

Term Limits and Turnover on the U.S. Supreme Court: A Comparative View

TESTIMONY FOR THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT

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My name is Tom Ginsburg, and I am a professor at the University of Chicago Law School, where I focus on comparative constitutional law as well as comparative judicial systems. In addition to my academic work, over the past three decades I have worked on judicial and constitutional reform projects in more than two dozen countries around the world, often grappling with issues that are directly relevant to the Commission's charge. These projects have put me in conversation with judges and reformers who seek to improve and develop their countries' judicial institutions.

Judicial reform, it turns out, is a frequent topic in much of the world. The importance of the rule of law for democracy and development has been widely recognized in recent decades. Accordingly, there have been major investments in trying to improve judicial capacity and independence, with a mixed record of success. In addition, courts are playing an increasingly important role in many polities, creating new demands for accountability and quality. At the same time, there is no magic formula creating the right balance between judicial independence and judicial accountability, and so there is a good deal of tinkering with mechanisms of appointment, discipline and management, as well as basic institutional design.¹

Today's session is on Term Limits and Turnover on the United States Supreme Court. The tenure of personnel is a critical matter for any institution, and in recent years, there have been many academic discussions on the need for some kind of limited term for the United States Supreme Court. These discussions reached the broader public during the 2020 election cycle, during which several reform proposals were made by candidates for the Democratic presidential

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¹ Even the global trend toward designated constitutional courts may be reaching its limit, as some societies have started to discuss returning to a unified judicial hierarchy. I have in mind proposals under discussion in some countries in the Caucasus, as well as the failure of some countries such as Tunisia to establish the constitutional courts required by their constitutions.

nomination. Surveys indicate public support for limiting terms on the Supreme Court.² So it is a timely topic for the Commission’s consideration.

My starting point is straightforward: were we writing the United States Constitution anew, there is no way we would adopt the particular institutional structure that we have for judicial tenure. No other country has true lifetime tenure for its justices, and for good reason. This means that the key question for consideration is what reforms should be adopted, were we in a position to achieve them. Limited terms and age limits are just two among many possible reforms, and they would interact with other features of institutional design such as court size, appointments, and removal processes. This makes it hard to isolate the expected effects. Nevertheless, I will speculate on some possible changes, informed by comparative experience. My conclusion is that I believe term limits and greater rotation of tenure would be desirable for the country. Age limits are a second-best solution.

A note on the use of comparative data is in order. It is common for Americans to assume that, by virtue of the age and stability of our constitutional democracy, information on other countries’ courts is of little relevance to our situation. I reject this vision of American exceptionalism as a general matter.³ While matters of constitutional and institutional design are certainly linked to local culture and history, it is also undeniably the case that certain issues recur across governance systems. Managing the balance between judicial independence and accountability is one such issue. This suggests that it is possible to draw from the experience of other countries. Obviously, one does not want to apply comparative lessons uncritically, but I believe that the experience of other democracies is relevant to thinking about our own institutional design.

The Tenure of Judges on Apex Courts

The U.S. Constitution grants judges tenure “during good behavior” and this phrase has been widely understood to be a life term.⁴ As Alexander Hamilton argued in Federalist No. 78, allowing judges to continue to serve during good behavior helps to insulate the judiciary from

² Chris Kahn, *Most Americans want to End Lifetime Appointments on the Supreme Court*, REUTERS.COM, April 18, 2021 (63% support for term or age limits), available at <https://www.reuters.com/business/legal/most-americans-want-end-lifetime-supreme-court-appointments-2021-04-18/>; see generally Adam Chilton et al., *Designing Supreme Court Term Limits*, forthcoming, Southern California Law Review, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788497

³ Tom Ginsburg and Aziz Z. Huq, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

⁴ U.S. Const., Art. III, Sec. 1. One could interpret the language to mean “good behavior during their term of service, whatever it might be.” Sanford Levinson, *OUR UNDEMOCRATIC CONSTITUTION*.126 (2006); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *YALE L.J.* 72 (2006).

political pressure, whether that be from the executive or the legislature.⁵ Life tenure is seen as being part of the suite of features of the U.S. Constitution that protect judicial independence; other such provisions are the protection of salaries during service,⁶ and removal only by impeachment.⁷

Because of its status as the oldest written constitution of an independent nation-state, the U.S. Constitution has been highly influential around the world. The particular formula of granting judges tenure during “good behavior” has been found in a number of countries, and it is even more common to find provision for lifetime service.⁸ Of more than 800 constitutions adopted since 1787, nearly 20% explicitly grant supreme court judges some form of “lifetime” tenure.⁹ This is true of about 30% of constitutions in force today, and many others grant life tenure through ordinary statute.

