Presidential Commission on the Supreme Court of the United States

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"*Democracies do not know how to reform themselves institutionally*."[1]

Commissioners Bauer and Rodriguez, thank you for inviting me to give testimony to the Presidential Commission on the Supreme Court of the United States ("Commission"). I am honored to do so. The scope of my written testimony is narrow: constitutional courts, independent judges and judicial tenure.[2] I would be pleased to respond to questions on any other subject of interest to the Commission.

My written testimony is in four parts. Part One describes some personal background that informs my views expressed here. Part Two concerns the drafting and adoption of the Massachusetts Constitution, in which the principle of constitutional democracy first gained institutional and practical form. The Commonwealth's Supreme Judicial Court remains "the oldest court in continuous service in the hemisphere, operating under the oldest, still functioning written constitution anywhere."[3] Its 1780 constitution is relevant to the issues being considered by this Commission for several reasons, the most pertinent being that the Massachusetts constitutional provisions concerning judicial selection and tenure are mirrored in key respects in the United States Constitution adopted seven years later.

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[1] David Runciman, *Talking Politics*, at 28:49 (July 8, 2021), https://www.talkingpoliticspodcast.com.

[2] The subject is one on which I have spoken or written on numerous occasions over the past 25 years. Some of my written testimony is drawn from previous remarks of mine.

[3] The phrase is taken from an address by Justice Benjamin Kaplan "given at the banquet, October 26, 1990, inaugurating a scholarly colloquium on the history of the Massachusetts Supreme Judicial Court. The colloquium anticipated the three hundredth anniversary of the court's founding." *See* Benjamin Kaplan, *Introduction: An Address*, *in* THE HISTORY OF LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992, at 1, 8 (Russell K. Osgood ed., 1992).

Part Three lays out in some detail a significant change to the original Massachusetts Constitution that had provided for life tenure[4] of judges: in 1972 Massachusetts amended its Constitution to provide for mandatory retirement at age 70 for all judges.

In Part Four, I describe the rejection over time of life tenure for state courts judges, for most Federal judges (in a different form) and for constitutional courts of last resort in other nations. Finally, I offer some reflections drawn from my own experiences on term limited tenure of constitutional judges. As it pertains to Justices of the United States, that subject is timely, if not urgent.[5]

## Part One: Background

I begin on a personal note. My testimony is that of an immigrant to, and citizen of, the United States. I address you as a retired Chief Justice of a state court whose devotion to the rule of law originates and is sustained in the personal experience of the arbitrary, often brutal abuse of official power.

I was born, grew up, and educated in what Nobel Prize winner Nadine Gordimer called the "rigidly racist and inhibited colonial society" of small-town, provincial, *apartheid* South Africa.[6] *Apartheid* was a government of lawlessness. Yes, there were duly-enacted statutes, and a sophisticated network of executive agencies and courts to implement and enforce those statutes. But *apartheid* South Africa's laws had one primary aim: to protect and consolidate the power of the

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[4] The Massachusetts Constitution does not use the term "lifetime tenure." Scholars have understood the phrase "during good behavior," MASS. CONST., pt. 2, ch. III, art. I, or "as long as they behave themselves well," *id.* pt. 1, art. XXIX, to provide in practice for life tenure because a judge could be removed only through impeachment or bill of address, both difficult to accomplish and seldom invoked. *Cf. The Evolution of Judicial Retirement*, FED. JUD. CTR., https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement (last visited July 8, 2021) (discussing the same provision in the Federal Constitution and noting that Article III "endowed federal judges with tenure 'during good behavior'—equivalent to life tenure, provided a judge were not removed from office by impeachment and conviction, an exceedingly rare event").

[5] My testimony does not address my views on the best methods for the *selection* of judges: the present method of selection of *Federal* judges is not where my immediate concerns lie.

[6] *See* Nadine Gordimer, Speech at the Nobel Banquet (Dec. 10, 1991), transcript available at https://www.nobelprize.org/prizes/literature/1991/gordimer/speech/.

powerful. Growing up as a white child, my life was peaceful, secure, even as I lived in the cauldron of a deliberately dividing and deeply racist system of laws.

