TIME IS UP: ASSESSING THE LIFE TENURE SYSTEM IN THE UNITED STATES SUPREME COURT AND THE MANDATORY RETIREMENT SYSTEM IN THE PHILIPPINE SUPREME COURT*

*By Jonathan T. Pampolina***

> "*Doubtless there is a time when a judge reaches, on account of age, the limit of effective service, but it is very difficult to fix that time.*" [1]
>
> - Chief Justice Charles Evans Hughes

> "*No, of course, I would not like to be replaced by someone who immediately sets about undoing everything that I've tried to do for 25 years, 26 years, sure. I mean, I shouldn't have to tell you that. Unless you think I'm a fool.*" [2]
>
> - Justice Antonin Scalia

INTRODUCTION

Holding neither the power of will nor force, the judiciary as the least dangerous branch of government [3] is envisioned to resolve cases of

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** Editor, Philippine Law Journal (2005). LL.M., Georgetown University Law Center (2013). LL.B., University of the Philippines (2007). B.S., Ateneo de Manila University (2002).

[1] Charles Evans Hughes, The Supreme Court of the United States 75 (1928).

[2] Interview of Justice Antonin Scalia by Chris Wallace on Fox News Sunday last July 29, 2012, *available at* http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2012/07/29/justice-antonin-scalia-issues-facing-scotus-and-country#p//v/1760654457001 (last visited Nov. 27, 2012).

[3] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962).

transcendental importance and to express the values and principles of the nation in its decisions. Insulated by the passion of politics (often characteristic of the executive and the legislative branches), the authority of the Supreme Court lies on its ability to divine reason from law and render enduring judgments that govern societal behavior. However, the core feature of the American and Philippine Supreme Courts – intended to ensure their judicial independence – has now become the very tool that has given rise to criticism of its increasing politicization. The terms of office of the members of the Supreme Courts in both countries (life tenure in the United States and mandatory retirement age of seventy in the Philippines) has opened unintended opportunities for its members to disregard their role as disinterested adjudicators and to don new robes as more active political players in their nation's history.

In an age of transparent and democratic governance, calls have been renewed for the review of the "aristocratic"[4] feature of the United States Supreme Court and to assess the viability of alternatives, specifically time-bound limits on the terms of the Justices. Many of the assumptions that were used to justify life tenure at the time the American Constitution was drafted are now being questioned. Professors Steven Calabresi (Calabresi) and James Lindgren (Lindgren), who have written extensively on the subject, have described the constitutional rule on life tenure in the United States as "fundamentally flawed."[5] Another has been bold enough to characterize it quite frankly "the stupidest provision of the 1787 Constitution that has any impact today."[6] With the recent vacancies in the Supreme Court after a long hiatus, academic literature on life tenure has been growing with the goal of dispelling "the myth that life tenure for justices is fundamental to our democratic self-government."[7]

In the Philippines, grave concerns have been raised over the system of mandatory retirement for Justices, after former President Gloria Macapagal-Arroyo (Arroyo) was able to appoint at one time fourteen of the fifteen

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[4] Saikrishna Prakash, *America's Aristocracy Taking the Constitution Away from the Courts*, 109 YALE L.J. 541, 569 (1999).

[5] Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

[6] L. A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 LAW & SOC. INQUIRY 1227, 1234 (2000).

[7] Linda Greenhouse, *How Long is Too Long for Justice?*, NEW YORK TIMES (U.S.), Jan. 16, 2005, *available at* http://www.nytimes.com/2005/01/16/weekinreview/16gree.html.

Justices of the country's Supreme Court, including then Chief Justice Renato Corona (Corona). Through a careful mix of old and young appointees, a court-packing strategy[8] (the improper filling of judicial appointments based overwhelmingly on politics) was implemented that almost pushed the Supreme Court to the edge of becoming a virtual rubber stamp for some of the most significant administration policies. Towards the latter part of Arroyo's immensely unpopular term, opposition critics described her appointments to the Supreme Court as being made on the sole basis of loyalty to her. Others described the appointments as providing the outgoing President with a judicial shield against possible prosecution in the future. The seeming "court capture"[9] perpetrated by Arroyo during her term spurred discussions on the importance of judicial independence and preventing similar abuses by future presidents.

This paper will assess the weaknesses and difficulties of using age as the standard for determining term limits for Justices of the Supreme Court and its effectiveness in securing judicial independence by drawing parallelisms to the experiences from the American system of life tenure and the Philippine system of mandatory retirement. The first part will describe the rationale for life tenure in the United States Supreme Court by reviewing its place under the framework of a tri-partite government under the American Constitution. Had the terms of the Justices been initially subject to constant modification by the legislature or executive under the Constitution, the Supreme Court would not be able to perform its function of checking abuses by the other two branches for fear of a shortened term or even possibly resulting in removal from office. Giving Justices life tenure during "good behavior" afforded them with a measure of protection from issuing unpopular decisions. However, recent developments have challenged the appropriateness of life tenure in the United States Supreme Court as a mechanism to ensure the performance of judicial functions, which is the focus of the second part of the paper. These challenges include the general increase in life expectancies among the Justices, changing working conditions and strategic retirements.

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[8] The term "court-packing" was first used to describe the legislative strategy of US President Franklin Delano Roosevelt to increase the number of Justices, after his reforms under the New Deal suffered stinging legal defeats in the Supreme Court. (Michael Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 149-150 [2003/04]).

[9] "Court capture" refers to the appointment of all or a majority of the Justices of the Supreme Court by a single President, which may lead to the danger of a judicial branch that is subject to the undue influences of the Executive. (Calabresi & Lindgren, *supra* note 5, at 845)

In response to these issues, proposals have been made to shift from life tenure to a mandatory retirement age for Justices. The next part of the paper will explain why a mandatory retirement age for Justices will not cure the problems and will even give rise to other potential dangers, as can be seen from the Philippine experience. The successful implementation of a court-packing strategy during the Arroyo administration gives a cautionary tale of how the adoption of a mandatory retirement system for the United States Supreme Court can still be held hostage by political interests.

The last part will discuss the benefits of fixed-year term limits for both the United States and the Philippines as compared to their current systems of life tenure and mandatory retirement, respectively. The regularity of vacancies and appointments arising from a fixed-year term for Justices resolves most of the controversies arising from the present system of term limits. There will be a brief discussion on the approaches that the United States and the Philippine can adopt to implement the proposed eighteen-year term limits for Members of the Supreme Court.

The overall aim is to contribute to the growing body of academic work pushing for the institution of fixed-year term limits for Supreme Court appointees in the two countries, preferably a period of eighteen years for each Justice. A sufficiently long period of effective service for members of the American and Philippine Supreme Court will ensure the institutional independence of the "least dangerous branch," without the perils of subjecting their chambers to unwanted politicization under a system of life tenure or mandatory retirement.

I
LIFE TENURE IN THE UNITED STATES SUPREME COURT: SECURING JUDICIAL INDEPENDENCE

A Brief Overview of the United States Supreme Court

The Supreme Court of the United States is composed of the Chief Justice and eight Associate Justices,[10] who are nominated by the President subject to the advice and consent of the Senate.[11] Once confirmed by the

[10] 28 U.S.C.A. § 1.

[11] U.S. CONST., art. II, § 2, cl. 2.

Senate, Justices shall continue to sit during "good behavior,"[12] which term has been interpreted to mean "for life."[13] Nothing in the American Constitution specifically addresses when or under what circumstances Justices should depart from the Court,[14] as distinguished from the constitutionally prescribed term limits for the President, Vice-President, Senators and Congressmen.[15] Hence, the appointment of a Supreme Court Justice can only be terminated voluntarily (by retirement or resignation) or involuntarily (by death or impeachment by Congress).[16] Of the 103 Justices who have left the United States Supreme Court since 1789, 56 Justices voluntarily retired (54.36%), whereas the remaining 47 Justices died while in office (45.63%).[17] No American Justice has been removed through impeachment.[18] Notably, for the half century between 1955 and 2005, there was not a single death of a sitting Supreme Court justice, except for Chief Justice William Rehnquist, who died in office on September 3, 2005.[19] Coincidentally, Chief Justice Rehnquist clerked for Justice Robert Jackson who was then the last sitting justice to die while on the Bench in 1954.[20] Since Chief Justice Rehnquist's untimely death, the last three Justices to leave the Supreme Court all voluntarily retired – Justices Sandra Day O'Connor (January 31, 2006), David Souter (June 29, 2009), and John Paul Stevens (June 29, 2010).[21]

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[12] U.S. CONST., art. III, § 1.

[13] United States v. Hatter, 532 U.S. 557, 567, 121 S. Ct. 1782, 1790, 149 L. Ed. 2d 820 (2001).

[14] DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 12 (1999).

[15] U.S. CONST. art. I, § 1(1), § 2(1), § 3(1); U.S. CONST. amend 22.

[16] Daniel Meador, *Thinking About Age and Supreme Court Tenure,* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 115 (Cramton & Carrington eds., 2006).

[17] J. Gordon Hylton, *Supreme Court Justices Today Are Unlikely To Die With Their Boots On* posted at the Marquette University Law School Faculty Blog on Mar. 9, 2012, *available at* http://law.marquette.edu/facultyblog/2012/03/09/supreme-court-justices-today-are-unlikely-to-die-with-their-boots-on/.

[18] "The only Justice to be impeached was Associate Justice Samuel Chase in 1805. The House of Representatives passed Articles of Impeachment against him; however, he was acquitted by the Senate." (*See* Website of the United States Supreme Court, available at http://www.supremecourt.gov/faq.aspx#faqgi5 (last visited on Jan. 5, 2013).

[19] Hylton, *supra* note 17.

[20] Kevin McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure in the United States Supreme Court*, 89 JUDICATURE 8, 14 (2005).

[21] *See supra* note 18.

The current members of the United States Supreme Court are on average 67 years old, but more than half of them are less than 65 years old – Chief Justice John Roberts, Jr. (58), Justice Clarence Thomas (64), Justice Samuel Anthony Alito, Jr. (62), Justice Sonia Sotomayor (58), and Justice Elena Kagan (52).[22] They have served in the Court for an average of 14.5 years, although most of them will have sat on the Bench for more than fifteen years by the end of 2012, namely Justices Antonin Scalia (26 years), Anthony Kennedy (24 years), Clarence Thomas (21 years), Ruth Bader Ginsburg (19 years) and Stephen Breyer (18 years).[23]

Judicial Independence and Life Tenure

One of the most admired features of the American judiciary is its independence from the other branches under a tri-partite system of government. Judicial independence is defined as "judges whose tenure is reasonably secure, who have been selected carefully, and who will decide cases according to the rule of law unconstrained by political fear, fear for physical safety, or other undue pressures, and uninfluenced by the status of the parties, the threat of salary reductions, or extraneous considerations."[24] Thus, judges are empowered to decide cases without the threat of political recourse or retaliation by elected officials in the other two branches.[25] The Framers of the American Constitution ultimately decided that it was imperative under a system of checks and balances "that the judiciary be independent of popular political pressure."[26] There has been no doubt that the least dangerous branch needs to be independent from the other two, so that it can impartially decide cases on the basis of law, without fear or favor.

With the need for judicial independence in mind, the Framers sought to employ all possible care to defend the Court from attacks by the executive or legislative.[27] They found that granting security of tenure for Members of the

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[22] *See* Annex 1: Table of Current Members of the United States Supreme Court.

[23] *See* Annex 1: Table of Current Members of the United States Supreme Court.

[24] Michael Traynor, *Judicial Independence: A Cornerstone of Liberty*, Golden Gate University School of Law Jesse Carter Distinguished Speaker Series Constitution Day Lecture, Sept. 18, 2006, 37 GOLDEN GATE U. L. REV. 487, 491 (2007).

[25] Calabresi & Lindgren, *supra* note 5, at 809.

[26] ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 240 (2003).

[27] THE FEDERALIST NO. 78 (Alexander Hamilton).

Supreme Court was a key safeguard that would ensure judicial independence. Together with adequate compensation,[28] security of tenure enabled judges to resist the political influences by the two other branches, especially when deciding cases that affect the executive and legislative. Indeed, judges could not be allowed to decide cases with one eye towards doing justice to the parties and another ensuring that they do not anger the political powers that be and have their positions threatened. The debates in the Constitutional Convention as well as the writings in the *Federalist Papers*[29] reflected "a strong commitment to security of tenure during good behavior for" Justices of the Supreme Court.[30] In the *Federalist Papers*, Alexander Hamilton explained that if the courts of justice are to be considered as the bulwarks of a limited Constitution against executive or legislative encroachments, then there is a strong argument for a sufficiently enduring tenure since nothing else will contribute as much to a judge's independent spirit than the security of his tenure, which is essential to the faithful performance of so arduous a duty.[31]

Although the Framers recognized the need for lasting judicial tenures, they grappled with the means by which to achieve that purpose.[32] This became a central concern for them in outlining the powers of the Supreme Court under a new form of government. The Framers therefore had to seek inspiration from the judicial system of another jurisdiction, namely Britain.[33] Following the Glorious Revolution of 1688,[34] Britain gave relatively new guarantees of tenure during "good behavior" for its higher judiciary.[35] The Act of Settlement of 1701 in Britain protected the independence of English judges by granting them tenure "as long as they conducted themselves well and provided termination only through a formal request by the Crown of the two Houses of Parliament."[36] Drawing from the wisdom of the English practice, the Framers adopted the same mechanism of "good behavior" in office for

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[28] THE FEDERALIST NO. 79 (Alexander Hamilton).

[29] THE FEDERALIST NO. 78, *supra* note 27.

[30] Mary Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 859-60 (2011).

[31] THE FEDERALIST NO. 78, *supra* note 27.

[32] *Id.*

[33] *Id.*

[34] Calabresi & Lindgren, *supra* note 5, at 777.

[35] Clark, *supra* note 30, at 859-60.

[36] Judith Resnik, *Democratic Responses to the Breadth and Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 197 (Cramton & Carrington eds., 2006).

judges to secure judicial independence.[37] In the present context, "good behavior" for Justices of the United States Supreme Court gives them opportunity to sit on the Bench virtually for the remainder of their lives.

