



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

Issue Brief

June 2017

Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments

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After an awkward and acrimonious fourteen months shorthanded, the Supreme Court is back to nine Justices. But if there is one thing people should be able to agree on after the tumultuous process of replacing Justice Scalia—the Republican blockade of President Obama’s nominee, the Democratic filibuster of President Trump’s, the Senate’s nuclear destruction of its centuries-old procedural rule for approving nominees—it is that our process for appointing Supreme Court Justices is broken.

In this issue brief we describe the problems that beset the current appointment process and propose a solution: term limits for Supreme Court Justices. While parts of our analysis may be novel, the solution certainly is not: it mirrors the practice of the rest of the Western world and is now being promoted by law and policy thinkers from across our political spectrum. The proposals may differ in some details, but there is broad consensus that term limits would constitute a desirable reform.

There is slightly more disagreement about how term limits might be implemented. Some scholars believe that a constitutional amendment would be required. That would be bad news for term limit proponents, as the U.S. Constitution is notoriously difficult to amend. We believe, however, that this view is mistaken. An amendment would not be necessary; a properly drawn statute could implement term limits for Supreme Court Justices without offending the constitutional guarantee that federal judges shall hold office during good behavior. We believe the case in favor of joining the majority of the world in establishing term limits for our highest court is compelling and hope that sharing this perspective and the proposal for its implementation will increase its appeal.

In Part I of this Issue Brief, we describe the problem and in Part II we identify its source. Changes in American society, most notably the rise of a two-party system, have placed additional stress on the nomination process. Because these political changes were not anticipated by its drafters, our Constitution has no method of resolving the strain. As a result, there is now a fundamental lack of agreement on when, whether, and under what conditions a president has the right to appoint a Supreme Court Justice. Part III explains how fixed eighteen-year terms for Supreme Court Justices will help resolve the current problems. Part IV sets out the details of the proposal and explains how it could be implemented without a constitutional amendment.

I. The Problem

A. Partisanship in Appointments and Retirements

With each new episode of partisan rancor over the Supreme Court, there comes an attempt to pinpoint the moment the appointment process went wrong and to fix the blame on one side or another. The Right often points to the defeat of Ronald Reagan's nominee Robert Bork; the Left counters that it began with the racist questioning of Thurgood Marshall by segregationist southern Senators.¹ In fact, however, partisan misbehavior began long before either of those nominations.

The history of playing politics with Supreme Court appointments goes back to the earliest days of our Republic. In the year 1800, a lame-duck Federalist Congress reduced the size of the Court to deny incoming President Thomas Jefferson an appointment.² Jefferson's party, upon taking control of Congress, repealed that measure and later added one seat to the Court to give Jefferson an additional appointment. By the early-to-mid nineteenth century, blocking presidents' Supreme Court nominations was a well-established possibility. Presidents John Quincy Adams, Millard Fillmore, and John Tyler all saw nominations defeated.³ Extreme partisan court-tampering maneuvers continued during the Civil War, when the Republican Congress increased the size of the Court to ten to ensure a pro-Union majority.⁴ After Abraham Lincoln's assassination, Congress shrank the Court to seven to deny President Andrew Johnson appointments. Once Ulysses S. Grant was elected, Congress returned the number of seats to nine.⁵

Partisan battles over the appointment process are bad enough as a general matter, as these squabbles tend not to promote the interests of the nation as a whole. But more specifically, the interaction of life tenure with partisan politics has spawned a number of other undesirable consequences. The end result, as explained below, is to reduce the quality of our Supreme Court in terms of individual Justices and to distort the Court's relation to the national political process.

With respect to the Justices themselves, the current system gives presidents incentives to pick a young nominee, rather than the best qualified, to maximize the length of their influence on the Court.⁶ Older candidates, no matter their status or abilities, may be eliminated for reasons of age alone. Franklin D. Roosevelt, for example, ignored advice to appoint 70-year-old Learned Hand in

¹ See generally STEPHEN CARTER, *THE CONFIRMATION MESS* (1994) (addressing the political chaos that comes with nominating and confirming Justices).

² Erick Trickey, *The History of the "Stolen" Supreme Court Seats*, SMITHSONIAN.COM (Mar. 20, 2017), <http://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/>.

³ See *id.* (giving an overview of the Supreme Court history and specifically explaining the Senate blocked John Tyler from filling a seat before the election, rejected his first nomination, sat on two qualified candidates for over a year then accepted one out of his next two nominations).

⁴ *Id.*

⁵ See generally Jean Edward Smith, *Stacking the Court*, N.Y. TIMES (July 26, 2007), <http://www.nytimes.com/2007/07/26/opinion/26smith.html> (giving a history of parties tampering with the number of Supreme Court seats).

⁶ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 801 (2006) (noting presidents have consistently nominated candidates who are around 50-55 years old, despite the continuous increase in life expectancy).