In 1962 I spent a year in the United States – in Wilmington, Delaware – as a high school exchange student. I was seventeen. I was astonished to find the day's great issues – civil rights, Soviet missiles in Cuba – fervently and openly debated. In Wilmington, I could read books outlawed at home. For the first time in my life, I was free to expand my horizons, to speak my mind. I was free to change my mind. I visited Congress, the White House, and the United States Supreme Court. I encountered, I was challenged by an entirely new form of government. Here, the law of the powerful was not supreme: judges could order, judges did order, Presidents, Governors, and Legislators from time to time to conform their actions to constitutional principles.[7] Recall, that this was the early 1960's when the movement for the civil rights of all Americans was a daily news item. The social arrangement of *apartheid*, the lens through which I had been taught to view all social relations, revealed itself as a distorting prism of terror and fear. I returned home to South Africa and to college looking through a different lens.

The blindness of white South Africans to the consequences of *apartheid* was quotidian. But not total. Many South Africans, mostly black, joined by a few, very few, white South Africans, spoke up and acted for freedom, at great peril to themselves and their families. These were "tiny ripples of hope" that Senator Robert F. Kennedy spoke about on his momentous trip to South Africa in 1966. "Each time a man stands up for an ideal," Senator Kennedy said, "or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance."[8] I was in the audience when Senator Kennedy

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[7] *See, e.g.*, *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.").

[8] *See* Robert F. Kennedy, Day of Affirmation Address, University of Cape Town, Cape Town, South Africa (June 6, 1966), https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/robert-f-kennedy/robert-f-kennedy-speeches/day-of-affirmation-address-university-of-

delivered that address to the National Union of South African Students in Cape Town on June 7, 1966, one of the anti-*apartheid* student leaders with him as he traveled across South Africa.

What had I discovered as a high school student in the United States that so changed the direction of my life? To the building of what kind of just society would I now direct my energy and commitment? The answer seemed clear: a different form of government, one with a written charter that guarantees certain fundamental rights, and entrusts the ultimate protection of those rights to judges who, in the words of the 1780 Massachusetts Constitution, are "as free, impartial, and independent as the lot of humanity will admit."[9]

Constitutional democracy is not perfect, but it is the best mechanism we have to date to ensure that debates about deeply divisive national issues will take place according to the rule of law and not the law of the ideologue or the law of the mob. But constitutional democracy is not self-perpetuating. It survives only where it is nurtured.[10] Judges who are, and are seen to be, independent and impartial are central to maintaining the peoples' confidence in the fairness and evenhandedness of their government. That confidence is tested time and again. Have the concerns of the Twenty-First Century rendered inadequate the Eighteenth-Century fabric of American government, in particular the fabric of what for me is its commanding center: a written charter of rights enforced by independent judges? The question brings a new urgency to our national conversation.

## Part Two: The Massachusetts Constitution (1780)

The Massachusetts Constitution was drafted principally by John Adams: patriot, statesman, future President – and the foremost political philosopher of his

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capetown-capetown-south-africa-june-6-1966; *see also Day of Affirmation Address*, WIKIPEDIA, https://en.wikipedia.org/wiki/Day_of_Affirmation_Address.

[9] MASS. CONST., pt. 1, art. XXIX.

[10] "Knowledge about the ideas embodied in the Constitution and the ways in which it shapes our lives is not passed down from generation to generation through the gene pool; it must be learned anew by each generation." Justice Sandra Day O'Connor, Liberty Medal Award Acceptance Speech, National Constitutional Center (July 4, 2003), https://constitutioncenter.org/liberty-medal/recipients/sandra-day-oconnor.

day.[11] Like many of his compatriots, Adams believed in both the nobility and the corruptibility of humankind. He believed that good government should strive for the greatest happiness of the greatest number.[12] But Adams also held a dark view of a world in which power begets the appetite for more power. "Nature throws us all into the world equal and alike," he wrote in his diary, but "[t]he love of power is insatiable and uncontrollable. . . . There is danger from all men. The only maxim of a free government ought to be to trust no man . . . with power to endanger the public liberty."[13]

The Massachusetts Constitution begins with a ringing promise: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness."[14] Was it possible to design a form of government that held in check the ruthless appetite for power while promoting, in Adams's words, "peace, order, safety, [and the] good and happiness of the people?"[15] In Britain, the word of Parliament was the supreme law of the land; while colonists chafed, judges enforced the will of Parliament.[16] Adams sought a different solution, one that is now so familiar to us but was revolutionary at the time.

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[11] *See, e.g.*, JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 165 (Vintage ed. 2002) (Adams was known to his contemporaries as "the Atlas of independence").

