The justice (not a current justice) was in declining mental health. Once brilliant, he became forgetful. Once tireless, he became lethargic. Once a workhorse on the Court, he was no longer physically or mentally able to pull his share of the load. One Term of Court, he wrote only four opinions and the next he did not write any. The other justices finally sent one from among them to deliver a message urging him to retire. The delivering justice found the other in the robing room, apparently unaware of his surroundings, aroused him from a stupor, and began down an indirect route to the point. The receiving justice deflected the conversation; it never reached the point; he stayed on the Court.

The justice was not fond of one president and then the next, and then the first president was re-elected and the justice still was not fond of him. He did not want either man to nominate his replacement. Furthermore, he had his sights set on the Supreme Court longevity record of 34 years, five months and two days (then held by Chief Justice John Marshall). Finally, he had a much younger wife who was quite fond of the
social benefits of being Mrs. Justice; she opposed his retirement.

Eventually he did submit a letter of resignation, to take effect on his 34th year, 8th month and 20th day on the Court.¹ Thus did Justice Stephen J. Field become — for a time — the longest serving justice in the history of the Supreme Court.²

¹ Many of these facts are taken from David N. Atkinson’s book Leaving the Bench: Supreme Court Justices at the End, 68-70 (1999) (hereinafter Leaving the Bench).
² Justice Field was nominated by President Abraham Lincoln. He took the oath of office on May 20, 1863.
³ Justice Breyer was nominated by President Bill Clinton.
⁴ Justice Thompson was nominated by President James Monroe. The Court that is in third place for having sat the longest without a new member — there have been a few times when the Court has gone almost six years without a new member — is not even close to the top two.
⁵ Some of these facts are taken from Leaving the Bench, at 32.
⁶ Justice Douglas was nominated by President Franklin Delano Roosevelt. He took the oath of office on April 17, 1939.
⁷ Leaving the Bench, at 148.
⁸ Many of these facts are taken from Leaving the Bench, at 146-49.

The first step toward the confirmation of a justice of the United States Supreme Court is the creation of a vacancy. In this regard, the current Supreme Court comes very near to holding the group longevity record. The last previous appointment to the Court was Justice Stephen G. Breyer,³ who took the oath of office on Aug. 3, 1994. Aug. 3, 2005, is, then, the 11th anniversary of this group of nine.

The record for the longest time between one justice’s judicial oath and the next one’s is 11 years, seven months and two days. The record was set between 1812 and 1823, back in the days when the Court had only six members. It began with the confirmation of Justice Joseph Story, who was nominated by President James Madison (who had been the defendant in Marbury v. Madison). Story took the oath of office on Feb. 3, 1812. The end date on the record is Sept. 1, 1823, when Justice Smith Thompson took the oath.⁴

Story, of course, is famous. Smith Thompson, though he served on the Court for 22 years, is almost entirely forgotten. He did nothing much of note as a justice. Among the reasons: (1) He devoted much of his time on the Court to opposing John Marshall, and that did not work out so well for him. (2) While sitting on the Supreme Court, he ran for governor of New York and lost. (3) He stayed on the Court until his death in 1843, at the age of 75, but for the last 10 months of his tenure he simply left D.C., went home to New York and refused either to hear any more cases or to retire.⁵

He died in office. Thus did Justice Smith Thompson go quietly into obscurity.

The current holder of the longevity record for an individual justice is William O. Douglas.⁶ He took it away from Justice Field. Like Field and Thompson before him, Douglas’ tenure on the Court outlasted his usefulness. He kept his seat after suffering a stroke that left him frail, fragile, without the considerable energy he’d had before. In time, he began calling other justices by the wrong names, mistaking one’s office for another’s and uttering non sequiturs. He was confined to a wheelchair and incontinent. He is quoted as saying, “I won’t resign while there is a breath in my body — until we get a Democratic president.”⁷ He stayed on the Court 20 months — almost two years — as his condition worsened.

Douglas finally retired and then, a month later, came to the Court intending to vote on a case that had been submitted before the date of his retirement. He was told he could not do so. He wrote on the case anyway, and his former colleagues ignored what he had written.⁸

One thing Justices Field, Thompson and Douglas have in common — and one huge difference between each of them and Justice Sandra Day O’Connor — is that all overstayed their welcome and none brought himself any honor by the way he left the Court.

