement age is an effective term limit. Today, the average time a judge spends on the ISC is less than five years.<sup>251</sup>

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that the endeavour most hereafter be to secure a uniform civil code throughout the territory of India. It is not difficult to imagine that some of the members of the Constituent Assembly may have felt impatient to achieve this ideal immediately; but as Article 44 shows this impatience was tempered by considerations of practical difficulties in the way. That is why the Constitution contents itself with laying down the directive principle in this article. In my opinion, the provisions of this article support the conclusion that the personal laws are not included in the expression “laws in force” in Article 13(1).”; Krishnadas Rajagopal, *With Sabarimala Verdict, ‘Ghost of Narasu’ is Finally Exorcised*, HINDU (Sep. 28, 2018, 5:49 AM), <https://www.thehindu.com/news/national/justice-chandrachud-ends-the-unchallenged-reign-of-a-bombay-hc-verdict/article25074175.ece>.

249. *Ahmedabad Women Action Group v. Union of India*, (1997) 3 SCC 573 (“In *State of Bombay v. Narasu Appa Mali* (AIR 1952 Bombay 84), . . . Gajendragadkar J. also expressed his opinion on the question whether Part IV of the Constitution applies to personal laws. The learned Judge observed as follows: . . . the framers of the Constitution wanted to leave the personal laws outside the ambit of Part IV of the Constitution. They must have been aware that these personal laws needed to be reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the fundamental rights guaranteed in Part IV of the Constitution and so they did not intend to include these personal laws within the definition of the expression ‘laws in force.’”).

250. *Indian Young Law’s Ass’n v. State of Kerala*, Writ Petition (Civil) No. 373 of 2006 at ¶ 101 (“The decision in *Narasu*, is based on flawed premises. Custom or usage cannot be excluded from ‘laws in force’. The decision in *Narasu* also opined that personal law is immune from constitutional scrutiny. The decision in *Narasu* also opined that personal law is immune from constitutional scrutiny. This detracts from the notion that no body of practices can claim supremacy over the Constitution and its vision of ensuring the sanctity of dignity, liberty and equality. . . The decision in *Narasu*, in immunizing uncodified personal law and construing the same as distinct from custom, deserves detailed reconsideration in an appropriate case in the future”).

251. Robinson, *supra* note 15; Chandrachud, *supra* note 16.



There are two lessons from the ISC that should inform any proposals to impose term limits on SCOTUS judges. First, like ISC judges that retire when they are young, term-limited SCOTUS judges would also be young and might pander to future employers or use their former positions inappropriately. This would thereby undermine judicial independence. Second, like ISC judges who spend a short period of time on the ISC, term limits would result in SCOTUS judges spending less time on the court than they have in the last few decades. This could lead to doctrinal instability.

Finally, it is important to point out one distinction between the ISC and SCOTUS that informs the question about politicization of the judicial appointments process. It is tempting to conclude that the lack of politicization of the appointments process in India is because of the short tenure of judges on the ISC or the mandatory retirement age, but that would be an inaccurate conclusion. While it is true that the process is not politicized, the reason for that is because the Parliament has no role in judicial appointments and the nominations are conducted largely in secret by the Chief Justice of India with consultation from four of the most senior ISC judges. Below I consider whether some of the unintended consequences we have seen in the ISC might also occur in SCOTUS if a system of term limits were adopted.

*A. Pandering to Future Employers or Inappropriately Using Their Influence*

There is evidence that retiring ISC judges may rule more favorably towards the Indian government in order to obtain prestigious post-retirement jobs with significant benefits.<sup>252</sup> Judges who retire from SCOTUS, however, will have broader post-employment options than ISC judges who are prohibited from returning to private practice. The likely reason we observe the pandering behavior among ISC judges is because they leave the court when they are relatively young—sixty-five years of age.

When judges retire from a term-limited SCOTUS, I argue that they will also be young and certainly younger than they are when they retire from SCOTUS under the present system. Indeed, under the current lifetime system, judges who have departed SCOTUS in the last few decades have been relatively old and some have died in office. Today, the average age of judges who have retired from or died in office is eighty-three years

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252. See *supra* Part IV.



old.<sup>253</sup> Under a term-limited system, judges are likely to be younger when they leave the court. While Presidents have greater incentive to appoint younger people to SCOTUS under a life-tenure system, they still have a similar incentive under a term-limited system.

