

Impeachment by Any Other Name

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The subject of how and when Justices of the U.S. Supreme Court¹ leave their jobs has been thoroughly and ably masticated.² What more remains to be chewed up and spit out? Perhaps not much, but still a little. By examining and framing the departures from office of some Justices—and the persistence in office of some others—from the perspective of government actors seeking to influence those departures, I hope to provide some perspective on both the efficacy and the legitimacy of such efforts. This little paper is, in other words, a historical introduction to the informal removal of judges.³

Informality has had a long history of mixed success and has a prospect of more of the same. Part I of this paper deals with preliminaries—mostly an explanation of why the Justices are an especially good subset of all judges for a study of this sort, and a caution about the hazards of confusing our (including my) approval or disapproval of a particular Justice with their fitness for office and the propriety of trying to shift them out of office. Parts II, III, and IV describe efforts by the three branches of the federal government (including some of the Justices' own colleagues) to informally remove Justices from the Court. (I will not waste your time with a lengthy treatment of the history, theory, policy, and practice of the

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1. They are called “Chief Justice” and “associate justices” in the U.S. Code, 28 U.S.C. § 1, and “Chief Justice” and “judges” in the Constitution, U.S. CONST. art. I, § 3; art. II, § 2; art. III, § 1; but in this paper all of them are referred to simply as “Justice” except when dealing with a named individual Chief Justice.

2. See, e.g., ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* (2003); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1003–04 (2000); MICHAEL J. GERHARDT, *FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000); DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (1999).

3. This paper focuses on the removal of judges from office, not recusal of judges from particular cases or cases involving particular parties. In other words, the focus is institutional—on the relationship between judges and the offices they hold, not judges and their relationship to particular litigants or disputes.

only constitutional device for formal removal of Justices—impeachment—because I believe most readers already know enough about that for present purposes or can find it easily enough elsewhere.) Part V offers a few thoughts about the future of informal removal.

I. CONTEXT AND CAUTION

First, why Justices of the U.S. Supreme Court are a good sample. Second, why we commentators are at risk of being bad.

A. The Suitability of the Court

This is a small paper that seeks to expand ever so slightly the larger conversation about cause and effect and propriety in judicial departure from office. An ideal point of entry for such a small contribution to such a wide and controversial topic would be a relatively narrow edge case in which removal options are sharply limited—a context in which all are formal or all are informal. Best to start in that narrow space, and then move to critiquing and improving (or perhaps wholly rejecting) the simple starting point before piling on any extensions, permutations, and ramifications.

The U.S. Supreme Court is the best available subject for such a study because the Justices on that Court are practically free from formal removal. Yes, a formal removal procedure does indeed exist in the U.S. Constitution—impeachment in the House of Representatives,⁴ followed by trial, conviction,⁵ and sentencing⁶ in the Senate—but for a variety of reasons that are beyond the scope of this paper, it has never worked. Other

4. U.S. CONST. art. I, § 2 (“The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.”).

5. *Id.* § 3 (“The Senate shall have the sole Power to try all Impeachments.”). Yes, yes, the same section of the Constitution provides that “the Chief Justice shall preside,” but that is only “[w]hen the President of the United States is tried.” *Id.* And besides, even in a Presidential trial the Chief Justice does not have a vote on the ultimate judgment. *Id.* (“[N]o person shall be convicted without the Concurrence of two thirds of the Members present.”).

6. *Id.* (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . .”).

judges, federal⁷ and state,⁸ are not so safe from formal removal.

Another reason to start with the Justices is that simply by serving on the highest court in the land, a person becomes a great public figure. Journalists, academics, and their ilk pay much attention to the Justices' words, deeds, and records, all of which are more likely to be recorded and preserved than those of ordinary people. So, there is more information available about all the members of that Court than any other. This is an instance of the streetlight actually and conveniently illuminating the drunk's keys.⁹

Finally, a more direct focus on informal removal might (and I hope it will) result in a study that is relatively free from partisanship, as the next section explains.

B. Caution to Commentators

No allegations—let alone proofs—of bad behavior or incompetence are invariably necessary to justify removing most leaders of the United States under Articles I and II of the Constitution. Senators, representatives, presidents, and vice-presidents can be removed from office for any reason or no reason at all: voters can simply not re-elect

7. First, there is impeachment, which has worked from time to time with inferior Article III federal judges, from John Pickering in 1804 to Thomas Porteous in 2010. See *List of Individuals Impeached by the House of Representatives*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Impeachment/Impeachment-List/> [<https://perma.cc/CEX7-762X>] (last visited Apr. 1, 2022). In addition, while absolutely complete removal from office without impeachment is unlawful for Article III judges, practically complete removal is lawful. See 28 U.S.C. § 354(a)(2)(B). And non-Article III judges may be completely removed from office under the same title. See, e.g., *id.* § 152(e) (bankruptcy judges); *id.* § 631(i) (magistrate judges).

8. See, e.g., KAN. CONST. art. III, §§ 5, 15; CAL. CONST. art. VI, § 18; TEX. CONST. art. V, § 1-a. I am not aware of any state in which judges enjoy as much constitutional and practical security from removal as Justices of the U.S. Supreme Court do (though I must confess I have not conducted an up to date fifty-state survey). Also, note that in many states, We the People can be directly involved in the removal of judges, via elections of various sorts, conventional, retention, and recall. See e.g., KAN. CONST. art. III, § 5; CAL. CONST. art. VI, § 16(d)(1); *California Judge Recalled for Sentence in Sexual Assault Case*, 132 HARV. L. REV. 1369 (Feb. 8, 2019).

9. Karen M. Gebbia, *Circuit Splits and Empiricism in the Supreme Court*, 36 PACE L. REV. 477, 556 n.232 (2016). See also *Where Economists Focus Their Research: They Don't Always Look in the Right Places*, THE ECONOMIST (Dec. 10, 2020), <https://www.economist.com/finance-and-economics/2020/12/10/where-economists-focus-their-research> [<https://perma.cc/V59K-QAT4>]:

AN OLD joke: a policeman sees an inebriated man searching for his keys under a lamp post and offers to help find them. After a few fruitless minutes, the officer asks the man whether he's certain he dropped his keys at that particular location. No, says the man, he lost them in the park. Then why search here, asks the officer. The man answers: "Because that's where the light is." For years, the story has been used to illustrate the simple point, of great relevance to social scientists, that what you find depends on where you look.

them.¹⁰ The President can also be removed simply by the passage of time: term limits.¹¹ Thus, one can be removed from high office as a federal legislator or executive without dishonor, and indeed, many have been removed with great honor.