The Framers gave Justices life tenure in an era when the average American could expect to live only 35 years.[38] Hence, there was little expectation at that time that those who would sit in the Supreme Court would hold on to their seats for prolonged periods. The Framers even anticipated that many of the appointees would eventually resign to engage in other activities and that others would die after relatively short periods of service.[39] In the *Federalist Papers*,[40] Hamilton reasoned that the "good behavior" clause would not result in extremely long service or in the "imaginary danger of a superannuated Bench" because most men did not survive that long since "few there are who outlive the season of intellectual vigor."[41] Hence, the Framers expected that new appointments to the Supreme Court would and should occur with some frequency.[42]

In the early period of the United States Supreme Court, Justices did not actually serve out their judicial capacities for more than a decade. Professor Artemus Ward (Ward) noted that from the early years of the Supreme Court from 1789 to 1800, the average tenure of Justices who resigned was 1 year and 8 months, while the average tenure of those who died was 9 years and 3 months.[43] Aside from attending to cases filed in the Supreme Court, Justices in the first 121 years of the Court also had to perform circuit-riding duties, whereby they would travel around the country to serve as judges of the various federal circuit courts.[44] Most of the early Justices reviled the practice and complained bitterly about having to travel at an advanced age and having less time to spend attending to their duties in the nation's capital.[45] Ward notes that "distaste for the rigors of circuit riding, coupled with health concerns and the

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[37] Calabresi & Lindgren, *supra* note 5, at 777.

[38] *Id.*, at 788.

[39] Roger Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 348 (Cramton & Carrington eds., 2006).

[40] THE FEDERALIST NO. 79, *supra* note 28.

[41] Cramton, *supra* note 39, at 347.

[42] *Id.*, at 348.

[43] WARD, *supra* note 26.

[44] Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

[45] *Id.*

availability of governmental positions of comparable pay and prestige" contributed to the decision of the earlier Justices to leave the court.[46]

Checks and Balances on Judicial Supremacy

Despite the Framers' strong emphasis on the need for judicial independence, the Supreme Court, much like the other two branches, was not to be beyond reproach when it exceeded its authority. Professors Calabresi and Lindgren pointed to three methods by which the United States Supreme Court would be democratically accountable to the sovereign people or their elected representatives: (1) the Presidential appointment process, subject to Senate confirmation, (2) Congressional impeachment, and (3) constitutional amendment.[47]

The appointment process is arguably the most striking involvement of the executive and legislature on judicial autonomy,[48] and hence, the most potent check on the United States Supreme Court. The inherently political nature of the appointment of a Justice provides some degree of democratic accountability on the judiciary. The sovereign people vicariously influence judicial appointment to the Court through the election of Presidents, who would more or less share the electorate's political philosophies and ideologies. In addition, the power of the President to nominate a person to the United States Supreme Court is circumscribed by the confirmation hearings of the Senate (again a body of the people's representatives). Under this arrangement of Presidential nomination and Senate confirmation of Supreme Court Justices, a President will tend to select a nominee who adheres closely to his political values, but cannot be so ideologically extreme, controversial or incompetent so as to fail Senate scrutiny.

The impeachment power is the second check against grave abuse or misconduct by Justices of the Supreme Court. The aim of impeachment is to determine whether a Justice had indeed acted with "good behavior" and if he had not, to remove them from the Bench. Under the American system, the

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[46] WARD 26, *supra* note 26.

[47] Calabresi & Lindgren, *supra* note 5, at 809.

[48] Burkeley Riggs & Tamera Westerberg, *Judicial Independence: An Historical Perspective the Independence of Judges Is . . . Requisite to Guard the Constitution and the Rights of the Individuals . . .*, 74 DENV. U. L. REV. 337, 341 (1997)

power of impeachment lies with House of Representatives,[49] but the power to try and decide impeachment cases lies with the Senate.[50] It is generally accepted that for an impeachment of a Justice to succeed, serious misconduct, such as committing a felony, must be established.[51] The violation must be grave enough to warrant the exercise of such an extreme measure of removal.[52] The involvement of the legislative branch with its vast membership underscores the necessity of a broad consensus to be able to remove a member of the Supreme Court. Compared to the simple majority requirement in the passage of laws, at least two-thirds of the Senate membership is required to impeach a sitting Justice. The condition of a super-majority insulated the impeachment process from succumbing to the whims of a dominant political party in the Senate and abusing the process to oust Justices with non-aligned views.[53]

The last check on the Supreme Court is the power of constitutional amendment. While impeachment responds to grave wrongdoing outside of a Justice's official functions, amendment of the Constitution is ordinarily resorted to in response to the substance of the Court's decisions, and not necessarily owing to some personal misconduct of an individual member of the Court. The duty of the Supreme Court is to interpret the Constitution in light of the facts and circumstances presented to it, and its understanding and analysis. Once issued, a decision by the Supreme Court is binding on the other branches as well as the nation, regardless of how a majority of the people objects or disagrees with the Court's reasoning. Under extreme circumstances, the Supreme Court can consider reversing itself in a future case, but this is rare owing to the general rule on precedent. Thus, the sovereign was given by the Constitution another avenue to undo the effects of a judicial decision they strongly consider not in keeping with their common sentiments – the process of constitutional amendment. The Framers required a high threshold of legislative approval (2/3 of both Houses for the United States) to ratify any amendment, in order to prevent trivial changes to the Constitution.[54] Although the members of the Supreme Court cannot be removed by impeachment for performing their judicial function in interpreting the Constitution, the sovereign people, through their representatives in the legislature, are not

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[49] U.S. CONST., art. I, § 2, cl. 5; CONST., art. XI, § 3 (1).
[50] U.S. CONST., art. I, § 3, cl. 6; CONST., art. XI, § 3 (6).
[51] Roger Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1320 (2007).
[52] U.S. CONST., art. I, § 3, cl. 6; CONST., art. XI, § 3 (6).
[53] U.S. CONST., art. I, § 3, cl. 6; CONST., art. XI, § 3 (6).
[54] U.S. CONST., art. V.

without remedies to express its disapproval of a judicial decision, which they find morally unacceptable.

Although its decisions are absolute and final within its sphere of governance, the Supreme Court is still an instrument of the sovereign people, and checking mechanisms are put in place to temper any outrageous abuse or appalling error.

II
MODERN CHALLENGES TO LIFE TENURE IN THE UNITED STATES SUPREME COURT

Several recent developments have challenged the original intention of the "good behavior" clause as conceived by the Framers of the American Constitution. Progress in the modern world (specifically, increased life expectancies and improving work conditions in the Supreme Court) has caused some doubts as to the effectiveness of life tenure as a tool for ensuring judicial independence. The most potent consequence of these developments is that Justices are living longer and outliving the seasons of intellectual rigors of their positions, contrary to what the Framers originally perceived. Hence, the advantages of life tenure, first articulated in 1789 when the Supreme Court was created, may now have brought unperceived dangers to the 21st century American judicial system, especially with respect to the timing of vacancies and the frequency of appointments. Together with the decreased resort to impeachments and constitutional amendments as checks to the Supreme Court, these modern challenges have placed much pressure on the appointment process and have sparked discussion on alternatives to life tenure.

A. Increasing Life Expectancies

The practical meaning of life tenure for Justices of the United States Supreme Court has changed and will continue to do so as people enjoy longer life expectancies.[55] Current advances in medical science have vastly improved life expectancy thereby increasing the time Justices sit on the Bench compared

[55] David Stras & Ryan Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791, 794 (2007).

to previous decades. Today, life expectancy in the United States stands at just over 77 years old, which is approximately twice the average life expectancy at the time the United States was founded.[56] Furthermore, these figures are expected to increase at the rate of three months every year.[57]

In his book entitled *Leaving the Bench*, David Atkinson (Atkinson) noted that the most recent pattern shows the average age of the Justices sitting on the Court has become older, from 51 years old in 1789 to 64 years old in 1998.[58] As mentioned earlier, the average age of the current members of the United States Supreme Court is now 67 years old, with Justice Ginsburg nearing 80 years old.[59] Even more revealing, Atkinson found that the time that Justices serve in the Court is increasing, with average judicial tenure in 1998 at 13 years.[60] By the end of 2012, average judicial tenure in the Supreme Court would be 14.5 years.[61] However, it must be noted that recent retirements of Justices O'Connor, Souter and Stevens have altered this average since four newly appointed Justices, who have just begun their judicial careers, are now included. In comparison, at the time Chief Justice Rehnquist died in September 3, 2005, the average tenure then was 19.5 years, with the Chief Justice himself having served for more than three decades from the time of his appointment as Associate Justice on January 7, 1972.[62] The latest retiree, Justice Stevens, served the Court for 34.5 years,[63] just two years shy of the record of the longest serving justice to date, Justice William Douglas (36.5 years).[64]

In a more recent study, Professors Calabresi and Lindgren found that in 2006, "the average Justice who is appointed to the Court in his early fifties can expect to sit on the Court for nearly three decades, whereas the average

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[56] Meador, *supra* note 16.

[57] *Id.*

[58] ATKINSON, *supra* note 14, at 188-192.

[59] *See* Annex 1: Table of Current Members of the United States Supreme Court. Chief Justice John G. Roberts, Jr. (58), Justice Clarence Thomas (64), Justice Samuel Anthony Alito, Jr. (62), Justice Sonia Sotomayor (58), and Justice Elena Kagan (52).

[60] ATKINSON, *supra* note 14.

[61] *See* Annex 1: Table of Current Members of the United States Supreme Court.

[62] *See* Annex 1A: Table of Tenure of Member of the United States Supreme Court (Rehnquist Court).

[63] Justice John Paul Stevens served the Supreme Court from Dec. 19, 1975 to Jun. 29, 2010.

[64] Justice William O Douglas served the Supreme Court from Apr. 17, 1939 to Nov. 12, 1975. Coincidentally, Justice Stevens took the seat vacated by Justice Douglas, when President Gerald Ford nominated the former.

Justice appointed to the Court in his early fifties in 1789 might have expected to sit on the Court for only two decades."[65] From 1789 to 1970, the average Supreme Court justice served for 15.2 years and retired at 68.5 years old, but since 1970, the average tenure has risen to 25.5 years and the average age at departure is 78.8 years old.[66] The experience of the United States in the 20th century has shown that the lengthened life span among life-tenured Supreme Court Justices has also meant lengthened service in the Court.[67]

The Framers of the American Constitution, acting at a time when life expectancy at birth was less than 40 years, could not have foreseen that life tenure would result in persons holding so powerful an office for a generation or more.[68] According to Professors Calabresi and Lindgren, with Justices now expected to serve for an average of three decades, members of the Supreme Court can sit on the Bench and easily surpass three successive Presidents who are elected for two four-year terms. From 1994 to 2005, the United States Supreme Court endured the longest period without a vacancy, which others have claimed to be sufficiently long enough in theory to deprive a successful, two-term President the opportunity to appoint a Justice.[69] It is unlikely that the Framers, in forging a newly democratically accountable form of government, envisioned Justices retaining their positions for more than half a century, which they may soon do in the distant future, if life expectancy further increases. Life tenure for Supreme Court Justices has now become characteristic of royalty, not of governing institutions in a democratic society.[70]

The problem of prolonged tenure of Justices arising from increased life expectancy is exacerbated by allegations of mental decrepitude afflicting some in the later years of their judicial service. In *Leaving the Bench*, Atkinson notes that mental decline or disability was one of the reasons why Justices leave office. [71] He offered biographical accounts and insights into the worsening mental states and conditions of some of the earlier Justices who made work in the Court quite difficult. Of particular note is the case of Justice

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[65] Calabresi & Lindgren, *supra* note 5, at 789.

[66] Greenhouse, *supra* note 7.

[67] Meador, *supra* note 16, at 116.

[68] Paul Carrington and Roger Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles,* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Carrington & Cramton eds., 2006).

[69] Calabresi & Lindgren, *supra* note 5, at 786.

[70] Daniel Meador, *Restructuring the Supreme Court: Regularizing Appointments, Providing More Frequent Rotation, Avoiding Physical and Mental Impairment*, 25 J. L. & POL. 459, 462 (2009).

[71] ATKINSON, *supra* note 14, at 1.

Robert Grier, whom Atkinson noted was of such a deteriorated mental health and afflicted with such indecisiveness that his colleagues even encouraged his resignation.[72] Atkinson concludes by saying that "although it has happened often enough during the nineteenth century, there have been no recent instances of Justices clinging to their seats for years after falling into decrepitude, despite relatively short-term disabilities."[73] But others have claimed that mental decrepitude has become an even more frequent problem in the 20th century Court than it was during the previous century, contrary to conventional wisdom.[74] David Garrow, in an article that followed-up on Atkinson's work, cited recent cases of alleged mental decrepitude of Justices based on a survey of historiography of the Supreme Court.[75] Mental incapacity can hinder the functions of the Supreme Court, if not totally disrupt its process, especially in highly contentious cases with Justices who are evenly divided on the issues. Life tenure can further complicate the problem of mental decrepitude since "the responsibility for determining when a member of the Court may no longer be fully fit for the job is left to the discretion of the individual justice, who obviously may not be in the best position to render an objective judgment about his or her capacities."[76] Chief Justice Charles Evans Hughes summed up the fears shared by all in this manner: "I agree that the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist on remaining on the Bench, is too great to permit chances to be taken."[77]

B. Changing Working Conditions

Members of the modern United States Supreme Court are now laboring under more favorable conditions than their predecessors. First, law clerks have contributed in easing some of the demands on judicial service.[78] From being mere errand boys doing menial tasks or simple "stenographic clerks" editing the written works of a justice, the role of the law clerks since

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[72] *Id.,* at 48-51.

[73] *Id.*, at 167.

[74] David Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).

[75] *Id.*

[76] McGuire, *supra* note 20, at 9.

[77] Hughes, *supra* note 1, at 76-77.

[78] Cramton, *supra* note 51, at 1313, 1317.

1925 has greatly expanded with Justices delegating more work to them.[79] Indeed, the initial contribution of law clerks to the work of the Supreme Court and the increased reliance by Justices on them were so significant that their numbers were increased in 1978 from two law clerks for each office to four.[80] Today, in many chambers, it is common practice for law clerks to prepare the initial drafts of opinions, with the Justices doing the editing – a reversal of roles from the earlier practice.[81] The prevalence nowadays of judicial ghostwriting – the delegation of opinion writing to law clerks – enables a small number of senile judges, and a significant number of judges who are well past their prime though not yet senile (merely "senescent"), to continue in office.[82] In some extreme cases, Justices suffering from mental infirmity have devolved nearly all responsibilities to their law clerks, who keep the chambers of their Justices running without a drop in the quality of decisions. [83] Although this phenomenon may attest to the brilliance of Supreme Court law clerks, one may ask what it says about the Justices. Professors Calabresi and Lindgren remarked that it was "striking that the increase in the number of law clerks post-1970 corresponds precisely with the period during which Justices have been staying longer on the Court."[84] In any case, the introduction of the law clerks and their rise in numbers have made them indispensible components of the operations of the Court[85] and have contributed to enabling Justices to better manage their dockets.

Second, the United States Supreme Court has gained greater control over its dockets, starting from the introduction of the certiorari process in 1925 to the gradual abandonment of almost all mandatory jurisdiction by the 1980s.[86] The power to refuse cases has enabled the Supreme Court to bide its time and "to intervene selectively, without committing itself to policing a new area it brings under its supervision."[87] Armed with the discretion to expand or

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[79] David Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 951-953 (2007).