1942, deciding instead to use his eighth nomination on 48-year-old Wiley Rutledge.⁷ Other seasoned candidates, like Richard Posner, have noted they are disqualified from the running because they are “too old”⁸ or because of uncertainty about how long they will live.⁹

Once on the Court, Justices tend to stay there a long time—sometimes longer than they should. Some Justices remain on the bench after they are no longer capable of performing at their best, or even at an acceptable level of professional competence. Justice William O. Douglas, for example, refused to step down even after he had a debilitating stroke.¹⁰ In part, this happens simply because of life tenure: Supreme Court Justices may prefer to hold their jobs as long as possible in order to retain the power, status, and satisfaction that accompany the position.

But it is the combination of both life tenure and partisan considerations which produces the phenomenon of strategic retirement. Justices often time their departures from the Court not with reference to their fitness, or even their enjoyment of the job, but based upon the politics of the president who will appoint their replacement. Justice Douglas, for example, said he would not resign until there was a Democratic president.¹¹ Justice Thurgood Marshall, likewise, was determined to serve until a Democrat took office.¹² With sight and hearing failing, beset by increasingly severe health problems, he would tell his incoming clerks, presumably in jest, “If I die, prop me up and keep on voting.”¹³ When, on election night, it appeared that Al Gore would win the 2000 Presidential election, Justice O’Connor exclaimed the outcome was “terrible” because it meant delaying her retirement plans another four years to avoid a Democrat naming her successor.¹⁴

As the path to Senate confirmation has grown more difficult, Justices seeking to ensure an ideologically comparable replacement must increasingly look to retire not only when their preferred party controls the White House, but must also consider Senate politics. When President Obama was still in office, for example, many urged Justice Breyer and Justice Ginsburg to retire. Justice Ginsburg dismissed the suggestion with the observation, “And who do you think Obama could have nominated and got confirmed that you’d rather see on a court?”¹⁵

⁷ John T. Noonan Jr., *Master of Restraint*, N.Y. TIMES (May 1, 1994), <http://www.nytimes.com/1994/05/01/books/master-of-restraint.html?pagewanted=all>.

⁸ Debra Cassens Weiss, *Posner Has “Absolutely No Desire” To Join SCOTUS, Which “Isn’t a Real Court,”* A.B.A.J. (Nov. 11, 2013),

http://www.abajournal.com/news/article/posner_has_absolutely_no_desire_to_join_scotus_which_isnt_a_real_court.

⁹ See Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment To Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 803 n.32 (1986) (noting Senator Garland of Arkansas advised President Cleveland he regarded himself disqualified for SCOTUS because of age).

¹⁰ Smith, *supra* note 5.

¹¹ Oliver, *supra* note 9, at 825 (citing *Douglas Finally Leaves the Bench*, TIME (Nov. 24, 1975), at 69).

¹² Richard Lacayo, *Marshall’s Legacy: A Lawyer Who Changed America*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,157412,00.html>.

¹³ *Id.*

¹⁴ *Pivotal Justice Upset by Prospect of a Gore Win*, BLADE (Dec. 19, 2000), at A6.

¹⁵ Gail Collins, *The Unsinkable R.B.G.*, N.Y. TIMES (Feb. 20, 2015), <https://www.nytimes.com/2015/02/22/opinion/sunday/gail-collins-ruth-bader-ginsburg-has-no-interest-in-retiring.html>.

These pressures help to explain why the Justices' tenures are longer now than ever before. For the Supreme Court's first thirty-two years, Justices averaged only 7.5 years on the Court. From 1941-1970 Justices averaged 12.2 years. Then, from 1971 to 2000 a 14-year jump brought the average Justice tenure to 26.1 years, with many Justices serving over 33 years.¹⁶

B. An Out of Touch Court?

The increasing length of judicial service yields older serving individual Justices¹⁷ and a higher average age of the Supreme Court. Neither is a desirable outcome. With Justices serving for over thirty years, the Court may lose its connection to the present day. It tends to lag behind the elected branches in terms of its sense of the world, reflecting not the political consensus of today, but one from decades ago.

The potential gap between the Court and modern America would be less concerning if the Constitution gave us clear right answers to legal questions, which never varied from decade to decade. But this understanding of the Constitution is theoretically implausible and, theory aside, it is obviously inconsistent with the Court's practice over our history.¹⁸ The Supreme Court *does* change its mind, and replacing older Justices with new ones is one of the main engines driving that change. The question is how quickly, and perhaps more important how regularly, that process of replacement should occur.

There is something to be said for a deliberate pace, in that it makes the Court a natural anchor that slows the rate of social transformation. But one can have too much of a good thing, and a Court that is out of touch with society is more likely to frustrate needed reforms than to preserve traditional wisdom. The clash between the Supreme Court and the administration of Franklin D. Roosevelt—the New Deal vs. the nine old men¹⁹—is an illustration. Like it or not, the New Deal reflected the constitutional understandings of the American people and their elected representatives, understandings that are now fundamental to the organization of our economically integrated society. The Supreme Court could not ultimately stand in its way, and it did no one any favors by resisting as long as it did.

¹⁶ Calabresi & Lindgren, *supra* note 6, at 778.

¹⁷ *See id.* at 783 (noting the average Justice retirement age in 2006 was the highest it had ever been at 78.7 years old).