In addition, there are other constitutional means of legislative and executive removal from office that may, but need not, involve allegations of bad behavior. Senators can remove a senator from office and representatives can do the same to colleagues in the House: they have a latitude that is broad (subject to a two-thirds vote) though perhaps not unlimited.¹² And a president's subordinates can remove a president from office (or at least from power) temporarily on their own authority, and permanently with the support of Congress: they can do so simply on a declaration that the president is unable to do the job.¹³

But Justices¹⁴ are both blessed and cursed by the unavailability of any constitutional provision for their formal removal from office absent proof that they are bad actors: they “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”¹⁵ In the absence of such a conviction, the Justices “shall hold their Offices during good Behaviour”—“Behaviour” being a term which has not been, and probably should not be, treated as extending the congressional impeachment authority beyond the crimes listed in the Constitution.¹⁶

So, to talk about the prospect of formally removing a Justice from office is, necessarily, to accuse that Justice of being a crook.¹⁷ To talk

10. U.S. CONST. art. I, §§ 2–3; *id.* art. II, § 1.

11. *Id.* amend. XXII, § 1.

12. *Id.* art. I, § 5; *Powell v. McCormack*, 395 U.S. 486, 506–12 (1969).

13. U.S. CONST. amend. XXV, § 4.

14. The same holds for inferior federal judges with life tenure under Article III, though they are subject to statutory procedures for removal from power, though not office, by their peers. *See supra* note 7.

15. U.S. CONST. art. II, § 4.

16. *Id.* art. III, § 1; GERHARDT, *supra* note 2, at 82–102.

17. 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE: CIVIL § 100.04 (3d ed. 2010). A caveat:

What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.

116 Cong. Rec. 11913 (1970) (statement of Rep. Gerald R. Ford). Such institutional arrogance, or realism, is not the exclusive province of legislators. *See, e.g.*, THE POWER OF THE PRESIDENCY 179 (Robert S. Hirschfield ed., 3d ed. 1982) (quoting former President Richard M. Nixon: “Well, when

about informally removing a president or vice-president or senator or representative is not necessarily to accuse that person of being a crook. It can be, but it need not.

But to talk about ways of inspiring a Justice to leave office—that is, to talk about informal removal—does not necessarily involve accusations of criminality, or even of incapacity—like presidential removal under the Twenty-Fifth Amendment. So, informal removal is, in a sense, the context in which a Justice doesn't need to be a bad actor to be a legitimate candidate for departure from the bench.

We—the polity in general and our political leaders in particular—need a basis for contemplating means of removal of Justices without recourse to grounds for indictment. Only then will the chances for credible, good faith, non-partisan, and even apolitical discussion improve for determining when and how it might be appropriate to inspire Justices to leave the bench.

To illustrate the point, here is an anecdote—actually, a snapshot of an ongoing anecdote—about recusal of Justices, not removal. I hope it brings to mind both (a) the sensitive nature of commentary on judgments about judges, and (b) the usefulness of an appropriately tentative state of mind as we consider contexts in which powerful government actors remove judges without the use of a formal removal process.

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The anecdote: Long ago, I wrote a short article about recusal and dissimulation in the U.S. Supreme Court.¹⁸ It is not an important article. It is rarely cited.¹⁹ But over the years it has occasionally caught the eye of a congressional staffer organizing testimony or gathering data about judicial ethics. When that happens, I receive an inquiry from the staffer, who asks if I would be willing to testify or submit written commentary

the President does it, that means that it is not illegal.”); Mark Tushnet, *Members of the Warren Court in Judicial Biography: Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995) (footnotes omitted):

[Justice] William J. Brennan saw his job much as [Justice Abe] Fortas did. His law clerks report an annual event: At some point early in their clerkships, Brennan asked his clerks to name the most important rule in constitutional law. Typically they fumbled, offering *Marbury v. Madison* or *Brown v. Board of Education* as their answers. Brennan would reject each answer, in the end providing his own by holding up his hand with the fingers wide apart. This, he would say, is the most important rule in constitutional law. Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything.

18. Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79 (2006) [hereinafter Davies, *Reluctant Recusants*].

19. An editor of the *Kansas Law Review* shepardized it shortly before the article you are now reading went to press and found just one case citation and fifteen other citing sources.

about judicial ethics and recusal practices at the Supreme Court. If the staffer works in the office of a Democrat, I say something along the lines of, “I suppose you’ve read the article in which I discuss William Rehnquist’s not-entirely-accurate description of his experience with recusal.”²⁰ The staffer confirms my guess, and I then say: “Please read the part of that article where I discuss Thurgood Marshall’s description of his own experience with recusal²¹ and then get back to me.” I have never heard back from a Democratic staffer. If the staffer works in the office of a Republican, I say something along the lines of, “I suppose you’ve read the article in which I discuss Thurgood Marshall’s not-entirely-accurate description of his experience with recusal.”²² The staffer confirms my guess, and I then say: “Please read the part of that article where I discuss William Rehnquist’s description of his own experience with recusal²³ and then get back to me.” I have never heard back from a Republican staffer.

The lack of callbacks may well be because my work is defective, or because other circumstances always intervene. But the perfectly partisan, polar balance of the inquiries, and the perfect follow-up silence in all cases, invites a supposition that the staffers’ interest has not been in judicial ethics, but in scoring points against Justices that one partisan or another dislikes for reasons other than their recusal practices.

. . . .

