THE PROBLEMS OF DISABLED JUSTICES: SUPREME COURT DEATHS AND RESIGNATIONS: 1865-1900

*David N. Atkinson**

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I. INTRODUCTION

Few subjects exercise a greater fascination than the loss of power. In the history of the United States Supreme Court, voluntary retirement of justices has been the exception.[1] And when justices have not died in office, the circumstances of their retirements often have been attended by physical disability, mental decline, and even indifference toward the Court's work due to

* B.A., M.A., J.D., Ph.D., University of Iowa; Professor and Chairman, Department of Political Science, and Professor of Political Science and Law, School of Law, University of Missouri-Kansas City.

1. Of the nineteen justices considered in this study, twelve died in office.

political ambition.

Judges sitting on legislatively created courts, as provided for in article 1 of the Constitution, retain their positions for the length of time Congress prescribed either at the time the court was created or as provided for in subsequent legislation. Congress has the power to decide upon a term of years, as is commonly done; however, it may grant tenure for "good behavior," or even provide a mandatory retirement age.[2] No such options are available for federal judges appointed pursuant to article III of the Constitution. Article III mandates that Supreme Court justices "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[3] In practice the justices have life tenure, and no member of the Supreme Court has ever been removed from office under the impeachment provisions of article II.[4]

Consequently, the tenure of Supreme Court justices has remained largely a matter of individual discretion, subject to the inevitable pressures from judicial colleagues and family members. There are no constitutional provisions, similar to those made for the president in the twenty-fifth amendment, which may be resorted to in the event of incapacitation.[5] Nor are there controlling precedents in Court history dealing with physical decline. Each case is in a sense *sui generis*. Nonetheless, it is possible to broadly categorize the ways in which the justices have left the Court. Death, politics, and ill health have accounted for nearly every retirement from the bench.

Elsewhere, I have suggested that the circumstances surrounding resignation and death on the Court since 1937 and from 1789 to 1965 have not, for a variety of reasons, posed a problem sufficiently serious to justify constitutional amendments.[6] The purpose of this article is to review the unique biographical evidence available for the period between 1865 and 1900, discover the extent to which physical and mental incapacity of justices existed, and consider the practical consequences, if any, those incapacities encouraged and permitted.[7] This was, after all, a period of vast industrial ex-

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2. Similarly, Congress may reduce the salaries of these judges as it chooses, may permit the President alone to appoint judges, or may provide procedures for removal other than impeachment. U.S. CONST. art. I, § 8.

3. *See* U.S. CONST. art. III, § 1.

4. In 1969 Justice Abe Fortas resigned rather than test the very real possibility of a successful impeachment. *See* B. MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988); R. SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT (1972).

5. *See* U.S. CONST. amend. XXV, §§ 3, 4.

6. Atkinson, *Bowing to the Inevitable: Supreme Court Deaths and Resignations, 1789-1864*, 1982 ARIZ. ST. L.J. 615; Atkinson, *Retirement and Death on the United States Supreme Court: From Van Devanter to Douglas*, 45 UMKC L. REV. 1 (1976).

7. Invaluable general sources include CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SU-

pansion. A massive urbanization of the work force occurred, and the government willingly deferred to the leaders of industry. Not surprisingly, these decades forced new pressures and obligations upon the country's democracy and inevitably upon its Supreme Court.[8] It was a time of change, social insensitivity on an unprecedented scale, and unregulated individualism. Watching from abroad, Thomas Carlyle characteristically observed, "[I]n the long-run every Government is the exact symbol of its People, with their wisdom and unwisdom; we have to say, 'Like People, like Government.' "[9]

America was in social and economic ferment, but inside the Supreme Court there were many years when striking instances of decrepitude among the justices existed, and which because of a common reluctance to stand aside, presented the century's strongest case for institutional reform.

II. Deaths and Resignations: 1865-1900

A. *Justice John Catron*

At nearly eighty years of age (his exact date of birth is unknown), Justice John Catron of Tennessee died in May, 1865. Like Chief Justice Roger Brooke Taney, with whom he had agreed in the *Dred Scott Case*,[10] he was feeble and broken in health at the time of his death. A year earlier he had been identified by Attorney General Edward Bates as one who might be willing to resign if Congress provided an adequate pension. However, Congress remained inactive and it was not until 1869 that a bill was passed which conferred a pension on those justices who resigned when they were at least seventy years of age with at least ten years of service.[11]

Whether Justice Catron's failing health much affected the quality of his performance may be doubted. As of 1857, when *Dred Scott* was decided, one Court observer described him in the following terms: "Judge Catron of Tennessee is a robust, unintellectual man, advanced in years, whose judgment would be inevitably swayed by his political associations, but whose erroneous opinions would, as a general rule, more often result from obtuseness than from original sin . . . ."[12]

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preme Court (1979); II & III The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions (L. Friedman & F. Israel ed. 1969) [hereinafter Friedman & Israel].

8. *See* A. Kelly, W. Harbison & H. Belz, The American Constitution: Its Origins and Development, 373-418 (6th ed. 1983); J. Lurie, Law and the Nation, 1865-1912, 27-42 (1983); C. Swisher, American Constitutional Development, 389-452 (2d ed. 1954).

9. T. Carlyle, Past and Present 311 (1918).

10. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

11. Act of April 10, 1869, ch. 22, § 5, 16 Stat. 44. Under this statute resigning justices would continue to receive the same salary.

12. II C. Warren, The Supreme Court in United States History 318 (1926) [hereinafter Warren].

B. *Justice James Wayne*

A second southerner was taken from the Court two years later. Justice James Wayne, still vigorous at seventy-seven, died suddenly of typhoid fever in Washington. Although he too had joined Chief Justice Taney in the *Dred Scott Case*, he generally was a more substantial presence on the Court than were many of his colleagues. Stylish and educated, he identified with the chivalric tradition of the antebellum South. At the time of his unexpected death, he refused to ride circuit in those southern states which were under military rule. He disfavored punitive retribution against the South, even though during the Civil War he remained loyal to the Union. His death was a loss to those who favored the moderate Reconstruction measures endorsed by President Andrew Johnson.