However, in every such country of which I am aware, life tenure is accompanied by an age limit on judges. I have searched in vain for a counter-example. Judges in common law countries such as Australia, New Zealand, and Israel, as well as at the United Kingdom Supreme Court must retire at age 70. Federal judges in Canada retire at age 75. Former U.S. territories whose constitutions were deeply influenced by our own also provide for a retirement age. For example, the Philippines requires judges to retire at 70, while Palau provides for a retirement age of 65 years.¹⁰ The same is true when one looks at the judicial systems of American states. All but Rhode Island have failed to follow the national constitution, and instead provided for age limits and/or term limits of between six and fourteen years. Massachusetts and New Hampshire have a retirement age of 70, while New Jersey has a limit of age 70 or seven years, whichever comes first.

Beside those countries that provide for “lifetime tenure” with age limits, some 27 constitutions have term limits for supreme court justices, ranging between 5 and 15 years. A subset provide for term limits of some kind as well. For example, Justices to the Supreme Court of Mexico are appointed for a nonrenewable 15-year term.¹¹

Judges who sit on specialized constitutional courts uniformly have a limited term of office, and generally have a limited number of terms. Of some 88 systems with constitutional review

⁵ Alexander Hamilton, Federalist No. 78 (“Service during good behavior “is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”)

⁶ U.S. Const., Art. III, Sec. 1.

⁷ U.S. Const., Art. II, Sec. 5.

⁸ The range of countries with the “good behavior” formula is diverse, including Tonga, Sri Lanka and Canada.

⁹ Data from the Comparative Constitutions Project, www.comparativeconstitutionsproject.org

¹⁰ Const. Philippines (1987), Art. VIII, Sec 11; Const. Palau (1981) Sec. 9.

¹¹ See also Const. Albania (1998) Art. 136, Sec. 3 (9 year term, without the right to re-appointment.)

exercised by a constitutional court, some 40 provide for a term limit for judges in the constitutional text, and all others of which I am aware have a statutory term limit. These terms range from two years (the Special Highest Court of Greece) to fifteen years (Zimbabwe). The modal term is nine years, and the vast majority of these constitutions only allow one term of service in a lifetime.¹²

These data demonstrate that the United States Constitution provides for uniquely long tenure for those who sit on its highest court. This means that our Supreme Court justices are some of the few people on the planet who can, and frequently do, enjoy a job for life. Others in this category include the Pope, Ayatollah Khamenei, the twelve Apostles of the Mormon Church, 28 living monarchs, and some tenured academics. Of the 106 justices who have left the Supreme Court since 1789, 51 have died in office, most recently Justices Ginsburg and Scalia.

I would submit that there is valuable information to be gleaned from the fact that no other country, and few other institutions of any kind, have adopted the rule of true lifetime appointment.

Tenure on the US Supreme Court and Current Calls for reform

In light of the distinctly long tenure enjoyed by justices of the Supreme Court, it is perhaps not surprising that periodically there are public calls for term limits from across the political spectrum. These go back very far indeed. In the debates over ratification of the Constitution, Brutus criticized life tenure as leading to a judiciary more powerful than the legislature.¹³ As he put it, tenure during good behavior combined with judicial review would make judges “independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”¹⁴ Somewhat later, Thomas Jefferson proposed four- or six-year renewable terms for federal judges.¹⁵ And more recently, academics and judges have made a wide variety of proposals for term limits or systems of rotation that would ensure greater turnover of the Supreme Court. Steven Calabresi and Sanford Levinson, who represent polar opposites in the political spectrum of the American law professorate, have both endorsed 18-year terms for the court.¹⁶

¹²Note the data for this sentence is restricted to those countries that lay out the term in the constitution. In terms of renewability, Ecuador allows non-successive terms, and Serbia allows two lifetime terms.