[12] *See* MASS. CONST., Preamble, which declares, among other things: "The end of the institution, maintenance, and administration of government is to secure the existence of the body politic; to protect it; and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life . . . ."

[13] DAVID MCCULLOUGH, JOHN ADAMS 70 (2001).

[14] MASS. CONST., pt. 1, art. I.

[15] MCCULLOUGH, *supra* note 13, at 69-70.

[16] *See, e.g.*, *London v. Wood*, 12 Mod Rep. 669, 678 (K.B. 1701) ("An act of Parliament can do no wrong"), quoted in Suzanna Sherry, *Independent Judges and Independent Justice*, 61 LAW & CONTEMP. PROBLEMS 15, 15 (1998).

To the executive and legislative departments[17] Adams added a third, equal-standing department: the judiciary. Central to Adams's constitutional model was an independent, co-equal judicial branch. How to secure its independence? Judges would hold their offices not for stated terms but during good behavior; judicial service could be ended only by formal impeachment or removal upon an address of both houses; and judges should be "allowed honorable salaries established by standing laws."[18] Recall that one of the grievances enumerated in the Declaration of Independence was that George III had made judges dependent on his "Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.[19]

The idea that judges would have the power to say "no," no to legislators and to governors, and to presidents from time to time, is the great ideal embodied in the Constitution of Massachusetts. It was a "mighty invention," said Justice Benjamin Kaplan, [20] while Professor Samuel Eliot Morison called the expression of judicial

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[17] Adams recognized that no monarch, no Westminster-style supreme parliament, could guarantee enforcement of the "natural, essential, and unalienable rights" that the Massachusetts colonists had insisted upon. Rather, he envisioned a supreme executive, the Governor elected separately by the voters, with specified constitutional powers. MASS. CONST., pt. 2, ch. 2. Second, he proposed a legislative department of two branches ("each of which shall have a negative on the other") elected annually by the freeholders and other inhabitants of Massachusetts. MASS. CONST., pt. 2, ch. 2, § I. The General Court. Adams's "department of legislation" was no invention: even in 1780, bicameral governing bodies were not new, and the Adams model plainly mirrored in certain respects the British House of Lords and the House of Commons, stripped of the former's hereditary members.

[18] MASS. CONST., pt. 1, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, art. XXIX. "The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution; provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability; and provided further, that upon attaining seventy years of age said judges shall be retired. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." MASS. CONST., pt. 2, ch. III, art. I.

[19] THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

[20] "Ideas about judicial independence had been afloat, but their particular combination and expression in the [1780 Massachusetts] constitution were a mighty invention." Kaplan, *supra* note 3, at 4.

independence in the Constitution of Massachusetts "one of John Adams's profoundest convictions."[21]

Part Three: Mandatory retirement for Massachusetts judges (1972)

In his framing of the Massachusetts Constitution, Adams sought to insulate judges as far as possible from outside influence, from the push and pull of political views and demands. The central mechanism: lifetime tenure for judges.[22] And so the Massachusetts Constitution remained, essentially unchanged[23] for almost two hundred years until 1972 when the people of Massachusetts voted overwhelmingly to amend the constitution to provide for mandatory retirement at age 70.

What gave rise to this dramatic and far-reaching change, where earlier attempts to limit lifetime tenure had been rebuffed?[24] In the late Eighteenth

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[21] *See* S.E. Morison, *History of the Constitution of Massachusetts*, *in* A MANUAL FOR THE CONSTITUTIONAL CONVENTION 1917, at 5, 23 (2d ed. 1917). That model is so familiar to us in the United States today, but some fifty years after its adoption, when Alexis de Tocqueville tried to explain this structure to his European readers he wrote: "I am not aware that any nation of the globe has hitherto organized a judicial power on the principle now adopted by the Americans . . . " he wrote. "The judicial organization . . . is the institution which a stranger [to the United States] has the greatest difficulty in understanding." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA ch. VI, at 116 (Henry Reeve trans., 2002) (1835), http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf.

[22] *See supra* note 4.

[23] In 1918, there was a constitutional amendment to provide for the mandatory retirement of judges suffering from mental or physical disabilities. MASS. CONST., amend. art. LVIII ("and provided also that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement.").