As everyone knows, Justice Sandra Day O’Connor has announced her retirement, effective upon the confirmation of her successor. As I write this on a Saturday in July, the president has not yet nominated

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¹ Leaving the Bench, at 68.
² Leaving the Bench, at 69.
³ Leaving the Bench, at 79.
⁴ Leaving the Bench, at 80.
⁵ Leaving the Bench, at 141.
⁶ Leaving the Bench, at 145.
⁷ Leaving the Bench, at 148.
⁸ Leaving the Bench, at 149.
her replacement. Also, as I write, Bob Novak reported yesterday that Chief Justice Rehnquist was going to announce his retirement that day. Since it was Bob Novak, I put little stock on the report either way, thinking perhaps it was accidentally true, perhaps not. (When my wife and I lived in Washington, D.C., Bob Novak still had a newspaper column with Rowland Evans. The popular name of the column was “Evans and No-Fact.”) Yesterday has come and gone and there has been no such announcement. It may well be, however, that by the time you are reading this there is more than one announced retirement.

Justice John Paul Stevens is 85. Chief Justice Rehnquist is 80 and has what is reported to be a particularly aggressive kind of thyroid cancer. Justice Ruth Bader Ginsburg is 72.

It is not that reaching 80, let alone 70, is a milestone for end of service. In fact, the Supreme Court seems to be a great place to grow old. The great Justice Oliver Wendell Holmes Jr. sat into his 90s, brilliant and effective until very near the end of his tenure. (When, at the age of 91, his brethren suggested that it was time for him to leave the Court, he did so immediately and graciously.) Louis Brandeis was 83 when he retired. Felix Frankfurter resigned at age 80 and Hugo Black at age 85.

The great Chief Justice John Marshall — best known for his opinions in *Marbury v. Madison* and *McCulloch v. Maryland* — served as chief justice until the age of 76. The controversial Chief Justice Roger Taney — best known for his infamous opinion in *Dred Scott v. Sandford* — did his job well until he died at the age of 88. The first Justice John Marshall Harlan — well known for his beautiful dissenting opinion in *Plessy v. Ferguson* — was a great justice up until the age of 78. Marshall went on the Court in 1801, Taney in 1836 and Harlan in 1877, back when the mid-to-late 70s really was old.

Between 1969 and the retirement of Justice O’Connor, the average age of justices who left the Court was 77. Four were 80 or older.9

There are, I am sure, many reasons why some justices stay on the Court so far into old age. Here is the short list of reasons as I see them:

1) They live long enough to do so. They get good medical care. The job keeps their minds alert and, as there is not a lot of heavy lifting, it does not wear out their bodies. If you want to grow old on the Court, the first thing you have to do is to grow old.

2) Some don’t know what else to do. There are justices who leave the Court to take other jobs10 or for family reasons11 or to run for elective office.12 Historically, however, many justices outlive their friends and family and they have not developed many interests outside of the job. For some it is the socialization that both keeps them at it and helps keep them sharp enough to do it.

3) As Justices, they tend to live long and productive lives. After they leave the Court, they tend to die — and soon. They stay on the Court to stay alive. This is important work and it gives a life great meaning. It helps keep the mind alert. And, referring back to the second point, it provides the socialization that can contribute so greatly to the physical and mental health of a person any age, but particularly that age. Giving that up can be, well, deadly.

4) Some feel indispensable. No one else will vote just the way I do. No one else has the experience with constitutional law that I do. No one else is as compassionate, or everyone else is too compassionate.

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9. None died while on the Court. All resigned or retired. Many of these facts are taken from Leaving the Bench, at 138-39. Justice O’Connor is 75. Her retirement will not have much affect on the average.


11. Justice Tom C. Clark left so that his son could become attorney general and there would be no father (Supreme Court justice) son (attorney general) conflict of interest.

12. Chief Justice Charles Evan Hughes left to run for president.
They stay for the good of the country. One of Chief Justice Salmon P. Chase’s good friends said: “Chase is a good man, but his theology is unsound. He thinks there is a fourth person in the Trinity.”

5) Some stay on because they do not want the current president to nominate their replacement. This can come from spite for a president the justice does not like personally. It can come from ideological differences between the president and the justice. (Even a justice who likes the current president personally and politically may have in mind how often justices disappoint the president who nominated them.)

6) And sometimes a justice becomes addicted to the power and the prestige. (Or, as with Justice Field, the spouse does.)

7) For some, there is a seventh reason: the record books. Justice Field stayed on the Court long after he was of much use as a justice in part so he could break John Marshall’s record and become the longest serving justice in the history of the Court.

