

IMPORTANT NOTE ON THESE DISCUSSION MATERIALS

The following are discussion materials on TERM LIMITS assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023.

These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.

The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for October 15.

The Commission will post a draft Report for deliberation, in advance of its next public meeting.

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TERM LIMITS

I. Introduction

Among the proposals for reforming the Supreme Court, term limits for Supreme Court Justices appear to enjoy the most widespread and bipartisan support. Testimony submitted to the Commission reflects this support.¹ Advocacy groups, nonprofits, and membership organizations expressed their support for term limits. A bipartisan group of experienced Supreme Court practitioners who testified before the Commission concluded that an 18-year term limit “warrants serious consideration.”² At least three current Justices on the Supreme Court—Chief Justice Roberts and Justices Breyer and Kagan—have noted the potential benefits of term limits.³ Major think tanks and their leaders have also endorsed the concept of term limits.⁴

There is also a great deal of support for term limits among academic experts. When the National Constitution Center organized separate groups of “conservative” scholars and “progressive” scholars to draft their own proposals for improving the Constitution, both groups concluded that Supreme Court Justices should be limited to eighteen-year terms.⁵ Prominent constitutional scholars, including both liberals and conservatives, originalists and non-originalists, have endorsed the concept of term limits. In fact, in its survey of the existing literature on Supreme Court term limits, the Commission discovered few works arguing against term limits.⁶

Moreover, term limits for high court justices are commonplace within the United States. Since the Founding, states have decidedly moved away from life-tenure for justices of their highest courts. Today almost all states now impose term limits on the justices of their highest courts, with terms ranging from six to fifteen years.⁷ Three of the four states that do not have term limits impose mandatory retirement. Thirty-one states and the District of Columbia have some form of mandatory retirement, with the majority of states setting the retirement age at 70.⁸ Rhode Island is the only state that currently has neither term limits nor a mandatory retirement age for its supreme court justices.⁹

The United States is the only major constitutional democracy in the world that has neither a retirement age nor a fixed term of years for its high court Justices.¹⁰ Most democracies like ours have term limits for their constitutional courts, and the small number of countries that have “life tenure” provisions for their apex court actually impose age limits.¹¹ One scholar testified before the Commission that “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.”¹²

In this Chapter, we present the case for term limits and give extended consideration to how they might be implemented. In Parts II and III, we consider the justifications for and objections to term limits. The discussion underscores that there are principled reasons favoring term limits for Supreme Court Justices, as they simultaneously would preserve the value of judicial independence and ensure that the Court’s membership is broadly responsive to the outcome of democratic elections over time. In Part IV, we consider how to design a

constitutional amendment that would institute a system of term limits. In Part V, we consider whether and how Congress might achieve the equivalent through statute. In each of these Parts, we consider questions such as how long should Supreme Court Justices' terms be, how many appointments should each President be able to make in four years' time, and how to transition to a term-limited system. We conclude in Parts VI and VII by addressing some prudential concerns: first, how to address the potential impasse in the Senate's confirmation process that would stymie a new system of term limits; second, whether adopting term limits through statute would open the door to further intervention in the judiciary by Congress.

II. The Justifications for Term Limits

While there are many reasons to support term limits, their core purpose is to regularize the appointments process, making judicial appointments more predictable and the composition of the U.S. Supreme Court more rationally related to the outcome of democratic elections over time. There is no sound reason for the number of appointments made by a President to vary much based on random chance, such as when Justices leave the bench due to illness or death. Under our current system, some Presidents make three (or more) appointments in a term while others make none. Moreover, the ability of Justices to make decisions to retire strategically and the public perception that Justices are doing so (whether accurate or not) can undermine the Court's legitimacy, a value that is discussed at length in Chapter 1 of this Report. The randomness of when vacancies arise also encourages political maneuvering to capture control of seats. Life tenure also leads Presidents to choose younger nominees, bypassing those who might make outstanding Justices but are unlikely to serve for thirty or more years.

Term limits may help strike a more appropriate balance between two important features of our constitutional system. The first is judicial independence. The second is the long-term responsiveness of the judiciary to our democratic system of representation. Under our constitutional system of checks and balances, the Constitution provides judges with independence from direct political pressure and political influence when they interpret laws, review executive actions and administrative regulations, and consider the constitutionality of state and federal legislation. In return, the Constitution gives the President and Senate power over appointments to the federal judiciary, and it gives Congress power over the structure and jurisdiction of the federal courts. It is through these powers, granted to the political branches by our Constitution, that the work of the federal judiciary is made responsive to the public will over long periods of time.