¹³ Brutus XV (20 March 1788).

¹⁴ Id.

¹⁵ Letter to William Barry (July 2, 1822)

¹⁶ Akhil Reed Amar and Steven G. Calabresi, *Term Limits for the High Court*, Washington Post at A23 (Aug. 9, 2005); Steven Calabresi and James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered* 29 Harv. J. L. & POL’Y 769 (2005); Sanford Levinson, OUR UNDEMOCRATIC CONSTITUTION 135-36 (2006); Roger C. Cramton & Paul D. Carrington eds., REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 375

There are several factors that in my view have led to greater calls for term and tenure limitations. One obvious factor is the very large role the Court plays in national life, leading to political mobilization around nominations. This interacts with growing polarization to put pressure on the Court, regardless of its attempt to cool down temperatures. In the term that just ended, 29 decisions out of 67 were decided unanimously, roughly consistent with the pattern in recent decades. But some degree of politicization is understandable and inevitable given the Court's *de facto* role in lawmaking.

Another factor is longer *de facto* tenure of justices. From 1789 to 1970, the average tenure of a supreme court justice was 14.9 years; for those justices who have left office since 1970, the average tenure has been 25.3 years.¹⁷ Most analyses attribute this increase to several factors. Most obvious is rising life expectancy. The life expectancy for a male surviving to adulthood at the time the US Constitution was ratified was around 68 years old.¹⁸ Today it is 82. And because justices are elites with access to high quality health care, their life expectancy is longer still. Sixteen justices have served after the age of 80, half of them in the last five decades.¹⁹ The current average age of the justices, after the three appointments by President Trump, is 64 years old, and one can easily imagine that Justices Gorsuch, Kavanaugh, and Barrett may serve for three decades or more. At the other end of the spectrum, there is the disappearance of the “short term justice.”²⁰ Since 1789, 40 of the 106 justices who have left the Court served for ten years or less, but none in the last 50 years.

Greater partisanship and polarization have not ameliorated the trend toward long terms of service. While some have argued that partisanship might incentivize older justices to retire strategically, or else hang on until a president of their preferred party is in office, there is not particularly strong evidence for either effect.²¹ Indeed, the current court has arguably taken pains to project an image of unity in the face of outside pressures to view it as a political body.²² This very impulse might extend a justice's term beyond an age at which they might otherwise retire.

(2006); Laurence Silberman, *Federalist Society Symposium: Term Limits for Judges?* 13 J. L. & POL. 669, 683 (1997).

¹⁷ Author's calculations.

¹⁸ J David Hacker, *Decennial Life Tables for the White Population of the United States, 1790-1900*, 43 HIST. METHODS 45-79 (2010). doi:10.1080/01615441003720449

¹⁹ Daniel Hemel, *Can Structural Changes Fix the Supreme Court?* 35 J. ECON. PERSP. 119, 130 (2021).

²⁰ Hemel, *Id.*, at 128; Justin Crowe and Christopher F. Karpowitz, *Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice* PERSPECTIVES ON POLITICS 5 (3): 425-45 (2007).

²¹ Hemel, note 19.

²² Amy Howe, *In Harvard Speech, Breyer speaks out against “court-packing,”* SCOTUSBLOG, Apr. 7, 2021, <https://www.scotusblog.com/2021/04/in-harvard-speech-breyer-speaks-out-against-court-packing/>

The politicization of the courts has created pressures on the appointment process that tend to lengthen prospective terms. The failure of the Senate to consider the Garland nomination, combined with the willingness of the same body to quickly confirm Justice Barrett, has led to speculation that appointments will only be possible during periods in which the Senate and President are of the same party. Whether or not this conjecture proves accurate, the *perception* of increased difficulty of the appointment process increases the stakes of vacancies when they do occur. The incentive for each party is to search for ever-younger judges, about whom the public has, by definition, less information, and who will likely serve for longer terms. This contributes to our current situation in which each nomination becomes an existential political battle.

