

A regimen to keep the high court healthy

By RICHARD SOBEL
and KEVIN R. LOUGHLIN, M.D.

The lingering illness of Chief Justice William H. Rehnquist after the recent resignation of Justice Sandra Day O'Connor raises questions of what to do about an infirm Supreme Court member who does not voluntarily retire.

While O'Connor chose to leave in good health, Rehnquist has indicated that he will continue to serve as long as his health permits. Two recent, if minor, hospitalizations leave open questions about future health issues. Creating appropriate procedures for dealing with debilitating illnesses on the court will contribute to continuity in government.

Illness and infirmities of Supreme Court justices are not recent concerns. Justices Robert Grier and Stephen Field served longer in the nineteenth century than their colleagues thought their mental acuity permitted. Leading lights like Oliver Wendell Holmes, Louis Brandeis and Benjamin Cardozo stayed on the court after their abilities had declined significantly. In the 1970s and 1980s, Justices William O. Douglas and William Brennan suffered strokes. John Marshall Harlan and Hugo Black had significant vision deficiencies. Thurgood Marshall developed heart problems.

Although only two presidents, Dwight D. Eisenhower and Ronald Reagan, have served beyond 70, the average retirement age for departing Supreme Court justices since 1954 has been 75 years. Since 1990 it has grown to 81 years.

The current court is no exception. Rehnquist and John Paul Stevens are 80 or older, and Ruth Bader Ginsburg is 72. All three have histories of serious illness.

Previously, when justices were impaired, their colleagues have applied awkward informal and unsuccessful pressures to encourage their retirements. Black ignored the hints of Chief Justice Earl Warren, Douglas and Harlan to resign for ill health in the 1970s. The situation repeated for

Richard Sobel is a research fellow at Harvard Medical School, policy director of the Program in Psychiatry and the Law at HMS, and consultant on constitutional cases. Kevin R. Loughlin is Professor of Surgery at Harvard Medical School, Senior Surgeon at Brigham and Women's Hospital, and researcher on illnesses among government officials.

A solution that deals with incapacity in privacy-respecting ways needs to be developed before the next serious Supreme Court health crisis might roil the court.

Douglas after a stroke required his colleagues, including Rehnquist, to reduce his duties. Ad hoc and ad hominem solutions are inappropriate for venerable public institutions.

Moreover, the right to medical privacy for government leaders needs to be respected in these cases. While the press speculates on the illness and diagnosis — as in Rehnquist's case — the details need not become public. It sets a good example to protect the privacy of senior government leaders, while addressing the continuity and quality of policy-making. A solution that deals with incapacity in privacy-respecting ways needs to be developed before the next serious Supreme Court health crisis might roil the court.

The 25th Amendment, dealing with presidential removal or resignation, provides a model for impaired justices. For constitutional reasons, the 1980 judicial disability law does not apply to the Supreme Court.

As the 25th Amendment authorizes an executive branch committee to declare the president infirm, court procedures could constitute the other members into a medical committee. When a member is seriously ill, the majority could decide whether she or he should step aside temporarily or step down. When in the majority, the chief justice would notify an ill justice of the determination of his brethren about the need to be relieved of duty. If the chief justice were ill, the senior associate justice would act instead.

Alternatively, the court could authorize an outside body of medical specialists to examine the ailing justice and recommend action. The panel should include specialists in the justice's illness and devise appropriate procedures for determining disability.

Recognition of political pressures to replace elderly justices with ideologically more acceptable juniors should inform the development of

objective criteria. The panel report and specifics about the illness would be confidential, but the resulting action would be public.

Developing and publicizing this procedure would be the simplest way of addressing the issue and avoiding a constitutional amendment. Because Article III of the Constitution sets the term for judges at life with good behavior, Congress cannot remove justices for causes other than impeachable conduct.

If the court does not soon create and publicize a satisfactory internal solution, the Congress should ask it to act under appropriate procedures.

If the court still does not create such procedures, the Congress and president should develop a 28th Amendment paralleling the 25th and begin the ratification process. The amendment should constitute the justices into a committee of the court, or authorize an external group appointed by the other justices to recommend temporary removal or retirement.

The length of Rehnquist's illness, the memory of the health problems that afflicted Presidents Eisenhower, Kennedy and Johnson, and an awareness of the time needed for ratification of an amendment remind leaders of the need to move quickly in developing policy. Such a solution needs to address illness of justices as public officials while respecting their privacy as individual citizens. Hence, it is now time to establish an interim procedure and set in motion a permanent solution. While the issues of dealing with illnesses on the Supreme Court may not arise during the hearings on Judge John G. Roberts Jr.'s nomination to the court, they do need to be raised in hearings on a new chief justice. This can begin the process of formal congressional hearings on a long-term solution for illnesses on the high court.