The constitutional principle of judicial independence requires that judges not face any consequences, positive or negative, for how they decide cases. But our system of checks and balances also requires that the elected branches be able to affect the composition of the judiciary through successive appointments. This arrangement aims to make the individual members of the judiciary *independent* at any given point in time, but the composition of the judiciary as a whole appropriately *responsive* to the people, as expressed through its electoral decisions at regular intervals. To preserve judicial independence, our Constitution insulates the Court's decisions from the vagaries of popular opinion. But to preserve checks and balances, it makes who sits on the Court responsive to election outcomes over time.

This system of checks and balances would function more successfully if Supreme Court appointments were related in a regular and predictable way to the results of successive national elections. Parties who win the White House should have the same or a roughly equal chance to shape the Supreme Court through new nominations.

The consequences of life tenure for our constitutional system have changed over time, as the average length of Justices' terms has expanded.¹³ Life spans have lengthened and modern Justices may increasingly delay retirement.¹⁴ Up until the late 1960s the average term of service was around fifteen years. By contrast, the average tenure of the Justices who have left the Court since 1970 has been roughly 26 years.¹⁵

The increasing length of the Justices' terms raises the stakes of each nomination. Presidents try to nominate younger candidates in the hope that they will serve longer¹⁶ and thus allow for the entrenchment of particular views on the Court for three or more decades into the future. Justices may retire strategically to ensure that they are replaced by successors with similar ideological views. As we explain in Chapter 1 of this Report, control over the Supreme Court has become one of the most valuable prizes of politics, leading to increasingly bitter partisan warfare.

The problem is not only the length of service but also the unpredictability of when vacancies occur. Throughout history, the median, modal, and mean number of chances for a Supreme Court appointment has been approximately two per four-year term.¹⁷ Most Presidents have gotten either one or two opportunities, and a small number have been very lucky and received four or more. But sometimes Presidents get none at all. This situation has occurred more frequently since the mid 1970s. In the 188 years from the presidency of George Washington to the presidency of Gerald Ford, there were only five presidential terms out of 47 (just 11 percent) in which Presidents did not get an opportunity to make a Supreme Court appointment.¹⁸ But in the 44 years from Jimmy Carter to Donald Trump, Presidents did not make a single appointment in three out of 11 terms (27 percent)—and four out of 11 terms if we include Republicans' refusal to consider the nomination of Judge Merrick Garland during President Obama's second term.

Together these changes undermine the system that ensures that the composition of the Supreme Court, and thus, the work of the Court considered over the long run, will be responsive to the people as expressed through regular elections.¹⁹ A lack of judicial responsiveness to the public in this sense undermines the checks and balances between the political branches and the federal judiciary, and it may put the Court's legitimacy at risk in the long term.

We stress that the goal of term limits is not to ensure partisan balance. If a party wins the White House more often, its Presidents should have the opportunity to appoint more Justices, checked, as with all judicial appointments, by the Senate's advice and consent. But our current system allows parties to obtain and keep control over the Court to a degree disproportionate to their record of electoral success. The existing system—buffeted by chance deaths, strategic behavior, and aggressive political tactics—makes it harder than it should be for parties that win elections to influence Supreme Court appointments, and easier than it should be for parties that

lose elections to nevertheless maintain control of the Supreme Court. Term limits respond to this problem.

A system of term limits, such as the proposal for staggered 18-year terms that we discuss in detail below, would advance our Constitution's commitments to checks and balances and popular sovereignty. It would ensure that Presidents have the opportunity to appoint two Justices to the Supreme Court in each term they serve. In addition, staggered 18-year term limits might somewhat lower the stakes of individual appointments and decrease incentives to engage in aggressive partisan tactics in the nominations and confirmations process, though the justification for term limits does not depend on this possibility. Properly designed, term limits also preserve judicial independence. As we discuss in Parts IV and V below, long fixed terms and guarantees of financial security thereafter will help insulate individual Justices from political pressure and financial temptation.