So, it is probably worthwhile at the outset to (a) bear in mind that discussions of judicial behavior are rife with partisan ax-grinding characterized by selective (perhaps consciously, perhaps not) attention to facts, and have been for a long time,²⁴ and (b) to question our own priors—to ask ourselves whether we are thinking like those anecdotal congressional staffers. If the answer is yes, then we are sure to find

20. See Davies, *Reluctant Recusants*, *supra* note 18, at 86–91.

21. See *id.* at 80–86.

22. See *id.*

23. See *id.* at 86–91.

24. And if we can’t find facts we like, we can make some up. Indeed, the intensity and pervasiveness of priors in this area—about the nobility and genius of judges we like and the villainy and obtuseness of judges we dislike—can make it difficult to resist positing pleasing facts that do not exist. See, e.g., Lisa T. McElroy & Michael C. 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, 96 n.65 (2011) (quoting Davies, *Reluctant Recusants*, out of context to suggest that Justice Thurgood Marshall consistently recused in cases involving the NAACP). In fact, the *Reluctant Recusants* article shows the exact opposite—that Justice Marshall did *not* consistently recuse in NAACP cases. See Davies, *Reluctant Recusants*, *supra* note 18, at 80–81. I am not suggesting that the mischaracterization of Justice Marshall’s recusal practices by Professors McElroy and Dorf was intentional. Perhaps it was merely a mistake triggered by a word-search that turned up a phrase that was temptingly useful (if taken out of context) for their argument, and that it was incorporated into their paper without anyone reading the article (or even the paragraph) in which that phrase appeared.

surfaces here on which to grind our axes (whether it happens in the law reviews or on Facebook or on Capitol Hill), but so are those who disagree with us—because Democrats and Republicans, liberals and conservatives, any old clusters of partisans, have always striven to push their favorites onto the courts, and sometimes that means striving to push their not-favorites out of the courts.²⁵ Perhaps more interestingly, some of the removal maneuvers described here do not appear to involve partisanship, not by legislators, not by presidents, not by judges. Maybe, just maybe, they are trying to do the right thing under extraordinary constraints.

So, setting aside our convictions, let us consider government actors' efforts to remove Justices without getting convictions, presented here in the form of three pairs of historical anecdotes—one about congressional attempts at informal removal, one about presidential attempts, and one about Justices'. Each pair consists of one attempt on each side of what might be a line, or at least a gray area, of propriety. What do you think?

II. CONGRESS: CARROT AND STICK

A. Justice Ward Hunt

In early January 1879, an already ailing Justice Ward Hunt suffered a debilitating stroke.²⁶ Except for a brief, embarrassing, and sharply criticized stint on the bench in late November 1881,²⁷ Hunt never participated in the work of the Court again.²⁸ And yet he did not resign or retire.²⁹ A plausible partisan explanation spread in government circles at the time: Hunt's political puppet master, Senator Roscoe Conkling of New York, was feuding with President Rutherford B. Hayes and insisted that Hunt remain on the bench so that Hayes could not nominate Hunt's

25. You might also find evidence here that I think like a congressional staffer. If you do, please send word to the email address in the author note.

26. 7 CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88* pt. 2, at 519 (1987) [hereinafter FAIRMAN, RECONSTRUCTION]; CHARLES FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890*, at 376–77 (1939) [hereinafter FAIRMAN, MILLER]; see also John S. Goff, *Old Age and the Supreme Court*, 4 AM. J. LEGAL HIST. 95, 98–100 (1960) (“Justice Ward Hunt . . . was struck speechless with paralysis.”).

27. Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 2D 463, 467–68 (2010).

28. Goff, *supra* note 26, at 99.

29. See FAIRMAN, RECONSTRUCTION, *supra* note 26, at 522–23; FAIRMAN, MILLER, *supra* note 26, at 376–84; see also 99 U.S. v (1879) (including Justice Hunt in the list of Justices of the Supreme Court of the United States).

successor.³⁰ But an equally plausible, practical, and apolitical reason for Hunt's useless (to the American people, at least) occupation of a seat on the Court was also well known inside the pre-Beltway: money.³¹ Having been appointed to the Court in 1873, Hunt had not served the ten years then required to receive a pension upon retirement.³² So, was Hunt hanging on because a vindictive partisan powerbroker-puppeteer was pulling his strings, or simply because he did not want to die in poverty?

Alas, we may never know for sure, but we can be fairly confident that it was the money, not the politics. Consider the basic sequence of events:

March 1877: President Hayes takes office. His efforts to reform (that is, depoliticize) the federal civil service make him many political enemies, none fiercer (or more powerful) than Senator Conkling.³³

January 1879: Justice Hunt is incapacitated by a stroke. He remains on the Supreme Court even though he can no longer perform the functions of a justice, depriving the country of the services of a fully functional Court and Hayes of the opportunity to appoint a replacement.³⁴

March 1881: The Hayes presidency ends, and the presidency of James A. Garfield begins. If Hunt is really merely holding out until Conkling's enemy Hayes is out of office, he should resign at this moment or shortly thereafter. Instead, Hunt stays on the Court.³⁵

September 1881: Garfield is assassinated, and Chester Arthur becomes president. Again, Hunt clings to office, even though Conkling's enemy Hayes and even Hayes's successor (who was, it must be said, a personal and political friend of Hayes) are out of office. Again, Hunt stays on the Court.

November 1881: Still on the Court, Justice Hunt appears on the bench for the last time. It is now nearly two years since he suffered that terrible stroke and more than a year-and-a-half since Conkling's enemy Hayes—whose presence in the White House was supposedly the reason Conkling

30. ATKINSON, *supra* note 2, at 61.

31. *See, e.g., id.*; WARD, *supra* note 2, at 86–87.

32. Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

33. ATKINSON, *supra* note 2, at 61.

34. WARD, *supra* note 2, at 86–87.

35. *Id.*

would not permit Hunt to resign from the Court—left the presidency.³⁶

January 1882: After much congressional wrangling, a private bill is passed providing a full pension to Hunt if he resigns from the Court promptly, and he does so.³⁷

So, Hunt clung to his justiceship long after the objectionable Hayes presidency, but then, when his money concerns had been dealt with, he promptly stepped down. In an amusing twist, Arthur nominated Conkling to replace Hunt, Conkling was confirmed by the Senate, and Conkling then declined to serve!³⁸

The bottom line here seems to be that mid-nineteenth century Congresses were not yet ready to regularize disability-based pension benefits for judges. But they were willing to consider legislation to deal with such issues on a case-by-case basis, at least when there were practical reasons for preferring to have someone more useful on the bench. The possibility that politics may also have been a factor might be disconcerting—Hunt’s connections to Conkling and Conkling’s hostility to Hayes were genuine—but that does not mean the action eventually taken by Congress to prompt Hunt to move off the Court was bad. The Hunt bill may be a good example of taking the imperfect good when waiting for the perfect good is fruitless: Offering a pension to buy Hunt’s seat back instead of waiting for Hunt to recognize his inability to fulfill his judicial duties.³⁹

36. *Id.*

37. The bill was introduced by Senator David Davis of Illinois, who had been lured off the Supreme Court himself via a notably different and surely unobjectionable legislative enticement of a different sort. Judge Glock, *The Politics of Disabled Supreme Court Justices*, 45 J. SUP. CT. HIST. 151, 156 (2020). In 1876, at the height of the 1876 Presidential election controversy, the Illinois legislature (dominated by Democrats) elected then-Justice Davis (a Republican and widely regarded as a possible “swing” vote on the 1876 Electoral Commission) to an Illinois seat in the U.S. Senate. See Benjamin C. Block, *Bradley, Breyer, Bush and Beyond: The Legal Realism of Legal History*, 15 U. FLA. J.L. & PUB. POL’Y 57, 66–67 & nn.51–52 (2003). If the Illinois lawmakers were hoping that Davis’s replacement on the Commission would vote in favor of electors pledged to the Democratic presidential candidate (Samuel Tilden), they were disappointed. See Block, *supra*, at 67–71. But they could console themselves with the service of a good senator.