[24] Mid-Nineteenth century attempts to limit lifetime judicial tenure for Massachusetts judges failed. For example, one amendment called "for the appointment of judges of the Supreme Judicial Court for a ten-year term, and other judges for a seven-year term, all to be eligible for reappointment until seventy years of age." A second amendment proposed to have "all judges elected by the people for seven years." Both were defeated. *See* S.E. Morison, *History of the Constitution of Massachusetts*, *in* A MANUAL FOR THE CONSTITUTIONAL CONVENTION 1917, at 5, 54-55 (2d ed. 1917). See also remarks by convention delegate Rufus Choate: "We, at least, hold that offices, and most of all the judicial office, are not made for incumbents or candidates,

Century the life expectancy for white men was "approximately 44 years."[25] By 1970 the life expectancy of adults in the United States was close to, or over 70 years,[26] and Massachusetts judges, appellate and trial, were serving into their seventies, eighties, and nineties.[27] Adams and the Founding Fathers had not anticipated that judges could and would serve for thirty or forty years or longer, and by 1972 the citizens of Massachusetts rebelled.

It is not easy to amend the Massachusetts Constitution. One route is by a proposed constitutional amendment that originates in the Legislature (the "General Court", as it is termed in Massachusetts). Once introduced, the proposed amendment is considered by both houses, and a final vote taken in a joint session. If approved, the entire process is repeated at the next legislative session, before it is submitted to the people for a vote at the next statewide election.[28]

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but for the people; to establish justice; to guarantee security among them. Let us constitute the office in reference to its ends." *Speech on the Judicial Tenure*, delivered at the Massachusetts State Convention, July 14, 1853, *reprinted in* SAMUEL GILMAN BROWN, THE WORKS OF RUFUS CHOATE, Volume II, at 284, 285 (1862).

[25] The life expectancy for the United States residents in 1780 cannot be ascertained with certainty. According to one scholar, in the period from 1790-1799, the life expectancy was 44 years. *See, e.g.*, J. David Hacker, *Decennial Life Tables for the White Population of the United States, 1790–1900*, PUBMED CENTRAL (2010) (author manuscript version), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2885717/. Hacker also noted that "Demographic historians of the nineteenth-century United States depend heavily on life tables and indirect estimation methods. Although the federal government conducted a census every ten years, it did not implement a vital registration system until the start of the twentieth century (the system was not complete until 1933)." *Id*.

[26] Health, United States, 2019 – Data Finder, Table 004, *National Center for Health Statistics*, CENTERS FOR DISEASE CONTROL, (2019), https://www.cdc.gov/nchs/data/hus/2019/004-508.pdf. For white men the number was 68.0 years, and 75.6 years for white women. For black men the number was 60.0 years, and 68.3 years for black women. *See id.*

[27] *See, e.g.*, Margo Miller, *8 Over-70 Judges Fight Amendment*, BOS. GLOBE, Nov. 21, 1972, at 24 (covering an ultimately unsuccessful lawsuit brought by several judges to challenge the mandatory-retirement amendment and naming at least six judges in their seventies, one in his eighties, and one in his nineties).

[28] *See* MASS. CONST., amend. art. XLVIII.

Support for judicial retirement at age 70 was overwhelming at each stage of the constitutional process. The proposed amendment[29] was introduced and then submitted to a joint session of the legislature in 1969.[30] There, a provision in the original bill to provide for the "recall of judges for temporary active service" was stricken[31] and a proposed amendment to "grandfather" sittings judges[32] was overwhelmingly rejected (9 votes in favor, 61 opposed).[33] The final vote in the joint legislative session was clear: 198 in favor, 63 opposed, with 18 absent or not voting.[34] The proposed plain vanilla amendment for retirement was then referred to the next legislative session.[35] With no further changes, on May 12, 1971, it was approved a second time by a joint session of the Legislature,[36] this time by even greater margins: the final vote was 231 in favor, 31 opposed, and 16 absent or not voting.[37]

In the statewide election of November 1972 that followed, Massachusetts voters considered whether "all judges must retire upon reaching seventy years of age."[38] They voted "yes" by a considerable margin: 1,608,282 voted in favor,

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[29] *See* H.B. 2244, 1St Sess., at 1 (Mass. 1969); H. JOURNAL, 166th Mass. Gen. Ct., 246 (1969)..

[30] H. JOURNAL, 166th Mass. Gen. Ct., 2095-96 (1969).