It is my view that this situation has distorting effects on our entire political system. The Court has become an issue over which presidential elections are won or lost. The spectacle of the confirmation process has been described as “broken” from both ends of the political spectrum.²³ The goal of any reform should be to reduce the stakes of judicial nominations, and there are many possible ways to do so.

Term Limits and Rotation: A Framework

For any job, a term limit may have several purposes. It can encourage rotation of new personnel, who can bring fresh ideas and input into the institution. It can prevent abuse of power. It can ensure that office-holders do not entrench themselves, which is particularly important in electoral contexts where incumbents have a built-in advantage. It can reduce the costs associated with poor quality office-holders. In addition, term limits may overlap with age limits to the extent they are motivated by assumptions about declining capacities over time.

Term limits also have costs. For elected offices, they limit the choice of the *demos*. If there is a uniquely qualified individual for a job, the institution may be worse off for that person’s absence. And, more generally, they deprive the institution of experience that may be difficult to come by. So a normative framework for thinking about term limits involves several considerations.

- 1) *The stakes of the job.* For low-stakes positions, there may be little cost associated with leaving someone in office for a long time. On the other hand, for high stakes or high-profile positions, term limits assume greater social importance.
- 2) *The relative capacity of the term-limited individual relative to the potential replacement.* This in turn would depend on the pool of human capital in the field as well as the unique

²³ John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181 (2003) Victoria Bassetti, *How the Republicans Broke the Senate in Confirming Kavanaugh*, Brennan Center for Justice, Oct. 8, 2018, available at <https://www.brennancenter.org/our-work/analysis-opinion/how-republicans-broke-senate-confirming-kavanaugh>

features of the particular context.²⁴ If there are a large number of people who could do the job, term limits make more sense.

- 3) *The learning curve.* In many fields, from being an airline pilot to an academic, skill improves with experience. But there is a point of diminishing marginal returns. At some point, skill might even decline as a result of age, though our society increasingly recognizes that this point will be highly individuated and may not be susceptible to a universal rule. If the job is easy to learn, term limits make more sense because performance in the early years will not suffer. If the job requires unique qualities (such as being designated by God in the examples of the Pope or Ayatollah), term limits make less sense.

These three considerations clearly push in favor of term limits for the United States Supreme Court. First, the job is a high stakes one, with great influence over social policy. Second, there is a potentially large pool of talent to sit on the Supreme Court. There are 179 currently authorized Circuit Court judgeships, whose holders are engaged in the core Supreme Court activity of appellate review. Beyond sitting appellate judges, there are many more district court judges, politicians, and academics with qualifications similar to the 115 persons who have sat on the Court in its history. Third, there does not seem to be a unique learning curve for the Supreme Court. While there are some distinctive institutional features of the Court, most recent justices have had experience on the courts of appeals, and so the learning curve is relatively flat.

One additional consideration in this regard is that judging on any high court is a matter of teamwork; the legal output results from a collective process of deliberation. One complaint sometimes voiced about the Court is the common background of current justices, who universally graduated from a handful of elite law schools, and (with the exception of Justice Kagan) served on courts of appeals. No justice since the retirement of Sandra Day O'Connor has had any experience in elective office. The epistemic diversity of the Court would benefit from greater rotation, in which a broader range of experiences could be reflected in its work.

The federal judiciary is an example of what is called a “recognition” judiciary rather than a “career” judiciary.²⁵ In the recognition model, judges are selected relatively late in life, in “recognition” of significant achievements as a lawyer, prosecutor, or academic. The individual achievements of the candidate are paramount for selection, and individuation continues on the bench. Individually signed opinions provide an incentive for judges to develop their own brands of jurisprudence. There is generally less rotation once on the highest court.

The system can be contrasted with the judicial system in many civil law countries (and in some corners of American law like the military or administrative justice systems) in which judges

²⁴ Economists would call this asset specific human capital.

²⁵ See generally Nuno Garuopa and Tom Ginsburg, *JUDICIAL REPUTATION* (2015).

enter the profession at a relatively young age. Judges spend their career in the profession, progressing through a series of career steps, the apex of which will be the highest court. Only a subset of judges will reach the peak job, and the selection is often in the control of the judiciary itself. The logic of this system is extensive monitoring within the judiciary; the idea is that judging is a profession, and the best people to make determinations of quality are other judges. In many such systems, opinions are unsigned, emphasizing the collective character of the enterprise.

