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THE BATTLE FOR THE CONSTITUTION

Term Limits Won't Fix the Court

But they could help restore confidence in the confirmation process and eliminate public concerns about aging justices.

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The death of Ruth Bader Ginsburg on Friday has prompted, once again, a wave of discussion about the idea of limiting the terms of Supreme Court justices. If only Ginsburg had been forced to retire years ago, the theory goes, the country would not be facing down the uncertainty of a confirmation fight in the midst of an already tumultuous election season. The hope, which first gained traction in modern times after Robert Bork's failed nomination in 1987, is that by more regularly replacing longtime justices with newer ones, adding predictability to when those switches occur, the judicial-nomination process would become less divisive and disruptive. This is largely right—term limits could help restore confidence in the confirmation process and eliminate the morbid health watches we now have as justices age—but there are other problems they wouldn't fix.

During and after the Bork showdown, the Court was in a period of rapid turnover, with six new justices in eight years (1986 to 1994), and for a while term limits seemed to be beside the point. Then, after Stephen Breyer joined the bench in 1994 and no further vacancies arose for over a decade, the drumbeat for term limits grew.

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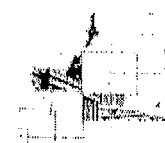
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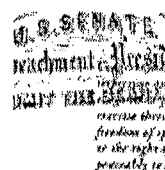
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The scholarship culminated in a proposal that the Northwestern University law professors Steven Calabresi and James Lindgren published in the *Harvard Journal of Law and Public Policy* in 2006. They argued for staggered 18-year terms, such that a vacancy would occur every two years, in nonelection years, giving each president two appointments per term. They also analyzed various possible outcomes of enacting such a reform by statute and found them wanting, and therefore recommended a constitutional amendment to achieve their goal.

Of course, the idea for limited judicial tenures is hardly a new one; it was debated at the founding. Back then, the idea of lifetime appointments seemed the best way to establish an independent judiciary, insulating judges from the political forces that might endanger constitutional rights and liberties. But many now believe that the pendulum swung too far the other way, with a high court too reflective of past political fights and thus unresponsive to contemporary realities. Even if these critics are wrong, if public perception is that the justices are out-of-touch ideologues, that isn't good for the Supreme Court as an institution or the American body politic more broadly. But if term limits were instituted, they would represent significant bipartisan consensus, given the difficulty of ratifying a constitutional amendment. That sort of consensus alone would indicate the resolution of many of the problems that term limits are being asked to remedy.

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uncertainty that now exists regarding when vacancies will occur,” making the Court “more democratically accountable and legitimate by providing for regular updating of the Court’s membership.” In other words, there would be a more direct connection between the will of the people and the direction of the Court.

But there are real risks, and ways in which instituting staggered term limits could spectacularly backfire. Imagine a scenario in which a GOP-controlled Senate blocks a Democratic president’s 2025 and 2027 nominations. A Republican president is then elected in 2028 and the Senate confirms *four* nominees: in 2029 and 2031, to serve the regular 18-year terms, and for the two empty seats, with 14 and 16 years left on their terms, respectively. This could happen in every cycle of divided government, and would exacerbate, not lessen, the politicization of the confirmation process.

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What’s more, if these 18-year terms had been around for the past few decades, the Court’s makeup would hardly be different; there would now be three George W. Bush appointees, four Barack Obama appointees, and two Donald Trump appointees. In the past 50 years, there have been 30 years of Republican presidents and 20 years of Democratic ones; if anything, liberal voices have been overrepresented on the Court. In other words, term limits wouldn’t change the ideological composition of the Court over time. Nor, for that matter, would they address the fundamental power that each justice wields, which is the reason we see such ferocious political battles every time a vacancy occurs.

There are also transition problems. Since term limits wouldn’t apply to sitting justices, for decades we would have term-limited justices serving alongside life-tenured ones. Moreover, it would take decades to get each seat’s 18-year term aligned with the others. Future vacancies wouldn’t arise in an orderly manner, so some transitional justice could serve five or 10 years before another one arrives. At a certain point, someone could end up “limited” to 20, 25, or even 35 years. Fixes could be put in place to prevent all this, but at some point the complications become more trouble than they’re worth.

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still a long time—more than the pre-1970 average tenure—so even with a biennial vacancy, the stakes would remain high, especially for those confirmation fights in which the Court's balance is at stake.

Even if term limits wouldn't change the Court's decision making, they might be worth trying anyway, because at least there would be less randomness about when vacancies arise. As the UC Berkeley law professor Orin Kerr put it, "If the Supreme Court is going to have an ideological direction—which, for better or worse, history suggests it will—it is better to have that direction hinge on a more democratically accountable basis than the health of one or two octogenarians."

The best argument for term limits is that they would make the Supreme Court more of a standard issue in presidential and Senate campaigns and thus less of a political football when the winners of those elections get to nominate and confirm justices.

This post was adapted from Shapiro's new book, Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.

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