38. *Subpar Presidents*, 6 GREEN BAG 2D 224, 225 (2003); *The Conkling Nomination*, 6 GREEN BAG 2D 334, 334 (2003); ALFRED R. CONKLING, *THE LIFE AND LETTERS OF ROSCOE CONKLING* 676–77 (1889).

39. Knowledgeable observers have said that as Congress has provided more reliably generous retirement pay and benefits for justices (see LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 48–49 (5th ed. 2012)), justices have tended to retire more readily when their health declines. See, e.g., ATKINSON, *supra* note 2, at 3–4, 167–68.

B. William O. Douglas and Abe Fortas

What, though, of a Justice at the height of their powers who is energetically exercising them in a way that Congress (or at least many therein) find objectionable? Congress has had little luck, but not none, informally removing such a justice.

The constitutional mechanism for getting justices and other civil officers *out of office*, the impeachment-in-the-House-trial-in-the-Senate process—specified in Article I, sections 2 and 3, Article II, section 4, and Article III, section 2—has never worked.⁴⁰ In an odd (and perhaps instructive for all justices thereafter) controversy, the constitutional mechanism for getting justices and other civil officers *into office*, the advice-and-consent-in-the-Senate process—specified in Article II, section 2—has worked in one case, in a sense.

In the late 1960s, Justices Abe Fortas and William O. Douglas raised some hackles in Congress as arguably the most liberal members of the Warren Court. Both were targets of congressional investigations inspired at least partly by their controversial jurisprudence.⁴¹ Neither was impeached, but each was under considerable pressure. Fortas did not survive the examination, resigning from the Court in the spring of 1969 and returning to private practice.⁴² Douglas did survive, and remained on the Court until 1975.⁴³

While the circumstances surrounding the congressional pursuit of both justices were complicated, three notable differences probably contributed to Fortas's departure and Douglas's durability.⁴⁴ First, there was the difference between opportunity and threat and its possible effect on the two justices' different approaches to their dealings with Congress. Fortas began his congressional gantlet in the context of advice and consent in the

40. See *Impeachment Trial of Justice Samuel Chase, 1804-05*, <https://www.senate.gov/about/powers-procedures/impeachment/impeachment-chase.htm>.

41. See *The Supreme Court: The Fortas Affair*, TIME (May 16, 1969), <http://content.time.com/time/subscriber/article/0,33009,902550,00.html> [<https://perma.cc/J8A8-GE97>]; Marjorie Hunter, *Ford Asks Douglas's Ouster*, N.Y. TIMES (Apr. 16, 1970), <https://www.nytimes.com/1970/04/16/archives/ford-asks-douglass-ouster-ford-calls-for-removal-of-douglas-from.html> [<https://perma.cc/2RET-Y557>].

42. LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 373 (1990).

43. At which point he was effectively removed by his allies on the Court rather than his adversaries in Congress! See *infra* notes 66–73 and accompanying text.

44. See generally Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595 (2010); KALMAN, *supra* note 42; BRUCE ALLEN MURPHY, WILD BILL (2003); Emily Field Van Tassel et al., *Why Judges Resign: Influences on Federal Judicial Service, 1789 to 1992*, FJC-MISC-93-3 (Fed. Jud. Ctr. 1993); Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 HASTINGS CONST. L.Q. 161 (2007).

Senate. Already a justice, he had been nominated by President Lyndon Johnson to be chief justice. Of course, the Senate Committee on the Judiciary expected the nominee to appear before the committee for questioning about his qualifications for the office. Scholarly experts might differ about whether Fortas was required by law to cooperate with the committee, but institutional experts could not but agree that he would not be confirmed if he failed to cooperate. And so Fortas chose to appear before the committee in the context of an opportunity: failure would merely mean remaining an associate justice rather than becoming chief justice. This explains, perhaps, why his preparation was not thorough and his care about his choice of words (and of facts) was not thoughtfully mooted or probingly reviewed by counsel, with an eye to all possible consequences. Douglas, in contrast, began his congressional gantlet in the context of impeachment in the House of Representatives. Again, scholarly experts might differ about whether he was required by law to cooperate—in this case with the subcommittee of the House Judiciary Committee considering impeachment—but, again, institutional experts could not but agree that he was far more likely to be impeached if the only evidence before the subcommittee was that provided by Douglas’s accusers if he failed to cooperate. For Douglas, dealings with the subcommittee arose in the context of a threat: failure would mean trial in the Senate, the danger of conviction, loss of his seat on the Court, and an infamous place in history. This explains, perhaps, his retention of expert and diligent legal counsel, and his thorough cooperation with all demands of the subcommittee for information.

Second, there was the difference between live testimony and document production. Fortas appeared in person before the Senate judiciary committee and engaged in days of live questioning by, and arguing with, committee members. And, as a leading Fortas biographer put it, “whereas in [an earlier, pre-Court appearance before a congressional committee] he had resolved the competing demands upon him through legalistic obfuscation, in 1968 [during his confirmation hearing to be chief justice] he simply lied.”⁴⁵ Whether this was Fortas’s plan when he entered the hearing room or whether it was a result of the heat and pressure of the back-and-forth of the contentious hearing (perhaps compounded by a lack of careful preparation), we may never know, but there can be no doubt that “the justice volunteered untrue information.”⁴⁶ Fortas unfiltered would turn out to be Fortas foolish and unfortunate. Douglas, in contrast, was

45. KALMAN, *supra* note 42, at 337.

46. *Id.* at 338.

not called to testify before the House subcommittee considering his impeachment, but he was subject to numerous and probing demands for records relating to his travels, his finances, his relations with various individuals and organizations, and on and on. He retained first-class legal counsel, and adopted, as a leading Douglas biographer put it, the proper “attitude about working with his attorney”⁴⁷:

