Justice Unlimited

Term limits for Supreme Court Justices would face constitutional and political problems which make their adoption unlikely

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The United States is one of a handful of nations in the world whose constitutional court judges serve until they pass away or choose to retire. Periodically scholars and occasional politicians start advocating for term limits for Supreme Court justices – typically, eighteen years, to allow for regular replacement every two years of one of the Court's nine justices. (The number nine is set by statute, and there are also occasional outbursts of interest in changing that number, but I don't discuss such proposals here.) The proposals have come from the left and the right – though typically from the left when conservatives are thought to control the court and from the right when liberals are thought to do so.

The passing of Justice Ruth Bader Ginsburg and her replacement by Judge Amy Coney Barrett has led to a spike in interest in imposing term limits for Supreme Court justices. The proposals now on the table are for doing so by statute because amending the U.S. Constitution is so difficult (and because getting a controversial amendment adopted typically takes such a long time that, aside from amendments dealing with purely technical matters, only proposals with a social movement behind them can move politicians to trigger the amendment process). These statutory proposals face constitutional and political obstacles, which in combination make their adoption unlikely.

The Constitutional Issues

According to the Constitution, all judges on the national courts of the United States serve "during good Behavior." They can be removed by impeachment, and a statute allows a council of judges to take all cases away from judges who become mentally or physically disabled. Otherwise, the "good Behavior" provision is taken to mean that these judges have tenure in their positions for life.

How, then, can a statute impose a term limit? The relevant clause reads, "The Judges, both of the supreme and the inferior Courts, shall hold *their Offices* during good Behavior." Proponents of statutory term limits argue that the Constitution doesn't define the "Office" a judge holds. So, they say, Congress can define an office this way: "Justice of the Supreme Court for eighteen years and thereafter a judge on the court of appeals." (There are a number of technical details about which courts of appeals the term-limited justices would sit on, but the details are irrelevant to the constitutional analysis.)

Opponents of statutory term limits counter with another constitutional provision. The Appointments Clause says that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … Judges of the Supreme Court, and all other Officers of the United States…." This provision distinguishes between Supreme Court justices and lower court judges (who are "other Officers"). That distinction, the argument goes, implies that – whatever one might say about lower court judges – Supreme Court justices are appointed to a single office defined by the Constitution.

The difficulty with this counterargument is that there appears to be no other context in which the distinction between the "office" of a Supreme Court justice and the office of a lower court judge makes any difference whatever: Both groups are removable by impeachment, both have salaries guaranteed against reduction, the jurisdiction of both sets of courts is subject to regulation by Congress. So, proponents of statutory term limits reply, the asserted distinction

might be textually *available*, but what reason do we have to adopt it, in terms of the understandings of the founding generation or of good constitutional design? Without a cogent argument that statutory term limits threaten some core constitutional values like judicial independence – and it is difficult to see how they would – a democratically taken decision resting on another textually available construction of the Constitution's terms should prevail. (The idea that Congress's decision should be given some "margin of appreciation" has been invoked in some discussions.)

I personally believe that the proponents of statutory term limits have the better of the argument. But one has to note that the Supreme Court itself would determine whether the statute is constitutional, and some observers suggest that the Court would be skeptical about upholding legislation that its members might see as an attack on the Court as an institution. (As an aside: How would a constitutional challenge reach the Court? Presumably when a litigant with a case before the Court seeks to disqualify a newly appointed justice whose commission defines the office as term-limited.)

The Political Issues

Term limits for judges are popular in the United States. Almost all judges on state courts have limited terms, and many legislators and chief executives also are term-limited. And, in light of the fact that both conservatives and liberals have periodically supported term limits, one might think that a political deal could be struck to impose them.

The political obstacles to doing so, though, are not small. The most important one is the question every member of Congress is said to fear: "What have you done for me lately?" That is, no one thinks that a statute can terminate the tenure of a justice already sitting on the Supreme Court. (The technical argument is that the commission of each sitting Justice defines the "office" simply as "justice of the Supreme Court.") Term limits, then, can apply only to newly appointed justices – and there's no telling when there will be an opportunity to appoint a new justice. Statutory term limits have no immediate political payoff.

One recent proposal attempts to get around this difficulty by authorizing new appointments every two years until all currently sitting justices leave the Court by death or retirement. The Court's size might gradually increase, but would ultimately return to nine. That's ingenious, and does have some near-term payoff – but getting one justice every two years might not offer a good enough answer to the "what have you done for me lately?" question.

Coupled with the constitutional uncertainties, the deferred political payoff of a term-limits statute makes enacting one rather unlikely.

The Bottom Line

Yet, though a term-limits statute might not be adopted, perhaps *proposing* one might have some effect. There's decent evidence from political scientists to the following effect: As the number of bills – mere proposals – aimed at reining in the Supreme Court increases, so does the chance that the Court will rein itself in, eliminating the political pressure for Court reform. (The mechanism behind this effect is obscure, but it probably involves decisions by one or two justices to withdraw from positions they had already taken, or at least to refrain from moving forward along a path to which they had seemed to be committed.)

Oddly, then, the United States might end up with a nine-member Supreme Court staffed by justices with life tenure – but chastened by the judges' awareness that many political actors thought that they had gone off course.

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