8) There used to be an eighth reason: poverty. They needed the salary. Some justices had not saved much money or had lost what they had saved in bad investments or, for whatever reason, just did not have much money to fall back on, and, until 1937 there was no automatic pension plan for Supreme Court justices. But they did have lifetime tenure in a job where the paymaster (Congress) is forbidden by the Constitution from reducing their salary while they are on the bench.

The first step in the nomination process is the creation of the vacancy. This has not always happened with the great dignity that has accompanied Justice Sandra Day O’Connor’s submission of her letter of retirement.

I have told of other justices who have stayed on the Court too long and done so for reasons straight from their ego: Justice Field, for example, who stayed on out of his dislike of two presidents and a young socialite wife — reasons that do not seem to outweigh the fact that, at the end, he sat on the Court in a stupor.

For reasons straight from her humanity, from her heart, Justice O’Connor has decided to leave the Court while at the peak of her powers. Her husband is ill. It has been reported that one reason for her retirement now is that she wants to spend more time with her family. What most government officials seem to mean when they say that is that they need to spend more time with their lawyers. When she says it, she means it. Throughout her service, she has been the kind of person worthy of the honor of being a justice of the Supreme Court of the United States.

The president soon will (“soon will” as I write; presumably “already has,” as you read) nominate someone to hold Justice O’Connor’s seat on the Court. Perhaps, by the time this is published, there will be more than one nomination. After the nomination there will, of course, be confirmation hearings.

The fact that it has been so long between nominations means a number of things. First, the Senate, which must confirm the president’s nominee, is crawling with men and women — Senators and staffers — who have not been through this before. The New York Times reports that 56 members of the Senate have never participated in a Supreme Court confirmation.

Perhaps it makes no difference that over half of the Senate has never participated in such a confirmation. I think, however, that it does make a difference. There are lessons to be learned by having been through these things before. Look at the Terry Schiavo matter and how Congress handled its first attempt to deal with an individual end-of-life decision.

It strikes me that Congress would handle this issue differently were it to come up again.

13. mrlincolnandfreedom.org/content_inside.asp?ID=68&subjectID=4. Chief Justice Salmon P. Chase was nominated by President Lincoln.
14. As with Justice Field, as discussed above.
15. As with Justice Douglas, as discussed above.
16. This is discussed, around footnote 27.
17. The first automatic pension for retiring justices is found in Pub. Law No. 10 (1937), 28 U.S.C. 375. Before that, a retiring justice could ask Congress to appropriate some money for the post-retirement support of the justice and his wife. Sometimes some money was appropriated. Sometimes not.
19. See Leaving the Bench, at 7-9.
20. The last time there were two vacancies at the same time was in 1971 when Justices Hugo Black and John Marshall Harlan announced their retirements within six days of one another. Their replacements, nominated on the same day and confirmed four days apart, were Justice Lewis Powell and then-Justice William Rehnquist.
21. Sheryl Gay Stolberg, “Out of Practice, Senate Crams for Battle Over Court Nominee” The New York Times (July 8, 2005). Sen. Arlen Specter, who chairs the Judiciary Committee, has been on that Committee for nearly 25 years and “has participated in nine Supreme Court nominations, though this will be his first as chairman.” Id.
again in front of a majority of the same men and women. In any event, I wonder what hope the nominee has before a body led by a doctor who looks at a few minutes of videotape of a patient in a coma and comes onto the floor of the Senate with a diagnosis in an attempt to control the outcome of a piece of proposed legislation.\textsuperscript{22}

Second, cable TV and the Internet. This will be the first nomination spun on the “No Spin Zone.” Information, true and false, will fly around the country faster than a speeding bullet. The proliferation of broadcast and cable television stations, newspapers (with instantly updated websites), Internet news sites and bloggers, increases the pressure on each to distinguish itself from all others — preferably by being first. The rush to broadcast means we can expect more revelations of the sort that led to Dan Rather’s early retirement from the “Evening News.” What’s true and what’s false will become blurred. Some damaging true information will be popularly considered false. Some damaging false information will be popularly considered true. The country will become more polarized. (Is that possible? Yes, it is!)\textsuperscript{23}

Third, this group of nine has been together so long they tell jokes by number. Eleven years is longer than any starting-nine professional baseball players stay together, it is as long as the Beatles were a band\textsuperscript{24} and it is longer than many marriages. It is almost a third of the life expectancy of a child born in 2005 in Sierra Leone.\textsuperscript{25} On the one hand, it should be healthy to throw someone new into the mix. On the other, achieving full membership in a group that tells jokes by number might require some adjustment on both sides.