In addition, term limits can enhance the Court's legitimacy in the eyes of the public. By regularizing Supreme Court appointments, they make the system of Supreme Court appointments appear fairer, less arbitrary, and more predictable. In particular, term limits largely eliminate the possibility of "strategic retirements" and, just as importantly, the *perception* that Justices retire for strategic reasons. Strategic retirements attempt to control the future direction of the Court by creating Supreme Court openings when sympathetic partisans are in control of the White House and Senate. (Conversely, Justices may remain on the Court, even if they are no longer up to the job, because they are waiting for sympathetic partisans to gain control.) This kind of strategic calculation, or the perception of it, can fuel public beliefs that the Court is a partisan institution. It can contribute to the perception that the system is unfair or rigged, in part because strategic retirements prevent Presidents from receiving a roughly equal number of appointments for each term of office. Moreover, the possibility that Justices might retire strategically can lead to public relations campaigns to push a Justice to retire precisely so that the party in power can appoint a successor. Though it is impossible to know why any particular Justice chooses to retire at a particular moment, term limits would put a stop to both the possibility and perception of strategic retirements. Under one possible design of term limits that we discuss further below, Presidents would only be able to fill out the remaining years of the term for a retiring Justice, essentially eliminating the advantage of, and hence the motivation for, retiring strategically.

Term limits are not a panacea for polarization, and parties will still continue to fight over judicial appointments. At the very least, though, term limits should help ensure the long-term responsiveness of the judiciary to the people, as expressed through their electoral preferences over time, while preserving individual Justices' independence during their terms in office.

The possibility of imposing a mandatory retirement age on Justices is sometimes offered as an alternative to term limits, and the Commission heard testimony on proposals for a mandatory retirement age for Justices.²⁰ Mandatory retirements would ensure some degree of responsiveness to elections over time, while preserving judicial independence. As with term limits, a mandatory retirement age would make it possible to know when a given Justice will retire (assuming that the Justice does not die or leave the bench early). But we conclude nonetheless that a mandatory retirement age is inferior to term limits in important respects. It would not guarantee regular appointments. It would still encourage parties to nominate ever

younger candidates in order to squeeze the maximum number of years out of each appointment. Thus, if the goal is to regularize appointments and to ensure that parties that win elections get a predictable number of chances to appoint new Justices, term limits are the better option.

III. Objections to Term Limits

By design, term limits would produce more turnover on the Supreme Court. That could have costs as well as benefits.

One important objection to term limits is that they might destabilize the Court's doctrine. To the extent that new Justices have different views of the law than their predecessors, and to the extent that they are willing to overrule or narrow precedents with which they disagree, more turnover on the Supreme Court could lead to more frequent doctrinal shifts, or even cycles in which major precedents are discarded only to be reinstated later. A recent study that created models with varying assumptions and then ran simulations of the effects of eighteen-year terms under each model concluded that "the danger of increased instability due to term limits is very real" and needs to be weighed against the potential benefits of term limits.²¹

On the other hand, the average tenure of the Justices who left the Supreme Court from the Founding until 1970 was less than eighteen years, so the Court has historically experienced greater turnover than a system of eighteen-year terms would be likely to produce now. In addition, a team of law professors and political scientists recently ran simulations to determine how the Court's composition might have differed if term limits systems had been implemented at any time between 1937 and 1970. For each start date, the team ran simulations over the next fifty years to estimate how often the Court would have shifted from having five or more Justices appointed by a President of one party to having five or more Justices appointed by a President of the other party. The team found that all but one of the most prominent proposals for term limits would likely have produced *fewer* flips than actually occurred in the real world.²²

A few commentators and scholars have also expressed concern that term limits (whether through constitutional amendment or by statute) threaten a basic structural principle of the Constitution's separation of powers: the principle of judicial independence.²³ They argue that life tenure is essential to that independence, as evidenced in our long-standing historical practice. However, evidence suggests that long and nonrenewable term limits on a high court do not threaten judicial independence,²⁴ particularly if Justices are guaranteed a lifetime of judicial office while performing other judicial duties and a lifetime of full salary. The length and nonrenewability of the term reduce incentives to please the political branches, and the tenure protections should enable Justices to decide cases without fear or favor. Thus, even some critics of term limits think it fair to expect "long fixed terms followed by assignment to a court of appeals" to give individual Justices a degree of independence reasonably equivalent to that of life tenure as it currently stands.²⁵

A more specific concern relating to judicial independence involves what Justices would do after their terms expire, and whether their plans for the future might affect either their performance as Justices or public perceptions of that performance. One might worry that a

Justice who is eyeing future positions in government might try to curry favor with political constituencies, or that a Justice who is eyeing future positions in industry might decide cases in light of those plans. Especially if term limits reduce the pressure for Presidents to appoint younger people, though, most Justices who serve eighteen-year terms may still view their positions on the Court as the last major jobs that they will have. In any event, term limits proposals could be coupled with restrictions on the types of post-Court employment that seem most troubling.