The benefit of settling these issues soon is that the process will assure the ongoing operation of the court. Creating an approach to debilitating health problems that protects the privacy of the justices will set a thoughtful precedent.

Though not urgent during the court's summer recess, the procedures need to be developed soon. In short, a course for dealing expeditiously with ill justices will improve the health of the court and the body politic.

Sobel: Your travel pass, please?

By Richard Sobel

Thursday, March 10, 2005

Currently, on frigid nights, you can get by bus from Harvard Square to Huron Village quickly, for just a little cash. If you were heading, for instance, to the Tobin School for Congressman Mike Capuano's community meeting during the recent cold spell, that was a convenient option.

Not so, shortly, if an idea for a National Transportation Security Identity Card becomes required for passage through card-readers on buses and subways. Richard Clarke, Harvard lecturer and former Clinton/Bush counter-terrorism adviser, outlines a 2006 possibility in the Atlantic Monthly.

A SID might begin in the current low-tech T-passes and the 2004 Intelligence Reform law passed in the December lame-duck Congress. The law creates a national driver's license by federally enforcing minimum standards on the states. Traditionally, our federal system gives states the decisions about licensing motorists.

A coalition of conservatives around New Hampshire Sen. John Sununu and liberals around New Jersey's Frank Lautenberg thought the section was removed in conference committee. But when President George Bush wanted the Intelligence Bill passed, the provisions ended up there.

A national driver's license is actually the base for a national identification system. It moves toward both a federal travel license and government benefits authorization card. If that legislation, or the more restrictive Sensenbrenner Section 7212 that the House approved in February is fully implemented, an SID would be needed when boarding planes at Logan or Amtrak at South Station.

Eventually, it might be required to rent a car or take the T. It would likely be needed to get federal benefits like Social Security or a U.S. passport. Being asked for your SID could become as common as requests for credit cards.

The convenient T-pass system, soon to be upgraded into the Charlie Card, could be reworked to deny travel to people without an SID. Even if they have cash. On cold nights, they can walk.

Among the wide-ranging town meeting issues Capuano ably handled, from Iraq to taxes, his views on a national driver's license raised questions. He opposes a national ID and no-fly lists. Being on the list has stopped Sen. Ted Kennedy from boarding some planes.

But Capuano thought national standards for a driver's license and requiring IDs to fly were OK. He voted against the Sensenbrenner extensions, however. Ever since a soldier asked for my papers on a train in still-Communist Hungary in the 1980s, travel credentials have seemed a bad idea. Didn't we mock places like Russia and South Africa for demanding people's papers?

The right to travel is a precious one Americans take for granted and the Supreme Court considered fundamental in the Guest decision. This is especially so when you're going to talk with government leaders.

Section 7212 gives the power to decide on the computer-linked, color-coded system of national driver's license to the Department of Homeland Security. It provides minimal consultation with the states on regulation. And there's no provision for privacy protections.

Cambridge residents may not think travel could be restricted locally. Most of us feel it can't happen here. But didn't the T's plan to ask people for IDs and search their bags during the uneventful DNC raise that specter?

If the national driver's license system becomes a travel license, the simple ride from Harvard Square to West Cambridge could become impossible for some on future frigid nights. The specter of domestic passports could become the harsh reality of a Cyber Winter here.

Americans across the political spectrum oppose the national driver's license for undermining our basic liberties. These range from the American Civil Liberties Union to the American Conservative Union.

Thoughtful people need to recognize we will be the ones to suffer restrictions on our movements, local and national. International visitors intent on harm won't be eligible for a national ID, and could travel on foreign passports. An SID won't stop them.

The Sensenbrenner section is a senseless extension of a flawed approach to security that undermines basic liberties in a simplistic search for safety. As the recent stories about unheeded threats before Sept. 11 suggests, coordinated use of intelligence information could better head off dangers.

If Section 7212 becomes law, the T-Pass could morph into a Travel License or internal passport. We need to address the consequences of a national driver's license now when warmer thoughts are more appealing on cold Cambridge nights.


That chilly week also celebrated patriot Josiah Quincy's birthday. He lived in constantly dangerous times when British troops terrorized the town.


As Ben Franklin famously wrote Cantabridgian Quincy on Sept. 11 over two centuries ago, "They that can give essential liberty to obtain a little temporary safety deserve neither liberty nor safety."


Sobel is a Cambridge resident.