C. *Justice Robert Grier*

In 1869 Congress increased the number of the Justices to nine. This was accompanied by Justice Robert Grier's resignation (the first under the new retirement act) in February 1870, which provided President Grant with two appointments to the Court. Both vacancies were defensible. The increase in the size of the Court from eight to nine made deadlock less likely. Moreover, Grier's resignation had been strongly encouraged by his colleagues. As early as 1864 Attorney General Bates observed that Grier was in a state of decline. This situation continued throughout the decade. After 1862 Grier could perform no circuit court duties and the simplest physical exertion became difficult for him. However, he was persistent in his refusal to leave even though it was necessary to carry him onto the bench. Grier eventually came to believe that his Court work was therapeutic. He suggested to the Chief Justice in 1866 that he needed "the exercise both of *mind* and *body*—which sitting in court would afford me."[13] Yet, he could scarcely function.[14] As he acknowledged, "I can write with difficulty, even with a pencil."[15] Unfortunately, Grier's decline was mental as well as physical. Justice Samuel F. Miller, who was a medical doctor before turning to the law, wrote that "Brother Grier who delivered the opinion . . . is getting a little muddy and may not have conveyed the idea clearly."[16]

Finally, Justice Stephen J. Field led a delegation charged by the Court

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13. C. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, 164 (1939) [hereinafter FAIRMAN].

14. On October 9, 1866, at the age of seventy-two, he had suggested to the Chief Justice: "If I could have a *room in the Capitol* on the *level* of our court room, so as not to be compelled to '*get up the stairs*' I could attend to my duty at Washington as usual, if my health continues." This astonishing proposal was gently rebuffed. *See* VII C. FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE—HISTORY OF THE SUPREME COURT OF THE UNITED STATES pt. 1, at 83 (1971) [hereinafter HISTORY OF THE SUPREME COURT].

15. FAIRMAN, *supra* note 13, at 164.

16. *Id.*

to encourage Grier's resignation. Difficult as this was for the justices to do, it was clearly necessary because of Grier's physical and mental deterioration. The *First Legal Tender Case*[17] was under consideration, and it was apparent to everyone that Grier was in no condition to participate. The case was necessarily delayed until he resigned, because at the conference when the case was first discussed, the Court was evenly divided concerning the constitutionality of the legal tender legislation. But then Grier reconsidered his vote, so that five justices favored striking the legislation. A week later Field and his committee paid their call and secured Grier's resignation.

Nonetheless, on January 29, 1870, two days before Grier left the bench, Chief Justice Chase persuaded his colleagues to agree with his decision invalidating the Legal Tender Act.[18] The Act was legislation that many thought was essential to national survival in times of emergency such as the Civil War.[19] Chase announced the result of the vote only after Grier had, in fact, left the Court.

On the same day President Grant nominated William Strong and Joseph P. Bradley to the Court. Once confirmed by the Senate, these two justices voted to reinstate the Legal Tender Act as a valid exercise of the congressional war power.[20] Chase's behavior has been subject to well deserved criticism. As Charles Fairman concluded: "[t]he chief responsibility for [what happened] must surely be placed upon Chase."[21]

Never a strong personality, Grier had been described earlier during his participation in the *Dred Scott Case* as one whose "real characteristics closely conform to his external, physiological delineations." The observer concluded:

> He is of a soft and rosy nature. He is facile and easy of suggestion. He succumbs under touch, and returns into shape on its removal. He is ardent and impressible. He is fickle and uncertain . . . . He is impulsive and precipitate. Let Grier associate with none but honest men, and be placed in no difficult or constraining circumstances, and he would not disgrace himself or his position.[22]

As his mental health deteriorated, Grier's indecisiveness meant that much depended on with whom he last discussed an issue. His unreliability disrupted the Court's deliberative process. He survived only six months after leaving the Court.

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17. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

18. HISTORY OF THE SUPREME COURT, *supra* note 14, at 677-775.

19. M. PUSEY, *The Court Copes with Disability*, in YEARBOOK: SUPREME COURT HISTORICAL SOCIETY 65 (1979).

20. *Id.*

21. HISTORY OF THE SUPREME COURT, *supra* note 14, at 719.

22. WARREN, *supra* note 12, at 319.

D. *Justice Samuel Nelson*

The following year President Grant appointed Justice Samuel Nelson to a commission charged with settling certain claims made by the United States against Great Britain. The claims were the result of British willingness to let Confederate ships outfit themselves in British ports during the Civil War. Justice Nelson had been on the Court since 1845. He was seventy-eight and had received relatively little national recognition except for his joint effort with Justice John Campbell to bring North and South together shortly before the Civil War. By accepting President Grant's assignment, he hastened his own departure from the Court. He took his responsibilities with the commission very seriously. The resulting overwork, along with the insomnia from which he habitually suffered, soon took its predictable toll. He resigned from the Court the next year, and died in Cooperstown, New York, eleven months later at age eighty-one.

E. *Justice Salmon P. Chase*

Earlier, in August of 1870, while returning from a western trip, Chief Justice Salmon P. Chase suffered a stroke which paralyzed his right side. He was much changed in appearance: his hair turned white and he became gaunt, though he retained his impressiveness of presence. In the eight months he was absent from the Court (which included the entire 1870 term), he grew a beard and mustache to disguise the "facial ravages" of his paralysis.[23] At a White House dinner, Justice David Davis's wife, Sarah, was surprised by his changed appearance: "The Chief Justice has a full pair of whiskers and a moustache, which changes his face so much that I did not recognize him until he spoke to me."[24]

The Court was without effective leadership until Chase's death three years later. He was ineligible for any retirement benefits. This consideration, added to his usual sense of indispensability, discouraged any thought of resignation. At the same time he was reportedly unable to "attempt hard and continuous labor."[25] His medical condition and his family's probable response to it were noted by Justice Miller at the time of the initial illness:

> The more recent indications are that the Chief will recover. Whether he will be able to serve efficiently may remain doubtful. But I do not think he will resign unless he is provided with something else. This is not now probable. The paralytic stroke places him out of the list of probable candidates for the Presidency, and thereby removes any inducement for Grant to propitiate him or send him to Europe which is the only alternative to his remaining a figure head to the Court. His daughters, especially

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23. W. KING, LINCOLN'S MANAGER: DAVID DAVIS 284 (1960) [hereinafter KING].
24. *Id.*
25. N.Y. Times, May 8, 1873, at 1, col.3.

