

THE WHITE HOUSE

WASHINGTON

October 3, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: DOJ Proposed Report on S.J. Res. 39,
a Bill which Proposes a Constitutional
Amendment to Establish a Ten-Year Term
of Office for Federal Judges

James Murr of OMB has asked for our views on the above-referenced proposed report. S.J. Res. 39 proposes a constitutional amendment to limit the term of office of federal judges to ten years, after which their names would be submitted to the Senate for reconfirmation to an additional term. The Justice Department's proposed report opposes such an amendment, noting that life tenure is critical to the independence of the judiciary and therefore to our system of separated powers. The Justice report also takes exception to the renomination process, which does not include any participation by the Executive.

The Justice report is similar to other reports it has filed in recent years and I do not propose to object to it. I would point out, however, that there is much to be said for changing life tenure to a term of years, without possibility of reappointment. The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then, but is becoming commonplace today. Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones. Denying reappointment would eliminate any significant threat to judicial independence.

Furthermore, the Justice report is, on a theoretical level, somewhat disingenuous. The frequent citations to statements in The Federalist and in Judge Story's writings on the need for life tenure ignore the fact that those statements were predicated on a view of the judge's role that many if not most sitting federal judges would find unacceptably circumscribed. It is certainly appropriate to protect judges from popular pressure if their task is limited to discerning and applying the intent of the Framers or

legislators. To the extent the judicial role is unabashedly viewed as one in which judges do more than simply figure out what the Framers intended, the case for insulating the judges from political accountability weakens. The federal judiciary today benefits from an insulation from political pressure even as it usurps the roles of the political branches. At present, however, it probably makes more sense to seek to return the judges to their proper role than to revoke the protections defensible only if they are in that role.