A President will want to ensure that the person they appoint to SCOTUS will live out the entire eighteen-year term. Under Calabresi and Lindgren's proposal, if a sitting judge dies while in office, then the President at that time would be able to appoint a judge for the remaining term of the judge who passed away.<sup>254</sup> The sitting President might be from a different party than the President that nominated the judge who died. Knowing that the judges they nominate could be replaced by another executive, Presidents are still likely to seek out people who are healthy and young for judicial appointments.

Reference to the Indian case study suggests that when judges leave the Court at a young age, they are likely to seek employment after their service on the Court. Like for judges on the ISC who are young when they retire (e.g., 65),<sup>255</sup> term-limited judges on SCOTUS might also pander (or appear to pander) to future employers, thus compromising judicial independence. However, unlike retiring ISC judges, judges retiring from SCOTUS when their terms are complete will have broader employment options. While judges retiring from the ISC are prohibited from entering private practice,<sup>256</sup> there is no such prohibition in any of the term limit proposals in the United States.<sup>257</sup> Retired SCOTUS judges would be very valuable to law firms with appellate practices for their relationships with judges on SCOTUS, their understanding of the inner workings of SCOTUS, and their experience. Corporations would also desire to hire them as in-house counsel. Finally, retiring SCOTUS judges on a term-

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253. Jack Brewster, *Progressives Want Breyer To Retire—But Supreme Court Justices Are Sticking Around Longer Than Ever*, FORBES (Apr. 15, 2021, 12:06 PM), <https://www.forbes.com/sites/jackbrewster/2021/04/15/progressives-want-breyer-to-retire-but-supreme-court-justices-are-sticking-around-longer-than-ever/?sh=47a867884ac1>.

254. Calabresi & Lindgren, *supra* note 8.

255. INDIA CONST. art. 124, § 2 ("Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years[.]").

256. INDIA CONST. art. 124, § 7 ("No person who has held office as a Judge of the Supreme Court shall plead or act in any court or before any authority within the territory of India.").

257. See generally Pager, *supra* note 5; McGinnis, *supra* note 65; Oliver, *supra* note 22; *Term Limits for Judges?*, *supra* note 37; Calabresi & Lindgren, *supra* note 8; Epps & Sitaraman, *supra* note 65; Black & Bryan, *supra* note 11; Calabresi, *supra* note 1.



limited court might also seek government appointments as do retiring ISC judges.

Calabresi and Lindgren recognize the pandering problem under a term-limited system.<sup>258</sup> To account for this potential behavior, they propose that SCOTUS judges have the option to be designated on the lower courts for life tenure to remove any pressure for a Justice to behave in any particular way in order to receive post-retirement jobs.<sup>259</sup> However, judges who have sat on the Supreme Court may not want to sit on the U.S. Federal Court of Appeals. Moreover, term-limited SCOTUS judges might want to pursue lucrative private practice or seek prestigious government jobs.

The Commission also recognized this problem and proposes offering retiring SCOTUS judges a pension for life commensurate with their judicial salaries without the need to work in addition to positions in lower courts.<sup>260</sup> However, the Commission further points out that this proposal does not address the entire problem. Retiring judges might want to pursue private practice rather than sit on lower courts or take a judicial pension. They could use their former positions inappropriately in private practice. To guard against the misuse of their prior position in future employment, the Commission suggests that retired judges could be barred from taking up legal matters before SCOTUS.<sup>261</sup> This would not solve the problem that judges who are seeking government positions post-retirement might pander to or be perceived to pander to the government. They could also be prohibited from taking a government position.

The experience of the ISC where judges retire when they are relatively young and seek employment after they retire suggests that any proposal for term limits should account for the possibility that sitting judges will pander to future employers and adopt appropriate measures to mitigate that risk. In addition, if retiring SCOTUS judges are not barred from private practice, then there is also a possibility that they will use their contacts and knowledge about SCOTUS to inappropriately influence legal

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258. Calabresi & Lindgren, *supra* note 8, at 769.

259. Calabresi & Lindgren, *supra* note 8. In addition, the pending House Bill proposing term limits incorporates a provision for retired "Senior Justices" who have completed an eighteen-year term "to perform such judicial duties as such Justice is willing and able to undertake, when designated and assigned by the Chief Justice of the United States." H.R. 8424, 116th Cong., 2nd Sess. (2020).

260. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 129 (December 2020), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

261. *Id.*



issues before the court. Consequently, if term limits are adopted, appropriate constraints on future employment should be put into place to prevent pandering and misuse of the influence they gained as SCOTUS judges.

*B. Doctrinal Instability*

Judges spend an average of five years on the ISC. Due to this short period of time each judge is on the court combined with other factors, there are significant doctrinal changes on the ISC.<sup>262</sup> If eighteen-year term limits are imposed, SCOTUS judges will spend significantly less time on the court than they have in the recent past. Since the inception of SCOTUS, judges have on average spent fifteen years on the court; however, in the last two decades, judges spent on average approximately twenty-two years on SCOTUS.<sup>263</sup> Moreover, the last seventeen judges to leave the Supreme Court either as a result of death or retirement spent an average of twenty-seven years on the court.<sup>264</sup> Thus, the average time a judge sits on SCOTUS has increased over time and is much greater than eighteen years.

As a result of the staggered terms that have been proposed, a judge would retire every two years.<sup>265</sup> Consequently, not only will judges spend less time on the court in a term-limited system than under the current system, but judges would also spend significantly less time together as a group. This revolving door could cause SCOTUS to flip flop on issues of major significance, creating doctrinal instability much like what we see in the ISC. However, it should be noted that there are two key design features of the ISC that lead to doctrinal instability that are not present in SCOTUS.<sup>266</sup> In the ISC, the great majority of decisions are made by two-judge benches rather than *en banc*. In addition, the chief justice of the ISC has the power to assign cases to other judges and as chief judges change, the outcome of decisions can also change even in significant cases.<sup>267</sup>

Despite these differences, SCOTUS judges will spend less time on the court than they do now, even if it is more time than ISC judges spend on the court. Shorter duration of tenure and a constantly changing composition in a court has been shown to lead to doctrinal instability.

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262. See *supra* Part IV.

263. To determine the average number of years spent by judges on the United States Supreme Court, I used data from the following source: <https://www.supremecourt.gov/about/biographies.aspx>.

264. *Id.*

265. Sundby & Sherry, *supra* note 10, at 126-27.

266. See *supra* Part IV.

267. See *supra* Part IV.



Indeed, one empirical study has indeed found that there would be considerable doctrinal instability under a term-limited SCOTUS.<sup>268</sup> Professors Sundby and Sherry have measured potential fluctuation and constitutional instability in SCOTUS' support for *Roe v. Wade* had it been operating under term limits from 1973 to 2019.<sup>269</sup> Christopher Sundby & Suzanna Sherry examined the question of "[w]hat would have happened to *Roe* over the years if the Justices since 1973 had served under eighteen-year term limits rather than having life tenure?"<sup>270</sup> They assumed that in a term-limited court system, Justices would have moderate or strong ideological alignment with the views of their nominating President.<sup>271</sup> In evaluating how such a model court would have reacted to abortion jurisprudence, they found that the Supreme Court "not only changes its collective mind on abortion three times in forty-six years, but also produces extreme swings with a high likelihood of reversal."<sup>272</sup> Their study was an example of how "a case can swing from a sure winner to a sure loser over the course of a single election" and how this may impact lower courts' perceptions of the Supreme Court and adherence to precedent.<sup>273</sup>

The doctrinal instability could have the same negative consequences in the U.S. as it does in India. Litigants have little incentive to file cases if they believe the outcome is dependent on largely on what judge is hearing their case. On the other hand, if there were doctrinal clarity on the issue, the litigant might decide that it is not even worth filing a case since it would be clear what the chances of success or failure are. In addition, doctrinal instability means that lower courts might also lack guidance on important issues. Finally, if SCOTUS changed its position on important issues, it would mean that the government would have to constantly adapt to new policies.

### C. *De-politicization of the Process*

One of the goals of the term limit proposal is to de-politicize the appointments process. According to Calabresi and Lindgren, an eighteen-year staggered term would lead to a predictable and regular court turnover

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268. Sundby & Sherry, *supra* note 10, at 123.

269. *Id.*

270. *Id.* at 122.

271. *Id.*

272. *Id.* at 123, 157.