[80] Calabresi & Lindgren, *supra* note 5, at 808.

[81] Meador, *supra* note 16, at 119.

[82] RICHARD POSNER, AGING AND OLD AGE 181 (1995).

[83] Ward Farnsworth, *The Case for Life Tenure*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 262 (Carrington & Cramton eds., 2006).

[84] Calabresi & Lindgren, *supra* note 5, at 808.

[85] Stras, *supra* note 79, at 953.

[86] Cramton, *supra* note 51, at 1317.

[87] Edward Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1730-31 (2000).

limit its own dockets, the Court has grown more predisposed to deny a majority of certiorari petitions. Although it assured Congress in 1925 that it would continue to decide about 350 cases a year on the merits, the Supreme has annually reduced the number of cases decided on the merits. It now decides fewer than 100 cases a year on the merits.[88] In the latest analysis of the statistics of the petitions filed before the Supreme Court, it was noted that during its October 2011 Term, it released only 65 signed merit opinions after oral arguments, which is one of the lowest in recent history.[89] Studies have suggested that increasing the workload of Justices, which in turn increases the amount of time spent on judging rather than leisure, may contribute to making retirement more attractive for the average Justice.[90] However, with fewer cases to hear and Justices authoring less than ten majority opinions per term on the merits, the current workload has become a less convincing factor for a Justice to retire under the existing system of life tenure.

Together with the abolition of circuit riding duties,[91] increase in the number of law clerks and the decrease in the number of certiorari petitions being heard, the odds are in favor of a modern Justice's capacity to endure the current rigors of judicial work. These favorable conditions allow Supreme Court Justices to outlast their predecessors from the 18th and 19th century. With better health care and increased longevity, the efforts required of remaining in the Bench at an advanced age have fallen in recent decades.[92] In sum, the job of being a Supreme Court Justice is "much easier today with four law clerks, no mandatory appellate jurisdiction, fewer grants of certiorari, and three months of summer vacation, than was the case at other times in American history."[93] Coupled with lengthened life expectancies and the enhanced prestige of sitting on the Bench, these factors might help explain

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[88] Carrington & Cramton, *supra*, note 68, at 470.

[89] The number of decisions after argument for previous Terms are 75 (OT10), 75 (OT09), 76 (OT08), 67 (OT07), 68 (OT06), 71 (OT05), 76 (OT04), 74 (OT03), 73 (OT02), 76 (OT01), 79 (OT00), 74 (OT99), 78 (OT98), 92 (OT97), 81 (OT96), 77 (OT95), 84 (OT94), 84 (OT93), 107 (OT92), 107 (OT91), and 102 (OT90)." (SCOTUSBLOG's End-of-Term Statistical Analysis – October Term 2011, available at http://www.scotusblog.com/2012/06/final-october-term-2011-stat-pack-and-summary-memo/ last visited on Dec. 19, 2012).

[90] David Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1437 (2006).

[91] WARD, *supra* note 26, at 25.

[92] POSNER, *supra* note 82, at 200.

[93] Calabresi & Lindgren, *supra* note 5, at 808.

why Justices are capitalizing on their "good behavior" tenure and staying on the Court for extensive periods of time.[94]

C. Strategic Retirements: Increasing Politicization of the Appointment Process

One of the most troubling controversies facing the current system of life tenure in the United States Supreme Court is the leeway granted to Justices in resorting to strategic retirements during the term of a President with shared political alignments. In a closely divided court of five Republicans and four Democrats,[95] filling any subsequent vacancy spells a huge difference in either protecting the Court's current conservative streak or reviving a liberal agenda in American jurisprudence. The Court's decisions on the 2000 Bush-Gore elections[96] and the lifting of restrictions on political campaign contributions by corporations[97] highlight how crucial one vote can be when party-lines are considered in deciding cases of national and political importance. The recent trend of strategic retirements has indeed subjected the consequent appointment of succeeding Justices to further politicization.

With the exception of a sudden death or a successful impeachment, Justices of the Supreme Court under the system of life tenure generally decide on their own when they will leave the Bench. They are expected to retire when they feel like retiring.[98] Unlike elected officials who step down at the end of a fixed term, Justices have complete control over when a vacancy in the Supreme Court will arise and hence, determine which President will have the opportunity to make the appointment to fill the vacancy. Members of the Supreme Court who retire of their own volition exercise some degree of influence on their replacement or successor. This can be a potent tool in the hands of policy-motivated Justices, who would want to preserve their legacies, especially in an equally divided Court.

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[94] *Id.*

[95] Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito were all appointed by Republican Presidents. Meanwhile, Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan were appointed by Democrat Presidents.

[96] Bush v. Gore, 531 U.S. 98 (2000).

[97] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

[98] Farnsworth, *supra* note 83, at 265.

Some Justices allegedly timed their retirements based on which president would nominate their successors. This practice has been noted from as far back as the early years of the Republic.[99] Surprisingly, the trend has become far more commonplace since World War II, and practically universal since 1968.[100] Since 1789, Justices have been noted to more than likely to resign when a President of the same party is in office, but are more than likely to die on the Bench, when the President is of the opposite party.[101] When examined over time, Professor Ward concluded that the partisan concerns of the Justices have recently begun to play a much more significant role in their thought process.[102] Chief Justice John Marshall was said to have postponed his decision to resign until after the next election, hoping that Andrew Jackson would be defeated.[103] In a letter to a fellow Justice, Chief Justice Marshall even wrote that "[y]ou know how much importance I attach to the character of the person who is to succeed me, and calculate the influence which probabilities on that subject would have on my continuance in the office."[104] Galvanized by his fear and foreboding of a Nixon presidency, Chief Justice Earl Warren entered into a retirement deal with outgoing Democrat President Lyndon Johnson in 1968, to ensure a liberal successor in the person of Associate Justice Abe Fortas.[105] In 2000, upon hearing in the television that Florida had been earlier called for Democrat Vice President Al Gore, Justice Sandra Day O'Connor was said to have looked stricken and uttered, "This is terrible."[106] A Gore victory in the 2000 Presidential elections would have prolonged Republican Justice O'Connor's stay in the Supreme Court for presumably four more years because she did not want to hand her seat to a Justice aligned with the Democrats.[107] Justice Antonin Scalia, in a most recent television interview, broke with traditional answers on his possible retirement. Exasperated, he said would not want his replacement to undo what he had accomplished in the Court. Although anecdotal in nature, these examples highlight the politics that

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[99] James DiTullio & John Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1101 (2004).

[100] *Id.*

[101] Calabresi & Lindgren, *supra* note 5, at 805.

[102] WARD 8, *supra* note 26.

[103] *Id.*, at 60-61.

[104] *Id.*

[105] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 4-5 (2005 ed.).

[106] JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 167-169 (2007).

[107] *Id.*

plagues the Supreme Court with Justices being able to direct, if not dictate, their successor and thus, the ideology of the Court.

The problem of strategic retirement under a life tenure system takes the form of Justices waiting to retire even if mental or physical conditions have long precluded them from performing their judicial functions. If Justices decide to hang on to their position in the hope that a like-minded president will arrive to "rescue his seat" in the Supreme Court, the costs to them waiting out a few more terms on the Bench are not high.[108] An elderly justice can delegate most of his work to law clerks, while continuing to enjoy the pleasures of his rank.[109] The manageable workloads and pleasant working conditions, as earlier discussed, further promote a system where Justices have greater discretion in timing their departures.[110] Despite the deterioration of their physical health or mental faculty, Justices under the life tenure system are even given greater opportunities, if not more incentives, to strategically time their retirements in order to favor a chosen political ideology. Armed with simple facts regarding the electoral calendar and the partisan composition of the presidency and Senate, a policy-motivated justice can reasonably predict whether an ideologically desirable successor is likely to be appointed.[111] Hence, Justices are able to yield a final weapon in their arsenal to influence history by departing in more auspicious administrative climates, or, worse, by frustrating a non-aligned President with their stubborn refusal to vacate their seats.

The decision to leave can be the final act of partisanship that Justices perform that undermines its independence from political considerations. Indeed, partisanship has become the chief organizing factor for departing Justice.[112] This is a problem in need of an immediate solution because it presents far-ranging implications for the composition of the Court that extend beyond the tenures of the individual Justice.[113]

D. Non-Use of Two Other Checking Mechanisms

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[108] Farnsworth, *supra* note 83, at 264-65.

[109] *Id.*

[110] WARD, *supra* note 26, at 247.

[111] Terri Peretti & Alan Rozzi, *Modern Departures from the U.S. Supreme Court: Party, Pension or Power?*, 30 QUINNIPIAC L. REV. 131, 135-146 (2011).

[112] WARD *supra* note 26, at 9.

[113] DiTullio & Schochet, *supra* note 99, at 1110.

The controversies surrounding these modern challenges gain more prominence, especially when we consider the unlikelihood that the two other checking mechanisms (impeachment and constitutional amendment) will be used to curb the disadvantages of a life tenure system.

First, impeachment is of no practical use in controlling the behavior of Supreme Court Justices in the United States.[114] Thomas Jefferson even characterized the ineffectiveness of impeachment as "a bungling way of removing judges – an impractical thing – a mere scarecrow."[115] In the entire American constitutional history, not a single Justice has ever been successfully impeached and removed from office by the Senate.[116] The last time the impeachment power was exercised in the United States was against Justice Samuel Chase in March 1804. Even then, the Senate acquitted him, as "his detractors fell four votes short of the necessary two-thirds."[117] This second safeguard against judicial misconduct has effectively become unavailing owing to the legislature's disinterest, if not reluctance, in exercising the burdensome and time-consuming impeachment power.

The third mechanism to check judicial power, constitutional amendment is likewise overly burdensome today. The vast political resources and capital necessary to accomplish it are daunting for any administration to take on. As pointed out by Professors Calabresi and Lindgren, in almost 217 years, the power of constitutional amendment in the United States has only been exercised four times to overturn specific decisions of the Supreme Court.[118] The most notable of these instances is, of course, the 1857 Dred Scott decision, where the Court ruled that African Americans were not citizens and thus, had no standing to sue in federal court. This ruling was the impetus for Congress in 1868 to adopt the 14th Amendment, which included a broad definition of citizens under the Citizenship Clause that would include African Americans. Successfully winning the adoption of any amendment to the American Constitution is extremely difficult, never mind the lengthy and highly

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[114] Calabresi & Lindgren, *supra* note 5, at 810.

[115] Mazza, supra note 8, at 153.

[116] Calabresi & Lindgren, *supra* note 5, at 810.

[117] ATKINSON, *supra* note 14, at 49.

[118] Oregon v. Mitchell, 400 U.S. 112 (1970), was overturned by the Twenty-Sixth Amendment. Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895), was overturned by the Sixteenth Amendment. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), was overturned by the Fourteenth Amendment. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), was overturned by the Eleventh Amendment. (Calabresi & Lindgren, *supra* note 5, n.108 at 87.)

complicated effort required of such an initiative.[119] Absent an effective check, the Supreme Court wields significant power to determine public policies in the petitions coming before it, based on the Justices' political proclivities without any fear of reversal by a future constitutional amendment. Although precedent and rationality of the laws are reasonable guideposts against radical legal positions, they would not temper Justices, who in extreme situations are willing to go rogue and run roughshod with their opinions and resort to wholesale judicial legislation.

The unrealistic exercise of impeachment power or constitutional amendment has shifted undue pressure to the last remaining check on the Supreme Court – the appointment process. The prolonged terms of the Justices and the infrequency of vacancies only ensure that political parties, lobbyists and other stakeholders will overly scrutinize every appointment to the Court, which disproportionately politicizes an already political process. The irregularity of vacancies in the United States Supreme Court means "that when one does arise, the stakes are enormous, for neither the President nor the Senate can know when the next vacancy might arise."[120] Absent any uniformity or consistency in the retirement of Justices, the appointment process will have to bear the brunt of public attention for every vacancy and may lead to more political compromises or accommodations in the selection of Justices.

These developments underscore the shortcomings of the system of life tenure in the United States. There is renewed interest in exploring other feasible alternatives to the terms of office granted to Justices that would still achieve the original purpose of securing judicial independence, but under a more democratically accountable framework.

III
Assessing the Mandatory Retirement System: The Controversies of the Philippine Experience

One of the proposals to replace the system of life tenure in the United States is the adoption of age-based criteria in limiting judicial terms, i.e.,

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[119] David Garrow, *Protecting and Enhancing the U.S. Supreme Court,* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 282 (Carrington & Cramton eds., 2006).

[120] Calabresi & Lindgren, *supra* note 5, at 813.

mandatory retirement ages for Justices. The system of mandatory retirement is not novel in the American experience since twenty-two states have adopted them for their own Justices or judges in the state supreme courts or superior courts. In these states, the mandatory retirement age ranges from 70 to 75 years old.[121] Even the United States Supreme Court has recognized that the mandatory retirement system of Minnesota for judges in the state supreme court is rational and does not violate the Equal Protection Clause of the American Constitution.[122] However, the experience of the Philippine Supreme Court with the mandatory retirement age serves as a cautionary tale for American policy-makers on the wisdom of adopting a similar system for their own Supreme Court. The mandatory retirement age (70 years old in the Philippines) does not provide adequate solutions to the challenges faced under the system of life tenure. Worse, it has even spawned its own set of controversies, specifically: (a) continued irregularity of vacancies, and (b) arbitrary determination of age, and (c) vulnerability to court capture by the Executive.

Brief Background of the Philippine Supreme Court System

The Philippine Supreme Court shares some similarities with its American counterpart because it draws much of its framework and structure from the latter. However, one distinctive feature of the Philippine model that deserves an important mention is the modified process of appointing Justices to the Supreme Court.

The modern Philippine Supreme Court traces its roots to the American colonial period. The Second Philippine Commission enacted the Judiciary Law (Act No. 136), which created the Supreme Court and gave it "genuine judicial independence, unlike the tribunals established earlier, which

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[121] These states include: Alaska, Arizona, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, South Dakota, Utah, Vermont, Wisconsin and Wyoming. *See* American Judicature Society, Methods of Judicial Selection, *available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last visited on Jan. 8, 2013).