Another possible objection to term limits involves the effects they would have on presidential power. If Presidents make new appointments to the Supreme Court every two years, two-term Presidents will have appointed four of the nine active Justices by the final year of their administrations. That might be desirable; one of the goals of term limits is to tie the composition of the Supreme Court more rationally to the outcome of national elections, and regular appointments are necessary to accomplish that goal. But the power to appoint four-ninths of the Supreme Court is a substantial power.²⁶ Term limits also remove a potential check on the President's power of appointment: Even if the sitting Justices have reason for concern about an incumbent President, they will have no discretion simply to remain on the Court and thereby deny the President a new appointment. Eliminating the possibility of strategic retirement and nonretirement has benefits, but it does eliminate a brake on presidential authority.

A different type of objection involves the incentives for gamesmanship in particular cases. If it is known that a swing Justice will lose the power to participate in cases on a specific date, either litigants or lower-court judges might try to time a case accordingly.²⁷ Conversely, Justices who want to weigh in on a question while they still have the power to do so might be inclined to grant certiorari before the question has fully "percolate[d]" through the lower courts, and they might also face temptations to accept cases that are not ideal "vehicle[s]" for presenting and deciding the question.²⁸

More fundamentally, critics fear that term limits might change the public's perception of the Court, and perhaps how the Justices themselves behave. If two seats on the Supreme Court are guaranteed to come open every four years, the Court might become even more of an issue in electoral politics than it currently is. To the extent that the reform is designed to tie the composition of the Supreme Court more closely to the results of elections, moreover, the reform might reinforce the message that appointments to the Supreme Court are the spoils of politics. One critic worries that the Justices "will be Republican appointees or Democratic appointees in a more explicit sense than they are now," and that some Justices "may . . . view their own roles in a manner a little more political and a little less law-like."²⁹ That effect might be offset if replacing life tenure with eighteen-year terms would lower the partisan heat of confirmation battles. But critics see no reason to expect that result. To the contrary, critics fear that increasing the frequency of appointments to the Supreme Court will simply increase the frequency of bitter fights over nominations, with all that they currently entail. In one scholar's words, "frequent and predictable vacancies under a system of nonrenewable eighteen-year terms seem more likely to feed the disease of power politics than to cure it."³⁰

A related objection is that term limits will fail to achieve their objectives because term limits by themselves cannot ensure that the Senate will confirm any nominees, an especially

pressing concern given the polarization-related deterioration of the confirmation process described in Chapter 1 of this Report. While reforming the appointments process is beyond the mandate of the Commission, we emphasize its importance to any discussion of term limits. Combining term limits and regular appointments requires a confirmation procedure that permits the Senate to play its appropriate role while also ensuring regular confirmations. At present, the party that controls or has blocking power in the Senate can just run out the clock and prevent a new appointment at the scheduled time, thereby undoing much of the good that would come from regularized appointments. For that reason, we emphasize that term limits cannot succeed without a change in the confirmation process to address the risk of systematic impasses. In the Appendix of this Report we summarize some helpful testimony regarding potential reforms to the confirmation process, and we discuss ways of addressing this concern in the design of term limits in Part VI of this Chapter.

Ultimately, the Supreme Court has functioned with life tenure ever since the Founding, and switching to a system of term limits could have unintended consequences. That fact should not be discounted; one should not make significant changes to complex institutions without careful thought. A broader concern is less about term limits than about reform in general. In our current polarized environment, *any* change to the structure of the Supreme Court might be regarded with suspicion. In addition, one reform might open the door to further proposals for structural change, with some risk to the stability of the institution. But while the risk of unintended consequences is an important point to consider, it is not necessarily a conclusive argument for inertia. Indeed, inertia too can have unintended consequences.