[31] *See* H. JOURNAL, 166th Mass. Gen. Ct., 246 (1969). The recall provision was stricken because, according to a subsequently commissioned Legislative Research Council report, "the supporters of the amendment felt it could not pass if the recall provision remained." MASS. LEGIS. RESEARCH COUNCIL, REPORT RELATIVE TO MANDATORY RETIREMENT OF JUDGES AT AGE 70, at 11 (1970), https://archives.lib.state.ma.us/bitstream/handle/2452/496740/ocm39986872-1970-HB-5108.pdf?sequence=1&isAllowed=y.

[32] "This amendment shall not apply to judicial officers holding office on the date of its adoption." *Id.* at 2096.

[33] *Id.*

[34] *Id.* at 2096-99.

[35] *Id.* at 2099.

[36] S. JOURNAL, 167th Mass. Gen. Ct., at 1297 (1971).

[37] *Id.* at 1294-97.

[38] P.D. 43, VOTES ON QUESTION NO. 7 – PROPOSED AMENDMENT TO THE CONSTITUTION (1972), https://electionstats.state.ma.us/data/serve_file_pages_for_item/4562/BallotQuestion/.

502,743 voted against (76.2% in favor, 23.8% opposed),[39] with every county voting in favor by at least 70%.[40] In December 1972, the amendment to the Massachusetts Constitution came into effect.[41]

What explains the overwhelming support for mandatory judicial retirement in 1972? In the words of a 1970 Legislative Research Council Report, proponents of the amendment suggested that "one method of narrowing the 'generation gap' is the replacement of older judges by younger ones in an era when the average population age has dropped from the 40's to the 30's and now to the 20's."[42] Or as an editorial of *The Boston Globe* put it, "Law . . . is crystallized custom" and "customs of the communities in which the elder judges of the bench in this state made their marks have changed radically in the last quarter-century."[43]

## Part Four: The demise of life tenure for United States judges

By establishing courts with judges removed from day-to-day partisan politics, corruption, and reprisal, Adams, the drafters of other early state constitutions and the Founders sought to ensure judicial independence, and the public's faith in judges, by insulating judges from prevailing political pressures. The insulating features of the Massachusetts Constitution were mirrored in the

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[39] *See id.* at 523-28; *see also 1972 – Statewide -- Question 7*, PD43+: MASSACHUSETTS ELECTION STATISTICS, https://electionstats.state.ma.us/ballot_questions/view/4562/. The final vote tally was 1,608,282 in favor to 502,743 opposed. *Id.*

[40] *Id.* In three counties —Worcester, Hampshire, and Berkshire — the amendment garnered the support of over 80% of the county's voters. *Id.*

[41] As amended in 1972, the applicable Massachusetts Constitution provides as follows: "All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior…provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability; ***and provided further, that upon attaining seventy years of age said judges shall be retired.***" MASS. CONST., pt. II, ch. III, art. 1. The 1972 amendment further provided that such retirement "shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement." *Id*.

[42] MASS. LEGIS. RESEARCH COUNCIL, *supra* note 31, at 10.

[43] *The Referenda – 6: Retiring Judges at 70*, BOS. GLOBE, Oct. 18, 1972, at 22. *See also* Globe Editorial Staff, *Judges Should Go at 70*, BOS. GLOBE, Feb. 26, 1972, at 8.

United States Constitution[44] and in other early state constitutions.[45] They have served our Nation well. And yet lifetime tenure of the Justices of the Supreme Court is now all but unique, and is sharply at odds with all other judges in our Nation. Today, judges of only one state, Rhode Island, continue to serve for life.[46] In two states, Massachusetts and New Hampshire, judges now serve for a ***single*** term until mandatory retirement at age 70.[47] In the remaining 47 states and in the

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[44] *See* U.S. Const. Art. III, § 1. providing that: "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. Art. II, § 4.

[45] *See, e.g.*, DEL. CONST. art. 12 (1776) ("The president and general assembly shall by joint ballot appoint three justices of the supreme court for the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, one of whom in each court shall be styled 'chief justice,' [and in case of division on the Ballot the president shall have an additional casting voice,] to be commissioned by the president under the great seal, who shall continue in office during good behavior; and during the time the justices of the said supreme court and courts of common pleas remain in office, they shall hold none other except in the militia"); N.C. CONST. art. XIII (1776) ("That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty, and Attorney-General, who shall be commissioned by the Governor, and hold their offices during good behavior.").