“He was the perfect client,” said [Douglas’s lead counsel Simon] Rifkind. “Less intrusive than the ordinary corporate clients that I deal with, [Douglas] sat back and attended to his business and just said, ‘you fellows do what you have to do.’” And such cooperation was necessary because this was more like a libel trial. Knowing that truth was always the best defense in such cases, Rifkind needed as much information about Douglas’s activities as he could find.⁴⁸

Which brings us to the third and by now obvious point: Fortas lied to Congress; Douglas did not. For present purposes, it matters little that what Fortas lied about was the depth and content of his work for President Johnson while Fortas was serving in another branch (the judiciary) of the federal government, nor that the most legally worrisome aspect of Douglas’s behavior was his financial dealings with an organization that had some dubious connections. What mattered was that Fortas was a Supreme Court justice whose dishonesty was on increasingly public display as information about his work with Johnson (the work that he had lied to the Senate about) gradually leaked to the public, and then was mixed with revelations about his own financial dealings with a different organization that had some dubious connections (but about which he had not been questioned by the Senate). In all likelihood, neither justice’s behavior, objectionable as it may have been, would have resulted in impeachment in the House, let alone conviction in the Senate. But it was Fortas who was driven to resign—without ever being impeached or even seriously investigated by the House—by rising tides of public, political, and even inside-the-Court pressure triggered by his own combination of choices to treat too lightly both the stakes of his advice-and-consent appearance and the consequences of casual forensic mendacity. Douglas never had any doubt about the stakes of the impeachment investigation to which he was subjected, or about the consequences of providing less than the whole truth. He survived, for a while, at least.⁴⁹

47. MURPHY, *supra* note 44, at 436.

48. *Id.*

49. *But see infra* Part IV.B.

III. PRESIDENT: A NEW JOB FOR WHO?

Presidents probably cannot lawfully offer cash to justices to leave the bench, as Congress can. But there are other available incentives. For example, an attractive job placement.

A. Justice Noah B. Swayne

Consider first the possibility of an attractive job for someone other than the Justice the President seeks to remove.

The Supreme Court on which Justice Hunt sat but failed to serve was also hamstrung by other Justices whose poor health hampered their performance of their duties. One of them was Noah H. Swayne. Having joined the Court in 1862, Swayne was eligible for a full pension upon retirement, and thus neither his finances nor his health (he could still sit, but contributed little to the Court's output) were problems as dire as Hunt's.⁵⁰ Still, Swayne's lack of energy and productivity made his occupation of a Court seat a burden on his colleagues, on the capacity of the Court to deliberate and deliver judgments, and on the legal community. But he did not want to leave and could not be persuaded to do so until President Hayes agreed to nominate Swayne's friend Stanley Matthews (a former senator from Ohio and a prominent railroad lawyer) to replace him.⁵¹ Swayne resigned on January 24, 1881, and Hayes nominated Matthews on January 26.⁵²

B. Justice Arthur Goldberg

Now, how about an attractive job for the targeted Justice themselves? This approach was famously used by President Lyndon B. Johnson to remove a recently-appointed Justice still in his prime in order to replace that Justice with one of Johnson's own favorites.

President John F. Kennedy appointed Arthur Goldberg to the Supreme Court in 1962.⁵³ In 1965, Kennedy's successor, Lyndon Johnson, wanted to place his favorite political confidant and counselor, Abe Fortas, on the

50. William Gillette, *Noah H. Swayne*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 491, 501–02 (Leon Friedman & Fred L. Israel eds., 1997).

51. ATKINSON, *supra* note 2, at 58–59.

52. FAIRMAN, RECONSTRUCTION, *supra* note 26, at 522.

53. DOROTHY GOLDBERG, A PRIVATE VIEW OF A PUBLIC LIFE 120 (1975).

Court.⁵⁴ In that position, Fortas could be relied upon not only to support Johnson's Great Society legislation and other programs in litigated cases, but also to provide Johnson with inside information about goings-on inside the Court while also continuing to serve as a political and policy advisor and speechwriter. It was an ethically and constitutionally questionable multi-branch portfolio, one that made Fortas himself uneasy, perhaps about the ethics or lawfulness, or perhaps about getting caught. But in any event, the uneasiness did not prevent him from accepting the position once an opening had been engineered, and the offer was made.⁵⁵

Johnson engineered the opening by offering Goldberg other jobs. First, he invited Goldberg to leave the Court and take over the Department of Health, Education, and Welfare. Goldberg said no, repeatedly.⁵⁶ Then, Johnson offered a more appealing new office: U.S. Ambassadorship to the United Nations. It was indeed an important job at an important time—a time of heavy U.S. military involvement in Vietnam, of rising tensions and violence in the Middle East, of an increasingly chilly Cold War with the U.S.S.R., and so on—and one which Goldberg accepted.⁵⁷ And thus the deal was done. Goldberg resigned from the Court on July 26, 1965 and was sworn in as U.N. Ambassador on July 28.⁵⁸ Justice Fortas was sworn in on October 4.⁵⁹

I know of no evidence that Johnson promised or even hinted that Goldberg would have an opportunity to return to the Court later in life, but Goldberg apparently did believe Johnson would someday reappoint him to the Court after his tour of duty at the U.N. It never happened.⁶⁰

So, is either of those quid pro quos acceptable? Is there a difference between paying a Justice to leave the bench in the coin of Justice (that is, by letting them choose their successor) and paying a Justice to leave the bench in the coin of opportunity (that is, by giving them a more appealing job)? Does it matter that the successors' appointments are subject to the

54. See Larry M. Roth, *Remembering 1965: Abe Fortas and the Supreme Court*, 28 MERCER L. REV. 961, 961 (1977).

55. See MICHAEL BESCHLOSS, *REACHING FOR GLORY: LYNDON JOHNSON'S SECRET WHITE HOUSE TAPES, 1964-1965*, at 427 (2001); see generally Kalman, *supra* note 42, at 249-358.

56. BESCHLOSS, *supra* note 55, at 395; GOLDBERG, *supra* note 53, at 194.

57. BESCHLOSS, *supra* note 55, at 399.

58. *Goldberg, Arthur Joseph*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/goldberg-arthur-joseph> [<https://perma.cc/P6Z3-R4XU>] (last visited Mar. 23, 2022); *Department of State. U.S. Mission to the United Nations 4/28/1947*, NAT'L ARCHIVES CATALOG, <https://catalog.archives.gov/id/10488701> [<https://perma.cc/EDL8-F5ZE>] (last visited May 4, 2022).