[122] Gregory v. Ashcroft, 501 U.S. 452, 473, 111 S. Ct. 2395, 2408, 115 L. Ed. 2d 410 (1991).

were subservient to colonial, military or executive sovereigns."[123] When the Philippines was still under American rule, the Justices of the Supreme Court were appointed by the United States President,[124] upon advice and consent of the United States Senate.[125] From 1901 to 1935, majority of the Court was in fact American, [126] though early Chief Justices were mostly Filipinos. [127] Decisions of the Philippine Supreme Court were even subject to review by the United States Supreme Court.[128] The practice of judicial oversight continued as late as 1936, when the United States Supreme Court still entertained and acted on petitions for writs of certiorari in order to review the decisions promulgated by the Philippine Supreme Court.[129]

At present, the Philippine Supreme Court is comprised of a Chief Justice and 14 Associate Justices,[130] who sit either as an *en banc* court or in three divisions of five members each.[131] The membership of the Court has grown from nine Justices during the American colonial rule,[132] to 11 Justices under its first Constitution in 1935,[133] and finally increased to 15 under the 1973 Constitution.[134] The 15-member composition of the Supreme Court has been maintained under the existing 1987 Constitution. The Philippine Constitution expressly required that for any person to become a member of the Supreme Court, they must be: (a) natural-born citizens of the Philippines; (b) at least 40 years of age; (c) had been a judge of the lower court or in the practice of law in

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[123]Supreme Court of the Philippines, History of the Philippine Supreme Court, *available at* http://sc.judiciary.gov.ph/history.htm (last visited on Dec. 18, 2012).

[124] From 1901-1935, seven American Presidents (William McKinley, Theodore Roosevelt, William Howard Taft, Warren G. Harding, Calvin Coolidge, Herbert Hoover and Franklin Delano Roosevelt) would appoint a total of 33 Justices of the Philippine Supreme Court, including its first four Chief Justices – Cayetano Arellano, Victorino Mapa, Manuel Araullo and Ramón Avanceña.

[125] Act No. 235, § 9 (1902). This is the Philippine Organic Act.

[126] 21 out of the 33 Justices of those appointed by the US Presidents, or exactly 60% were Americans.

[127] *See supra* note 124.

[128] Act No. 235, § 10.

[129] Manila Gas Corporation v. Collector of Internal Revenue, 299 U.S. 571, Oct. 12, 1936; Unijeng v. People of the Philippine Islands, 299 U.S. 543, Oct.12, 1936; Bengzon v. Secretary of Justice and Insular Auditor of Philippine Islands, 299 U.S. 526, Oct. 12, 1936.

[130] CONST., art. VIII, § 4 (1).

[131] INTERNAL RULES OF THE SUPREME COURT (PHILS.), Rule 8, § 2 (2010).

[132] Act No. 2711. This is the Administrative Code of 1917.

[133] CONST. (1935), art. VIII, § 4.

[134] CONST. (1973), art. X, § 2(1).

the Philippines for at least 15 years; and (d) of proven competence, integrity, probity and independence.[135]

Following the example of the Framers of the American Constitution, the Philippines underscored the need for judicial independence for its own Supreme Court through the institution of a similar tri-partite system of democratic governance.[136] Philippine Chief Justice Enrique Fernando echoed the same sentiments of the American Framers in drawing a direct relation between institutional independence and a system of secured terms for Justices that would allow the Supreme Court to properly administer justice:

> The law may vest in a public official certain rights. It does so to enable them to perform his functions and fulfill his responsibilities more efficiently. It is from that standpoint that the security of tenure provision to assure judicial independence is to be viewed. It is an added guarantee that Justices and judges can administer justice undeterred by any fear of reprisal or untoward consequence. **Their judgments then are even more likely to be inspired solely by their knowledge of the law and the dictates of their conscience, free from the corrupting influence of base or unworthy motives. The independence of which they are assured is impressed with a significance transcending that of a purely personal right.** As thus viewed, it is not solely for their welfare.[137] (Emphasis supplied)

To achieve this, the "good behavior" language of the American Constitution was introduced in the first Philippine Constitution in 1935. However, a specific mandatory retirement age was added into the provision.[138] The mandatory retirement age of 70 was not changed in the 1973 Constitution[139] or the current 1987 Constitution.[140]

With the most recent appointment of Justice Marvic Leonen in November 2012, the average age of the Justices in the Philippine Supreme

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[135] CONST., art. VIII, § 7(1), 7(3).

[136] In re First Endorsement From Honorable Raul M. Gonzales, A.M. No. 88-4-5433, Apr. 15, 1988.

[137] De La Llana v. Alba, G.R. No. 57883, Mar. 12, 1982.

[138] CONST. (1935), art. VIII, § 9.

[139] CONST. (1973), art. X, § 7.

[140] CONST., art. VIII, § 11.

Court stands at 58 years old.[141] By the end of 2012, Justices are expected to serve the Court for 12 more years on average, but 11 of the incumbent Justices will retire in the next seven years.[142]

Curiously, 21 of the 24 Chief Justices of the Philippines, including incumbent Chief Justice Maria Lourdes Sereno, were sitting as Associate Justices when they were appointed to head the Supreme Court. The three Chief Justices,[143] who were not incumbent Justices at the time of their appointment, included (1) Chief Justice Cayetano Arellano, the first person to hold such position, (2) Chief Justice Victorino Mapa, who was then Secretary of Justice from 1913-1920, but previously served as an Associate Justice from 1901-1913, and (3) Chief Justice Jose Yulo, who was Speaker of the House when he was appointed by the Japanese military commanders during the World War II.[144] Since 1945, none of the Chief Justices have been appointed from outside the Court. In sharp contrast, only five of the 17 Chief Justices of the United States were elevated from their position as Associate Justice to Chief Justice,[145] the most recent being Chief Justice Rehnquist. In the Philippines, the appointment of a Chief Justice from within the ranks presents a myriad of issues, since it allows the President to elevate a closely allied justice to head the third branch of government and in addition, to fill another vacancy with a like-minded replacement to populate the Court.

One of the most distinct characteristics of the Philippine Supreme Court is the shift of the appointment power from the legislature to a separate constitutional body – the Judicial and Bar Council ("JBC"). The JBC is an independent body created under the 1987 Constitution and is composed of seven members representing various stakeholders in the appointment process.[146] Although Presidents continue to participate in the process of selecting Justices to the Philippine Supreme Court, they can only select from a list of

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[141] *See* Annex 2: Table of Current Members of the Philippine Supreme Court.

[142] *See* Annex 2: Table of Current Members of the Philippine Supreme Court.

[143] Supreme Court of the Philippines, Biographies of Philippine Chief Justices, *available at* http://elibrary.judiciary.gov.ph/supremecourtjustices/chiefjusticelist/ (last visited on Dec. 21, 2012).

[144] Chief Justice Cayetano Arellano was appointed on June 1, 1901.

[145] Chief Justices John Rutledge (Associate Justice 1789-1791, Chief Justice 1795); Eduard Douglas White (Associate Justice 1894-1910, Chief Justice 1910-1921); Charles Evans Hughes (Associate Justice 1910-1916, Chief Justice 1930-1941); Harlan Fisk Stone (Associate Justice 1925-1941, Chief Justice 1941-1956); and William Rehnquist (Associate Justice 1972-1986, Chief Justice 1986-2005). *See supra* note 18.

[146] CONST., art. VIII, § 8(1).

nominees submitted by the JBC.[147] Under the previous system in the 1935 Constitution, the appointment of Justices was subject to the consent and approval of the Commission on Appointments, which was composed of members of the House of Representatives and Senate.[148] Resort to the Commission on Appointments was abandoned in favor of the JBC, "largely in response to the criticism that the old system was a rich ground for political patronage," according to one of the constitutional Framers.[149] With a drastically limited membership, the JBC assumed the responsibility of vetting applicants to any judicial vacancy[150] and replaced the more politically charged atmosphere of confirmation hearings by the previous bicameral Commission on Appointments.[151]

Although the order of appointment is reversed in the Philippine context, i.e., Presidents nominate or appoint Justices only after the JBC submits a list of at least three nominees, the objective of appointment as a democratic check against the Supreme Court remains. The JBC, whose members include those with constituencies from the courts, Congress, the Department of Justice, legal profession, law schools, retired Justices and the private sector, must vet nominees who are capable and beyond reproach to the Supreme Court. Meanwhile, Presidents are limited in their choice of Supreme Court Justices to the nominees selected by the JBC. Except for the 90-day deadline to fill the vacancy, there is no explicit constitutional prohibition against dissatisfied Presidents from sending back the list of nominees to the JBC in order include more names. Nevertheless, when past Presidents rejected the nominees of the JBC and returned the list, the JBC stood firm in its constitutional duty and responded by submitting the same list without any changes.[152]

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[147] CONST., art. VIII, § 9.

[148] CONST. (1935), art. VIII, § 5.

[149] Fr. Joaquin G. Bernas, S.J., *Why a Judicial and Bar Council*, PHIL. INQUIRER, posted on Jun. 25, 2012, *available at* http://opinion.inquirer.net/31391/why-a-judicial-and-bar-council.

[150] CONST., art. VIII, § (8)1.

[151] Chavez v. Judicial and Bar Council, G.R. No. 202242, Jul. 17, 2012.

[152] *Few Limits to President's Power of Judicial Appointment,* posted in ABS-CBN News Website on Jun. 12, 2012, *available at* http://www.abs-cbnnews.com/-depth/06/11/12/few-limits-president%E2%80%99s-power-judicial-appointment (last visited on Dec. 21, 2012).

Given the brief overview of the appointment process in the Philippine Supreme Court, we now proceed to the controversies that have arisen because the mandatory retirement system for Supreme Court Justices.

A. Continued Irregularity of Vacancies

A system of mandatory retirement age may resolve to some extent the uncertainty of determining when a Justice will leave the Bench. It removes the discretion to retire from Justices under a life tenure system and minimizes the dangers of senile Justices from hanging on their positions after their physical and mental health has deteriorated. Although a mandatory retirement age increases the actual turnover of Justices in the Supreme Court,[153] a measure of irregularity in the vacancies and appointments, which is complained of under the life tenure system, still remains.

A mandatory retirement system for Supreme Court Justices does nothing to even out appointments among presidents.[154] From the time that the number of sitting members of the Philippine Supreme Court increased to fifteen in 1973, no discernable pattern can be ascribed as to the frequency of appointments.[155] Although the retirement age makes it easy to determine when a vacancy will arise, the randomness of its occurrence may give some Presidents a disproportionate share in naming Supreme Court Justices. An element of chance persists under a mandatory retirement system since a vacancy is determined by the appointee's birthdate. Whereas life tenure gave the question of retirement to the discretion of the Justices, the mandatory retirement would subject the system of appointments to the Supreme Court to an erratic and irregular procedure. Although the element of discretion in retirement is removed by pegging an appointee's term to his or her birthdate, it simply transfers the power of opening up vacancies in the Bench to the

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[153] Terri Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments,* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 444 (Carrington & Cramton eds., 2006).

[154] Meador, *supra* note 16, at 123.

[155] Ferdinand Marcos (21 appointments); Corazon Aquino (27 appointments); Fidel V. Ramos (14 appointments); Joseph Ejercito Estrada (7 appointments); Gloria Macapagal Arroyo (24 appointments); Benigno Aquino (5 appointments by the end of his term on 2016). (*See* List of Supreme Court Justices *available at* http://elibrary.judiciary.gov.ph/supremecourtjustices/listofjustices last visited on Jun. 2, 2013).

appointing power. With astute planning, a President can exploit the appointment process and be able to appoint a majority of the members of the Supreme Court. In fact, under the Court's present configuration, 11 out of the 15 Justices are appointees of President Arroyo. Indeed, President Arroyo named 24 Justices during her term from 2001-2010, including three Chief Justices. Meanwhile, her successor, President Benigno Aquino III, has named only 4 Justices, including the incumbent Chief Justice, and he will be able to name one more Justice before the end of his term in 2016.

It is not denied that Justices, once appointed to the Bench, should ideally become independent of the appointing power and should harbor no other allegiance than to the Constitution upon their assumption to office. Since they are not subject to re-appointment and are difficult to remove by impeachment, Justices enjoy a level of independence in deciding cases, even if their opinions are antagonistic to the policies or politics of the appointing President. However, some Justices have been criticized of having been afflicted with the so-called "first-year syndrome." That is, they ordinarily vote in favor of the interests of the appointing President in petitions raised before the Supreme Court.[156] The phenomenon allegedly stems from the Filipino culture of paying debts of gratitude ("*utang na loob*").[157] In the case of Philippine Justices, the gratitude over their appointment is demonstrated by deciding cases in favor of the interest of the appointing President. To be fair, some Justices appointed by former President Arroyo have been seen as having weaned themselves from the "first year syndrome" and have voted against her interests in the past. In a 2008 survey, Justices Consuelo Ynares-Santiago, Antonio Carpio and Conchita Carpio Morales were noted to have voted against the perceived interests of the Arroyo administration in more than half the 21 significant cases surveyed.[158] Nevertheless, the sheer number of Arroyo-appointed Justices is formidable, and the danger of a majority block voting in favor of the appointing power still looms. Despite the few outliers in their ranks, a loyal majority of appointees can possibly push decisions to protect the

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[156] Aries Rufo & Purple Romero, *In the High Court Some Justices are More Loyal than Others*, posted in ABS-CBN News.com/Newsbreak on Oct. 23, 2008, *available at* http://www.abs-cbnnews.com/special-report/10/23/08/high-court-some-Justice-are-more-loyal-others.

[157] *Id.*

[158] Purple Romero, *Voting Pattern of Supreme Court Justices*, posted in ABS-CBN News.com/Newsbreak on Oct. 23, 2008, *available at* http://www.abs-cbnnews.com/research/10/23/08/voting-pattern-supreme-court-justices (last visited on Jun. 2, 2013).

interests of their patron. Any proposed alternative to the mandatory retirement age in the Philippines must be able to evenly space out appointments among the Presidents to obviate any possibility of the "first-year syndrome" having any long-term debilitating effect on the independence of the institution.

B. Arbitrary Determination of Age

A mandatory retirement age for Justices is arbitrary, whether it is set at 70, 75 or 100 years old. Any age will either be too low or too high, depending on the Justice in question.[159] As Chief Justice Hughes laments, determining the precise age in which judges would cease to be effective in judicial service involves extreme hardship.[160] This holds true for the Philippines, because each individual justice upon reaching the age of 70 has a different physical and mental disposition depending on their lifestyles and other factors. Some may be sickly and in need of constant medical assistance or treatment. Yet others may still have years of productivity in them. Cutting the term of a Philippine Justice to a randomly determined age is undeserved since the one-size-fits-all imposition fails to take into account each Justices' individual capacities for public judicial service. This sweeping bias against Justices of advanced age has been enshrined as a rule in the JBC. In the selection of nominees to a vacancy in the Supreme Court, the JBC consider the age of the nominees with a view to discouraging appointments of those who would not be able to serve a judicial term for a reasonably sufficient time.[161] What "a reasonably sufficient time" is, however, not precisely defined. The mandatory retirement age is indeed "unfair in that it would blindly discriminate against judicial service on the basis of age in a harsh way, one that does not take into account the actual mental condition of a given individual."[162]

There is no basis to make a sweeping generalization that reaching the mandatory retirement age incapacitates a person from performing judicial work. Those who have recently left the Bench continue to lead productive lives even after 70 years old. Chief Justice Hilario Davide, Jr., (76 years old) went on to serve as Ambassador of the Philippines to the United Nations (2007-2010) and would have served as the Chairman of the Philippine Truth Commission

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[159] WARD, *supra* note 26, at 242.