There is at least one vacancy, maybe, by the time you read this, more than one. Whom the president nominates is extraordinarily important. We all know that. I believe that outside of time of war or national tragedy, such as the Great Depression, Supreme Court nomination is the most important thing a president does. Sometimes even in a time of war it is the most important thing a president does.

As president, the most important thing John Adams did to determine the future of this country was to nominate John Marshall to be chief justice. The most important thing Dwight David Eisenhower did as president was to nominate Earl Warren and Bill Brennan. The most lasting impact from Gerald Ford’s brief presidency comes from his nomination of John Paul Stevens to the Court. I believe that more than anything else the presidency of the first President Bush will be remembered by the impact his nominee Clarence Thomas has on the country.

\textsuperscript{22} I know that after the autopsy showed that Schiavo’s brain had shrunk to half its normal size and that she was in fact in a persistent vegetative state, Senate Majority Leader Bill Frist (R-Tenn.) said, “I never made a diagnosis.” I also know that during the debate of Public Law No. 109-3 (March 21, 2005), an act entitled “An Act for the relief of the parents of Therese Marie Schiavo,” Frist took to the floor of the Senate, stated that he had watched videotape of Schiavo and spoken with her brother and one of several neurologists who had evaluated Ms. Schiavo, and concluded “That [meaning Ms. Schiavo] is not someone in a persistent vegetative state.” See, for example, Charles Babington, \textit{The Washington Post} A17 (June 17, 2005). You can conclude for yourself whether that is a diagnosis. As for myself, if I need medical care, I will go elsewhere.

\textsuperscript{23} This could be avoided if the president would nominate a person who is popular with the members of the United States Senate and whose position on abortion is not known, but, while I know why I might want to do that, I do not see why President Bush would want to.

\textsuperscript{24} The Beatles was founded in 1959; Paul McCartney left the group in 1970. Though the group officially disbanded in 1971, they were no longer together when McCartney left.

\textsuperscript{25} According to the United Nations Common Database, the life expectancy of a child born in Sierra Leone in 2005 is 34.2 years. This information was found on the July 8, 2005, posting at \url{globalis.gyu.wwu.edu/indicator_detail.cfm?country=SL&indicatorid=18}. 
Justice Douglas served almost 37 years: 36+ years of constitutional rulings; 36+ years of saying what the law is; 36+ years of finding and enforcing individual rights; 36+ years of saying who has the power and who does not.

From the president’s standpoint, he needs to take care to nominate someone who has the intellect and the ability to use that intellect effectively — particularly the ability to write well. These are the things that a justice needs to do if he or she is to direct the course of history. Also, from the president’s perspective, he needs to take care to nominate someone who will, in the end, remain a good conservative.

Hanging over the head of the selection process is the fact that the president doesn’t always get it right. Presidents are often disappointed by the positions their nominees take as justices. Theodore Roosevelt nominated Oliver Wendell Holmes, in part, for how the former believed the latter would vote in antitrust cases. When Holmes recorded a vote contrary to Roosevelt’s trust-busting philosophy, the president stopped inviting Justice and Mrs. Holmes to the White House for dinner.

In modern times, the presidents who have been disappointed by the votes of their nominees are all Republicans. President Eisenhower nominated Earl Warren and later called it “the biggest damn fool thing I ever did.” President Nixon nominated Harry Blackmun, who went on to write the majority opinion in Roe v. Wade. President Ford nominated John Paul Stevens, the most liberal justice on the current Court.

President Reagan nominated Sandra Day O’Connor and Anthony Kennedy, both of whom were part of a five-to-four majority that reaffirmed the right to an abortion. O’Connor wrote the majority opinion that upheld the University of Michigan Law School’s racial affirmative action plan. Kennedy wrote the majority opinion that found it was unconstitutional for the state of Texas to criminalize adult, private, consensual, same-sex sodomy. James Dodson’s Focus on the Family Action Newsletter for April of 2005 includes the following: “Justice Anthony Kennedy, whom I consider to be the most dangerous man in America …” George H. Bush nominated David Souter, who is a solid member of what passes for the liberal wing of the current court.

Presumably George W. Bush would like to avoid nominating someone who will fill the perceived hole in the Court’s middle — a replacement swing vote. That is not what he was elected to do.

I do hope, however, that he nominates someone with the kind of character Justice O’Connor has shown in leaving. I hope he nominates someone who will have what it takes to retire from the Court when the time is right: before she is no longer able or willing to do the work. And someone who will retire for all of the right reasons, including, perhaps, her love for a good husband.

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