Herald Interactive Tools


 [View Graphic Version](#)


 [Email to a Friend](#)


 [Sign Up for Home Delivery](#)

 **SEARCH:** Enter keyword(s)


Recent Opinion & Letters

 [Editorial: Don't emasculate police review board](#)

 [Carleton: Focus on administration cutting misplaced](#)

 [Toner: Clerical cuts will hurt schools](#)

 [Green: Debunking the Cambridge Fallacy](#)

 [This dog's caught in a divorce battle](#)

Sobel: Your travel pass, please?

By Richard Sobel

Thursday, March 10, 2005

Currently, on frigid nights, you can get by bus from Harvard Square to Huron Village quickly, for just a little cash. If you were heading, for instance, to the Tobin School for Congressman Mike Capuano's community meeting during the recent cold spell, that was a convenient option.

Not so, shortly, if an idea for a National Transportation Security Identity Card becomes required for passage through card-readers on buses and subways. Richard Clarke, Harvard lecturer and former Clinton/Bush counter-terrorism adviser, outlines a 2006 possibility in the Atlantic Monthly.

A SID might begin in the current low-tech T-passes and the 2004 Intelligence Reform law passed in the December lame-duck Congress. The law creates a national driver's license by federally enforcing minimum standards on the states. Traditionally, our federal system gives states the decisions about licensing motorists.

A coalition of conservatives around New Hampshire Sen. John Sununu and liberals around New Jersey's Frank Lautenberg thought the section was removed in conference committee. But when President George Bush wanted the Intelligence Bill passed, the provisions ended up there.

A national driver's license is actually the base for a national identification system. It moves toward both a federal travel license and government benefits authorization card. If that legislation, or the more restrictive Sensenbrenner Section 7212 that the House approved in February is fully implemented, an SID would be needed when boarding planes at Logan or Amtrak at South Station.

Eventually, it might be required to rent a car or take the T. It would likely be needed to get federal benefits like Social Security or a U.S. passport. Being asked for your SID could become as common as requests for credit cards.

The convenient T-pass system, soon to be upgraded into the Charlie Card, could be reworked to deny travel to people without an SID. Even if they have cash. On cold nights, they can walk.

Among the wide-ranging town meeting issues Capuano ably handled, from Iraq to taxes, his views on a national driver's license raised questions. He opposes a national ID and no-fly lists. Being on the list has stopped Sen. Ted Kennedy from boarding some planes.

But Capuano thought national standards for a driver's license and requiring IDs to fly were OK. He voted against the Sensenbrenner extensions, however. Ever since a soldier asked for my papers on a train in still-Communist Hungary in the 1980s, travel credentials have seemed a bad idea. Didn't we mock places like Russia and South Africa for demanding people's papers?

The right to travel is a precious one Americans take for granted and the Supreme Court considered fundamental in the Guest decision. This is especially so when you're going to talk with government leaders.

Section 7212 gives the power to decide on the computer-linked, color-coded system of national driver's license to the Department of Homeland Security. It provides minimal consultation with the states on regulation. And there's no provision for privacy protections.

Cambridge residents may not think travel could be restricted locally. Most of us feel it can't happen here. But didn't the T's plan to ask people for IDs and search their bags during the uneventful DNC raise that specter?

If the national driver's license system becomes a travel license, the simple ride from Harvard Square to West Cambridge could become impossible for some on future frigid nights. The specter of domestic passports could become the harsh reality of a Cyber Winter here.

Americans across the political spectrum oppose the national driver's license for undermining our basic liberties. These range from the American Civil Liberties Union to the American Conservative Union.

Thoughtful people need to recognize we will be the ones to suffer restrictions on our movements, local and national. International visitors intent on harm won't be eligible for a national ID, and could travel on foreign passports. An SID won't stop them.

The Sensenbrenner section is a senseless extension of a flawed approach to security that undermines basic liberties in a simplistic search for safety. As the recent stories about unheeded threats before Sept. 11 suggests, coordinated use of intelligence information could better head off dangers.

If Section 7212 becomes law, the T-Pass could morph into a Travel License or internal passport. We need to address the consequences of a national driver's license now when warmer thoughts are more appealing on cold Cambridge nights.

That chilly week also celebrated patriot Josiah Quincy's birthday. He lived in constantly dangerous times when British troops terrorized the town.

As Ben Franklin famously wrote Cantabridgian Quincy on Sept. 11 over two centuries ago, "They that can give essential liberty to obtain a little temporary safety deserve neither liberty nor safety."


Sobel is a Cambridge resident.

Herald Interactive Tools

 [View Graphic Version](#)


 [Email to a Friend](#)


 [Sign Up for Home Delivery](#)

 **SEARCH:** Enter keyword(s)

all

Recent Opinion & Letters

 [Editorial: Don't emasculate police review board](#)

 [Carleton: Focus on administration cutting misplaced](#)

 [Toner: Clerical cuts will hurt schools](#)

 [Green: Debunking the Cambridge Fallacy](#)

 [This dog's caught in a divorce battle](#)

Sobel: Your travel pass, please?