[46] *See* R.I. CONST. art. X, § 5 ("Justices of the supreme court shall hold office during good behavior.").

[47] MASS. CONST., pt. 2, ch. III, art. I ("The tenure, that all commissioned officers shall by law have in their offices, shall be expressed in their respective commissions. All judicial officers, duly appointed, commissioned and sworn, shall hold their offices during good behavior, excepting such concerning whom there is different provision made in this Constitution; provided, nevertheless, the governor, with the consent of the council, may remove them upon the address of both houses of the legislature; and provided, also, that the governor, with the consent of the council, may after due notice and hearing retire them because of advanced age or mental or physical disability; and provided further, that upon attaining seventy years of age said judges shall be retired. Such retirement shall be subject to any provisions made by law as to pensions or allowances payable to such officers upon their voluntary retirement."); N.H. CONST., pt. 2, art. 78 ("No person shall hold the office of judge of any court, or judge of probate, or sheriff of any county, after he has attained the age of seventy years"); *id.* art. 73 ("The tenure that all commissioned officers shall have by law in their offices shall be expressed in their respective commissions, and all judicial officers duly appointed, commissioned and sworn, shall hold their

District of Columbia judges face mandatory age retirement ***and/or*** serve for sequential short terms (typically 6 to 8 years) that may or may not be available.

(a) **States with mandatory retirement age:** Thirty-three states (including the District of Columbia) now have mandatory age retirement for judges, age 70 in eighteen States, and age 72 to 75 in fourteen States.[48] In one state, Vermont, the mandatory retirement age is 90.[49] Note, however, that with the exception of Massachusetts and New Hampshire, even with mandatory retirement, the initial and any subsequent terms of a judge is short.[50]

(b) **States with no mandatory retirement age.** Eighteen states have no mandatory retirement age for judges. Judges in these states (other than Rhode Island) serve an initial term ranging from six years to twelve years before the judge must be re-selected for his or her judicial office.[51]

With few exceptions, the constitutional provisions for judicial tenure of State judges were amended over time to provide for greater responsiveness to the needs of the people. In addition to ending life tenure, forty-seven states now provide for some system of reselection after an initial short term of service by a judge. While once sleepy affairs, beginning in the 1990's the selection and reselection of State supreme court judges became increasingly partisan and bitter, and many came to

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offices during good behavior except those for whom a different provision is made in this constitution. The governor with consent of the council may remove any commissioned officer for reasonable cause upon the address of both houses of the legislature, provided nevertheless that the cause for removal shall be stated fully and substantially in the address and shall not be a cause which is a sufficient ground for impeachment, and provided further that no officer shall be so removed unless he shall have had an opportunity to be heard in his defense by a joint committee of both houses of the legislature").

[48] *See Mandatory Judicial Retirement*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/mandatory-judicial-retirement (last viewed July 7, 2021). Massachusetts is one of only three states that has no elected judges (trial or appellate) and no Massachusetts judges (trial or appellate) are subject to reappointment of any kind.

[49] *See id.*

[50] *See Methods of Judicial Selection*, NAT'L CTR. FOR STATE CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=.

[51] *See id.*

question whether judicial impartiality, fairness, and independence were being undermined. In 2001, the then-President of the American Bar Association, Alfred P. Carlton, Jr., established a *Commission on the 21st Century Judiciary* "to study, report and make recommendations to ensure fairness, impartiality and accountability in state judiciaries."[52] The Commission recommended that "judicial appointees serve a *single* lengthy term of *at least 15 years* or until a specified age and *not* be subject to a reselection process."[53] The recommendation of the ABA Commission is closely similar to what Professor Rosalind Dixon described to this Commission as a "global best practice."[54] This Commission with its focus on the Supreme Court of the United States may overlook these historical shifts in the States, but even if the varied solutions adopted over time in each State are no longer attractive, one message is clear: in the United States life tenure for judges is not welcomed.[55] That message is worthy of note.

The message finds echo in the Federal judicial branch. Viewed one way, the provision of "senior status" for qualified federal judges reflects an attempt to resolve some of the problems arising from life tenure. First enacted in 1919, the

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[52] JUSTICE IN JEOPARDY, REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, AMERICAN BAR ASSOCIATION vii (July 2003) (emphasis added). The Commission, whose ten members comprised two Chief Justices, a former Governor, a State elected Representative, corporate counsel and lawyers in private practice and public service, held hearings across the United States.