[160] Hughes, *supra* note 1.

[161] RULES OF THE JUDICIAL & BAR COUNCIL, Rule 8, § 2.

[162] Calabresi & Lindgren, *supra* note 5, at 817-818.

in 2011, had it not been struck down as unconstitutional. Justice Jose Melo (80 years old) was Chairman of the Commission on Elections from 2008-2011 and successfully oversaw the first automated national elections in the country. Justice Florentino Feliciano (84 years old) retired early from the Court in order to served as one of the first nine judges in the Appellate Body of the World Trade Organization for two terms from 1995-2001 and is now of counsel to his former law office. Ending the terms of all Justices upon reaching a mandatory retirement age (even if scientifically or statistically pre-determined) makes an arbitrary exclusion without considering the evolving capacities for public service of each individual Justice.

A system of mandatory retirement does not take into consideration the possibility of improving life expectancies in the future. The productivity and quality of judicial performance declines with age, but such decline does not begin to set in until an unusually advanced age.[163] With improvements and continuing advancement in medical science, it is not far-fetched that in the next few decades, life expectancy would vastly improve as it has in the past century. It seems regrettable that the Philippines would forego the benefits of being served by any individual Justice who can medically be expected to live productively until ninety simply because of a randomly selected mandatory retirement age. To tie up future generations to an arbitrary retirement age may deprive them of great minds who could have sat longer on the Bench, if not for their having reached their 70th birthday. This is not to say that brilliant Justices should be allowed to sit for life or that less admirable Justices be kicked-out as soon as possible even before retirement age. One advocates that each individual Justice should simply be given an equitable amount of opportunity to contribute his or her judicial skills in the Supreme Court regardless of his or her age.

Aside from the minimum age of 40 years old and requirement of 15 years of law practice, presidents have wide discretion to appoint both young and old lawyers alike to the Supreme Court. Justice Jose Campos, Jr., was 69 years old, when he was appointed to the Supreme Court in 1992 and served only eight months before he retired.[164] Meanwhile, Justice Leonen, the latest addition to the Court, is one of the youngest. He was 49 years old at the time

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[163] Joshua 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. 161,167 (2006).

[164] Profile of Associate Justice Jose Campos, Jr., *available at* http://elibrary.judiciary.gov.ph/supremecourtjustices/associatejustice/78 (last visited on Jan. 8, 2013).

of his appointment and is expected to serve the Court for 21 years.[165] The subjective decision of the President to appoint extremely advanced or young Justice creates undesirable consequences under a system of mandatory retirement.

For old appointees, an appointment to the Supreme Court is generally the final cap to a long-judicial career, from being a trial court judge to an appellate court justice and finally to the Supreme Court. In practice, Presidents "dole out" appointments to the Supreme Court to distinguished appellate court justices as a reward, without regard as to how short they serve in that capacity. Aside from the prestige and distinction of the position, older appointees benefit from the appointment from an increase in their retirement packages, which they can fully enjoy in a few years time. Hence, it is unsurprising that a number of Justices who come from the judicial ranks are appointed at an advanced age and serve the Supreme Court an average of only six years before they retire at 70 years old.[166] In fact, eleven of the current Justices of the Court had served extensively in the lower or appellate courts prior to appointment.[167]

The brief tenures of Justices of advanced ages pose added pressures on the already full dockets of the Philippine Supreme Court. Unlike the American system where the Chief Justice or the most Senior Associate Justice assigns the writer of the court's opinion during the deliberations, the merits of the petitions in the Philippine Supreme Court are immediately assigned by raffle to one of the fifteen Justices,[168] either in the Court *en banc* or to one of the three divisions. The designated Member-in-Charge shall oversee its

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[165] *See* Annex 2: Table of Current Members of the Philippine Supreme Court.

[166] The six-year average is based on the number of years served of all 69 Justices who have since retired after the Court increased its number to fifteen members in 1973, from Justices Estanislao A. Fernandez (October 29, 1973 – March 28, 1975) to Chief Justice Renato C. Corona (April 9, 2002 – May 29, 2012).

[167] Justices Presbitero J Velasco, Jr., Teresita Leonardo-De Castro, Arturo B. Brion, Diosdado M. Peralta, Lucas P. Bersamin, Mariano C. Del Castillo, Martin S. Villarama, Jr., Jose P. Perez, Jose C. Mendoza, Bienvenido L. Reyes and Estela M. Perlas-Bernabe.

[168] INTERNAL RULES OF THE SUPREME COURT (PHILS.), Rule 7, § 1. "Every initiatory pleading already identified by a G.R. or a UDK number shall be **raffled** among the Members of the Court. The Member- in-Charge to whom a case is raffled, whether such case is to be taken up by the Court en banc or by a Division, shall oversee its progress and disposition unless for valid reason, such as inhibition, the case has to be re-raffled, unloaded or assigned to another Member." Emphasis supplied by the author.

progress and eventual disposition,[169] and shall prepare and circulate a draft decision for approval of the other members, after discussing its merits during the *en banc* or division session. Hence, it is not uncommon that one Justice is responsible for as many as 500 to 1,000 petitions. Although each chamber has as many as 10 court attorneys working full time, career Justices who are appointed for such a short time find it difficult to clear all their caseloads and keep up with the deluge of incoming petitions before they reach the mandatory retirement age. When an old Justice consequently retires after sitting in the court for less than five years, the newly appointed justice who replaces them "inherits" the burden of the large caseload left by the retiring justice. Worse, this neophyte Justice may receive more cases from the other fourteen Justices, under an averaging formula for the purpose of equitably distributing the number of cases per Justice.[170] This scheme not only discourages efficient Justices from disposing their caseloads, it likewise has been criticized as a major source of delay for some petitions that have been passed on from one retiring Justice to another.

On the other hand, it is only in the past few years that Philippine Presidents have been increasingly appointing younger and younger Justices. The average age at appointment of the incumbent Members of the Philippine Supreme Court is at 62 years old.[171] However, three of them were less than 52 years old when they were appointed, a decade younger than the current average. Barring any untimely death or removal by impeachment, ten of the eleven Arroyo-appointed Justices will outlast the term of President Benigno Aquino III, which expires on 2016.[172] In similar vein, three out of the four current appointees of President Aquino will outlast his successor's six-year term from 2016-2022; two of the three will even outlive the succeeding president, whose term is set to expire on 2028.[173] As explained earlier, this scenario has grave implications to the power of later presidents to make appointments on the Supreme Court.

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[169] Rule 7, § 1.

[170] Rule 2, § 10.

[171] Chief Justice Maria Lourdes Sereno (50), Senior Associate Justice Antonio Carpio (52), and Justice Marvic Leonen (49).

[172] Justice Roberto Abad will retire on May 22, 2014, during the term of President Benigno Aquino III.

[173] Chief Justice Maria Lourdes Sereno (retires on July 2, 2030), Justice Estela Perlas-Bernabe (retires on May 14, 2022), and Justice Marvic Leonen (retires on December 29, 2032).

There are certain advantages in appointing younger lawyers to the Court since their judicial philosophies will likely reflect the current generation and not of an older one. However, the prolonged tenure of younger Justices (possibly three decades if one is appointed at 40 years old) may have the effect of demoralizing career judges who are deprived of a promotion to a higher position. Aspiring for a seat in the Supreme Court is a significant motivating factor for lower court judges to perform well and maintain a reputation for integrity and excellence during their career. Without a professional incentive, lawyers would be all the more discouraged to take on the responsibilities and functions of low-paid judges. If one wants to get appointed to the Supreme Court as soon as they hit the minimum age of 40 years old, it would be more practical or efficient for scheming lawyers to resort to political patronage instead to secure the prized appointment in the Bench, rather than going through the arduous judicial track.

The system of mandatory retirement is a definite improvement from the uncertainty of the life tenure system. Yet, it still possesses the disadvantage of using an age-based term limit that is prone to chance depending on the birthdate of the appointed justice. In the Philippines, the disadvantage of the mandatory retirement system is highlighted by the extreme situations of appointing either a nearly retiring career judge or a novice lawyer to the Supreme Court. Any alternative measure needs to move away from using age as a standard and consider an age-neutral norm in setting the length of the terms of the Justices.

C. Vulnerability to Court Capture: The Arroyo Supreme Court

A mandatory retirement system for Justices of the Supreme Court makes the institution vulnerable to "court capture" or the improper appointment of all or a majority of Justices by a single President. The most worrisome characteristic of the system is the open possibility of politically savvy presidents engineering circumstances that would allow them to appoint a substantial number of the Justices to the Bench. The successful court packing implemented by President Arroyo during her term from 2001-2010 strongly demonstrates how this could be achieved with detrimental costs to the public's perception of the independence of the Supreme Court.

Maneuvering the intricacies of the mandatory retirement system in the Supreme Court, President Arroyo was able to appoint a mix of old and young Justices from 2001 to 2010. During her term, she had occasion to appoint 24 Justices,[174] including three Chief Justices.[175] Her record is surpassed only by President Marcos, who had the benefit of a 20-year martial law rule and the increase in the number of Justices to the Supreme Court upon ratification of the 1973 Constitution (from 11 to 15 Justices). President Arroyo's record of Supreme Court appointments approximates the number of appointments made by President Corazon C. Aquino, who had the benefit of courtesy resignations of all the Justices after the People Power Revolution in 1987. When President Arroyo's term finally ended in June 2010, 14 of the 15 incumbent Justices of the Supreme Court owed their appointments to her.

In addition, six of President Arroyo's appointees were of such an advanced age that they would reach the retirement age of 70 years old even before President Arroyo would finish her term in 2010.[176] President Arroyo was also given a "bonus" appointment with the early retirement announcement of Justice Alicia-Austria Martinez that was made effective on April 30, 2009, a year before she was set to mandatorily retire.[177] Four of those named to replace the seven retiring Justices were appointed a year before President Arroyo's term was to expire.[178] The benefit of naming Justices nearing retirement but before the end of the presidential term is two-fold: (a) as mentioned earlier, Presidents can award positions to loyal allies in the judiciary; and (b) Presidents in the sunset years of their terms would be permitted to maximize their appointments by naming Justices who would outlast the succeeding President's six-year term.

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[174] Namely, Justices Antonio Carpio, Alicia Austria-Martinez, Renato Corona, Romeo Callejo, Jr., Conchita Carpio-Morales, Adolfo Azcuna, Dante Tinga, Minita Chico-Nazario, Cancio Garcia, Presbitero Velasco, Jr., Antonio Eduardo Nachura, Ruben Reyes, Teresita Leonardo-De Castro, Arturo Brion, Diosdado Peralta, Lucas Bersamin, Mariano Del Castillo, Roberto Abad, Martin Villarama, Jose Perez, Jose Mendoza.

[175] Chief Justices Artemio Panganiban (2005), Reynato Puno (2006), and Renato Corona (2010).

[176] Justices Romeo Callejo, Sr., (2002-2007), Adolfo Azcuna (2002-2009), Dante Tinga (2003-2009), Minita Chico-Nazario (2004-2009), Cancio Garcia (2004-2007), and Ruben Reyes (2002-2009).

[177] Justice Alicia Austria Martinez, who was appointed on April 12, 2002, was supposed to mandatorily retire on December 10, 2010.

[178] Justices Lucas P. Bersamin, Mariano del Castillo, Roberto Abad and Jose Mendoza.

Faced with a crisis of legitimacy during the latter part of her term because of allegations of electoral cheating, President Arroyo relied heavily on the Supreme Court to defend her against the many issues and problems that plagued her presidency, and packed the Supreme Court with her former officials and allies.[179] Loyalty was said to have became a discernable criterion for her appointments to the Supreme Court as "political insecurity hobbled her administration" in her later years.[180] Although a few of the "Arroyo-appointed" Justices have weaned themselves from the "first-year syndrome" and demonstrated their independence from their principal, a formidable majority block continued to sit on the Supreme Court and was claimed to consistently vote for the interests of President Arroyo in a few crucial petitions.[181] Opposition groups lamented how President Arroyo pushed the boundaries of the system of mandatory retirement so successfully as to provide her ample judicial coverage for any suits that would be filed against her, even after her term ended.

Another controversial aspect of the mandatory retirement age is the possibility of "midnight appointments" to the Supreme Court. Under the present Philippine Constitution, the President is generally prohibited from making appointments two months immediately before the next presidential election and up to the end of his term.[182] The rationale behind the prohibition was to eliminate the previous practice of outgoing Presidents of appointing officials a day before their term expires to the prejudice of incoming Presidents who would then be unduly bound by these "midnight" appointments.[183] The occasion for a midnight appointment arose recently in the Philippines when Chief Justice Reynato S. Puno was set to retire on May 17, 2010, seven days after the 2010 Presidential elections were conducted. Despite the clear prohibition against appointing Chief Justice Puno's replacement within the prohibited period, allies of President Arroyo pressed the JBC to submit a list of nominees to the impending vacancy. Various sectors, organizations and lawyers groups questioned the matter with the Supreme Court. Except for a lone dissent by Justice Conchita Carpio-Morales, a Court dominated by Arroyo

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[179] *See supra* note 176.

[180] *See supra* note 156.

[181] Aries Rufo and Purple Romero, *Voting Pattern of Supreme Court Justices Shows They Play Politics*, posted in ABS-CBN News.com/Newsbreak on Oct. 22, 2008, *available at* http://www.abs-cbnnews.com/special-report/10/22/08/voting-pattern-supreme-court-justices-shows-they-play-politics (last visited on Dec. 18, 2012).

[182] CONST. art. VII, § 15.

[183] Aytona v. Castillo, G.R. No. 19313, 4 SCRA 1, Jan. 19, 1962.

appointees ruled that the constitutional prohibition on midnight appointments did not cover judicial appointments, and hence, ordered the JBC to submit a list of nominees for Chief Justices to the President.[184] The phenomenon of midnight judicial appointment is far more common than expected, as in fact another such situation will arise in the near future. Justice Martin Villarama, Jr., will retire on April 14, 2016, which is within the two-month period preceding the next Presidential elections in May 2016. Whether President Aquino will rely on the Court's decision and proceed to appoint Justice Villarama's replacement remains to be seen. Notwithstanding the Court's decision, the existing degree of unpredictability of vacancies based on the system of mandatory retirement will continue to intensify political tensions between the outgoing and incoming Presidents, especially when the birthdates of retiring Justices fall within prohibited period of midnight appointments.