> Mrs. Sprague will never consent to his retiring to private life.[26]

Accordingly, Chase participated in both the 1872 and 1873 terms, even though toward the end he was barely able to function. The 1873 term was particularly exhausting. The Chief Justice had dissented in The *Slaughter House Cases*,[27] decided by a five-to-four vote on April 14. During this period he was noticeably failing:

> During the last few days he sat in Court, a sudden weakness surprised him. His walk was not so firm; his breath hardly lasted the ascent of Capitol Hill, which his feet had trodden for a quarter of a century. His voice was weaker; his manner always considerate, but sometimes abrupt through nervousness or illness, became gentler and kinder every day. His very silence was benignant. On the last day Court was in session, he relinquished his place to his venerable friend and associate, Justice Clifford, and remained seated at his side, for the first and last time of his life resting his head all day upon his hand . . . .[28]

On May 5 Chase wrote a final letter to an old friend in Cleveland, which detailed the strain of his final days:

> Since my adjournment, which came none too soon, I have made my way to New York . . . . It seems odd to be so entirely out of the world in the midst of this great Babylon; but I am too much of an invalid to be more than a cipher. Sometimes I feel as if I were dead, though alive. I am on my way to Boston, where I am to try a treatment, from which great results are promised; but I expect little. The lapse of 65 years is hard to cure.[29]

The anticipated treatment in Boston consisted of a new form of magnetic or electric treatment which was currently in fashion for stroke victims. Chief Justice Chase never received the anticipated treatment. The next day his attendant found him in bed and was much alarmed by his change of appearance. A spasm had apparently awakened him, but by the time a physician had been summoned he was unconscious. He had suffered another stroke, much worse than before; this time his left side was incapacitated. He died the next day without regaining consciousness.

The obituary in the *New York Times* emphasized the medical deterioration which had overtaken him:

> Within the last two years he had fallen away so much in flesh that his frame presented a marked contrast with its former fullness, and his face had changed to such a degree that many of his friends who had not seen him for several months did not recognize him in company or on the

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26. Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 419-20 (1938) [hereinafter *Retirement of Federal Judges*].

27. The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872).

28. J. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 622 (1874).

29. *Id.*

> street. Everybody spoke of the change in appearance of the Chief Justice, and many anticipated a sudden death . . . . He appeared to be cheerful and conversed with his usual freedom, but it was apparent that his constitution had received a shock from which he could never recover.[30]

F. *Justice David Davis*

President Lincoln's campaign manager in 1860, David Davis of Illinois, resigned his Supreme Court seat in 1877 to accept a seat in the United States Senate. He was actually elected to the Senate by the Illinois state legislature while still on the Court. Judicial work had become burdensome to him, particularly as the docket increased. At the time of his appointment in 1862, the Court met from December to March. By 1874, when he reached his sixtieth year, the sessions began in October and continued through May. Discouraged, he concluded that "To be on a strain from 2nd Monday of October till the 1st of May is wearing to both body & mind . . . . I get so worn every Spring that I think I will never go back . . . . I ought to quit and stay at home with my wife."[31] His family agreed and, given his extreme corpulence, there was concern he might "lose the use of his limbs" if he remained constantly at his desk.[32] He had decided to leave even before, but remained through President Grant's second term of office because of concern over the unpredictable and sometimes luckless nominations which characterized Grant's administration.

When Davis did leave the Court, Justice Miller reacted with indignation when the suggestion reached him that John A. Campbell, who had resigned from the Court in 1861 in order to join the Confederacy, ought to be reappointed. Campbell was then sixty-five, but he had aged prematurely and appeared very old. As Miller wrote in 1877:

> There is no man on the bench of the Supreme Court more interested in the character and efficiency of its personnel than I am. If I live so long, it will still be nine years before I can retire with the salary. I have already been there longer than any man but two, both of whom are over seventy.
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> Within five years from this time three other of the present Judges will be over seventy. Strong is now in his sixty ninth, Hunt in his sixty eighth and broken down with gout, and Bradley in feeble health and in his sixty ninth year.
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> In the name of God what do I and Waite and Field, all men in our sixty first year, want of another old, old man on the bench . . . . I have told the Attorney General that if an old man was appointed we should have within five years a majority of old imbeciles on the bench, for in the work we have to do no man ought to be there after he is seventy. But

30. N.Y. Times, May 8, 1873, at 1, col.3.
31. KING, *supra* note 23, at 287.
32. *Id.*

> they will not resign. Neither Swayne nor Clifford whose mental failure is obvious to all the court, who have come to do nothing but write garrulous opinions and clamor for more of that work, have any thought of resigning.[33]

Davis never lost interest in politics. There was some talk he might be the Democratic presidential nominee. His biographer noted that he lent "a more or less attentive ear to the suggestions."[34] Nonetheless, he was not given serious consideration at the 1875 convention, which nominated Samuel J. Tilden.

Davis' subsequent election to the Senate was not without controversy, although he apparently did not solicit the position. He was effectively disqualified as a member of the electoral commission, where he was expected to serve. The commission had been established to determine the disputed presidential election of 1876 between Tilden and Rutherford B. Hayes. Justice Joseph P. Bradley, a Republican, took Davis' seat on the commission and swung the vote to Hayes. Davis later indicated he would have reached the same conclusions, even though at the time there was speculation he would be somewhat more independent and less inclined to vote along strict party lines. His decision to step down from the Court was not difficult. His wife had become ill and she could no longer tolerate life in Washington. His Senate responsibilities permitted their return to Illinois.