[53] *Id.* at 92-93, this despite the fact that judges in only three states (Massachusetts, New Hampshire, and Rhode Island serve for a **single** lengthy term, with no reappointment requirement.

[54] See letter of Professor Rosalind Dixon to Co-Chairs Professors Bauer and Rodriguez (June 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf at note 60 and accompanying text.

[55] Although not a definitive measure of public opinion, recent polling indicates broad support for limiting the tenure of Supreme Court justices. *See, e.g.*, *New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines*, FIX THE COURT (June 10, 2020), https://fixthecourt.com/2020/06/latest-scotus-term-limits-poll/ ("New polling from PSB on behalf of Fix the Court shows 77% of Americans favor restrictions on length of SCOTUS service, vs. 23% against."); Chris Kahn, *Most Americans Want to End Lifetime Supreme Court Appointments*, REUTERS (Apr. 18, 2021, 6:03 AM), https://www.reuters.com/business/legal/most-americans-want-end-lifetime-supreme-court-appointments-2021-04-18/ ("The national opinion poll, conducted on Thursday and Friday, found that 63% of adults supported term or age limits for Supreme Court justices. Another 22% said they opposed any limits and the rest did not express an opinion.").

legislation did not strip federal judges of their tenure but allowed older judges to voluntarily reduce their case load if they so desired.[56] The availability of "senior status" for federal judges was long in formation,[57] but has been extraordinarily positive in opening up new judicial positions, bringing a steady stream of new, often younger judges, into the federal system. Federal judges may continue to be appointed with lifetime tenure, but few do not avail themselves of "senior status."[58]

Last, a comment on other nations. The rise of constitutional democracies across the globe in my lifetime is nothing short of remarkable. Now countries as

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[56] *See* Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157-58. The 1919 statute permitted judges 70 years or older with at least 10 years of service to retire but to retain judicial duties at their own discretion. It also allowed the President to appoint a new judge to the effected court. Congress also viewed senior status as increasing the efficiency of the courts because it allowed judges, who were able to retire with full pay, to continue to contribute to the courts at no additional cost.

See also H.R. Rep. No. 65-573 (1918) for a helpful history of the enactment of senior status. The report notes that "[t]he merit" of senior status "is that instead of resigning[,] the judge simply retires and is still enabled to perform judicial services when the business of the district demands it. It is believed that the enactment of this provision will lead to further efficiency of the Federal courts without adding anything whatever in the way of expense for the additional services." *Id.* at 6. The "senior status" provisions have been slightly amended from time to time and today "the rule of 80" allows a federal judge of 65 years of age to assume senior status with 15 years of experience (and a 66 year-old judge to assume senior status with 14 years of experience, etc.). *See* 28 U.S.C. § 371(c). *See also* Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1240-45 (2021).

[57] To respond to what was perceived as a growing problem of aging judges, in 1869, and again in the early 20th Century, Congress considered several legislative schemes that would allow the President to *require* judges to retire because of a "disability" and to appoint an additional, new judge if a judge failed to do so. For example, in reference to legislation proposed in 1869, "t]he Judiciary Committee amendment . . . included two additional provisions, both of which were controversial: one permitting the forceable retirement of judges who had become incapacitated upon proof of their disability made before a justice of the Supreme Court (a proposal that was likely unconstitutional) and another allowing the president to appoint a new judge to any court on which a judge did not retire within a year of becoming eligible to do so." *The Evolution of Judicial Retirement*, FED. JUD. CTR., https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement.

[58] *See Demography of Article III Judges*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges ("In recent decades, many federal judges have assumed senior status even though eligible for full retirement").

diverse as Lithuania, South Africa, Uruguay, and Canada have staked their future on the promise of constitutional democracy. What judicial selection and tenure systems have been adopted for these new constitutional courts? The testimony of Professor Rosalind Dixon to this Commission directly addressed the point: "the United States is alone among leading constitutional democracies in having neither a fixed term nor a mandatory retirement age for its high court judges."[59] Professor Dixon suggested that it is a "global best practice" to have some judicial term limits and that "there is precedent" to limit judicial terms to "both: (a) a system of relatively long, fixed term and non-renewable judicial appointments, for periods ranging from 8 to 12 years; and (b) a system of mandatory retirement."[60] This is what the 2003 ABA Commission recommended.[61]

## Concluding observations

The Commission has received a plethora of suggestions addressing the tenure of Justices of the Supreme Court. Many are imaginative, thoughtful and will be helpful in your deliberations. My position is both specific and narrow.