D. Inadequacy of the Checking Mechanisms in the Philippines

The shortcomings of the mandatory retirement system in the Philippine Supreme Court and the pressing need to seek for other alternatives are only underscored by the inadequacy of the checking mechanisms to ensure judicial independence and prevent abuse in the appointment process. First, the JBC, which was conceived to insulate judicial appointments from the politics of the Commission on Appointments, has been criticized for being prone to political pressure[185] and for its lack of independence from the Executive.[186] Some of the *ex-oficio* members of the JBC, e.g., Secretary of Justice and Congressional representative, ordinarily have strong political ties with the Executive. Meanwhile, the four regular members are subject to infinite re-

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[184] De Castro v. Judicial and Bar Council, G.R. Nos. 191002, 191032, 191057, 191149 and A.M. No. 10-2-5-SC, Mar. 17, 2010. The Supreme Court held that constitutional prohibition against midnight appointments by the President did not apply to appointments to fill a vacancy in the Supreme Court or to other appointments in the judiciary.

[185] Aries Rufo, *Eyes on the JBC*, posted in the Rappler website on Mar. 17, 2012 and updated on Mar. 19, 2012, *available at* http://www.rappler.com/newsbreak/2625-eyes-on-the-jbc (last visited on Jan. 9, 2013).

[186] *JBC Partly to Blame for Problems in the Judiciary* posted in ABS-CBN News.com on June 12, 2012, *available at* http://www.abs-cbnnews.com/-depth/06/10/12/jbc-partly-blame-problems-judiciary (last visited on Dec. 21, 2012).

appointment by the President to four-year terms and maybe susceptible to influence and political accommodations in the choice of nominees.[187]

Second, the exercise of the power of impeachment in the Philippines remains a "bungling" process that is not easily resorted to. In 2012, the Philippine Senate successfully completed its first impeachment trial and overwhelming voted to remove then Chief Justice Corona from the Supreme Court for failing to declare millions of dollars in assets. However, this political feat was only achieved through a convergence of extraordinary circumstances, such as exposed transgressions, an overwhelming majority in the House and strong public pressure on the Senate Impeachment Tribunal, that no one expects to be repeated anytime soon.[188]

Finally, constitutional amendment as a third checking mechanism is likewise inadequate since it will not be able to correct the previous judicial decisions that favored the interests of President Arroyo. Of course, any amendment to the constitution will only have prospective application and cannot reach back in the past to correct a mistake that has already been committed. The Supreme Court's decision carving out an exception to the midnight appointments may be "corrected" by a constitutional amendment that would expressly include future judicial appointments from the prohibition, but cannot possibly retroact to a past appointment. In any case, the process of constitutional amendment will have to undergo the difficult processes before it can be enacted. Much like impeachment, a constitutional amendment would require considerable public and political support. However, the public's distrust of politicians who are largely perceived to favor amending the current Constitution only for purposes of removing term limits on elected positions may make this third check on the judiciary seem impractical, if not improbable in the near future.

III
Fixed-Year Term Limits for American and Philippine Supreme Courts

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[187] Rufo, *supra* note 185.

[188] Andrei Medina, *Belmonte: Impeachment Case vs. SC Justice Del Castillo Will Not Be Elevated to Senate* posted in the website of GMA News Network on Jun. 1, 2012, *available at* http://www.gmanetwork.com/news/story/260279/news/nation/belmonte-impeachment-case-vs-sc-justice-del-castillo-will-not-be-elevated-to-senate (last visited on Dec. 21, 2012).

Fixed-year term limits for Justices offer greater advantages and avoid the substantial weaknesses of the life tenure in the United States and mandatory retirement in the Philippines. Term limits of a fixed time duration (say, eighteen years, as proposed by Calabresi and Lindgren[189]) offers major improvements for both countries in terms of the regularity of vacancies and appointments.

For the United States, the proposal offers: (1) enhanced predictability of vacancies that leads to the stability of the Court in terms of the appointment process; (2) minimization of the politicization of the appointment process; and (3) strengthened judicial independence through a more democratically accountable process.

For the Philippines, fixed-year term limits for Supreme Court Justices provide the following advantages: (1) elimination of the arbitrariness of a mandatory retirement age; (2) preventing the concentration of appointments to a single President, including the problems of "bonus" appointments and midnight appointments; and (3) reserving the exercise of the impeachment power for extremely serious misconduct.

A.
Untied States Supreme Court

1. Enhanced Predictability of Vacancies and Stability in the Supreme Court

Judicial independence is not an unqualified good.[190] It must be balanced with a mechanism that allows for the exercise of a check on the Court that is predictable and regularly available. Fixed-year terms will give the United States the best assurance of that kind of regularity so that each vacancy in the Supreme Court will occur like clockwork. Removing the randomness of vacancies in the current system of life tenure will help stabilize the process of selecting and appointing Justices in the Untied States. Hence, the judiciary will resemble the other branches in that judicial appointments would follow a definite and regular cycle of fixed-year terms. Allowing Justices themselves to determine when to relinquish a public office is anathema to a democratic

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[189] Calabresi & Lindgren, *supra* note 5.

[190] Calabresi & Lindgren, *supra* note 5, at 813.

system, especially when compared to the executive and legislative branches, which are subject to periodic renewals of electoral mandates.

In the United States, fixed-year term limits would remove from the Justice the discretion to determine for themselves when they will retire under the current life tenure system. With fixed terms, Justices shall now have definite dates of departure.[191] They will no longer be able to prolong their tenure in the Court beyond the predetermined number of years. Gone will be the days when members of the Court can vacillate on their decision to leave the Bench or enter into retirement deals with outgoing Presidents. Fixed-year terms will also eliminate the problem of overstaying Justices who suffer from serious physical, mental or health disabilities.

More significant to the substance of their judicial function, all Justices will now have an equal opportunity to exert influence and expound legal ideologies during their tenure.[192] Regardless of whether they are young or old at the time of appointment, each of them will have the same number of years to serve in the court, barring any sudden death, early retirement or removal by impeachment. The additional years that a Justice hopes to gain under a life tenure system in being appointed at an early age will be eliminated. Hence, fixed-year terms would remove a President's inclination to nominate younger Justices for purposes of extending their influence on the United States Supreme Court. Each appointment a President makes in the Supreme Court will have the same time and opportunity to further his or her political ideology in the judiciary, without prejudice to the same benefit being extended to other future Presidents.

Although fixed-year term limits would make young and old nominees stand at parity with each other in terms of age, requiring a minimum age or number of years of experience would complement the proposed system. Judging, especially in the United States Supreme Court, should be viewed as a terminal job rather than a springboard to another career.[193] Hence, Justices should be appointed at an age sufficiently advanced to make it unlikely that they will change careers,[194] especially when they step down from office at the end of the eighteen-year term. There are ethical concerns for example of a Justice, who is appointed at 35 years old and after retiring from the Bench at

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[191] DiTullio & Schochet, *supra* note 99, at 1121.

[192] *Id.*

[193] Posner, *supra* note 82, at 193.

[194] *Id.*

53 years old, goes back to private practice by appearing before a lower court judge, or even presenting oral arguments before his colleagues at the Supreme Court. It is suggested that a minimum age (e.g., 40 years old) or a minimum number of years in the practice of law (e.g., 15 years) be added in the proposals for fixed-year term limits, similar to the present requirements under the Philippine system. Together with the requirements of minimum age and minimum number of years of practice, fixed-year term limits will offer broader Presidential discretion on their choice of nominees, without having the need to overly obsess on the candidate's longevity in the Supreme Court. Moreover, any future improvements in life expectancy due to advances in medicine will only contribute to broadening the pool to even older candidates, who can reasonably be expected to serve the full term. The age of the nominee will thus become less of a factor that it is now under the current life tenure system. The fixed-year term limits will hopefully place in sharper focus the other more important qualities of the candidate in the appointment process.

2. Minimizing the Politicization of Appointment Process

The political pressures that are made to bear on the appointment process under the life tenure system will be greatly lessened by the imposition of fixed-year term limits. To recall, the life tenure system shifted the decision of retirement to the Justices' individual discretion, which made vacancies rare and unpredictable. Hence, extreme partisan politics shows itself every time the United States undergoes the process of appointing a Supreme Court Justice since they cannot tell when the next vacancy will arise. The fixed-year term limits will alleviate some of those pressures since each vacancy and appointment will now become regular and predictable.

A fixed-year term limit for all Justices of the United States Supreme Court would reduce the intensity of partisan warfare in the confirmation process.[195] The uncertainty of vacancies under the proposed system is eliminated and the stakes associated with each appointment is reduced.[196] Removing the unpredictability of retirements under life tenure will contribute to mitigating the excessive fixation by stakeholders on sporadic vacancies. In recent decades, the contentiousness of the confirmation process in the United States has become a more pressing problem due primarily to the realization, in the aftermath of the Warren Court, that the Justices do have considerable

[195] Calabresi & Lindgren, *supra* note 5, at 835.

[196] *Id.*

power.[197] Certainly, it is not expected that the politics of judicial appointment would be completely removed under the new system since the partisan interests of the President, the Senators and other stakeholders will still contribute in determining the kind of person to be appointed to the Court. Although each appointment will always be crucial for the country, the fixed-year term system will nevertheless alleviate the nation's excessive anxiety over the process since they now know that another vacancy will certainly occur in a definite future time. The hope is that with frequent and regularized appointments the political interests would be evenly diffused as well. Regular appointments to the United States Supreme Court will ease the acrimonious process between partisan interests and may even "help promote the public's trust in the selection" process.[198]

The regularity of the vacancies will allow for an equitable distribution of appointments by Presidents. Equal opportunity to make judicial appointments gives Presidents an even hand in making their marks in the United States Supreme Court by affecting the Court's decisions.[199] Regularizing Supreme Court vacancies would eliminate occasional "hot spots" of multiple vacancies,[200] i.e., instances where a number of Justices leave the Supreme Court during the term of one President who will have an opportunity to name all their replacements. Hence, fixed-year terms will abate the unsavory convergence of circumstances where American Presidents during their terms of office would be able to nominate more than half the Court's members, e.g., Presidents William Howard Taft and Warren Harding, or the opposite, of not being able to make a single nomination at all, e.g., President Jimmy Carter.[201] With predictability and stability in the appointment process under a fixed term system, a President's influence on judicial appointment is equitably standardized and the politicization of the appointment process is minimized to an acceptable degree.

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[197] John Gruhl, *The Impact of Term Limits for Supreme Court Justices Had Term Limits Been in Place Throughout the Court's History, Many of the Best Justices Would Have Been Forced Off the Bench Too Soon*, 81 JUDICATURE 66, 72 (1997).

[198] Calabresi & Lindgren, *supra* note 5, at 812.

[199] Philip 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, 802 (1986).

[200] Calabresi & Lindgren, *supra* note 5, at 834.

[201] DiTullio & Schochet, *supra* note 99, at 1118.

3. Judicial Independence Subject to Democratic Accountability

A definite term of sufficient length achieves the same goal of securing judicial independence under a life tenure system. However, fixed-year term limits for Justices possess an additional advantage more in keeping with the American system of checks and balances – subjecting the appointment processes to greater and more frequent democratic accountability.

Under the life tenure system, Justices, non-elected public officials, have the ability to indirectly ordain their successors, as if they were abdicating royal monarchs. Fixed-year term limits would return that power to the sovereign people through their elected representatives in the Executive and Legislature.[202] The regular cycle of vacancies and appointments under the proposed system will invariably coincide with the cycle of elections of the President and the Senators. Members of the Supreme Court are made to reflect more deeply on the values and ideals shared by the prevailing electoral majority. Hence, it raises the likelihood that Justices will decide disputes in their present context based on a rational analysis of legal principles that better resonate with the current generation and not a generation three decades ago. One would wonder how the United States Supreme Court would decide cases of slavery or criminalizing sodomy[203], if its members had been of a different generation or era. That Justices are more ideologically in synch with the people that they serve becomes distinctly relevant in issues of pressing importance, where the nation itself is sharply divided and there is no overwhelming consensus on the matter, e.g., same-sex marriages, immigration laws and doctor-assisted suicide.

Enhancing popular control over the Court's constitutional interpretations under a fixed-year term system will also further deter its members from resorting to extreme positions and lead to better decisions than are produced under the current system of life tenure.[204] Regular changes in the composition of the Court will pose safeguards against its judicial actions from becoming too liberal or conservative for the people's taste. Decisions would be more reflective of the spirit of the times but without blindly surrendering to sheer populism, since the terms of the Justices are sufficiently lengthy and not subject to re-appointment. Absent the incentives to self-interested behavior in

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[202] *Id.,* at 1121.

[203] *See* Dredd Scott v. Sandford, 60 U.S. 393 (1856); Bowers v. Hardwick, 478 U.S. 186 (1986).

[204] Calabresi & Lindgren, *supra* note 5, at 834.

the usual sense, a judge will ideally render a decision genuinely in the interest of the public.[205] In truth, the political circumstances that gave birth to a Supreme Court nomination and confirmation would in time be lost to history.[206] As society begins to breaks away from its past, so should Justices by mandatorily surrendering their seats to those who are in a greater position to tap into the pulse of society and respond to its growing needs.

B.
Philippine Supreme Court

1. Eliminate Arbitrariness of Setting a Mandatory Retirement Age

Adopting fixed-year term limits in the Philippines will eliminate the randomness of vacancies of the mandatory retirement system arising from disparate appointment ages of the Justices. Although one can easily determine when a person will reach the mandatory retirement age, the current system still suffers from some degree of arbitrariness because no one can control when they are born. In fact, a President can solely base the appointment on a nominee's age with the mischievous intent of maximizing the number of appointments to the Supreme Court. Although all appointees are treated equally insofar as the age of retirement, the inequity in the mandatory retirement system arises on the part of the appointing power, who can select candidates who will retire before the end of the six-year presidential term and give them multiple opportunities to fill the Bench. Under a fixed-year term system, vacancies to the Philippine Supreme Court would be made to depend on a more definite and time-bound indicator rather than the arrival of a person's 70th birthday.

Under a fixed-year term system, Philippine Presidents will be provided a broader pool of candidates to choose from. In vetting applicants to the Supreme Court, the JBC need not strictly adhere to its inequitable policy of considering age and can make more holistic and age-neutral assessments of the applicants to the position. Thus, old and young alike will have identical standing in the vetting process. For career judges, they can still aspire under the proposed system to be appointed to the Supreme Court even if they are nearing retirement age. This will definitely give additional encouragement for

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[205] Posner, *supra* note 82, 196.