¹⁸ *See generally* KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM 47–58 (2008) (describing theories of constitutional change).

¹⁹ *See* Noonan Jr., *supra* note 7 (noting one of the reasons FDR put younger Justices on the court was because they contrasted to the sitting Justices he referred to as the “nine old men”).

C. The Vagaries of Replacement Opportunities

Generally speaking, and in many cases that were controversial when decided, the Court has been a majoritarian institution, enforcing the will of a national majority against outlier states.²⁰ This should not be surprising. Presidents nominate Justices who share their constitutional visions, and presidential elections allow the American people a voice in the interpretation of the Constitution.²¹ A political coalition that wins a presidential election is rewarded with the opportunity to influence the direction of the Supreme Court.

Or at least it should be. But as just noted, Justices tend to time their retirements based on the President who will appoint their replacement. In consequence, the partisan balance on the Court shifts much more slowly than it otherwise might. We can go decades without a Republican president replacing a Democratic appointee or vice-versa. And when such cross-party appointments do occur, they tend to be the result of random chance, when sudden death or undeniable incapacity prevent a strategic retirement.

Working in concert, strategic retirement and the uncertainties of life have produced a system whereby some presidents get no appointments and others a large number. Depending on how many appointments they get, and more crucially whether they can replace a Justice appointed by the other party, some presidents have no opportunity to shift the ideological balance on the Court and some have the chance to transform it dramatically. And, most important, the degree of presidential influence has no necessary link to the success of the president or her party in winning the support of the American people.

Hot spots, where some presidents get several nominations within a single term, can result in one party locking up the court for a long period of time—as the Republicans did at the beginning of the 20th century and the Democrats did following the New Deal²²—leaving the next Chief Executive without an appointment. Such was also the case when President Nixon got four Supreme Court nominations in five years, abruptly shifting the Court to the right and leaving President Carter, a few years later, with none.²³ Several other presidents left the White House with no Supreme Court legacy, including William Harrison, Zachary Taylor and Andrew Johnson. Other presidents had luck

²⁰ This is the pattern followed by *Brown v. Board of Education*, *Loving v. Virginia*, *Lawrence v. Texas*, and *Obergefell v. Hodges*. See generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing the Court has always been shaped by the American public and its view of the Constitution).

²¹ This was, notoriously, the stated reason behind the Republican refusal to consider Merrick Garland. Amita Kelly, *McConnell: Blocking Supreme Court Nomination “About a Principle, Not a Person,”* NPR (Mar. 16, 2016), <http://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person>. Less dramatically, the Republican Party platform for many years has contained a plank devoted to the reversal of *Roe v. Wade*. On the other side, President Obama stated while campaigning in 2008 that his ideal Justice, “. . . has a sense of what’s happening in the real world and recognizes that one of the roles of the court is to protect people who don’t have a voice.” Linda Hirshman, *After 45 Years of Conservative Rulings, Here’s What a Liberal Supreme Court Would Do*, WASH. POST (Feb. 19, 2006), https://www.washingtonpost.com/opinions/after-45-years-of-conservative-rulings-heres-what-a-liberal-supreme-court-would-do/2016/02/19/efa63ad4-d589-11e5-b195-2e29a4c13425_story.html?utm_term=.23c33b6103c1.

²² Calabresi & Lindgren, *supra* note 6, at 813.

²³ *Id.* at 737.

closer to Nixon's: Andrew Jackson had six nominations and both William Howard Taft and President Eisenhower had five.²⁴ Presumably due to the Justices' extended tenures, presidential terms devoid of appointments are occurring with more frequency, evidenced by Jimmy Carter's term, Bill Clinton's second term, and George W. Bush's first term.²⁵

Put all these factors together and you have a mess. Justices serve longer than they should. Vacancies occur infrequently and unpredictably. The stakes for each nomination are high, and the parties are naturally invested in wringing whatever partisan advantage they can from the process. The President has incentives to pick not the most qualified candidate, but someone young who has never expressed a controversial view. The Court thus produced is neither composed of the best judges available nor related in any logical way to the national political dialogue about the meaning of our Constitution and the best method of interpreting it.

II. How We Got Here: Partisan Politics in a Nonpartisan Constitution

How did we get here? There have been a number of changes since the Framers' day that have contributed to the current situation. Increased life expectancy, for instance, has altered the consequences of life tenure. In post-colonial times, the average life expectancy was somewhere between 35 and 50 years old,²⁶ and the Framers presumably did not anticipate that Justices would routinely serve for 30 years or more. (Indeed, as noted, average tenure in the Founding era was less than ten years.)