The recognition system involves *ex ante* screening before entering the profession; the career system involves *ex post* monitoring after entry. Either way, there is a process of making sure those at the highest level of the judicial system are of sufficient quality to make the important decisions required, and to keep the law accurate and responsive to the needs of a changing society. Both models find ways to keep judges from being unduly influenced by outside forces.

Each system has its own pathologies and risks. One potential advantage of the career system is that many more justices will rotate through the highest court. This will reduce the costs associated with a poor appointment, but also the benefits obtained from a star judge. Another advantage is stability. Highest law may be more stable in the career system, even though personnel rotate through more often. However, the logic of the system discourages creativity and responsiveness to a changing society. Judges do not conceive of their role in this way.

Our system, on the other hand, places great emphasis—some would say too much emphasis—on the creative role of the individual justice. Court-watchers examine the hearings and decisions as if interpreting oracles, and obsess about the health of older justices. Excessive individuation encourages litigants to tailor their arguments and cases to the specific jurisprudential approaches of the nine justices currently sitting. Arguably, this has a distorting effect on the law over time.

In my view, the country would be served by greater rotation on the highest court. It would lead to a richer jurisprudence, and reduce the stakes of any particular appointment. It would not lead to a decline in independence. Of course, there are complex questions of term length, how to handle vacancies that arise before the end of a term, the transition from our current system, and other issues.²⁶ But the fact that these questions are tricky should not deter us from trying to tackle them.

Term Length

Assuming a term limit is adopted, how long should it be? A simple intuition is that longer terms correlate with independence, and reduce accountability. Their effects on the quality of judicial output are less clear, as they may lead to less effort, or service past the point of diminishing or negative returns. Terms that are too short may increase accountability to outside forces, but

²⁶ Chilton et al, *supra* n. 2.

might reduce the quality of the law because of politicization. There is thus a “goldilocks” range in which terms provide for sufficient insulation without distorting the law.

There seems to be a consensus in democracies that, for offices requiring insulation from politics, agents should have terms longer than those of the appointing body, lest the appointee seek to “pay back” the appointer. Similarly, when an agent has the possibility of reappointment, there is concern that she might curry favor with the body that has the power to do so. But these broad considerations leave a range of possible institutional choices.

My view is that once a certain threshold of years is reached, say ten or twelve, there is little additional benefit from extending the Supreme Court term. The current proposals for staggered, nonrenewable 18-year terms for the U.S. Supreme Court seem to be driven by the fact that there are nine judges on the current court and so there would be a kind of rhythm to the replacements and vacancies. But of course, that rhythm depends on other decisions such as the size of the court.

Relative to the current average of leaving office after 25.3 years of service, an 18-year term seems short. But 18 years is still a significant amount of time, and we would not be discussing such a long term without the baseline of lifetime service. As noted above, designated constitutional courts have terms that are shorter—nine to twelve years seems to be a common range. In established democracies such as Germany or South Korea, there are no systemic complaints about a lack of independence resulting from the limited term.²⁷

Some argue that short terms would conduce to judicial signaling to favored audiences, seeking post-retirement benefits. This is one of the fundamental arguments for life tenure, going back to Hamilton. A term limited justice who had post-retirement aspirations might be willing to signal to potential employers in politics or business, distorting the law. I find much of this concern about post-retirement employment to be unconvincing. Supreme Court justices do not seem to be motivated by money, and could always retire to academic positions or serve in senior status. There is an implicit assumption in some of the arguments about post-retirement behavior that justices would be appointed at a young age rather than as a capstone to a distinguished career. And limited terms might encourage nominations of more people with legislative and executive experience, whose absence some have decried. Of course, there might be some distorting effect if such persons sought to return to political positions after serving on the Court. But this does not seem such a significant prospect as to overcome the general benefits of limited terms.

With the exception of India (discussed below under Age Limits), there is no literature indicating that the prospect of post-retirement employment has been a major concern for justices in other

²⁷ Donald Kommers, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (3rd ed., 2012).

countries. Justices in countries with constitutional courts, such as Germany, South Korea, or Spain, typically retire to academic positions or take a judicial pension.

