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The Need for Supreme Court Term Limits

By Maggie Jo Buchanan August 3, 2020

"I do think that if there were a long term—I don't know, 18, 20 years, something like that, and it was fixed—I would say that was fine. In fact, it'd make my life a lot simpler, to tell you the truth." – Justice Stephen Breyer[1]

"The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then, but is becoming commonplace today. Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones." – Future Chief Justice John Roberts[2]

The rules governing the U.S. Supreme Court must be updated to reflect the reality of life in modern America. The average tenure of a Supreme Court justice has significantly lengthened since the establishment of the federal judiciary in the 1700s, giving outsize power to nine individuals in a way the framers of the Constitution could never have imagined. This longevity has resulted in a lack of regularity in vacancies, introducing further randomness to the judicial selection process. As a result, the confirmation process for the highest court has become politically divisive, with extremely narrow votes and theatrics from the nominees themselves. This state of affairs in untenable; policymakers must address it by enacting legislation to create term limits for justices.

Longer terms have led to an increasingly political confirmation process and a court more likely to be out of touch with the general public

The average age at which a justice is appointed to the Supreme Court has remained relatively static throughout history, falling between the early- to mid-50s—meaning that as life expectancy has grown, so too have the terms of Supreme Court justices.[3] In fact, the average justice's term is now longer than it has been at any other point in U.S. history. In addition, because the ease of the position has grown and the workload has decreased—long gone are the days of large dockets, circuit riding, and working without clerks—justices are more likely to stay on the bench for long periods of time.[4]

As Supreme Court justices and many legal academics have noted, this state of affairs has resulted in each individual justice having more power over American life in a way that no other branch of government does.[5] For example, members of Congress, on average, are younger than the current members of the Supreme Court, and every appointee before Justice Sonia Sotomayor has been in office longer than the average senator.[6] And, of course, the president is term limited by law.

This growth in power has contributed to the political nature of the confirmation process. Because there is no regularity in vacancies and each justice can now be easily expected to sit on the court for multiple decades, Senate leaders have a strong incentive to upend the confirmation process in order to secure a justice appointed by a president of their same political party.[7] In addition, presidents are incentivized to select nominees with records that demonstrate they will likely rule in lockstep with that party's ideology.

Supreme Court selections have always been political in nature to a degree, and sitting justices themselves often contribute to this. For example, when Chief Justice Earl Warren—a noted progressive—retired after 15 years on the Supreme Court, he originally submitted his resignation to then-President Lyndon B. Johnson to avoid having a potential Republican president choose his replacement.[8] More recently, however, these problems have been so exacerbated as to weaken the legitimacy of the court itself, culminating in Senate Majority Leader Mitch McConnell's (R-KY) move to steal a Supreme Court seat by refusing to consider a nominee from then-President Barack Obama. Sen. McConnell followed this unprecedented snub by eliminating the filibuster for a Republican nominee and confirming two controversial justices nominated by President Donald Trump.[9]

Regular appointments, however, would hopefully make the confirmation process less political. For example, there would be less intense pressure on each individual pick because there would be an understanding that winning the presidency comes with the appointment of two justices. Moreover, creating a more regular appointment process would ensure that the court better reflects the broader public. Happenstance can result in presidents getting a greater or lesser number of appointments, potentially resulting in a court that is widely out of step with society as a whole.

Several term-limit proposals are gaining momentum

While there is a range of potential term-limit proposals, there are some general principles that have rightly achieved broad support. An 18-year nonrenewable limit is overwhelmingly the most common proposal, although Chief Justice Roberts once expressed support for a 15-year term.[10] Justice Breyer has argued that an 18-year term period would give justices enough time to fully learn the job and develop

jurisprudence—a position bolstered by the fact that many justices have voluntarily retired after a similar period of service on the court.[11] Moreover, under advocacy organization Fix the Court's bipartisan model, the 18-year term would be staggered so that a vacancy would open every two years. This would make certain that each presidential term would bring two new justices—helping to ensure the court reflects the general public.[12] Once at the end of their term, justices would have the option to continue to work as fully compensated federal judges in senior status, as all currently retired Supreme Court justices have elected to do.

This model has been supported as a good government reform by notable progressives and conservatives alike.[13] Among those who support such term limits, there are two general points of debate. First, there is the question of whether the reform could be achieved through statute. However, as long as term-limited judges are allowed to take on senior status or otherwise serve the judiciary in some capacity while continuing to be fully compensated, there is every reason to think that term limits could be done by statute.[14]

Second, and more importantly, there is the question of whether statutory limits could be instituted retrospectively or only prospectively—in other words, if the current justices would be subject to the limit or if the limit would only apply to new justices. The debate hinges on whether such a change redefines the nature of the position to which the justice was appointed, thereby creating constitutional issues.[15]

Regardless of a final approach, term limits would help to advance significant change.

Objections to term limits are misplaced

Term limits have received support from those on both sides of the political aisle, but some concerns remain. There are two leading policy objections to term limits: first, that they would cause greater instability in jurisprudence and second, that they would create incentives for judges near the end of the term to audition for, or cater their decisions to, their next position. While these are indeed important considerations, neither objection outweighs the potential benefits of term limits.