59. *Fortas, Abe*, SUP. CT. COLLECTION, <https://library.cqpress.com/scc/document.php?id=bioenc-427-18166-979222&v=376bd91c0997ad6e> [<https://perma.cc/FBB8-QDP7>] (last visited Feb. 15, 2022).

60. DAVID L. STEBENNE, *ARTHUR J. GOLDBERG: NEW DEAL LIBERAL* 348, 363, 371-72 (1996).

advice and consent of the Senate? Does it matter in these cases that the Senate did in fact confirm both opportunities dispensed by the President? Does it matter that one of them (Fortas) later resigned in disgrace?

IV. THE COURT: A LIVING HELL?

When justices want to get rid of a colleague, they probably cannot entice with the appealing prospect of greener pastures elsewhere. Unlike Congress, they cannot offer the unwanted justice cash. Unlike presidents, they cannot offer the unwanted justice (or someone close to the justice) a sweet job. But justices do have nastily subversive means at their disposal: they can make life on the Court so unpleasant for their unwanted colleague that leaving the Court becomes more appealing than staying. Congresses and presidents can offer positive incentives to leave the Court, but the Justices themselves can offer negative ones.

A. Justice Benjamin R. Curtis

The experience of Justice Benjamin R. Curtis was indeed in many ways the converse of Justice Ward Hunt's, though the result was the same in the end. Curtis left the Court because of inside pressure from an adversary (or adversaries), though a conventional narrative suggested that he left the Court because the money was wrong. In other words, money and personal pressure were factors in the departures of both Hunt and Curtis, with money being the tipping factor for Hunt and pressure the tipping factor for Curtis, even though conventional narratives suggested they were vice versa.

Curtis had been on the Supreme Court for about six years when the Court decided the *Dred Scott* case in 1857. Chief Justice Roger B. Taney wrote the lead opinion in the case. Curtis's dissenting opinion was a devastating critique of Taney's inaccurate and warped presentation of history and analysis of law.⁶¹ On September 1, 1857, six months after the justices read their *Dred Scott* opinions in open court, Curtis—in the pink of health and at the height of his powers—resigned from the Court at the age of forty-seven.⁶² He would spend the rest of his life (he died in 1874) engaged in a hugely successful, respectable, and influential private practice.⁶³

61. See DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 335–414 (1978).

62. Kathleen Shurtleff, *Benjamin R. Curtis*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–2012*, 143 (Clare Cushman ed., 3d ed. 2013).

63. See *id.*

A plausible financial basis for Curtis's resignation circulated widely at the time: Curtis, with a large family and a lifestyle developed during his pre-Court years as a successful practitioner, had decided to return to private labor and a large income to support the Curtis family's deluxe lifestyle, rather than continue with public service and a small income with a reduced lifestyle. Curtis himself gave credence to this rationale, both by hinting at it himself and by declining to explicitly deny it when invited to do so by others.⁶⁴ But an at least equally plausible reason for Curtis's departure was the state of judicial relations within the Court, about which most details were not widely known at the time. The gist of the unpleasantness, however, was known and widely reported. (Most of the details came out two decades later with the publication of a two-volume "life and letters" biography of Curtis edited by his son.⁶⁵)

Again, as with Hunt's removal, a review of the basic timeline leading up to Curtis's departure from the Court may bring some sense of perspective about causation, even if it does not provide absolute certainty:⁶⁶

1851: Curtis is appointed to the Supreme Court, and promptly begins complaining about the relatively low pay (when compared to private practice).⁶⁷

1851–57: Curtis serves on the Court with great distinction,⁶⁸ while giving no indication that the low pay has prompted him to consider leaving the Court.⁶⁹

March 5–6, 1857: Taney delivers his "opinion of the court," and Curtis delivers his dissent. (Other members of the Court also read or simply

64. See STUART STREICHLER, JUSTICE CURTIS IN THE CIVIL WAR ERA: AT THE CROSSROADS OF AMERICAN CONSTITUTIONALISM 148–49 (2005).

65. See generally A MEMOIR OF BENJAMIN ROBBINS CURTIS, LL.D. WITH SOME OF HIS PROFESSIONAL AND MISCELLANEOUS WRITINGS (Benjamin R. Curtis ed., 1879) [hereinafter MEMOIR].

66. Much of the material in this timeline is taken from Ross E. Davies, *The Last Word*, 11 J. APP. PRAC. & PROCESS 229, 253–58 (2010) [hereinafter Davies, *Last Word*], which in turn draws heavily from George Ticknor Curtis, *The Dred Scott Case as Remembered by Justice Curtis's Family*, 10 GREEN BAG 2D 213, 225–38 (2007) [hereinafter Curtis, *The Dred Scott Case*]. See also Curtis E. Gannon & Ross E. Davies, *B.R. Curtis & G.T. Curtis*, 10 GREEN BAG 2D 209, 225–28 (2007).

67. See STREICHLER, *supra* note 64, at 148.

68. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, 356 (1985).

69. STREICHLER, *supra* note 64, at 148.

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submit written opinions, none of which have the significance of Taney's and Curtis's.)

March 6–June 20, 1857: Taney then engages in a series of extraordinary maneuvers that eventually drive Curtis off the Court.

March 14, 1857: Having learned that Taney is revising his opinion, Curtis notifies Clerk of the Court William T. Carroll that his dissent should not be submitted for official publication until he has a chance to review Taney's revised opinion and adjust his dissent accordingly.

April 2: Curtis requests a copy of Taney's revised opinion from Carroll.

April 6: Taney issues an order to Carroll to “give no copy of this [Taney's] opinion to *any* one, until the reporter has printed it”⁷⁰—and two other Justices, James Wayne and Peter Daniel, co-sign the order—thus preventing Curtis from revising his dissenting opinion to address whatever changes Taney has been secretly making to his own opinion. Carroll notifies Curtis of the order and suggests that Curtis request a copy of Taney's opinion from the author.

April 9: Curtis suggests to Carroll that the Taney-Wayne-Daniel order could not apply to a member of the Court and that Carroll should consult with Taney.

April 14: Carroll replies to Curtis that he did consult with Taney after sending a copy of the April 6 order to Curtis, and that Taney approved of withholding his opinion from Curtis.

April 18: Curtis writes to Taney, asking him to instruct Carroll to send Curtis a copy of Taney's opinion.

