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Should Supreme Court justices have term limits? | Pro/Con

Following the death of 87-year-old RBG, some wonder if lifetime appointments still make sense for the highest court in the country.



The flag-draped casket of Justice Ruth Bader Ginsburg, carried by Supreme Court police officers, arrives in the Great Hall at the Supreme Court in Washington, Wednesday, Sept. 23, ... Read more
Andrew Harnik / AP

by Staff Reports

Published Sep 24, 2020

The death of 87-year-old Supreme Court Justice Ruth Bader Ginsburg has renewed debate over America's highest judicial office. Like all federal judges, Supreme Court justices serve lifetime appointments on the court, as outlined in the Constitution.

Because of increased lifespans, that often means more than three decades on the court, causing some to wonder if lifetime appointments are still appropriate.

The Inquirer turned to two experts to debate: **Should Supreme Court justices have term limits?**

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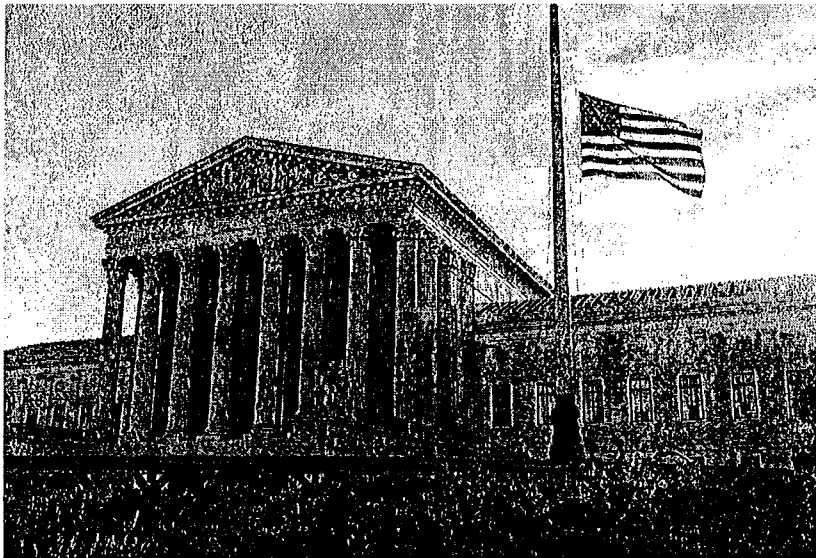
Yes: Ensure seats are filled fairly and rationally.

By Tyler Cooper

We lost, perhaps, the most recognizable Supreme Court justice we've ever known last Friday.

But rather than the aftermath being a singular national moment full of remembrances and reflections on a legendary legacy, the last week has been marked by a hyperpartisan discussion over the seat now vacant. A moment that should have brought us together as Americans in celebration of the values Ruth Bader Ginsburg helped elucidate during her decades of public service has instead become one that will deepen our divisions and corrode our already crumbling sense of shared purpose.

It didn't have to be this way.



The flag flies at half-staff at the Supreme Court on the morning after the death of Justice Ruth Bader Ginsburg, 87, Saturday, Sept. 19, 2020, in Washington. (AP Photo/J. Scott Applewhite)
J. Scott Applewhite / AP

This was a choice — not a choice we actively made, but one passively made for us, as we have allowed our democratic system to continue to rely upon justices afforded life tenure. This is despite the fact that term limits for the Supreme Court have long been popular among the American people, with demonstrated strong support across the partisan spectrum for years.

The most common reason we're told that this proposal cannot be enacted is that it would be unconstitutional. Federal judges and justices

serve for life because the founders wrote in Article III of the Constitution that Jurists "hold their offices during good behaviour," and simply declining to cede the power of the office after a reasonable term of service hasn't been deemed a violation of this clause.

"It would restore predictability and fairness to an institution based on predictability and fairness."

— Tyler Cooper

Regardless, there is no need to reinterpret "good behavior" because the most common proposal to fix interminable tenures at the high court — an 18-year nonrenewable term limit for future justices, with an appointment every other year — would not remove a justice from her "office" upon completion of her term. Instead, after 18 years the justice would become a "senior justice," which would operate similarly to how federal judges become "senior judges" after reaching age 65 and a certain length of service.

When there are unexpected vacancies, senior justices would be called back into service in order to maintain a full bench. In the meantime, they'd be able to serve on a different federal appeals court, as a dozen retired justices have opted to do since the law was changed to accommodate this in the 1930s. Sandra Day O'Connor and David Souter themselves have chosen this path for their own post-Supreme Court lives.