Term limits are unlikely to bring huge upheavals in law

Regular upheavals in law have long been raised as a potential negative outcome to term limits. To a certain extent, some amount of change in doctrine is an expected and even necessary aspect of jurisprudence. But regular, wild shifts in a wide range of legal issues could have negative consequences for the stability of American law. Ultimately, however, a term limit of nearly two decades is unlikely to contribute significantly to such upheavals, especially given that a respect for stare decisis—or precedent—continues to inform judicial decision-making as well as the reality that important lines of jurisprudence experience major changes even without such a reform.

Recent research has examined how term limits could lead to more regular reversals of major decisions, particularly if individual justices largely ignore precedent.[16] The recent Supreme Court term taught us, however, that precedent can still play an important role in shaping decisions. The most notable evidence of this came when Chief Justice Roberts voted to strike down the anti-choice law at issue this term in *June Medical v. Russo,* proving that judges can break with their previous votes on an issue when clear precedent is at stake.[17]

Furthermore, it is important to keep in mind the significant changes that have occurred within Supreme Court jurisprudence. For example, major cases challenging abortion rights and the promise of *Roe v. Wade* are regularly brought before the court. The holding in *Planned Parenthood v. Casey* rewrote the constitutional standard under which abortion restrictions are tested, and *Gonzales v. Carhart* eliminated access to an abortion procedure in almost all cases without an exception for a woman's health.[18] These examples demonstrate that the court's interpretation of important rights can change significantly even without term limits in place.

Any new justice on the court will have an effect on how precedent is evaluated as well as how novel legal questions are decided. However, most modern presidents have appointed between two and four justices—with the most common number being two, regardless of if the president served for one or two terms.[19] Term-limit proposals could increase the number of justices that some presidents appoint, but not dramatically enough to lead to significantly more doctrinal upheaval.

Term limits are unlikely to result in more corrupt justices

Another concern is that term limits would give justices heightened political and financial incentives to set themselves up for their next job through their legal opinions before fully resigning from the bench.[20] There is, of course, nothing preventing a corrupt justice from doing so now in the hopes of gaining greater fame or wealth. The likelihood of this concern coming to fruition, then, depends on whether the individuals appointed under a term-limit scheme are likely to be more corrupt than current justices.

Currently, any federal judge or justice can at any time choose to fully resign or, once they meet certain requirements, enter into senior status. Full retirement from the bench allows a judge to return to practice law and generally act without any constraint on earnings or profession; from 1970 to 2009, 80 former judges chose this path.[21] In contrast, taking senior status—which requires some judicial service while the judge continues to be fully compensated along with certain tax advantages—comes with at least some ethics requirements in regard to limits on outside earnings.[22] There are currently three former Supreme Court justices and 577 lower court judges currently in senior status.

Despite the fact that most justices have declined to do so, it is not out of the question that a term-limited justice would choose full retirement over senior status, which would come with at least some protections against such self-dealing. Among those federal judges who have fully retired from the bench, the most commonly stated reasons for doing so collected through surveys were '"return to private practice," "appointment to other office," and "inadequate salary."'[23] From 1970 to 2009, just two judges resigned to run for office, although approximately 18 total left the bench for another state or federal appointment. But while it is possible that term-limited justices could choose full resignation for similar reasons, that is unlikely to be a significant reason for concern.

Given that, despite all the changes the Supreme Court has undergone, the average age of appointment has held steady throughout the court's history, it is reasonable to assume justices of a similar age would continue to be selected even if term limits were enacted. For example, a person in their early- to mid-50s—the current average age for newly appointed justices—would face the end of their term in their early 70s. For many, that may open the window for them to take on a new career after their term has ended. However, it is also a substantial amount of time spent on the country's highest court and would invite the great many prestigious opportunities allowable under senior status while providing for the comfortable lifestyle that current retired justices enjoy.

It is also worth noting that Supreme Court justices are already allowed to enjoy luxurious sponsored trips and teaching opportunities as well as own stock and have a variety of other potential conflicts of interest that could influence their rulings. For example, the court once was unable to consider a case because it could not muster the needed quorum to do so as a result of too many justices having financial conflicts.[24] While this brief does not aim to explore the merits of Supreme Court ethics reform proposals, the fact remains that the significant ethics concerns that already plague the court are unlikely to worsen with term limits in place. Moreover, any term-limit proposal could be coupled with reforms to address these existing problems.

Conclusion

Lifelong appointments for justices are resulting in increasingly longer terms, with significant implications for the politicization of the court. Creating term limits for justices would establish regularity in vacancies and help to avoid an escalation of the negative outcomes linked to justices' ever-longer lifetime tenures. The nine individuals who sit on the Supreme Court hold incredible power over American life. It is therefore vital that the makeup of that court not be determined by happenstance but rather by Americans' support for those policymakers tasked with selecting and confirming federal judges.

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Endnotes

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