By Richard Sobel

Thursday, March 10, 2005

Currently, on frigid nights, you can get by bus from Harvard Square to Huron Village quickly, for just a little cash. If you were heading, for instance, to the Tobin School for Congressman Mike Capuano's community meeting during the recent cold spell, that was a convenient option.

Not so, shortly, if an idea for a National Transportation Security Identity Card becomes required for passage through card-readers on buses and subways. Richard Clarke, Harvard lecturer and former Clinton/Bush counter-terrorism adviser, outlines a 2006 possibility in the Atlantic Monthly.

A SID might begin in the current low-tech T-passes and the 2004 Intelligence Reform law passed in the December lame-duck Congress. The law creates a national driver's license by federally enforcing minimum standards on the states. Traditionally, our federal system gives states the decisions about licensing motorists.

A coalition of conservatives around New Hampshire Sen. John Sununu and liberals around New Jersey's Frank Lautenberg thought the section was removed in conference committee. But when President George Bush wanted the Intelligence Bill passed, the provisions ended up there.

A national driver's license is actually the base for a national identification system. It moves toward both a federal travel license and government benefits authorization card. If that legislation, or the more restrictive Sensenbrenner Section 7212 that the House approved in February is fully implemented, an SID would be needed when boarding planes at Logan or Amtrak at South Station.

Eventually, it might be required to rent a car or take the T. It would likely be needed to get federal benefits like Social Security or a U.S. passport. Being asked for your SID could become as common as requests for credit cards.

The convenient T-pass system, soon to be upgraded into the Charlie Card, could be reworked to deny travel to people without an SID. Even if they have cash. On cold nights, they can walk.

Among the wide-ranging town meeting issues Capuano ably handled, from Iraq to taxes, his views on a national driver's license raised questions. He opposes a national ID and no-fly lists. Being on the list has stopped Sen. Ted Kennedy from boarding some planes.

But Capuano thought national standards for a driver's license and requiring IDs to fly were OK. He voted against the Sensenbrenner extensions, however. Ever since a soldier asked for my papers on a train in still-Communist Hungary in the 1980s, travel credentials have seemed a bad idea. Didn't we mock places like Russia and South Africa for demanding people's papers?

The right to travel is a precious one Americans take for granted and the Supreme Court considered fundamental in the Guest decision. This is especially so when you're going to talk with government leaders.

Section 7212 gives the power to decide on the computer-linked, color-coded system of national driver's license to the Department of Homeland Security. It provides minimal consultation with the states on regulation. And there's no provision for privacy protections.

Cambridge residents may not think travel could be restricted locally. Most of us feel it can't happen here. But didn't the T's plan to ask people for IDs and search their bags during the uneventful DNC raise that specter?

If the national driver's license system becomes a travel license, the simple ride from Harvard Square to West Cambridge could become impossible for some on future frigid nights. The specter of domestic passports could become the harsh reality of a Cyber Winter here.

Americans across the political spectrum oppose the national driver's license for undermining our basic liberties. These range from the American Civil Liberties Union to the American Conservative Union.

Thoughtful people need to recognize we will be the ones to suffer restrictions on our movements, local and national. International visitors intent on harm won't be eligible for a national ID, and could travel on foreign passports. An SID won't stop them.

The Sensenbrenner section is a senseless extension of a flawed approach to security that undermines basic liberties in a simplistic search for safety. As the recent stories about unheeded threats before Sept. 11 suggests, coordinated use of intelligence information could better head off dangers.

If Section 7212 becomes law, the T-Pass could morph into a Travel License or internal passport. We need to address the consequences of a national driver's license now when warmer thoughts are more appealing on cold Cambridge nights.


That chilly week also celebrated patriot Josiah Quincy's birthday. He lived in constantly dangerous times when British troops terrorized the town.


As Ben Franklin famously wrote Cantabridgian Quincy on Sept. 11 over two centuries ago, "They that can give essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

Sobel is a Cambridge resident.

Herald Interactive Tools


 [View Graphic Version](#)


 [Email to a Friend](#)


 [Sign Up for Home Delivery](#)


 **SEARCH:** Enter keyword(s)


Recent Opinion & Letters

 [Editorial: Don't emasculate police review board](#)

 [Carleton: Focus on administration cutting misplaced](#)

 [Toner: Clerical cuts will hurt schools](#)

 [Green: Debunking the Cambridge Fallacy](#)

 [This dog's caught in a divorce battle](#)