Davis was a strong presence in the Senate, but any presidential ambitions had left him by 1879 when his wife, Sarah, died. The next year he was found to have diabetes. However, it seemed to have no debilitating effect on his performance. In 1881 he was elected president pro tem of the Senate by a unanimous Republican vote (even though a unanimous Democratic vote in the Illinois legislature had first sent him to the Senate). Following the assassination of President Garfield, Davis was next in the line of succession to the presidency in the event of President Arthur's death or resignation. Davis was seen during this period as one who stood above party rivalry; his independence and evenhandedness were appreciated by those who sought to encourage the mediation of differences arising from lingering sectional animosities. Davis recognized his special role:

> The day is drawing near when I shall retire from this chamber. My only ambition, while here, is to be instrumental in bringing about perfect peace between North and South . . . . When the rude voices of faction which for fifteen years . . . have disturbed the national fellowship . . . shall be silenced, this country will bound forward in a career of grandeur and glory that will astonish mankind.[35]

After a term in the Senate, Davis was elected President of the Illinois

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33. *Retirement of Federal Judges*, *supra* note 26, at 421.
34. KING, *supra* note 23, at 288.
35. *Id.* at 302.

Bar Association. The next year he became ill with a carbuncle on his shoulder, which was associated with his diabetes. A patch of cellulitis (or erysipelas) was discovered on his thigh. This skin infection is caused by the streptococcus bacteria which enter the body through small cuts or sores of the kind diabetics are prone to have. In the absence of antibiotics, the infection travels rapidly to the lymph glands and thereafter into the blood stream. Blood poisoning quickly results, which in Davis' case was accompanied by a coma.

Following Justice Davis' death on June 20, 1886, the *New York Times* suggested he was one who would be best remembered as "the friend of Abraham Lincoln."[36] More critically, the *Times* noted that he had timidly shrunk from the responsibility of the electoral commission in 1877, knowing he would have been the "odd man" on the commission. The *Times* believed this timidity in the face of extreme pressure cut short his political career. Later, by refusing to offend either party in the Senate, he commended himself to neither. But an equally persuasive argument cuts in precisely the other way: Justice Davis' special talent for conciliation made his six years in the Senate a more significant contribution toward national reconciliation than if he had taken his seat as a partisan.

G. *Justice William Strong*

Having succeeded the incapacitated Robert C. Grier, Justice William Strong retired in 1880 after a decade of service while he was still recognized as one of the ablest men on the Court. He obviously hoped to set an example. The Court at the time included several people who were clearly unable to do the work, but who were still reluctant to leave. Strong's daughter related the circumstances of her father's retirement as she had heard it from him:

> Having reached the age of seventy-three years, and although remarkably well preserved physically and mentally and quite as capable of efficient service as any of the other justices, he became convinced that it would be for the interest of the Court if one or two of the justices who had become enfeebled by age were to retire and their places be filled by more vigorous men. He enjoyed the position and its duties, and would not have retired at that time if the retirement of other justices could have been effected without his setting an example. This conviction led him to say to Justice Swayne, who had been on the bench a long time and was quite enfeebled, that he had had in mind the strengthening of the bench by resigning, and as they had both reached the period in life when they could retire with the continuance of their salaries during life, he would offer his resignation if Mr. Justice Swayne would follow him in so doing. Justice Swayne assented to this . . . .[37]

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36. N.Y. Times, June 27, 1886, at 8, col.3.
37. S. Strong, Landmarks of a Lawyer's Lifetime 28 (1914).

Strong was eligible for a pension, since he had served a decade and was over the age of seventy. However, this was apparently not an important consideration. As his daughter also said, he thought it much better to leave while people were inclined to ask "Why does he leave?" rather than wait until they asked "Why doesn't he leave?"[38] Justice Miller was much concerned about the resignation, writing that "the loss of Judge Strong is a heavy one to the Court, while the men occupying the other places could well be spared."[39]

Strong remained busily engaged in religious work following his retirement, serving at various times as vice president of the American Bible Society and president of the American Sunday School Union and the American Tract Society until his death on August 19, 1895. At the end he suffered a stroke after his constitution had been weakened by catarrhal fever (a medical term no longer used, but which at the time referred to an inflammation of the mucus membrane, especially of the nose and throat).

H. *Justice Noah H. Swayne*

At age seventy-seven and after nineteen years of service, Justice Noah H. Swayne left the Court on January 25, 1881. Although Justice Strong had by words and example encouraged him to leave, it was President Hayes' willingness to appoint Swayne's good friend, Stanley Matthews, which was the decisive consideration. In any event Swayne's mental acuity and his ability to contribute had noticeably declined throughout the late 1870s.

Justice Swayne survived his retirement by three years. Although he had noticeably overstayed, he soon became converted to the pleasures of retirement. As he wrote Justice Joseph P. Bradley, who had just turned sixty-nine, about his new convictions:

> I have no doubt you will resign at the close of your seventieth year or very soon afterwards & I think you ought to. You need have no apprehension that you will not find enough to do—constantly and agreeably to employ you—nor that a moment of your time will necessarily be attended with a sense of tedium or *ennui*. You will be brighter and happier than you have been for the last five years or will be in the future while you remain on the bench.[40]

I. *Justice Nathan Clifford*

Justice Nathan Clifford presented another extraordinary problem during this same period. Like Swayne, he outstayed his usefulness but remained a difficult and easily disgruntled colleague with whom it was virtually impos-

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38. *Id.*
39. FAIRMAN, *supra* note 13, at 382.
40. *Id.* at 383.

sible to work. As John W. Wallace, the Court's Reporter from 1863 to 1874, wrote in 1880:

> The "shorter handed" the Court is—while the observation comes from the absence of such judges as Clifford & Swayne, the more business it will do, and the better. I often used to wonder whether in the history of the whole world there ever was such a man as the first named one, *in such a place* . . . . Swayne was no worse than some other cases, but bad enough, no doubt. But unless Strong has lost a good deal since I came away, his departure would, I think, be regretted. In the department of Patent Cases he was of great value on that particular bench.[41]

Justice Clifford presented a very real problem for Chief Justice Morrison R. Waite, since he had begun to deteriorate mentally and physically as early as 1874. He sometimes rejected opinion assignments, simply indicating that he did not care to write one. As he once told Waite, "I think I did not vote for the judgment. At all events I am not prepared to take the opinion."[42] He had, in fact, voted for the judgment in that particular case. Moreover, he was easily offended. Any perceived slight was instantly resented. "I am not willing to write an opinion on No. 93 and therefore return it," he wrote the Chief Justice. "If you want No. 99 for any of your friends you may have that also."[43] Other justices had to contend with him as well. Justice Miller found himself thoroughly frustrated with what was going on: "I can't make Clifford and Swayne who are too old resign, nor keep the Chief Justice from giving them cases to write opinions in, which their garrulity is often mixed with mischief."[44] Two years after Miller made this observation, Clifford was chosen, incredibly enough, to chair the electoral commission established to decide the contested presidential election of 1876. In this capacity he cast all his votes for Samuel Tilden and resolutely thereafter refused to acknowledge Hayes as President. He would neither enter the White House nor permit Hayes to appoint his successor under any circumstances.