But the fundamental reason that our system for appointing Supreme Court Justices is malfunctioning in these ways is the rise of the party system. The Framers, as is well known, did not anticipate the role that political parties would play in our system of governance. The party system—especially our modern two-party system—has played havoc with a number of constitutional structures. One obvious example is the original method for electing the president and vice-president. Assuming that presidential elections would be based on something like a nonpartisan assessment of merit, the Framers decided that the highest vote-getter should be President and the second-place finisher Vice-President.²⁷ In a world without political parties, that would plausibly yield the best and second-best candidates filling the top two offices in the Executive Branch, where they might be expected to cooperate on the task of governing. But once the presidential election became a contest between ideologically opposed parties, that system predictably produced a president from one party and a vice president from another. Now the top two positions were staffed by ideological opponents

²⁴ Jeremy Berke, *How Many Supreme Court Appointments Every President Has Made*, BUS. INSIDER (Mar. 17, 2016), <http://www.businessinsider.com/supreme-court-nominations-of-presidents-2016-3>; *Judgeship Appointments by President*, U.S. CTS., <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/judgeship-appointments-president> (last visited May 4, 2017).

²⁵ Calabresi & Lindgren, *supra* note 6, at 737.

²⁶ *How Things Have Changed in Philadelphia Since the 1787 Convention*, CONST. CTR. (May 25, 2016), <https://constitutioncenter.org/blog/how-things-have-changed-since-1787/>; Christopher Ingraham, *Why It's Time To Get Serious About Supreme Court Term Limits*, WASH. POST (Feb. 13, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/13/why-its-time-to-get-serious-about-supreme-court-term-limits/?utm_term=.3dfba069029c.

²⁷ Dewey Clayton, *Picking the President*, 13 INSIGHTS ON L. & SOC'Y, no. 1, Fall 2012.

whose relations would be tense, as they were between the Federalist President John Adams and his Democratic-Republican Vice-President Thomas Jefferson.

Presidential elections are a discrete process that can be revised in isolation, and the Twelfth Amendment did so.²⁸ But the party system also has effects that are harder to correct. Separation of powers is a structural device that the Framers used to protect individual liberty, on the assumption that individuals in government would feel loyalty to their offices and branch of government and resist expansive claims of authority from the other branches. But this institutional loyalty is, in the modern world, overwhelmed by party loyalty. A Congress controlled by the same party as the president shows little interest in checking abuses of power or investigating wrongdoing; a Congress controlled by the opposite party tends to launch witch hunts and do what it can to make the president fail in order to recapture the White House in the next election. It is hard to think of a discrete change to the Constitution that could fix this problem.

For present purposes, however, the most important consequence of the party system is that it interferes with the appointment process the Framers designed. In a world without parties, nomination and confirmation of Supreme Court Justices would presumably be relatively straightforward. Whenever a vacancy arose, the president would nominate a replacement, and if that person met some threshold criterion of merit, the Senate would confirm. The president would have no incentive to do anything but nominate the most qualified candidate, and the Senate no reason to do anything but vote based on merit.

Introduce the party system, however, and the incentives change. The president now has an incentive to nominate the youngest and most extreme person she can get away with; the Senate has an incentive to demand moderate nominees from the other party and to block anyone they can in the hopes of transferring the nomination to the next president. Nominees have an incentive to mouth platitudes about how judges are umpires, not players, and to reveal as little as they can about their actual approach to deciding cases. Unsurprisingly, the two sides have engaged in a pattern of escalating misbehavior and reprisals, culminating in the Garland blockade and the destruction of the filibuster to confirm Neil Gorsuch.²⁹

The fundamental problem is that what was supposed to be a nonpartisan decision has become an object of partisan contention, and the two sides cannot agree on what the basic rules are. They cannot agree, that is, about when, whether, or under what circumstances a president has the right to appoint a Justice. Because the Framers did not imagine that this would become a partisan issue, the Constitution gives no guidance. It says that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” Justices.³⁰ But this does not tell us when the Senate

²⁸ *Id.*

²⁹ Matt Flegenheimer, *Senate Republicans Deploy “Nuclear Option” To Clear Path for Gorsuch*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

³⁰ U.S. CONST. art. II, § 2.

may withhold consent, nor whether they may ever properly decline to consider *any* nominee put forward by a particular president.³¹

When Justice Scalia died and Republican Senators openly refused to consider any Obama appointee, both parties used the Constitution's ambiguity to justify their outlook on the Senate's duty. Democrats viewed this obstruction as a constitutional violation, noting that the Constitution does not expressly give the Senate the right to refuse to exercise its power of advice and consent.³² Republicans countered that Article III does not require denial by formal procedure.³³ They maintained the Senate can decide that refusal to consider constituted a form of "advice and consent." As Ted Cruz put it, they were "advising" the President not to make an appointment.³⁴

In our view, it is relatively easy to offer sensible answers to these questions.³⁵ The Senate is supposed to play some role in the process, and it can vote down nominees who stray too far from its constitutional preferences.³⁶ It should not, however, engage in a blanket refusal to consider any nominee from a particular president unless there is substantial reason to dispute that president's legitimacy—a situation that might arise with an unelected president, but should not occur otherwise.³⁷

³¹ See Noah Feldman, *Obama and Republicans Are Both Wrong About the Constitution*, BLOOMBERG (Feb. 17, 2016), <https://www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution> (noting that "the Constitution really doesn't answer the question of what the president or the Senate must do.").