April 28: Taney refuses to do so.

May 13: Curtis replies to Taney expressing, among other things, concerns about the relationship between Taney's revised opinion and Curtis's original dissent:

70. MEMOIR, *supra* note 65, at 216 (emphasis in original).

In my judgment, and I cannot doubt you will agree with me, a judge who dissents from an opinion of a majority of the court upon questions of constitutional law which deeply affect the country, discharges an official duty when he lays before the country the grounds and reasons of his dissent. This opinion of the court was read in conference of all the judges. I shaped my dissent from that opinion accordingly. After I returned home, I was informed that this opinion had been revised and materially altered. I did not know whether the information was true or false. I thought I had a right to know, before my own opinion should be published by the reporter in a permanent form, whether any alterations material to my dissent had been made after its promulgation from the bench.⁷¹

Late May: The official report of *Dred Scott v. Sandford* is published in Volume 19 of *Howard's Reports*, the then-official reporter of Supreme Court decisions and opinions.

June 11: Taney replies to Curtis denying, among other things, that he has revised his opinion, but only by taking the laughably implausible position that support for the conclusions in an opinion do not count as revisions.⁷²

June 16 and 20: Curtis and Taney close their correspondence with a chilly final exchange of letters.

Curtis never did get to see a copy of Taney's revised opinion before it appeared in the *19 Howard*, and he later complained that Taney's revisions "amount[ed] to upwards of eighteen pages. No one can read them without perceiving that they are in reply to my opinion."⁷³ In his thorough study of the *Dred Scott* case, Professor Don Fehrenbacher concludes that Curtis's complaint was well-founded. Taney expanded his opinion by at least twenty-five percent, and probably more like fifty percent, in response to Curtis's dissent (and, to a lesser extent, in response to a dissent by Justice John McLean).⁷⁴ Thus, "Taney's denial of having made any significant changes, though perhaps not untruthful according to his own peculiar lights, must be labeled inaccurate."⁷⁵

The aftermath for the Court was Curtis's resignation—an understandable response to exceedingly uncollegial and unjudicial

71. *Id.* at 218–19.

72. *Id.* at 221–22.

73. Curtis, *The Dred Scott Case*, *supra* note 66, at 237.

74. FEHRENBACHER, *supra* note 61, at 320.

75. *Id.*

treatment of the Justice by the Chief Justice (abetted by at least two other justices), which did not bode well for a productive future on the Court, or a pleasant one.⁷⁶ The aftermath for the country was, of course, a civil war.

The reason given in public for Curtis's resignation was that a Justice's salary was insufficient for his needs,⁷⁷ but privately, his brother George wrote,

To state that ground [of Justice Curtis's resignation] with proper accuracy, it was a conviction, more or less justified by what occurred before the adjournment of the court [after the Dred Scott decision and subsequent imbroglio], but held with entire sincerity, that he could no longer expect, on constitutional questions, to see the court act with that judicial propriety and consistency, and that freedom from political considerations, which could alone enable it to retain the confidence of the country. The pecuniary reason for resigning was the leading and decisive one; the other, as will presently be seen, although secondary and subordinate, had a material influence.⁷⁸

In other words, Justice Curtis's brother—a prominent lawyer with a practice that included Supreme Court work—writing in 1879 nevertheless felt obliged to acknowledge the significance of the effect of the Dred Scott affair on Justice Curtis. This occurred while Justice Nathan Clifford, who had replaced Curtis, was still on the Court, and the Bar was still well-populated with senior lawyers who would be sensitive about aspersions cast on Justices of recent vintage. So, not surprisingly under contemporary conditions, George sought to downplay the significance of the institutional mistreatment of his brother and of the fact that “he could no longer expect, on constitutional questions, to see the court act with that judicial propriety and consistency, and that freedom from political considerations, which could alone enable it to retain the confidence of the country.”⁷⁹

So, a Justice rose up to challenge not only Chief Justice Taney's dominance of the Court, but also to challenge the Chief Justice's arguments in favor of the perpetual subordination of all Americans of African origin. The Chief Justice then engineered the institutional sabotage and disablement of that Justice. Small wonder then, that the Justice left when there was no justice to be done as well as no money to be made. Alas, we may never know for sure, but it sure does look like it was internal Court politics, not money, that drove Curtis off the Court.

76. MEMOIR, *supra* note 65, at 244.

77. *Id.* at 243.

78. *Id.* at 244.

79. *Id.*

B. Justice William O. Douglas

But what if the objectionable Justice was not an extraordinarily effective one but, instead, an extraordinarily ineffective one? Would that justify a miserable exercise in sabotage and disablement? That is what happened to Justice William O. Douglas.⁸⁰

On Friday, October 17, 1975, eight of the Court's nine members—Chief Justice Warren Burger and Justices William Brennan, Potter Stewart, Byron White, Thurgood Marshall, Harry Blackmun, Lewis Powell, and William Rehnquist—met without telling the ninth member of the Court, [Justice] Douglas, what they were doing. In a post-meeting letter distributed only to the participants, White identified two decisions made by seven members of the group of eight (implying but not stating that he had dissented). First, the “Court [would] not assign the writing of any opinions to Mr. Justice Douglas.” Second, “they would not hand down any judgment arrived at by a 5-4 vote where Mr. Justice Douglas is in the majority.”⁸¹ They were motivated by concerns about Douglas's competence to serve. He had suffered a serious stroke the previous New Year's Eve, and his recovery was not going well. His disturbingly uneven behavior inside the Court and in public showed that he was not well enough to serve as a judge.⁸² For reasons about which we can only speculate, the group dealt with the problem in secret. The only direct evidence of this entire exercise is White's letter.

According to White, the decisions of the seven-Justice majority in the group of eight amounted to arrogation by the Court of the congressional power to impeach and remove judges. White was, as Professor Dennis Hutchinson describes him, “overwrought” by his own “constitutional fastidiousness.”⁸³ After all, they had not removed Douglas from office. Instead, as Powell biographer John Jeffries explains, “They took away his vote.”⁸⁴ In other words, when Douglas failed to recuse himself until he was capable of functioning effectively, the rest of the Court took over and made the decision for him. The constitutionality of what amounts to collusive compulsory informal secret recusal [in all cases in which a Justice's vote might matter for the result—that is, such a maneuver functioning as a practical informal removal—] is an open question,⁸⁵ but the raw fact that the Court has engaged in this form of self-management

80. Here, I rely heavily on Davies, *Reluctant Recusants*, *supra* note 18, at 88–89, the Article mentioned at the beginning of this Article, and from which the following block quote is taken (with footnotes formatted for internal consistency and trimmed for internal relevance).