Another argument put forward by some observers is that, by increasing the frequency of vacancies, a term limit would necessarily increase the number that occur when presidency and senate are in the hands of different parties.²⁸ But the effects of this fact are uncertain: it might induce more reciprocity across political parties rather than scorched earth fights. There are other institutional reforms that could provide for a default appointment in the event the Senate refused to confirm the President's nominee. (I realize that appointment procedures are outside the scope of this session, but one could imagine a system in which the President sent three nominees for each seat over to the Senate, from which the latter would choose one. If the Senate refused to act, the President might have the power to make the appointment unilaterally. There are myriad other ways to structure such a system.)

I should note that life terms do not necessarily correspond with more independence. In a cross-national study I conducted with James Melton in 2014, we examined the correlation between constitutional design and observed levels of judicial independence, as measured by political scientists.²⁹ We examined six features of constitutional design: (1) nominal guarantees of judicial independence; (2) the presence of a life term; (3) appointment mechanisms that required multiple branches to cooperate; (4) a high threshold for removal; (5) a limited set of predicate acts for removal; and, (6) a guarantee against salary reductions. We found that only the combination of cooperative appointments and an insulated removal procedure had a statistically significant effect on enhancing independence. The result is somewhat intuitive: a life term will not protect independence if the judge can be arbitrarily removed at any time, or suffer a salary reduction. Similarly, protections against removal do little good if the appointment process is highly politicized.

Of course, one must be careful in drawing conclusions from this comparative study for the U.S. context, which has multiple protections for judicial independence. However, the basic result leads me to believe that, so long as other guarantees of judicial independence are present, reducing terms on their own would not lead to any decline.

Age Limits

²⁸ Hemel, *supra* n.19, at 132.

²⁹ Tom Ginsburg and James Melton, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J. L. CTS. (2014). Cross-national measures of judicial independence are complicated but we relied on the widely used data of Drew Linzer and Jeffrey Staton. See Jeffrey Staton, Drew Linzer, Christopher Reenock, & Jordan Holsinger, Jordan, 2019, "Update, A Global Measure of Judicial Independence, 1900-2015", <https://doi.org/10.7910/DVN/NFXWUO>, Harvard Dataverse.; Drew Linzer and Jeffrey Staton, *A Global Measure of Judicial Independence 1948-2012*, 3. J. L. CTS. 223 (2015).

Another way to reduce the tenure of justices would be to impose an age limit. Proposals to do so have surfaced from time to time. In 1954, the Senate approved a constitutional amendment that would have required retirement at age 75, but the process stopped there.³⁰

I tend to view age limits as overly mechanical, with two defects. First, they artificially lump the capabilities of diverse people without individual assessment. While that may be appropriate for airline pilots, for whom a sharp sudden decline in capacity might pose grave risks, it does not make sense for Supreme Court justices. In an era in which 80 is the new 70, age limits should not be a first choice.

Second, there is no way to predict the effect of age limits without tinkering with other aspects of the judicial system. Given current structures in the United States, a mandatory retirement age for Supreme Court justices of, say, 75, might only prompt presidents to seek ever-younger nominees, and so there is no guarantee that tenures would actually shorten. In this scenario, one would lose valuable experience without any corresponding institutional improvement. One might respond that an upper age limit could be accompanied by a minimum age for service. But this kind of tinkering strikes me as inferior to term limits, in which the individual capacities of an appointee are dispositive rather than gross generalizations about age.

To be sure, many other high judiciaries that we consider independent utilize age limits. Whether in a “recognition” or “career” system, appointments to the highest court tends to come later in life, and so terms are short. Judges on the United Kingdom Supreme Court, still a young institution, leave office after 5.3 years of service on average; over the past seven decades, justices in the Philippines average a tenure of 5.5 years.³¹

To illustrate the dynamics that lead to short terms, consider the Japanese Supreme Court. This body is made up of justices who have life tenure, subject to a mandatory retirement age of 70 (on the Supreme Court; 65 otherwise). Judges operate in a “career” system, in which they spend their entire careers within the judiciary, rotating through various offices. A Supreme Court appointment is the pinnacle of the judicial career; management of that career is largely done by the judiciary itself through the Supreme Court Secretariat. Judges tend to be appointed in their young 60s, and so do not serve very long terms.³² No justice has ever served more than 12 years. Critics argue that the intensive screening and relatively short terms lead to a judiciary that is relatively quiescent, but the age limit allows more judges to pass through the court.