³² The Alliance for Justice, for instance, circulated a letter signed by 356 law professors, arguing that the Senate has a "constitutional duty" to consider a nominee. Press Release, Alliance for Justice, *Over 350 Law Professors Urge Senators To Fulfill Their Constitutional Duty* (Mar. 7, 2016), <http://www.afi.org/press-room/press-releases/over-350-law-professors-urge-senators-to-fulfill-their-constitutional-duty>. See also Alan M. Dershowitz, *Ask Neil Gorsuch About Merrick Garland*, BOSTON GLOBE (Feb. 6, 2017), <https://www.bostonglobe.com/opinion/2017/02/02/ask-neil-gorsuch-about-merrick-garland/hB1lMt89367mAGjDIgI7sM/story.html>. (suggesting that originalists must agree "that the Senate has a constitutional obligation either to consent or deny consent to a president's nominee").

³³ Michael D. Ramsey, *Why the Senate Doesn't Have To Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), <https://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/>.

³⁴ Jeff Stein, *The Strongest Republican Arguments for Block President Obama's Supreme Court Pick*, VOX (Feb. 15, 2016), <https://www.vox.com/2016/2/15/11008764/why-republicans-scalia-obama>.

³⁵ One of us (Roosevelt) signed a letter circulated by the American Constitution Society offering essentially this view of the duties of the President and the Senate. See <https://www.acslaw.org/sites/default/files/Con%20Law%20Scholars%20on%20Scotus%20Vacancy.pdf>

³⁶ For an expanded discussion of the appropriate role of the Senate, see CHRISTOPHER L. EISGRUBER, *THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS* (2007).

³⁷ Before the Garland nomination, the Senate had in some cases denied any appointments to particular presidents, but in every case these were presidents who had attained office via succession rather than election: the Senate stalled or rejected nine nominations by President Tyler, took no action on three of President Fillmore's nominations, delayed the confirmation of President Lyndon B. Johnson's nominee (Justice Blackmun) for nearly thirteen months, and took no immediate action to approve Andrew Johnson's nomination of Henry Stanbery. Gabriel Malor, *There's Ample Precedent for Rejecting Lame Duck Supreme Court Nominees*, FEDERALIST (Feb. 13, 2016), <http://thefederalist.com/2016/02/13/ample-precedent-for-rejecting-supreme-court-nominees/>; See generally Robin Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. ONLINE 53 (2016) (noting that refusal to consider a Supreme Court nominee had occurred before only with unelected presidents). An elected president under impeachment might also be deemed sufficiently illegitimate to warrant denial of consideration of any nominee.

These answers are reasonable, but one thing that partisanship does most reliably is to overwhelm reason.³⁸ Instead, the confirmation process provides us the unedifying sight of partisans on both sides switching their positions to fit their current preferences.³⁹ Worse, each side's transgressions offer justification for the other side doing something more extreme the next time it holds power. Neither reason nor good faith has staying power in such circumstances. We are in a downward spiral, and the Constitution offers no way out.

III. The Solution

The solution, however, is simple. All we need to do is to provide a relatively definite answer to the fundamental question raised above: when, whether and under what circumstances a president has the right to appoint a Justice. This can be done easily by establishing fixed terms (we suggest eighteen years) for Supreme Court Justices. With appropriately staggered terms, each President will then predictably be able to nominate—and appoint—two Justices per four-year Presidential term.

Imposing term limits would solve, or at a minimum greatly improve, almost all of the problems that now plague the appointment process. In terms of which Justices will make up the bench, fixed terms will do three things. First, they will eliminate the incentive for the president to pick someone young rather than the best candidate available: it will increase the possibility of a Justice Learned Hand, Henry Friendly, Richard Posner, or Guido Calabresi. Second, fixed terms will reduce the problem of Justices staying longer than they should in order to strategically time their retirement. Third, fixed terms will reduce the danger that the Court will represent a political or constitutional consensus that the American people have long rejected. The problems will not be totally eliminated: it is possible for a Justice to lose ability during a fixed term and refuse to retire, and actuarial realities may always push in favor of youth. But they will all be greatly reduced.

In terms of the nomination process, fixed terms will lower the stakes of each nomination. If the political players know that each president will get two appointments per term, not every confirmation need be a scorched-earth battle. They need not worry that the nominee who speaks so fervently of judicial humility will wield a different agenda for thirty years as Justice.

Most important, term limits will make the transformation of the Supreme Court a predictable and rational process. It might be nice if judging were a mechanical task, if our Constitution were written so that it could be applied with no resolution of clashing values, balancing of competing visions, or decisions affected by judicial ideology and life experience. (Actually, we think that Constitution

³⁸ See Dan Kahan, *Climate-Science Communication and the Measurement Problem*, 36 *ADVANCES POL. PSYCHOL.* 1, 14 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459057.