[206] Powe, *supra* note 6, at 1234.

career judges, if not improve morale among the judicial ranks. Experienced lawyers, who are within the range of retirement, can also view the fixed-year appointment as another career path when they eventually retire from their law offices. Aside from teaching, getting an in-house position, consulting or being a senior counsel in a law firm, retiring practitioners can opt to do public service in the Supreme Court with the benefit of a secured fixed term. The reclusive and pensive lifestyle of a Justice may be appealing to some retirees who still have the stamina and capacity to productively contribute to government and need not fear a short stint in the Bench. Meanwhile, young practitioners would be discouraged from immediately aspiring for an appointment to the Supreme Court during the early stages of their career since the length of the tenure would now been standardized. Appointment at a young age will not lead to additional years of tenure in the Bench. Considering the modest pay of Justices, younger lawyers would be better off maximizing their productive potential in private practice instead and postponing consideration for the Supreme Court at a much later time in their careers.

Fixed time-bound term limits would also assist in de-clogging of the Court's dockets in the Philippines, which is exacerbated by the arbitrary and abrupt departures of old Justices under a mandatory retirement system. It is the practice in the Philippine Supreme Court that the newly appointed Justice inherits the caseload of the Justice he or she replaces.[207] Hence, long-staying Justices enjoy the benefit of time in resolving the substantial number of cases they receive from their predecessors. In contrast, short-staying Justices would have to quickly adapt to the court's system and begin to unburden themselves of the inherited caseload. In addition, they must keep abreast of the increase in incoming petitions. Hence, an undue strain or burden is discriminately placed on an old Justice to perform the same level of work as a young appointee, but within a considerably shortened time frame. It is common that Justices who stay for less than five years have diminished chances of significantly reducing the inherited caseload. Worse, they may even pass on a legacy of inefficiency and long over due decisions to their replacements. The vicious cycle is repeated and even compounded if the incoming Justice is nearing retirement age as well.

Fixed-year term limits will also help abolish the operational pitfalls of the "reward system" for nearly retired appointees. The Philippines will no longer have to endure the troublesome consequences of successive short-time

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[207] INTERNAL RULES OF THE SUPREME COURT (PHILS.), Rule 2, § 10.

Justice to the dockets of the Supreme Court. Justices who are appointed at an advanced age, or career judges, would no longer be able to idly pass the time on the Bench until they reach 70 years old and simply pass their untouched caseloads to the next justice who would replace them. Since each Justice will have an equal amount of time to serve the Court, they will have greater opportunity to substantially dispose of their inherited caseloads and at the same time cope with the influx of incoming petitions. With a significant number years on the Bench, Justices with a moderate degree of diligence will have sufficient occasion to resolve the cases assigned to them and will even contribute to lightening the Court's heavy dockets by ending the cycle of bequeathing their workloads to their replacements.

2. Prevent Concentration of Appointments to a Single President

Adopting a system of fixed-year term limits will prevent a fortuitous concentration of vacancies on a single Presidential term and will instead evenly distribute appointments among several Presidents. Time-bound term limits would similarly enhance the democratic character of the process of judicial appointment in the Philippines, owing to the regularity of the vacancies in the Supreme Court.

Under the proposed system, each Philippine President would be able to appoint the same number of Justices to the Supreme Court during their six-year term. Since Philippine Presidents only have a single six-year term and are not subject to re-election, a system of eighteen-year terms for Justices can easily be installed in such a way that each President would be able to appoint five Justices during their term. In such a scenario, the first President elected upon effectivity of the proposed system will select the first five Justices, the succeeding second President will select the second five Justices and finally, the succeeding third President will choose the final five Justices. By the time the fourth President is elected, the terms of the first five Justices would be ending and thus, would give the newly elected President the chance to appoint a new batch of five Justices. The same goes for the fifth and sixth Presidents. Had the proposal been adopted during the term of President Arroyo, she would have been prevented from appointing nearly all the members of the Supreme Court during her entire term. Evenly spacing out the appointments of Justices would have averted any future plans of a court capture . However, it will take several years to undo the detrimental effects of Arroyo's court capture to public

perception since most of her appointees are quite young and will serve several more years before they reach 70 years old.

A situation of "bonus" appointments may arise when Justices opt to retire early for whatever reason prior to the end of their eighteen-year term. In that instance, a President would be given an additional appointment, similar to the situation of the Justice Austria-Martinez, who decided to leave the Bench a year before reaching the mandatory retirement age. To minimize the distortion brought by "bonus" appointments, it will be provided that the replacing appointees will only sit on the Bench for the unserved portion of the eighteen-year term of the retiring Justice. If the replacing appointee is given a fresh eighteen-year term, there will be a perpetual imbalance of the number of appointments by succeeding Presidents. It may even come to the extreme situation that all Justices would resort to early retirement and again concentrate the appointments to a single President. Hence, the proposal for appointees to sit only for the unserved portion of the eighteen-year term without re-appointment will lead to the eventual correction of the distortion when the remainder of the term expires. The question arises as to who would want an appointment with a "diminished" term of less than the prescribed number of years. The President may allocate these "bonus appointments" to lawyers of advanced age, who are somewhat at the twilight of their careers but have sufficient productive capacity to finish the unserved term, i.e., career appellate justices who are nearing retirement age. The problem of a "bonus" appointee not being able to cope with the caseload before the end of the term and eventually burden the Court's docket is minimal, since the person who will replace the "bonus" appointee will have the full eighteen year term to perform that task. Confining the "bonus" appointee to sit only during the remainder of the term will also exclude any possible seat-sharing arrangements, whereby a President will appoint a person to the Supreme Court, if the latter guarantees that he or she will voluntarily retire prior to the expiration of the President's term and hence, allows another judicial appointment to be made.

The issue of midnight judicial appointments will also be rendered moot and academic under a fixed-year term limit. The regularity and spacing of appointments can prevent outgoing Presidents to make last-minute judicial appointments to the Supreme Court before the elections that would unnecessarily bind the incoming President. The eighteen-year terms of the Justices can be scheduled to expire after the elections so that outgoing Presidents would have no opportunity to sneak in judicial appointments prior to the expiration of their terms. Since judicial appointments to the Philippine

Supreme Court will no longer occur immediately before an election is conducted, the appointment process would be conducted after a President has already secured an electoral mandate and will be able to select Justices during less politically charged times.

Finally, the even distribution of judicial appointments among the Presidents will substantially reduce the effects of the "first-year" syndrome of Supreme Court Justices. In the unlikely event that all fifteen Justices are afflicted with the "first-year" syndrome and will be presumed to vote in accordance with the interests of the President who appointed them, the equal number of five judicial appointees among the first three Presidents will prevent one interest from dominating the Court. In a situation where Presidents A, B and C each appoint five Justices each and the Supreme Court is to decide a case that is favorable to President B but unfavorable to President C, the opposing sets of Justices appointed by Presidents B and C would have to convince the five other justices appointed by President A to join their cause in order to win the case. The even distribution of Supreme Court appointments among three Presidents will dull the effects of voting along Presidential political interests and promote a more judicial atmosphere of reasonable and logical argumentation. The three-tiered split of the fifteen-member Supreme Court will eventually lead to narrower decisions based on compromises in legal positions among an eight-member majority and diffuse the effect of the "first-year" syndrome on the individual Justices.

3. Reserving Impeachment for Extreme Situations Only

The benefits of a fixed-year term limit with respect to increasing democratic accountability in the United States apply with equal force to the Philippines and need not be discussed in greater detail. In addition, the adoption of the proposed system in the Philippines will substantially diminish the inclination to impulsively resort to impeachment, except for extreme cases of judicial misconduct.

The proposed system of fixed-year terms and regular appointments to the Supreme Court achieves the same objective of removing an incumbent Justice, but with less costs and political acrimony than an impeachment trial. If the people are dissatisfied with the performance of a justice, they need not undergo the laborious impeachment proceedings and can simply wait for the

next appointment cycle. At the end of the Justice's fixed-year term, the public can then pressure the elected President or the members of the JBC to appoint a new Justice who embraces similar political beliefs and values. With respect to the recent impeachment of Chief Justice Corona, a factor that may have been considered by the legislators in pursuing this checking mechanism against the Chief Justice was that he was only 63 years old at the time the impeachment complaint was sent to the Senate in December 2011. Thus, he would have had seven more years to go before he reached the mandatory retirement age. The resolve of the legislators in pursuing the impeachment process may have wavered had the embattled Chief Justice Corona been just a few months shy of retirement. Applying the same logic to the proposed system, the public may be disinclined to pursue the costly process of impeachment if they know that the term of the Justice is nearing the end of the eighteen-year term. The tremendous resources that could have been expended from pursuing impeachment may then be freed and channeled to other national priorities. Therefore, unless an incumbent Justice has committed a gross violation or grave misconduct in which there is a public or moral imperative to impeach him or her, the public will tend to focus more on safeguarding the appointment process from undue political influence and carefully scrutinizing all judicial candidates from the very start.

Under the proposed fixed-year term limits, Justices of the Philippine Supreme Court will continue to enjoy a measure of personal independence from political pressures. In addition, it will vastly improve the Court's relationship with the people they serve by making appointees subject to relatively regular changes in their composition. A reasonably long but fixed term of eighteen years will enable Justices to outlast three six-year presidential terms and sustain a level of constitutional continuity by deciding cases based on common principles shared from the founding of the country. Yet, they should not succumb to the trap of being too old-fashioned or backward that they no longer share the modern outlook of the larger majority or see the pressing and greater good.

IV
REFORM PROPOSALS ON HOW TO INSTITUTE AN EIGHTEEN-YEAR TERM LIMITS IN THE AMERICAN AND PHILIPPINE SUPREME COURTS

Considering the cited benefits of fixed-year term limits, a review of the current literature on how best to effectuate the shift under the current legal regimes in the United States is called for. Sadly, there is no comparable and extensive review of the proposal for the Philippines. Nevertheless, a modest attempt shall be made here to provide a working constitutional amendment to introduce a system of fixed-year terms in the Philippine Supreme Court by drawing inspiration from a short analysis of similar proposals in the United States. The proposal for the Philippines described here will hopefully inspire the same degree of discussion as the one currently being explored in the United States.

Although no definite term is advocated at length in this paper, a fixed-term of eighteen years for each Justice is probably ideal since it allows a sufficiently long period for a Justice to sit in the Supreme Court to make an impact in jurisprudence but without necessarily holding the position hostage to possible future decrepitude. Eighteen years is in between the 14.5-year average tenure of the current United States Supreme Court under Chief Justice Roberts and the 19.5-year average of the Court under Chief Justice Rehnquist. On the other hand, the 11-year average length of term of the incumbent Philippine Justices before mandatory retirement provides a staring point for justifying the benchmark for the eighteen-year term limit. Moreover, the eighteen year period will sufficiently allow appointed Justices some distance from the appointing power in later years. In the United States, assuming that the appointing president is elected for two successive four-year terms, the appointed Justice by his eighth year in the Supreme Court will presumably have enough political space in the next ten years to decide cases free from the influence of the appointing power. In the Philippines, since the President is only given one six-year term without re-election, an appointed Justice is assumed to enjoy twelve years of independence from the appointing power. Increasing the time difference between the appointing president and the sitting Justice with an increased term limit will reduce the possibility of the Executive exerting undue political pressure and enhance judicial independence in the later years. Nevertheless, it is not discounted that other term periods (i.e., ten, twelve, fifteen) may be considered in introducing the fixed-term limit system in each of the countries. The proposed eighteen-year term is discussed here only as a starting reference point for further discussion in the future.

Reform Proposals for the United States Supreme Court

With a variety of scholarly works having adequately addressed this issue, the paper will confine itself to a limited evaluation of these proposals. Reforming the life tenure provision in the American Supreme Court either through the legislative process or through amendment of the Constitution presents advantages and disadvantages that warrant further review beyond the scope of this paper.

Professors Calabresi and Lindgren have expounded on a proposal for a constitutional amendment to allow each Justice to serve non-renewable eighteen-year term limits:[208]

> Under our proposal, each Justice would serve for eighteen years, and the terms would be established so that a vacancy on the Court would occur every two years at the beginning of the summer recess in every odd-numbered year. These terms would be structured so the turnover of Justices would occur during the first and third year of a President's four-year term. This would diminish the possibility of a Supreme Court appointment's being held up by Senate confirmation so as to deprive the President of the ability to nominate either of his two appointees to the Supreme Court. **The terms would also be set up so an outgoing Justice would complete his tenure on the last day of the Supreme Court's term and the new Justice could be confirmed in time to begin serving his term in October, before the beginning of the Supreme Court's next term.** The Justices' terms would be **nonrenewable**: no Justice could be reappointed to a second term. This provision would help guarantee the independence of the Justices by removing any incentive for them to curry favor with politicians in order to win a second term on the high Court. Retired Justices would be permitted to sit, if they wanted to, on the lower federal courts for life.[209] (Emphasis supplied.)

Aside from the burdensome process of amending the Constitution and having it ratified, two significant obstacles have also been identified.[210] One is the possible committed opposition to the amendment from "constitutional purists and textualists,"[211] not to mention those coming from the incumbent holders of the position whose life terms would be suddenly cut

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[208] *See* Part II: Term Limits for the Supreme Court in Calabresi & Lindgren, *supra* note 5, at 822-854.

[209] Calabresi & Lindgren, *supra* note 5, at 824-25.

[210] DiTullio & Schochet, *supra* note 99, at 1145.

[211] *Id.*

short. Another is the rarity in which the structure of the Federal government has been subject of amendments, e.g., Twelfth, Twenty-Fifth (revised process for selecting Vice-Presidents) and Seventeenth Amendments (method of electing Senators).[212] These pose serious issues that may hinder a successful amendment of the Constitution's "good behavior" clause in Article III.

The Cramton-Carrington proposal, on the other hand, goes through a statutory route.[213] Under their proposal, a justice's participation on the United States Supreme Court would be limited to about eighteen years followed by lifetime service on a lower Article III Court:

> Specifically, we propose that the President appoint one and only one new Justice during each term of Congress, with the nine Justices who are junior in commission serving as the active members of the Court. The proposal would result in a tenure on the sitting Court of eighteen years, which is longer than the historical average of fifteen years. Senior Justices would retain their title and compensation for life. After completion of the period of service on the sitting Court, Justices would continue to serve in accordance with the Good Behavior Clause of Article III by performing judicial duties in circuit courts, much as Justices were required to do during most of the nineteenth century. If needed to provide a nine-member Court, the Senior Justice junior in commission would be recalled to the Court to serve until the next term of Congress, when the new appointment would be made. Senior Justices would also participate in the Court's procedural rule-making authority; their involvement with the lower federal courts would be helpful in the Court's consideration of the procedural rules of those courts.[214]

About fifty-two eminent constitutional law and federal court scholars, including Lawrence H. Tribe, David L. Shapiro and Richard A. Epstein, among others, have purportedly supported the statutory route.[215] Senator Patrick

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[212] DiTullio & Schochet, *supra* note 99, at 1134.