By 1880 Justice Clifford had mentally collapsed. Justice Miller incisively reported the medical details:

> Judge Clifford reached Washington on the 8th of October . . . . I saw him within three hours after his arrival, and he did not know me or any thing, and though his tongue framed words there was no sense in them.
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> An effort was made . . . to call it paralysis because he was taken suddenly between Boston and Washington, but there was no paralysis in the case. He remains yet about in the same condition. His general health is good as usual. Able to ride out and walk about the house, but his mind

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41. *Id.* at 382.

42. C. MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 261 (1963) [hereinafter MAGRATH].

43. *Id.*

44. FAIRMAN, *supra* note 13, at 374.

> is a wreck and no one believes that he will ever try another case, though the one idea which he seems to have is a desire to get to his seat in the capitol. I have seen him twice and the other judges have also. It is doubtful if he knew any of us. His wife thought I could do more to persuade him to return home than any one else and sent for me. But when I saw him I saw also that it was no use to try for he introduced me to his wife twice in ten minutes, though I have known her for eighteen years quite intimately. His work is ended though he may live for several years.[45]

Justice Clifford was entitled to full pay had he retired at any time after 1873. At his death in 1881, he was the sole justice who had been appointed in a Democratic administration. He had outlived the man he had most reviled, Rutherford B. Hayes.

J. *Justice Ward Hunt*

Justice Ward Hunt was the last of a trio of incapacitated justices to leave when he resigned in 1882. At the time of his resignation, he had been unable to serve for five years. Chief Justice Waite had assumed his circuit court duties for him and had hinted at the appropriateness of a resignation, but to no avail. Hunt stayed on, principally for two reasons. Like Clifford, he did not want to give President Hayes an opportunity to appoint his successor. Hunt's political sponsor, the influential Senator Roscoe Conkling of New York, had quarreled with President Hayes over reform policies. That was enough to alienate Hunt. Justice Miller confidentially confirmed Hunt's sense of indebtedness to Conkling in a letter written on December 14, 1879: "Judge Hunt would resign at once if Conkling would express his willingness. But he owed his appointment to Conkling and the latter is selfish enough to wish the chance of dictating his successor under a new administration."[46] Perhaps equally important, Hunt did not qualify for a pension. When Congress finally passed a special bill for him, he resigned immediately.

Hunt's medical difficulties became acute in 1878, when he was left speechless by a stroke. As usual, Justice Miller's summary of the situation was most perceptive:

> Judge Hunt whether he shall die within the next ten days, or within the year will never return to the court. This is a great grief to me. He is a cultivated lawyer and gentleman. A warm hearted courteous man. Having no family with him but his wife, and of a sociable nature, he has made himself one of the most agreeable men on the bench.
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> Last winter he had three attacks of gout which is with him inherited. It enfeebled him so much that when we all adjourned it was much doubted if he would live to return. Such was also the feeling in regard to myself. He and I sympathized with each other and talked it over very freely, and I came to have a warmer affection for him than I can at my

45. *Id.* at 378.
46. *Id.*

years get up for many men.[47]

Following his retirement, Hunt survived in a debilitated state for the next four years.

In a little over a year, four new justices took their places on the Supreme Court. Quickly the Court experienced a renewal; a period characterized by incompetence and disability was over. There were no changes during the next five years.

K. *Justice William B. Woods*

Justice William B. Woods survived only six and a half years following his appointment. Little is known about the final illness of this Ohio man who, following the Civil War, stayed on in Alabama to become a successful businessman and judge. His appointment was consistent with Hayes' intention to bring the South back into the Union as quickly as possible. The *New York Times* noted that Woods had been ill for a year or more before his death. Apparently his incapacitation had been total for several months before his death.

Beginning in 1887 with the death of Justice Woods, the Court lost a justice each year for the next four years. Each justice died while still active.

L. *Chief Justice Morrison R. Waite*

Prior to his death at age seventy-one, after fourteen years of service, Chief Justice Morrison R. Waite had experienced only one serious ailment. That occurred in 1885 and was probably the result of overwork. He, in effect, suffered a nervous breakdown. Justice Miller observed what happened:

> In consequence of the illness of the Chief Justice I have had to be acting Chief Justice in his place. I always knew that he did a great deal more work than I, and had many apparently unimportant matters to look after to which the other Judges gave no time and very little attention. I find now that what I had suspected hardly came up to the draft on his time as he performed these duties. Disposition of practice cases, motions to dismiss for want of jurisdiction, reading carefully and [word illegible] and answering letters or telling the clerk how to answer them constituted in his way of doing it a heavy load on his time and on his mind.
>
> It is this which caused his illness. He is much broken down and if [he] does not diminish his excessive labours, he will not be capable of any work in a year or two more.
>
> He leaves for Florida to be gone a month for recuperation.[48]

Waite's biographer remarks that the Chief Justice was aging rapidly.

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47. *Id.*
48. *Id.* at 391.