81. Letter from Justice Byron R. White to Chief Justice Warren Burger (Oct. 20, 1975), *reprinted in* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE* 463–65 (1998).

82. Garrow, *supra* note 2, at 1052–56 (2000); MURPHY, *supra* note 44, at 481–95.

83. HUTCHINSON, *supra* note 81, at 434–36.

84. JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* 417 (1994).

85. Compare HUTCHINSON, *supra* note 81, at 435, with *McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of the Jud. Conf. of the U.S.*, 264 F.3d 52, 67 n.5 (D.C. Cir. 2001).

is not.⁸⁶

The actions by the Burger Court-Minus-Douglas against Douglas appear more thoroughly orchestrated and comprehensive, and also humiliating, than those executed by Taney and his collaborators upon Curtis. Does it matter that Douglas's closest decisional-doctrinal colleagues were all on board for his treatment, while it was Curtis's decisional-doctrinal adversaries on the Court who were responsible for his treatment? Does it matter that the treatment of Douglas did not in fact affect any decisions by the Court,⁸⁷ while the treatment of Curtis had an inestimable impact on the Court and the country?

V. PROGNOSTICATIONS AND CONCLUSIONS

There is, obviously, plenty of room for outrage about these relatively informal means of engineering a transfer of judicial power at the highest level. Why should we countenance such behavior when we have a constitution that specifies the means of placing Justices in office and of removing them from office?

The short answer is that sometimes the benefits of this kind of behavior outweigh the costs.

Justice Hunt, for example, did not belong on the Court, but there was no way that the constitutional impeachment process could plausibly be employed to remove him. Corrupting that process would have been a terrible move, and a constitutional amendment to provide for removal due to incompetence was not then (and surely is not now) a viable alternative. The relatively low-cost and entirely lawful alternative of a little financial incentive was surely worth it.⁸⁸ And while Justices Fortas and Douglas were both regrettably, but probably not impeachably, short on ethics (for accepting large chunks of cash from the rich and powerful on what amounted to the sly), only the one who lied under oath—and do we really want people who lie under oath occupying seats on the Supreme Court?—

86. There have been other instances of this sort of behavior, although none with a climax so dramatic. See, for example, Garrow, *supra* note 2, at 1015–16, on the Court's dealings with Justice Joseph McKenna in 1924–25. Davies, *Reluctant Recusants*, *supra* note 18, at 89 n.37.

87. “The irony is that the rump Court's action was not necessary (Douglas cast no decisive votes during the period) . . .” HUTCHINSON, *supra* note 81, at 435.

88. Modern commentators generally agree that financial incentives are no longer a useful tool, since the Supreme Court Retirement Act of 1937 guaranteed retirement with full salary and benefits for Justices meeting certain generally easily reachable requirements. But don't be too sure. Consider, for example, the possibility of a statute making the papers of Justices who serve for more than a certain number of years—perhaps 18?—subject to the Presidential Records Act of 1978.

was informally driven from office.

The business of a President catering to a sitting justice's desire to choose their successor may or may not be objectionable as a general matter,⁸⁹ but if the choice a President has is to burden the country with a justice of dubious competence (such as Justice Swayne) when a justice of undoubted competence (Justice Matthews) could replace them, perhaps opting for competence would in the best interest of the country, especially in light of the Senate's advice-and-consent role, which should prevent an unduly oppressive bargain between a President and unduly demanding justice.⁹⁰ The case for countenancing this kind of Article II–Article III wheeling and dealing is perhaps even less objectionable in the context of the offer of a more appealing job. This is simply an exercise in revelation of preferences. If a justice would rather be an ambassador, let 'em, at least if they will be a competent ambassador. And again, advice-and-consent screening should provide a backstop.

Finally, there is the matter of institutional self-regulation. Justices of the Supreme Court have long resisted formal accountability to anyone but themselves—except via impeachment, and the attenuated constraint of congressional budgeting—with a near-perfect record of success. As a general matter, this is a good thing. Preserving judicial independence and all that. But then along comes an occasion like the *Dred Scott* case, in which a cabal of justices disabled a colleague from effectively serving the public—by depriving Justice Curtis of the information necessary to produce a complete dissent from Chief Justice Taney's opinion. And then there is the troubling question of whether *Dred Scott* is topped or offset by an occasion like the Douglas disability disaster, in which a cabal of justices disabled a colleague from ineffectively dis-serving the public—by

89. This kind of behavior does seem to be enjoying a current surge of popularity in at least two branches of government. See, e.g., Christopher H. Schroeder, *Authority of the President to Prospectively Appoint a Supreme Court Justice*, Op. O.L.C. (Apr. 6, 2022), <https://www.justice.gov/olc/file/1494816/download> [<https://perma.cc/668B-6AVN>]; Debra Cassens Weiss, *9th Circuit judge wants to pass the torch to her favored replacement; is there an 'optics' problem?*, A.B.A. J. (Apr. 18, 2022), <https://www.abajournal.com/news/article/9th-circuit-judge-wants-to-pass-the-torch-to-her-favored-replacement-is-there-an-optics-problem> [<https://perma.cc/Z69J-M7VL>].

90. It would be foolish, though, to ignore the slide into direct judicial influence on executive functions that could result from this sort of bargaining. See, e.g., GOLDBERG, *supra* note 53, at 195 (“The very weekend before [Justice Arthur Goldberg] submitted his letter of resignation we were both guests of the President and Mrs. Johnson at Camp David. On Sunday afternoon of that weekend, [Secretary of Defense] Bob McNamara presented a proposal for calling up the reserves for service in Vietnam. Arthur told the President that if that were done, he would withdraw his acceptance of [the United Nations ambassadorship] and not submit his resignation [from the Supreme Court] because, to him, calling up the reserves meant the equivalent of a formal declaration of war. President Johnson did not give the order.”).

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depriving Justice Douglas of all capacity to write any opinions for the Court or to cast a deciding vote in any case before the Court. The choice between trusting other government actors (legislative or executive) to assume more formal control over the removal of Justices and trusting the Justices to do the right thing as self-regulators, is painful, especially in light of the treatment of Curtis and Douglas, but obvious: Leave the justices to their own devices—as a formal matter—but don't give up on informality.