[213] Carrington & Cramton, *supra*, note 68, at 467- 471.

[214] Cramton, *supra* note 51, at 1324-25.

[215] A list of those endorsing the statutory proposal are posted in Mr. Carrington's website. *Available at* http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm (last visited on Dec. 20, 2012).

Leahy, Chairman of the Senate Judiciary Committee introduced a bill[216] that would lift the prohibition on retired Supreme Court Justices from sitting by designation on the high court.[217] In order to allow them "to hold office during good behavior," it has been proposed that Justices will be permitted to sit as a "senior justice" in lower federal courts after the expiration of their fixed year terms. Moreover, in cases where one of the incumbent Supreme Court Justices would inhibit, a senior Justice can occasionally substitute to possibly break a 4-4 decision in highly controversial cases.

The primary advantage of the statutory route is the ease by which it can be passed through the normal legislative process, provided a majority support from the Congressmen and Senators is secured. The danger lies however in a possible certiorari petition being filed with the Court to question the constitutionality of this legislative act on the ground that it would directly circumvent the import of the constitutional provisions on the "good behavior" clause. It would indeed be an interesting, if not fascinating, page in the United States' history of judicial review for the Supreme Court to decide the validity of a statute that would determine how long they would actually sit in the Bench.

Professor Ward Farnsworth, however, has argued against changing the present system of life tenure using the statutory route.[218] Although the statutory approach avoids the costs of a constitutional amendment, the proposal suffers the disadvantage of being "revocable" similar to any other ordinary law, which may create even greater trouble of its own. Once the legislature is permitted to vary the term limits of the Justices, a later Congress can lengthen or shorten the term limits in the United States Supreme Court depending on their political designs as long as the Justices continue to enjoy life tenure on some lower federal court. Nothing would then prevent the legislature from giving out one-year terms to an antagonistic set of Justices and reversing course later on and granting twenty-year terms to a more friendly set of Justices. The malleable nature of the statutory route of changing the term

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[216] S. 3871, 111th Cong., 2nd Session. "To amend chapter 13 of title 28, United States Code, to authorize the designation and assignment of retired justices of the Supreme Court to particular cases in which an active justice is recused."

[217] *See* Lisa McElroy & Michael Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81 (2011) for a discussion on the substantial questions of policy, administrability, and constitutionality raised by the Leahy Bill.

[218] Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 451-52 (2005)

limits in the Supreme Court does little to shield the Justices from the political machinations of the legislature.

Reform Proposals for the Philippine Supreme Court

Unlike the United States, the Philippines must undergo a constitutional amendment to adopt the proposed fixed-year term limits for the Supreme Court Justices because the existing mandatory retirement system is expressly provided in its Constitution. The proposed amendment would read as follows:

> The Members of the Supreme Court shall serve for a fixed term of eighteen years, which shall be non-renewable in all cases. An associate justice who is promoted to Chief Justice shall serve in the latter capacity only for the remainder of his term and shall not be entitled to a separate or renewed eighteen-year term. In cases of the death, incapacity, resignation, impeachment or other means of removal or departure of a Justice other than the lapse of his or her fixed term, the Member who is later appointed in replacement shall serve only the remainder of the fixed term and shall not be subject to reappointment.[219]

Under the proposed constitutional amendment, each President, who is elected to a single six-year term without re-election, would be given an equal opportunity to appoint at least five Justices. The first two Justices would be appointed immediately *after the Presidential elections*, and the last three shall be appointed *after the mid-term (non-Presidential) elections*. Timing the appointments immediately after the elections would presume that the *ex-oficio* members of the JBC would adhere to their elective mandate in appointing members of the Supreme Court. "Back loading" a majority of the appointments towards the second half of the six-year presidential term would likewise minimize the possibility of Justices succumbing to the "first-year syndrome" of favoring the policies of the appointing power.

In addition, the JBC will be able to better anticipate the vetting process and ensure a wide pool of competent nominees for submission to the President. The amendment would relieve the JBC of sudden, sporadic and long

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[219] CONST. art., VIII, § 11.

nomination processes and free up precious time in performing its more critical function of filling up lower court vacancies. Simultaneous appointments to the Supreme Court would also lessen the burden of the JBC because the regularity of term expiration and appointment would allow it to better prepare for and handle the process, without the need of successively undergoing the vetting process for each and every vacancy. In the past, the JBC was subject to the inefficient process of conducting its vetting process and submitting a list of three nominees for one vacancy, only to undergo the same process six months later for another vacancy.

Under the proposed system, the aggregation of the vacancies (two after the Presidential election and three after the mid-term elections) will allow the JBC to perform the vetting process for the multiple vacancies simultaneously and even broaden the list to about six or nine names in total for the President to choose for every appointment cycle. The President need only appoint within specific timelines without the need of constantly having the process politically charged for every sudden vacancy, which is what is often done under the existing system. In fact, there have been several instances where a shortlisted nominee would be submitted to the President several times before he or she gets the nod. A respected senior appellate Justice, Justice Martin Villarama, Jr., was a mainstay at the short list since 2007, and even topped the list a few times with most number of votes from the members of the JBC, but had been successively bypassed before he was finally appointed in 2009.

Early resignation, incapacity, death or removal by impeachment of a Justice should result in the appointment of an *interim Justice*, who will only be entitled to serve the remainder of the eighteen-year term. This would remove the incentives for Justices nearing their term limits to suddenly resign and give the appointing President and the replacing Justice a brand new eighteen-year term. The same principle should be applied as well to a case of promotion of an incumbent member to the position of Chief Justice. Any incumbent justice, who is promoted to Chief Justice, would only serve in that capacity for the remainder of his or her eighteen-year fixed term, in order to preserve the sequence and cycle of appointments. The President would still appoint a new justice to serve a new vacancy for the eighteen-year term for the position vacated by the previous Chief Justice. Hence, the elevation of an associate justice to Chief Justice would not give additional years or prolong his or her appointment. This would maintain the balance of powers in the Court. Although this problem is uncommon in the American system with Chief

Justices usually being appointed from outside the Bench, the controversy remains a live one in the Philippine system, where Chief Justices are more often than not chosen from within the ranks.

The experience of the Supreme Court during the transition period under the 1987 Philippine Constitution provides insights on how to operationalize the shift from a mandatory age regime to the proposed fixed term limits. After the People Power Revolution in 1986 that ousted former President Ferdinand Marcos, the members of the Supreme Court, pursuant to President Corazon Aquino's Proclamation No. 1, submitted their courtesy resignations to allow the latter a free hand to appoint the members of the Court under the new democratic regime.[220] She, nevertheless, re-appointed some of the previous members of the Court.[221] There are other possible routes to effect a smooth and non-discriminatory transition into a fixed term system, but this would be subject of a different paper altogether. Suffice to say, the experience of the Philippines has proven that constitutional amendment with respect to the judicial branch can be achieved without undue prejudice against incumbent Justices and absent any diminished trust on the judiciary.

CONCLUSION: A MORE DEMOCRATICALLY ACCOUNTABLE SUPREME COURT

A Supreme Court that is completely divorced from public accountability is an affront to the democratic system of checks and balances.[222] Demands for greater accountability in the American and Philippine Supreme Court arose due to the inherent vulnerabilities of their respective systems of life tenure and mandatory retirement for the Justices. Such demands have opened discussions on exploring other alternative measures to limit and place the judicial power in check without unduly sacrificing its institutional independence from the political branches. The curtain that has shrouded the Supreme Court in both countries in mystery has come under serious attack by well-meaning individuals who question the counter-majoritarian nature of the institution in a democratic society.

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[220] Proc. No. 1 (1986).

[221] President Aquino eventually reappointed Amuerfina Melencio-Herrera, Hugo Gutierrez, Jr., and Nestor Alampay, but only after she had made new appointments to the Court, which distorted the rule of seniority for a certain period.

[222] Calabresi & Lindgren, *supra* note 5, at 813.

The tri-partite system of democratic government has been aptly described like the hands of a watch.[223] The second and minute hands represent the executive and the legislative, respectively, moving quickly in approving and implementing laws to respond to the needs of the people and the times. Meanwhile, the hour hand signifies the judiciary, which is slow moving and deeply contemplative in its pace with respect to reviewing the constitutionality of laws. Indeed, a deliberate and introspective judiciary performs a moderating function in a democracy by reducing the amplitude of swings in public policy pursued by the two other political branches.[224] Yet, perhaps the glacial pace of change in the American and Philippine Supreme Court has caused them to be out of touch with the sovereign people whom they serve?

"When democratically determined public policies that directly affect the nation are at issue, it is not unreasonable to expect that those who exercise judicial review over what is done by the president and Congress be part of the present, not the past."[225] The proposed fixed-year and non-renewable term limits for appointments to the Supreme Court would enhance judicial independence by guaranteeing a sufficient period for Justices to perform their judicial duties without having to resort to constant political validation from the appointing power. Increased interconnectivity and up-to-the-minute coverage of court proceedings have only whetted the public's appetite for more information about the Court's proceedings and how a bunch of old men and women are supposed to represent their values in an age of growing diversity. Indeed, a Bench that closely resembles the composition of a nation renews public confidence in its members who have a keen sense of their values and principles.[226] Time has come for the United States and the Philippines to modify the limitations on the terms of office of their respective Supreme Court Justices and to submit to the public demand for increased democratic accountability of the unelected third branch of government.

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[223] David Dziengowski, *Return to Sender: Responses to Professor Carrington et al., Regarding Four Proposals for a Judiciary Act of 2009*, 21 STAN. L. & POL'Y REV. 349, 379 (2010).

[224] Posner, *supra* note 82, at 195.

[225] Powe, *supra* note 6, at 1235.

[226] Carl Tobias, *Dear President Bush: Leaving A Legacy on the Federal Bench*, 42 U. RICH. L. REV. 1041, 1047-48 (2008).

ANNEX 1

Table of Current Members of the United States Supreme Court
As of December 31, 2012

	Birth Date	Took Seat	President who Appointed	Age at Appointment	Current Age	Present Number of Years in the Court
John G. Roberts. Jr., *CJ*	27-Jan-55	29-Sep-05	George W. Bush (R)	50.7	58.0	7.3
Antonin Scalia	11-Mar-36	26-Sep-86	Ronald Reagan (R)	50.6	76.9	26.3
Anthony M. Kennedy	23-Jul-36	18-Feb-88	Ronald Reagan (R)	51.6	76.5	24.9
Clarence Thomas	23-Jun-48	23-Oct-91	George H. Bush (R)	43.4	64.6	21.2
Ruth Bader Ginsburg	15-Mar-33	10-Aug-93	William Clinton (D)	60.4	79.9	19.4
Stephen G. Breyer	15-Aug-38	3-Aug-94	William Clinton (D)	56.0	74.4	18.4
Samuel Anthony Alito, Jr.	1-Apr-50	31-Jan-06	George W. Bush (R)	55.9	62.8	6.9
Sonia Sotomayor	25-Jun-54	8-Aug-09	Barrack Obama (D)	55.2	58.6	3.4
Elena Kagan	28-Apr-60	7-Aug-10	Barrack Obama (D)	50.3	52.7	2.4
AVERAGE				**52.7**	**67.1**	**14.5**

ANNEX 1A

Table of Tenure of Members of the United States Supreme Court (Rehnquist Court)
As of September 3, 2005 (Death of Chief Justice William Rehnquist)

Justice	**Birthdate**	**Date of Appointment**	**Tenure (As of September 3, 2005)**
William H. Rehnquist	1-Oct-24	7-Jan-72	33.7
John Paul Stevens	20-Apr-20	19-Dec-75	29.7
Sandra Day O'Connor	26-Mar-30	25-Sep-81	24.0

Antonin Scalia	11-Mar-36	26-Sep-86	19.0
Anthony M. Kennedy	23-Jul-36	18-Feb-88	17.6
David H. Souter	17-Sep-39	9-Oct-90	14.9
Clarence Thomas	23-Jun-48	23-Oct-91	13.9
Ruth Bader Ginsburg	15-Mar-33	10-Aug-93	12.1
Stephen G. Breyer	15-Aug-38	3-Aug-94	11.1
Average			**19.5**

ANNEX 2

Table of Current Members of the Philippine Supreme Court
As of December 31, 2012

	Birth Date	Appointed	Appointing President	Age at Appointment	Current Age	Years Served in Court	Remaining Years in Court	Total Projected Years of Service in Court
Maria Lourdes P. A Sereno, *CJ*	02-Jul-60	16-Aug-10/ 24-Aug-12 (as Chief Justice)	Benigno Aquino	50.2	52.5	2.4	17.5	19.8
Antonio T. Carpio	26-Oct-49	26-Oct-01	Gloria Arroyo	52.0	63.2	11.2	6.8	18.0
Presbitero J. Velasco, Jr.	08-Aug-48	31-Mar-06	Gloria Arroyo	57.7	64.4	6.8	5.6	12.3
Teresita J. Leonardo-De Castro	08-Oct-48	04-Dec-07	Gloria Arroyo	59.2	64.3	5.1	5.7	10.8
Arturo D. Brion	29-Dec-46	17-Mar-08	Gloria Arroyo	61.3	66.1	4.8	3.9	8.7
Diosdado M. Peralta	27-Mar-52	13-Jan-09	Gloria Arroyo	56.8	60.8	4.0	9.2	13.2
Lucas P.	18-	01-Apr-09	Gloria	59.5	63.2	3.8	6.8	10.5

Bersamin	Oct-49		Arroyo					
Mariano C. del Castillo	29-Jul-49	28-Jul-09	Gloria Arroyo	60.0	63.5	3.4	6.5	10.0
Roberto A. Abad	22-May-44	07-Aug-09	Gloria Arroyo	65.3	68.7	3.4	1.3	4.7
Martin S. Villarama, Jr.	14-Apr-46	03-Nov-09	Gloria Arroyo	63.6	66.8	3.2	3.2	6.4
Jose P. Perez	14-Dec-46	21-Dec-09	Gloria Arroyo	63.1	66.1	3.0	3.9	6.9
Jose C. Mendoza	13-Aug-47	06-Jan-10	Gloria Arroyo	62.4	65.4	3.0	4.6	7.6
Bienvenido L. Reyes	06-Jul-47	23-Aug-11	Benigno Aquino	64.2	65.5	1.4	4.5	5.8
Estela M. Perlas-Bernabe	14-May-52	16-Sep-11	Benigno Aquino	59.4	60.7	1.3	9.3	10.6
Marvic Leonen	29-Dec-62	21-Nov-12	Benigno Aquino	49.9	50.0	0.1	20.0	20.1
AVERAGE				**58.3**	**62.8**	**3.8**	7.2	**11.0**