Two years after his breakdown, in a letter to his wife, Waite commented on a friend's illness in a tone mindful of his own mortality: "We can not help it darling, age has got hold of us all."[49]

Chief Justice Waite's death on March 23, 1888, demonstrated the curious nature of causation: it began with the illness of his coachman. Having no coachman to drive him, Waite walked to and from a reception, which left him with a chill. In an age without antibiotics, this was often the prelude to pneumonia. Even though he was sick, Waite insisted on coming to Court because he was determined to read an opinion. Once seated on the bench, however, he was physically unable to read his opinion and Justice Samuel Blatchford read it for him. People in the courtroom were shocked at his appearance. As Attorney General Alexander Garland later reported, "It was evident to the observer death had almost placed its hand upon him."[50]

Pneumonia eventually killed him, although the *New York Times* indicated that he had some problems with his liver and spleen (organs which served to justify some of the more fanciful diagnostic flourishes of the day). On the day of his death, Waite awoke to the company of his nurse, said simply, "I feel better," and thereupon died immediately.[51]

Morrison Waite has never ranked among the most important chief justices, but Felix Frankfurter always felt that Waite had been unfairly neglected.[52] President Hayes wrote sympathetically about him in his dairy, emphasizing the human qualities he brought to public office:

> He was of large and strong intellect. He was great-hearted, warm-hearted, and of generous, just and noble sentiments and feelings. He was thoroughly trained and schooled from his youth up. He was in the best sense a learned and a well educated man. He had saving common sense, untiring industry, and great energy. He was always cheerful, easily made happy by others, and with amazing powers and a never failing disposition to make others happy. He was the best beloved man that ever lived in this part of the United States.[53]

M. *Justice Stanley Matthews*

The next year Justice Stanley Matthews died at age sixty-four after a tenure of eight years. He was incapacitated for about a year prior to his death. He suffered from indigestion, lost a good deal of weight, and had attacks of what was described as muscular rheumatism. He tried to recuperate at his Massachusetts home, but his condition grew worse. His rheuma-

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49. MAGRATH, *supra* note 42, at 309.
50. *Id.* at 309-10.
51. *Id.* at 310.
52. *See* F. FRANKFURTHER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 74-114 (1964). *See also* R. STEAMER, CHIEF JUSTICE: LEADERSHIP AND THE SUPREME COURT 97-158 (1986).
53. MAGRATH, *supra* note 42, at 310-11.

tism was accompanied by a high fever which confined him to bed. He eventually left New England and returned to Washington. There he continued to suffer, racked by constant fever and chills. His death reportedly occurred because of exhaustion of the heart and congestion of the kidneys. This is a generalized description which indicated the extent to which he collapsed during the final weeks of his life.

N. *Justice Samuel F. Miller*

Before his unexpected death at age seventy-four, Justice Samuel F. Miller was still in possession of all his considerable powers. Even though he had expressed his belief that one should leave the Supreme Court at seventy and even though he had witnessed some of the more extraordinary instances of medical disability in Court history, he shrank from his own prescription when he turned seventy. Of course, as a physician himself, he might have acted otherwise had his own health been other than entirely robust. Certainly no one else watched the health of others with greater curiosity or perceptiveness, as his personal letters demonstrate. Among all the justices his interest in the health of others was rivaled only by that of the always observant Joseph Story.

Although he acknowledged that judicial independence and institutional stability were important considerations, Miller nonetheless came to believe that impeachment was, without more, an unsatisfactory way of removing judges who were unfit for office. As he once explained:

> There are many matters which ought to be causes of removal that are neither treason, bribery, nor high crimes or misdemeanors. Physical infirmities for which a man is not to be blamed, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely postponed . . . . [A] vile and overbearing temper becomes sometimes in one long accustomed to the exercise of power unendurable to those who are subjected to its humors.[54]

A constitutional amendment would be necessary, he thought, to bring about the necessary change, although he never offered a specific draft of such an amendment.

Justice Miller's final illness was a matter of widespread national concern and interest, quite unlike the indifference which often attended the final illnesses of his colleagues. On October 10, 1890, while coming home from the Court and still in the street outside his house, his left side was paralyzed by a stroke. He had been somewhat weakened that summer by a bout of dysentery (a not uncommon nineteenth century ailment, given the state of

54. FAIRMAN, *supra* note 13, at 379-80.

water supplies) but had seemed to recover in due course. During the first day of paralysis, Miller's mind remained clear and he bantered easily with his doctors. Finally, when they told him to remain quiet because they feared he might overtax his brain, his response was, "That is a compliment for you must think that when I talk I use my brains."[55] But on the next day the paralysis of his left side deepened and he sank into a coma. The end came as quickly and as painlessly as he might have wished for any of his own patients.

O. *Justice Joseph Bradley*

David Davis' replacement on the electoral commission of 1876 was Justice Joseph Bradley, because he was judged to be the least partisan choice in the absence of Davis himself. He voted in favor of Rutherford B. Hayes in each case in which the electoral votes were disputed, which brought him a certain notoriety. He always thereafter stoutly denied any partisan motives—an assertion which was confirmed in his long and distinguished career on the Court.

Justice Bradley's work habits did not vary much over the years. He arose early and worked late. He made the following entry in his diary a year before his death.

> 5 ½ a.m. My birthday. 78 years completed. Unable to work at my table last evening from somnolence. I rise early this morning to make up for lost time; as being conference time, I have many cases to master and decide. I have now been 21 years on the bench . . . and begin to be pretty tired with the awful hard work of the court.[56]

A cold weakened him the following winter, forcing him to miss frequent sessions of Court. His cold worsened and he died on January 22, 1892, after an illness of one week.

P. *Justice Lucius Quintus Cincinnatus Lamar*

The next year the Court lost Justice Lucius Quintus Cincinnatus Lamar of Mississippi. Lamar had first had an attack of apoplexy while serving in the Confederate Army encamped outside of Richmond in 1861. Although his health forced him to leave the Army, he soon joined the diplomatic corps and represented the Confederate cause in Europe as a special envoy to Russia. He never actually went to Russia, however, because of the Russian government's lack of interest in his mission. As a southerner committed to the reconciliation of the states after the Civil War, his political fortunes prospered. His health remained reasonably stable during years of elective office in both the United States Senate and the House of Representatives, al-

55. N.Y. Times, Oct. 11, 1890, at 1, col.5.
56. Friedman & Israel, *supra* note 7, at 1199.

though there were reports of seizures in the 1880s when he was in the United States Senate and later when he was President Grover Cleveland's Secretary of the Interior. The descriptions of the "apoplexy" from which he periodically suffered strongly suggests epilepsy, but the exact diagnosis remained unspecified.