³⁹ See Jonathan H Adler, *No, Obstruction of Neil Gorsuch Is Not About Merrick Garland*, *WASH. POST* (Feb. 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/01/no-obstruction-of-neil-gorsuch-is-not-about-merrick-garland/?utm_term=.4b1984893d82 (reviewing hypocrisy and partisan retaliation in Senate consideration of Supreme Court nominees); See also Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, *N.Y. TIMES* (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html?_r=0 (asserting that Joe Biden proposed blocking President Bush's nominee in the same way Republicans blocked President Obama's).

would probably not be a good one.) But in any case, that is not the Constitution we have, and it has never been the practice of the Supreme Court.⁴⁰

The question at hand is not whether personal or subjective factors can be eliminated from judging—they cannot. The question is whether the power to pick Justices, who will invariably differ in their resolution of certain questions, should be awarded by partisan maneuvering subject to random inflections, or whether it should be tied in a consistent and predictable way to success in a national election. We live now under the system of partisanship and random chance; term limits would take us to the system of order and predictability. It is hard to see any reason why this would not be an improvement, and indeed among experts in the field there is broad and bipartisan consensus in support of term limits.⁴¹

IV. How To Get There: Implementation

The Constitution provides that federal judges, including Supreme Court Justices, shall hold their offices during “good behavior” and can be removed only by impeachment.⁴² The most straightforward path to the desired conclusion would be to add to Article III a provision specifying that Supreme Court Justices shall serve fixed eighteen-year terms.

The Constitution, however, is notoriously difficult to amend. Obtaining supermajority support in both houses of Congress and then ratification by three-quarters of state legislatures is an onerous task. For an amendment with partisan implications, it is almost impossible, since even a party on the ropes will usually retain enough strength to block an amendment. We do not believe that term limits for Supreme Court Justices does have a partisan valence, as evidenced by the bipartisan support it commands.⁴³ Nonetheless, a constitutional amendment is sufficiently difficult that an alternative path would be preferable, if such a path exists.

⁴⁰ See generally Kermit Roosevelt III, *Interpretation and Construction: Originalism and Its Discontents*, 34 HARV. J.L. & PUB POL’Y 99 (2011) (noting inevitability of judicial discretion).

⁴¹ The nonpartisan advocacy organization Fix the Court, for instance, has 21 law professors from across the political spectrum as signatories to its current term limits proposal. See Letter from Vikram Amar, Dean, Univ. of Ill. Coll. of Law, et al., to Hon. Charles Grassley, Chairman, Comm. on the Judiciary, U.S. Senate, et al. (June 28, 2017), [FixTheCourt.com/2017/06/TLProposal](https://www.fixthecourt.com/2017/06/TLProposal). In 2009, a similar group of 33 academics, practitioners, and former judges sent a recommendation for term limits to the Vice President, Attorney General, and chairs of the House and Senate Judiciary Committees. See Jack Balkin, *Reforming the Supreme Court*, <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html>; see also Emma Baccellieri, *Term limits for U.S. Supreme Court Justices?*, SEATTLE TIMES (July 27, 2015), <http://www.seattletimes.com/nation-world/term-limits-for-us-supreme-court-justices/>. The criticism most often put forward is that life tenure is necessary to protect judicial independence. This strikes us as mistaken. Judicial independence exists as long as judges are shielded from punishment or reward for their decisions. A fixed 18-year term with senior status thereafter protects them from punishment just as well as life tenure. The possibility of reward exists: after 18 years, a Justice could, for instance, move to a lucrative position inside an industry or corporation she had favored while on the Court. But a Justice with life tenure is free to do so at any time, so the fixed term makes things no worse from that perspective.

⁴² U.S. CONST. art. III, § 1 (“The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.”); U.S. CONST. art. II, § 4.

⁴³ Erwin Chemerinsky, *Ted Cruz Is Right: The Supreme Court Needs Term Limits*, NEW REPUBLIC (July 2, 2015), <https://newrepublic.com/article/122225/ted-cruz-right-supreme-court-needs-term-limits>.

One alternative some have suggested is to use nonbinding mechanisms. Judges could be awarded substantial bonuses for retiring at the end of a fixed term.⁴⁴ Or they could be punished for staying longer, not by reducing their salaries (which the Constitution forbids)⁴⁵ but perhaps by denying them the assistance of clerks⁴⁶ or forcing them to spend time serving on lower courts, as Justices used to.⁴⁷ Neither of these proposals strikes us as either normatively appealing or likely to be consistently effective—most probably, they will be ineffective in precisely the most important instances.

Another idea is to seek promises from the Justices themselves, before confirmation, that they will retire at the end of a fixed term.⁴⁸ But such a promise is unenforceable and, again, likely to prove ineffective precisely when it is needed most. It is easy to imagine a Justice deciding that the needs of the nation and the Constitution outweigh words uttered under pressure years ago. (As the English judge Baron Bramwell once wrote, explaining his change of position from one case to another, “The matter does not appear to me now as it appears to have appeared to me then.”⁴⁹) Congress could, of course, impeach a Justice who refused to retire at the appointed hour, but impeachment is difficult—conviction and removal from office requires a two-thirds supermajority in the Senate⁵⁰—and falls prey to the same partisan dysfunction as the confirmation process.