First, in my own work as a Justice, I have experienced the benefits of new (and younger) judges joining my court. Observing and understanding the work of constitutional court judges with whom I have met in and from different countries persuades me that my experience is not unique. The departure of seasoned, brilliant, thoughtful judges is almost always experienced as a loss, but new arrivals bring a vibrancy to deliberations that I found stimulating and always enlightening. My Supreme Judicial Court colleagues were appointed by Governors of both major parties. That had far less impact on the decisions of the court than the expertise

[59] See Letter of Professor Rosalind Dixon to Co-Chairs Professors Bauer and Rodriguez (June 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf; *See also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL'Y 769, 819 (2006) ("Every major democratic nation, without exception, instead provides for some sort of a limited tenure of office for its constitutional court judges") .

[60] *Id.* (citing EUR. COMM'N FOR DEMOCRACY THROUGH LAW (VENICE COMM'N), THE COMPOSITION OF CONSTITUTIONAL COURTS (1997); Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges*, 35 OXFORD J. LEGAL STUD. 627 (2015)).

[61] *See supra* note 53 and accompanying text.

and outlook of colleagues who arrived with recent experiences in diverse areas of practice.

Without mandatory retirement, I and four of the Justices on the Court when I was appointed Chief Justice twenty plus years ago, would in all likelihood still be on the Supreme Judicial Court, as would the Chief Justice I replaced. But for mandatory retirement, the Supreme Judicial Court would not yet have had its first woman Chief Justice, its first African-American Chief Justice, or its first Jewish Chief Justice. Diversity is not determinative of the quality of judicial opinions, but I have learned that different life experiences make for rich contributions to judicial decision-making.

Second, the United States is a huge and a diverse (in every way) country. In many new constitutional courts across the globe, the tenure of constitutional judges is short, often 12 years or less. To me, that is an unattractive option for the United States. I benefitted greatly from the guidance and wisdom of senior colleagues as we faced a wide array of legal questions for which there were no precedents in the United States or elsewhere. I learned much from them, and I learned much from the Chief Justices of other States who had more experience than I. The rapid change in our society gives rise to new, complex and confounding legal questions. The mandated departure of judges from a constitutional court of last resort in the United States after 6 or 8 years or even 12 years would deprive the court of the stability that is needed to maintain public confidence.

While there are a variety of ways to change the tenure provisions of the Justices of the Supreme Court – some of the proposals to this Commission are for legislative change, others for rule changes or other mechanisms – change as fundamental as this cannot be accomplished overnight. For lasting stability it must have the widest possible support from the widest possible participants. There are no successful short cuts.

With these experiences in mind, I favor change by amending the Constitution to provide that Justices serve for a limited time, the duration established either by mandatory retirement age (70-75) or by number of years (18-20 years). I am mindful that amendments to the United States Constitution are difficult to accomplish. My response is two-fold. In Massachusetts I experienced first-hand the benefits of a lengthy constitutional amendment process, followed by a vote of the people for mandatory retirement of judges. Twenty five years before my tenure on the Court began, the lasting effects of that careful process still resonated. The 1972 amendment was controversial in many quarters at the time,

but was ultimately adopted overwhelmingly by the people. For some fifty years, mandatory retirement of Massachusetts judges has been accepted as non-controversial, even as mandatory retirement has ended in the academy and other comparable institutions. The benefit of predictable departures of the Justices was incalculable, especially as we moved into the 21st century when challenges to particular decisions or particular appointments were amplified by social media. In countless conversations I have had, and in lectures I have given about the Massachusetts Constitution, I often discovered that the constitutional change in 1972 and the wide support it garnered is still understood as a lasting positive contribution to our Court.

My experiences in South Africa taught me the value of taking the long view. As an anti-*apartheid* activist in the early 1960's, a time when *apartheid* was reaching its zenith, when Nelson Mandela and his colleagues had been sentenced to draconian prison terms, change in South Africa seemed all but impossible. I learned that change begins with first steps and is accomplished by perseverance. I revere the constitutional democracy of the United States, and remain alert to challenges that weaken its acceptance by the people of our Nation. There may be several, but maintaining confidence in the independence and impartiality of the Justices of the Supreme Court remains paramount. I respectfully conclude that their continued lifetime tenure is injurious to that effort.

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