Another prominent Supreme Court is that of India, which has traditionally been a highly independent body that has played a very active role in that country’s democracy. Its appointment

³⁰ David, J. Garrow, *Mental Decrepitude in the US Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chicago L. Rev. 995, 996 (2000).

³¹ Data available from author.

³² J. Mark Ramseyer, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* (2003).

process is largely controlled by the Court itself, through the so-called Collegium system.³³ The Constitution states that appointment of Supreme Court justices should be done by the president of India (who is mainly a ceremonial figure) in consultation with existing justices of the Court. The Court has formed a body called the Collegium, made up of the chief justice and four senior-most justices, which manages appointments to the higher courts, as well as promotions and transfers. When the Government of Narendra Modi tried to modify this system in 2014, the justices held that it was unconstitutional, violating the so-called: “basic structure” of the Constitution. So the judges have maintained a good deal of autonomy in terms of the appointment process. From this point of view they are independent.

However, justices have a mandatory retirement age of 65. As in Japan, the combination of a self-appointing judiciary and mandatory retirement age helps to ensure there is a good deal of turnover on the court. The average justice spends six years on the bench before retirement.³⁴

In recent years, concern over post-retirement positions has come to the fore. Because judges retire at a relatively young age, the possibility of post-retirement appointments may shape their behavior. Many of them take on appointments in India’s numerous government commissions, which have quasi-judicial or arbitral roles. For example, there are many arbitration commissions that deal with boundary disputes among states, to which appointments are made by the government. Not only do these commissions provide for employment, but they allow the judges to maintain their desirable housing in Delhi. One study showed that as judges approached the mandatory retirement age, they began to rule in more progovernment directions in the hope of securing an appointment to a post-retirement position.³⁵ There was a correlation between progovernment decisions and post-retirement appointment.

This is a cautionary tale on a number of points. It illustrates that an age limit, especially one set too low, may be inferior to a term limit. Under a term limit, a 65-year old could begin a term on the Supreme Court; under an age limit, she cannot. Presumably, a person ending their term in their 70s or 80s would care less about post-retirement positions. And while I do not believe that post-retirement positions would be a significant issue in the United States, the story also highlights the systemic nature of judicial reform.

³³ See, e.g., Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173 (2013).

³⁴ Sital Kalantry, *Lessons from India on the issue of Supreme Court Term Limits*, THE HILL, Apr. 20, 2021, available at <https://thehill.com/opinion/judiciary/549263-lessons-from-india-on-the-issue-of-supreme-court-justice-term-limits> In addition, India has a system by which the oldest justice will serve as chief. Thus, one can predict with near certainty who will be the chief for which period, and the tenures tend to be very short. 48 persons have held the post since 1950, as compared with 19 in Japan since 1946 and only 17 in U.S. history.

³⁵ Madhav Aney, Shubhankar Dam and Giovanni Ko, *Jobs for justice(s) : corruption in the Supreme Court of India*. J. L & ECON (2021).

Conclusion

In sum, I believe greater rotation on the Supreme Court would resolve some serious problems in our constitutional system. These problems are not necessarily created by the Court, but result from its interactions with other actors. Reducing the stakes of Supreme Court appointments will not fix our politics, but at least it will reduce the effects of polarization on the Court. More rotation will also improve the epistemic base for the highest court in the land. In addition, I do not believe there would be any detrimental effect on the quality of the law.

Certain American institutions have been enormously influential around the world. Constitutional bills of rights, judicial review, presidential term limits, and a separation of powers have been adopted widely. Other American innovations have been wisely discarded by the drafters of the more than 800 national constitutions since 1787. These include the Electoral College, the provisions of the Third Amendment, and a rule allowing state legislatures to draw district boundaries for national elections. I would submit that interpreting “good behavior” to provide for true lifetime tenure is one of the institutions that have been rejected. We should follow suit.