Our nomination and confirmation process is clearly broken. Leading Democrats and Republicans agree on that. However, this is just a downstream consequence of life tenure.

It's undoubtedly imprudent that American jurisprudence, which touches the lives of more than 330 million individuals, is based upon the mortality of nine individuals. It's a breakdown of democracy when one of those nine individuals manipulates the timing of his or her retirement to coincide with the term of a president he or she personally finds politically palatable — or tries to, as conservative Justice Antonin Scalia was through President Barack Obama's second term, or as liberal Justice Ginsburg was through President Donald Trump's first term.

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The Supreme Court had no Scalia seat, no Ginsburg seat. It has only seats occupied by individuals, not seats belonging to individuals. Fixed terms for Supreme Court justices would help us, and the individuals on the court, remember that. It would restore predictability and fairness to an institution based on predictability (its rulings are grounded in precedent, or *stare decisis*) and fairness ("equal justice under law" emblazons the court's façade).

It would ensure that seats are filled on a rational basis — two each presidential term — rather than upon the whims, or the deaths, of individual justices.

Tyler Cooper is a senior researcher of Fix the Court, a national nonpartisan organization that advocates for greater transparency and accountability in the federal judiciary.

No: Short-term appointments will escalate divisiveness.

By Suzanna Sherry

Term limits for Supreme Court justices are a bad idea. They won't solve any problems, will make some existing problems worse, and will cause new ones.

Adherents of term limits suggest that limiting justices to a fixed term will reduce the stakes of the confirmation process, and thus depoliticize it, because every president will be guaranteed an equal number of appointments. Unfortunately, however, term limits are likely to have exactly the opposite effect.

"Justices who know that they will likely need another job after they retire from the court

may well tailor their rulings to curry favor from potential employers.”

— Suzanna Sherry

Presidents, knowing that their appointees will be on the court for a relatively short time, might well search out the most extremist judges. Given the political polarization of the Senate, that will make the confirmation process more rather than less divisive. And instead of the Supreme Court being an issue in only some presidential elections, it will become an issue in every presidential election.

Even worse, justices who know that they will likely need another job after they retire from the court may well tailor their rulings to curry favor from potential employers. Justices who think they might want to work for a law firm, a foundation, a quasipolitical organization, or even an educational institution will think twice about how they vote on issues affecting such entities. If the court seems to be polarized and political now, imagine if some justices plan to work for the Heritage Foundation when they leave the court, and others plan to work for the Brookings Institution (or substitute your own favorite conservative or liberal organizations).

Those in favor of term limits also argue that replacing justices more frequently will keep the court in step with political majorities, instead of having long-serving justices keep the court locked into the politics of an earlier time. The problem with this argument is that it undermines the primary function of the judiciary, especially the Supreme Court: preventing political majorities from trampling on others' constitutional rights. As we know from states in which judges have to stand for reelection, judges without life tenure are less likely to act independently of the political branches or of public opinion, and thus cannot serve the purpose of holding the tyranny of the majority in check. Our Constitution would be a useless parchment if political majorities could safely ignore it because the judiciary always shared the majority's views.

Indeed, having a Supreme Court fixated on earlier times is a benefit: the court should be a lagging indicator. We need constitutional law to be stable and predictable, and to change only slowly and incrementally. Sudden shifts based on changes in personnel disrupt settled expectations and create difficult problems of enforcement, fairness, and retroactivity.

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And it is likely that term limits would lead to doctrinal instability, as a coauthor and I suggested in a 2019 article. We used computer simulations to predict how the Supreme Court might have treated abortion rights if 18-year term limits had been in effect at the time *Roe v. Wade* was decided. We concluded that the most likely result is that *Roe* would have been overruled in the 1980s, reinstated in the 2000s, and overruled again during Trump's first term.

Finally, as a political solution to the short-term problem of a Democratic administration faced with a solid conservative majority on the Supreme Court, term limits won't help. All the justices currently on the court — and Trump's new nominee, if confirmed before term limits are enacted — will serve for life. If an incoming Democratic Congress wants to change the political tilt of the current court, only increasing the size of the court or impeaching one or more justices can accomplish that. Term limits won't help.

Suzanna Sherry is the Herman O. Loewenstein professor of law at Vanderbilt Law School. She has published widely on a broad range of constitutional issues.

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