Lamar's health began to fail in earnest in 1889, when he was sixty-four and had only been on the Court one year. When he did not regain his strength following an illness that winter, he wrote his sister that "two Doctors say, upon consultation, that one of the valves of my heart has ceased to act (I don't believe that) . . . ." Nonetheless, he remained very weak.[57]

He continued to do his work on the Court as best he could and even began to feel more optimistic about his health. The next winter he wrote his sister an encouraging summary of his situation:

> During the last preceding four days my health has been sensibly improving. Everyone has said all the time that I am looking better, but now I feel such a decided improvement that I have postponed my trip South until the 1st of February. Of course there is a very general protest among all my friends against this conclusion, but the work that is upon this Court is not a mere matter of sentimental duty; it is a hard reality; and if I left, I would be throwing upon my associates—some of whom are older and weaker than myself, and others more prostrated by sickness, who are staying here bravely at their post—an increase of the labor with which they are already burdened.[58]

Justice Lamar's circumstances changed dramatically between January when he wrote to his sister, and the third of April, when he wrote the following letter to President Cleveland:

> I am too weak to scribble more . . . . I am sorry not to be able to give you a good account of my health. Have been down eleven days with frequent and copious hemorrhages, with no sign of an early recovery. I spend many of the silent and tedious hours of the night on my sick couch in thought of you, and in earnest aspirations for your happiness.[59]

Justice Lamar's symptoms in the spring of 1892 suggested the possibility of tuberculosis. Yet the lung hemorrhaging continued even when he went west to find drier air. His doctors failed to agree on a diagnosis. One believed his arteries and kidneys were degenerating. Another concluded he suffered from Bright's disease, a kidney ailment. Whatever the correct diagnosis, we do know Lamar was experiencing lung hemorrhaging and kidney difficulty.[60]

As 1892 approached, Lamar was discouraged with the progress he had

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57. W. CATE, LUCIUS Q. C. LAMAR 515 (1935) [hereinafter CATE].
58. *Id.* at 516.
59. *Id.* at 518.
60. J. MURPHY, L.Q.C. LAMAR: PRAGMATIC PATRIOT 269 (1973).

made over the summer (as he told his sister, he had "not realized the sanguine hopes of restored health") and discouraged also about his future prospects as a member of the Court. He confided his thoughts about retirement to his sister: "I am in doubt, whether I ought to undertake that work or resign a position the duties of which I do not feel able to discharge with credit to myself and those I love, or in a manner due to the public interests concerned . . . ."[61] The matter resolved itself. Justice Lamar suffered a massive heart attack shortly before Christmas, while on a train headed for Mississippi. He was carried from the train at Atlanta and from their taken to Macon. He could go no further; death came just two days before Christmas.

Q. *Justice Samuel Blatchford*

By the following July Justice Samuel Blatchford was also dead at the age of seventy-three. The scholarly Blatchford had been weakened by a series of strokes. The first stroke occurred about a year before his death. He recovered sufficiently to resume work on the Court. Before leaving for Newport for summer vacation, however, he had suffered three smaller strokes. His Newport holiday became a grim effort at convalescence. Three weeks before his death on July 7, he was subject to a fifth stroke. He was able to speak and maintain some mobility throughout his final ordeal.

R. *Justice Howell E. Jackson*

Justice Howell E. Jackson experienced one of the shorter tenures in Court history. He was confirmed by the Senate on February 18, 1893, and contracted tuberculosis a year later. In October of 1894 he went west, hoping the drier air would improve his condition. The *Income Tax Case*[62] was reheard in May 1895. A very sick Jackson returned to Washington to cast his vote in favor of a national income tax statute. The vote went against him. (His position eventually prevailed, however, with the passage of the sixteenth amendment in 1913.) Three months later he succumbed to tuberculosis at his home in Nashville, Tennessee.

S. *Justice Stephen J. Field*

The last resignation tendered in the nineteenth century was that of Justice Stephen J. Field. Predictably, his colorful and determined personality grew more difficult and temperamental throughout his long tenure. His last years were complicated by a nagging knee injury he had suffered much earlier in life. The pain increased his nervous irritability, causing frequent outbursts of temper and an increased use of profanity in inappropriate situa-

61. CATE, *supra* note 57, at 519.
62. Pollock v. Farmers Loan & Trust Co., 158 U.S. 601 (1895).

tions (about which he was quite unremorseful). More practically, his game leg made it difficult for him to mount the bench. Field waved it all aside and reminded his solicitous friends that "I don't write my opinions with my leg."[63]

Rumors of Justice Field's pending resignation had swept the Court periodically for a number of years. The first talk of resignation came in 1888, but Field soon quarreled with President Cleveland, refusing to yield his seat in favor of a President in whom he had lost confidence. The same pattern repeated itself with President Benjamin Harrison. When Cleveland returned to power, Justice Field still retained his old animosity toward him. Moreover, Field had married late in life and his wife was much younger than he was. She enjoyed the social activities in Washington and the attention she received as a justice's wife. She did not favor his retirement.

By the 1890s Field's mental condition was in noticeable decline. Once one of the workhorses of the Court, he delivered only four opinions in 1895 and none at all the next year. Even more disturbing, it became apparent from his questions from the bench and from his conversations with the other justices that he could no longer function as he once had. He forgot how he had voted in conference and sank into long spells of lethargy.

Field's biographer tells how the Justice's mind worked during these final years:

> Chief Justice Fuller sent two of his colleagues over to the Old Capitol home to present the materials which they had gathered on a case then before the Court, and to show how they arrived at the decision which they were about to adopt. They found Field in an unusually lethargic condition. He sat in a great arm chair, his head dropped forward on his breast, and his eyes closed. He stirred for a moment as he recognized his visitors, then again dropped his head and closed his eyes. Uncertain in what to do, his colleagues hesitantly took out their papers and asked if they might read them to him. Their host gave no assent nor denial, nor sign that he was any longer aware of the presence of his colleagues. Nevertheless one of them began to read the opinion which he had written. For some time Field gave no evidence that he heard. Then suddenly he raised his right hand. "Read that again," he commanded. The passage was read again. "That is not good law," he exclaimed. "You err when you say—" and here he launched into a clear and forceful argument which finally convinced his listeners that he was right. His argument completed, he lapsed into his former comatose condition. He showed no sign that he was aware when the two justices gathered up their papers and left the room.[64]

This incident was extraordinary but not unique. None can mistake the powerful lucidity of Field's concurring opinion in the *Income Tax Case* of

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63. C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 440 (1969).
64. *Id.* at 442-43.