Another suggestion is to impose not a term limit but a mandatory retirement age.⁵¹ This solution is both ineffective and discriminatory. It would exacerbate the current incentive to overlook better candidates in favor of youth, and it would do nothing to regularize the appointment process in terms of tying appointments to the national election. It is also clearly in conflict with the “good behavior” provision of Article III, and could hence be implemented only via constitutional amendment.

Luckily, Supreme Court term limits require neither constitutional amendment nor any of the other aforementioned methods: they can be created through statute. Several proposals exist for statutorily setting term limits for Supreme Court justices.⁵² We believe the details are of secondary importance: any proposal that leads to fixed terms would be a dramatic improvement. What we present here is not intended to follow any proposal in all its details; it is rather an overview of the features we think are most essential, an explanation of why they are important, and an account of why they are consistent with the Article III guarantee of office during good behavior.⁵³

⁴⁴ Jack M. Balkin, *Reforming the Supreme Court*, BALKINIZATION BLOG (Feb. 13, 2009), <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html>.

⁴⁵ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

⁴⁶ Calabresi & Lindgren, *supra* note 6, at 874.

⁴⁷ Balkin, *supra* note 44.

⁴⁸ Calabresi & Lindgren, *supra* note 6, at 871.

⁴⁹ *Andrews v. Styrax* [1872] 26 LT 704 (Exch.) 706 (Eng.).

⁵⁰ The Senate tries impeachment proceedings, and conviction requires a two-thirds majority of the members present. U.S. CONST. art. I, § 3, cl. 6.

⁵¹ Calabresi & Lindgren, *supra* note 6, at 815 n.128.

⁵² *Id.* at 824 n.171; *Term Limits*, FIX THE COURT, <http://fixthecourt.com/fix/term-limits/> (last visited May 4, 2017); Balkin, *supra* note 44.

⁵³ These include the proposals of several authorities listed within this Issue Brief. *See* Fix the Court, *supra* note 52; Oliver, *supra* note 9; Calabresi & Lindgren, *supra* note 6.

Supreme Court Justices will serve a fixed term of eighteen years. Appointments shall be staggered so that each elected president will have two Supreme Court appointments: one in the first year and one in the third year. The number of active Justices, performing the work of deciding cases, will stay at nine.⁵⁴ As each new Justice is appointed, the most senior Justice on the Court will move to senior status, retaining a full salary, the option of sitting on lower courts, and the availability to serve as an active Justice if the need arises.⁵⁵

As described in Part III, setting the term at eighteen years fixes the main problems we have identified. It does, however, raise three new problems: how to deal with vacancies that arise outside the normal timeframe, what to do with current Justices, and whether a fixed term is constitutional. We address these in turn.

First, the question of vacancies is a difficult one—but difficult largely because different competing answers seem adequate. When a Justice retires or otherwise leaves the Court after a president's first year appointment, but before the third year, some proposals suggest that the president should make his third-year nomination early.⁵⁶ While this seems easy enough, it will produce a short-handed Court unless the Justice who left happens to be the one whose term was next to expire. We believe that an unscheduled vacancy should be handled by appointing a Justice to serve the remainder of the departed Justice's term. This appointment could be made by the president, or it could be achieved by recalling the most junior of the Senior Justices. There is not much to choose between these two solutions, but we prefer giving the appointment to the president as the most recent winner of a national election, rather than recalling Justice appointed by the winner of a decades-old election.

A vacancy occurring after a president's third year appointment is a bit trickier. One solution, proposed in some of the draft statutes, is to allow the president to make an appointment which would cancel the next scheduled appointment and allow the appointed Justice to serve extra time to bring the process back on schedule. This is plausible, but it strikes us as undesirable because it amplifies the effect of randomness: it would allow the president to take an appointment from her successor.

The solution we believe is both simplest and most sensible is to give the sitting president an extra appointment—though only to fill the remainder of the term for the vacant seat. While this still results in an additional nomination for the President, it would be for a reduced term and with the added benefit that a president would have additional leeway to select a seasoned judge who may otherwise have been rendered ineligible because of age.

Second, the issue of what will happen to current Justices is also a difficult one, this time because no solution seems fully satisfactory. One idea is to simply apply the statutory timeframe to them, so that

⁵⁴ As discussed below, there may be a transition period when the number of active Justices rises, given the undesirability of forcing current Justices to take senior status.

⁵⁵ Such a need for a Senior Justice to fill in could arise to break a tie in the event the Supreme Court is waiting on Senate approval for an appointment (such as in the case of Justice Scalia's vacancy) or if a Justice recuses herself, leaving an even-numbered bench.

⁵⁶ FIX THE COURT, *supra* note 52; Balkin, *supra* note 44.

when a president makes his first appointment under the eighteen-year framework, the most senior sitting Justice will become a Senior Justice.⁵⁷ The problem with this is that presidents will not only be appointing a Justice; they will effectively be removing one as well. Current Justices might resent this, since they took office with different expectations; moreover, because the process that put the current Justices on the Court was our amalgam of partisanship and chance, removals will also have partisan effects unrelated to success in national elections.