273. *Id.* at 157.



and in turn result in less politically polarized confirmation hearings.<sup>274</sup> They have argued that the proportional power to appoint justices amongst the different Presidents will help “the American people to regularly [check] the Court when it has strayed from following the Constitution’s text and original meaning.”<sup>275</sup>

A superficial understanding of the design of the Indian judiciary might lead one to assume that shorter tenure for judges could contribute to depoliticizing the appointments process. While it is true that appointments to the ISC are not politicized, the reason is because the Chief Justice of India (in consultation with the four senior-most judges) appoints other judges.<sup>276</sup> The Parliament is not involved in appointments and the President normally rubber stamps the decision of the Chief Justice of India and his or her four senior colleagues.<sup>277</sup> But just because it is not politicized among the branches or in public does not mean it is not political. This appointment system is known to be nepotistic, marked by favoritism and sexism, but all of this is not transparent because the decision-making process is secretive.<sup>278</sup>

## VI. CONCLUSION

Questions about reforming the United States Supreme Court have become increasingly important. With several new justices on the court, the majority of the judges appear to be ready to abandon long-held precedents, including the right to choose embodied in *Roe v. Wade*.<sup>279</sup> President Biden appointed a commission consisting largely of law scholars from the nation’s top law schools in 2021 to consider whether the seats on the Supreme Court should be increased and/or term limits imposed on the judges. The Commission’s final report made no recommendations one

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274. Calabresi & Lindgren, *supra* note 8, at 813-14; see Black & Bryan, *supra* note 11, at 825.

275. Calabresi & Lindgren, *supra* note 8, at 811.

276. See *supra* Part IV.

277. See *supra* Part IV.

278. Chandra et al., *supra* note 143; see a recounting of these criticisms in the opinion of Justice Kurian (concurring) and Justice Chelameshwar (dissenting) in Supreme Court Advoc’s on Rec. Assoc’n v. Union of India, 2016 (5) SCC 1; see Jain, *supra* note 162; see Tripathi, *supra* note 162.

279. Leah Litman, *Supreme Court Justices Could Overturn Roe v. Wade Over One Word*, NBC News (Dec. 1, 2021, 9:33 PM), <https://www.nbcnews.com/think/opinion/supreme-court-justices-could-overturn-roe-v-wade-over-one-ncna1285208>.



way or the other, but instead only provided historical context and described both sides of the argument.<sup>280</sup>

The Commission's report referred to the design of apex courts around the world. For example, they noted that twenty-seven countries in the world impose term limits on their apex courts and those that do not have adopted mandatory retirement ages.<sup>281</sup> Simply examining the numerical data, however, does not give us any information as to how term limits or mandatory retirement ages have played out in practice. What challenges have courts faced when judges have short tenures? What safeguards have countries adopted to prevent potential negative consequences? An in-depth analysis of courts and their design can provide better guidance. Just because other countries have term limits and mandatory retirement ages does not mean there were no negative consequences flowing from them. To the extent those courts have not experienced any problematic consequences of short tenures, it is also important to examine what safeguards they have put into place to avoid pandering for post-employment jobs or other potential problems.

Much of the scholarship on term limits and its consequences has also failed to engage a rich comparative analysis. Scholars have either made predictions about what would happen if term limits were adopted based on their personal viewpoints or developed hypothetical models or simulations to make predictions about the future. This Article provides an in-depth and contextualized case study of the court system of another common law democracy where judges do not have life tenure. Judges of the ISC are forced to leave the Court at sixty-five years of age. As a result, they have spent less than five years on the Court in the last few decades. The revolving doors of judges and chief justices has led to increasing doctrinal instability in the ISC as well as pandering incentives for judges seeking employment after they leave the Court.

As President Biden evaluates the path forward for the U.S. Supreme Court, he should look to the design and functioning of courts around the world with term limits, including the South African, Colombian, and Ecuadorian Constitutional Courts. There could be many unanticipated consequences of moving from a system of life-tenure to term limits for

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280. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT (December 2020), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.

281. PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 112 (December 2020), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.



SCOTUS. The contextual examination of the design and functioning of the Indian Supreme Court presented in this Article suggests that any proposal to adopt term limits for SCOTUS judges should include appropriate post-employment constraints for retiring judges and be aware of the potential for doctrinal instability.