1895. It was an age when the justices wrote their own opinions, and there can be no doubt that Field was in full control of his material.

Nonetheless, as the situation continued to worsen, the other justices decided to propose that Field resign. Justice John Marshall Harlan was delegated to pay a call on Field and advise him of the collective opinion of his colleagues. In such situations diplomatic circumlocutions are not uncommon. Thus, when Justice Harlan began by cautiously reminding Field of his own call on Justice Grier many years before, the old gentleman roused himself one last time and spat out his memory of the occasion. "Yes!" he exclaimed. "And a dirtier day's work I never did in my life!"[65]

Time succeeded where Justice Harlan failed. The letter of resignation was finally secured in April of 1897, after Field had served for thirty-four years, eight months, and twenty days. Justice Field attached importance to his record tenure and it was only after he had eclipsed Chief Justice John Marshall's record of thirty-four years, five months, and five days that he was willing to seriously entertain the thought of leaving the Court.[66] He lingered on for an additional two years, until finally he took a chill while driving in the late winter air. Death came on April 9, 1899. He claimed to have seen visions shortly before he died.

III. Conclusion

From the Civil War to the end of the century, the Supreme Court endured more personnel difficulty than at any other time in its history. The late 1870s, in particular, were years when justices who were unable to responsibly discharge their responsibilities were nonetheless unwilling to resign. Fortunately for the country, less harm occurred than might reasonably have been anticipated. There were relatively few cases of extraordinary constitutional importance where a disabled justice's vote was pivotal. Of course, there were some. The *First Legal Tender Case* is perhaps the best example. But even in that case, the other justices, knowing the importance of the case and the extent to which Justice Grier was incompetent to judge the issues, acted in a thoroughly responsible manner and held the case over until he could be replaced. There were many cases in which Justices Clifford, Hunt, and Swayne participated as best they could, sometimes in a way deplored by their colleagues. Again, the country was fortunate that more harm was not done. As a practical matter, the illnesses of others placed a greater responsibility on the justices who were in good health and who were (like Justices

65. C. Hughes, The Supreme Court of the United States 75-76 (1928).

66. History sometimes furnishes interesting contrasts. When Justice Hugo L. Black's son, Hugo, Jr., told his father—who was lying desperately ill at the Bethesda Naval Hospital—that he was within six months of Field's longevity record and that if he retired before he died his wife's insurance policy would be substantially reduced, Justice Black's reply was: "That does not make any difference! I can't serve." H. Black & E. Black, The Memoirs of Hugo L. Black and Elizabeth Black 277-78 (1986).

Miller, Bradley, and Field) the major justices of the period. Ironically, the Court lost so many sitting justices to ill health that it was renewed, much to its advantage.[67] In a little over a year, three presidents—Hayes, Garfield, and Arthur—appointed four remarkably able justices—William B. Woods, Stanley Matthews, Horace Grey, and Samuel Blatchford. Justice Miller commented at the time that "the Court is as strong mentally and physically as it ever was and is as capable of usefulness as it has ever been."[68] Academic critics have agreed. As Charles Fairman observed from the perspective of the 1930s: "Looking back today it seems that perhaps at no other time has it ever reached such a generally high level of distinction."[69]

There was a touch of inevitability about what happened to the Court. There was no effective public pressure to which the justices might be sensitive. Newspapers tended to ignore the personal circumstances of the justices, and medical knowledge—as witnessed by the uncertain and sometimes fanciful diagnostic efforts of the doctors—was primitive even by the state of knowledge at the time of the First World War.

Efforts by other justices to encourage the resignation of an impaired brother, although the only alternative, were also of uncertain usefulness in the absence of any focused national attention directed toward the problem. As Chief Justice Waite discovered in the case of Justice Hunt, and as Justice Harlan learned from his encounter with Justice Field, there is really nothing the Court collectively can do to remove a colleague if he is not amenable to peer group pressure.

Special problems arise where disabilities affect more than one justice. If a single justice is seriously incapacitated for any length of time, the others can absorb the workload with no institutional ill effect, at least for a while. No justice has centrality in quite the same way as do presidents or governors. But this distinction becomes less persuasive when more than one justice is disabled, because their disabilities directly affect the capacity of the institution to function as it should. In a five-justice majority, for example, the vote of each of the prevailing justices is essential to the final decision. When the number of participating justices declines, the degree of responsibility is increased. It was only by chance that the justices who avoided the most serious disabilities tended to be the ablest.

Justice Miller's concern about the practical problems of the period highlight the difficulty. There was much to commend a constitutional amendment which would provide an alternative to impeachment in the event of incapacitation in the fashion of the twenty-fifth amendment.[70] Because of informal mechanisms that have subsequently developed, and which

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67. *See* VII C. FAIRMAN, THE OLIVER WENDELL HOLMES DEVISE—HISTORY OF THE SUPREME COURT OF THE UNITED STATES pt. 2, at 498-549 (1987).

68. FAIRMAN, *supra* note 13, at 388.

69. *Retirement of Federal Judges*, *supra* note 26, at 425.

70. *See supra* note 5.

presently control the Court, such a proposal is now unnecessary.[71] But in the nineteenth century an amendment providing for a committee of physicians, selected by Congress with the concurrence of the Chief Justice or senior justice as the situation required, to inquire into the mental or physical health of a justice, with provision for the Congress to remove justices if the commission's findings persuaded two-thirds of both houses of Congress that such action was appropriate, would surely have been worthy of serious consideration.

Many nineteenth century justices saw others overstay their usefulness. They themselves were disinclined to give up their life's work. Many of them seem to have had a strong sense of indispensability. In this, of course, they were far from unique. But the frequency and duration of their illnesses were exceptional. As a famous physician in the present century dispassionately concluded: "When [death] comes, you may be certain you will disappear like all the rest and that you will not be missed, nearly as much as in your sanguine moments you have been inclined to suppose."[72] The nineteenth century justices—like most of humankind—found this truism hard to accept.

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71. Atkinson, *Retirement and Death in the United States Supreme Court: From Van Devanter to Douglas*, 45 UMKC L. Rev. 1, 24-25 (1976).

72. L. Clendening, The Human Body 384 (1927).