If we do not apply the eighteen-year term limit to sitting Justices, there are two possibilities. Either the fixed term appointments will begin upon enactment, while current Justices retain their seats (thus enlarging the active Supreme Court)⁵⁸ or they will begin only when sitting Justices leave, phasing in the term-limited Court as the current Justices leave.⁵⁹ In our view, the former solution is preferable because it will immediately connect the appointment process to success in national elections. Waiting for current Justices to leave, even if their successors serve only eighteen years, retains the problems of strategic retirement and random vacancies.

Third, there is a question as to whether the process described is consistent with Article III.⁶⁰ We believe it is. We believe that Congress has the power to determine which Justices of the Supreme Court shall be active and which shall be senior, provided that it does so in a manner that does not compromise judicial independence. This proposal, by providing lengthy, nonrenewable terms, does not increase the ability of the political branches to exert pressure on individual Justices.⁶¹ By accelerating turnover, it will make the Court as an institution more responsive to the outcomes of national elections, but it will do so in a rational manner, and that is the best response to the rise of the party system. Partisan considerations have corroded the appointments process, and regularization of appointments is a way to reduce their effect.

If retention of the title of Supreme Court Justice and full salary are not enough to comply with Article III, there is an alternative that might pass muster. The president could appoint new Justices to lower federal courts first, from which they would then be eligible to serve on the Supreme Court by designation for eighteen years.⁶² After that term, they would return to full active service on the court to which they had been appointed. Some scholars argue this would be unconstitutional because the Appointments Clause “contemplates a separate office of Supreme Court Justices.”⁶³ That is true, but the existence of that separate office does not establish that other judges may not serve on the Supreme Court by designation. By the same token, the Constitution contemplates a separate office of lower federal judge, but it is well established that Supreme Court Justices can serve

⁵⁷ Oliver, *supra* note 9, at 825.

⁵⁸ This reflects the view and proposal of Fix the Court. FIX THE COURT, *supra* note 52.

⁵⁹ Balkin, *supra* note 44.

⁶⁰ See generally Calabresi & Lindgren, *supra* note 6 (arguing term limits likely cannot be imposed without a constitutional amendment).

⁶¹ Compared to some of the things Congress has done for clearly partisan reasons—increasing and decreasing the size of the Court, eliminating the entire 1802 Term—term limits seem a very minor intrusion.

⁶² Calabresi & Lindgren, *supra* note 6, at 855.

⁶³ See *Id.* at 859–60 (arguing a judge serving on lower federal courts and The Supreme Court would be inconsistent with the Constitution’s Appointments Clause which contemplates the two as separate offices).

on lower courts by designation. In a reverse fashion, lower federal judges could plausibly serve fixed eighteen-year Supreme Court terms.⁶⁴

V. Conclusion

The drafters of the Constitution were brilliant, and the system they designed works very well in a number of ways. But their failure to foresee the party system means that several of the structural provisions of the Constitution do not work as they were intended to or fail to account for the problems created by partisan politics.

The process for appointing Supreme Court Justices is perhaps the starkest example of this. Because the Constitution contemplates a nonpartisan appointment process, it fails to answer the question over which the two parties now battle: when a president is entitled to appoint a Supreme Court Justice. The partisan struggle over Supreme Court nominations negatively affects both the composition of the Court and its relation to the other branches of government and the American people. The recent drama over the Garland and Gorsuch nominations should convince anyone paying attention that our appointment process is in shambles. Precisely because it focuses public attention on the process, however, that drama gives us an exceptional opportunity to fix what is broken.

For such a serious problem, which regularly shows us our elected officials at their worst, the broken appointment process has a surprisingly simple solution. Term limits for Supreme Court Justices will solve or drastically ameliorate essentially all of the problems we now encounter. Unsurprisingly, the proposal has widespread support.⁶⁵ In one version or another, it has been endorsed by politicians like Ted Cruz and Paul Ryan, by Justices like Chief Justice Roberts and Justice Breyer, and even by the American people.⁶⁶ It is high time to do away with the “when they go low, we go lower” mentality that characterizes our appointment process today. By statute, we can end the cycle of political finger-pointing and fix our broken Court.

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⁶⁴ See PAUL D. CARRINGTON & ROGER C. CRAMTON, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006) (making the argument that just as Justices used to circuit-ride [for a period of 121 years], so too can federal judges serve on the Supreme Court before returning to become judges once more). The Calabresi objection may be that under our proposal, the President would never actually appoint anyone to the “separate office” of Supreme Court Justice. But under our proposal there would never be a vacancy that needed to be filled by such an appointment, so we do not see the problem.

⁶⁵ See Baccellieri, *supra* note 41 (noting the wide, bipartisan support for Supreme Court term limits).

⁶⁶ Ingraham, *supra* note 26; FIX THE COURT, QUOTES ON SUPREME COURT TERM LIMITS FROM JUSTICES, ELECTED OFFICIALS, ACADEMICS, AND PUNDITS (Dec. 2016), <http://fixthecourt.com/wp-content/uploads/2016/12/Quotes-on-term-limits-December-2016.pdf>.

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