IV. Analyzing a Constitutional Amendment for Term Limits

This section identifies the major issues to consider in designing a system of term limits. These issues include the size of the Court, the length of the Justices' terms, how to fill vacancies that arise before a set term ends, and how to transition from the current system.

Many of these issues arise under either a proposed constitutional amendment creating term limits or a statutory term limit proposal. But the options for addressing them differ depending on which path is being considered. In this Part, we discuss these issues in the context of a constitutional amendment to adopt term limits. In Part V, we do so in the context of a statutory term limits proposal, and we also discuss whether these reforms would require constitutional amendment or whether they could be enacted by Congress. While our aim is not to recommend a specific proposal, we believe it is necessary to discuss plausible reform options in order to ground our analysis.

A. Setting the Court's Size and the Appropriate Term Length

A system of term limits would need to specify the appropriate size of the Court. One major justification for a staggered, term-limited system of appointment is that such a system would bring about less randomness and greater equality across presidential terms in the number of Justices a President would have the opportunity to appoint. That aim would be drastically

undermined, however, were Congress free to vary the size of the Court. We separately evaluate proposals to expand the size of the Court in Chapter 2 of this Report. For purposes of our analysis in this Chapter, we assume that the Court's long-term size would be fixed at nine Justices.

With a nine-member Court, the two likeliest options for term limits would be a twelve-year term or an eighteen-year term, as both would create a roughly equal number of appointment opportunities in each presidential term. In recent decades, the overwhelming majority of term limit proposals have endorsed the eighteen-year version. In that version, each President would have two regular appointments in a single presidential term. In the twelve-year version, each President would have three such appointments.

Important trade-offs are involved in this choice. As we noted at the outset of this Chapter, from the perspective of the state courts and international peers, an eighteen-year term is quite long. Of the forty-seven states that impose term limits for their highest court judges, only one state has a term longer than twelve years.³¹ Similarly, of the twenty-seven countries that impose a term limit, those limits range between five and fifteen years.³² The German constitutional court, considered one of the strongest constitutional courts in Europe, is composed of judges who serve twelve-year non-renewable terms and who must retire at age sixty-eight.³³

As this experience in the states and other countries suggests, there is a case to be made for twelve-year terms if the structure of the Court is considered in isolation from the larger political circumstances of the appointments process. With twelve-year terms, each presidential term would involve three regularly scheduled appointments. In addition, a President elected for two terms would have the power to appoint six regularly appointed Justices. Even if a constitutional amendment for term limits would to some extent reduce the intensity of political conflict over Court appointments, three appointments every four years would put the Court at the center of the political process on an almost yearly basis. There are also reasons to be concerned that enabling a single two-term President to make six appointments gives one person too much power to reshape the Court. This tradeoff has led most proponents of term limits in the United States to endorse an eighteen-year term. For simplicity's sake, and in the light of these considerations, we will use an eighteen-year term limit to ground our analysis.

That said, circumstances could change, making potential turbulence less of a risk. If so, the costs and benefits of a twelve-year term as opposed to an eighteen-year term might be weighted differently than at present. For this reason, the designers of a constitutional amendment might consider whether the amendment should give Congress the power to adopt prospectively a twelve-year term (that is, to adopt a statute that would take effect for Justices appointed after the date of enactment). Drafters should take care to hew to the core purpose of such an amendment by ensuring that each President receives the same number of regularly scheduled appointments.

B. Effective Date and Timing of Appointments

The designers of a constitutional amendment to implement a term limit system must make several choices related to the timing of the reform.

First, drafters must decide when the amendment would take effect. The amendment could, of course, take effect upon adoption. If there is concern that knowledge of who the sitting President is at the time the amendment takes effect would make it more difficult for the amendment to be adopted, the amendment could be structured to take effect starting at some later date. For instance, it could begin in the first presidential administration elected after the amendment is approved.

Second, drafters must also determine the timing of appointments. The amendment could specify when during a presidential term the President's two appointments would arise. If the drafters wished to avoid appointments arising during an election year, they could specify that appointments would arise in years one and three of a presidential term. To avoid disrupting an ongoing Supreme Court term, the amendment could specify that the outgoing Justice's term ends on a specific date that typically falls after the Court has issued all its opinions in argued cases. The incoming Justice's term can be made to run from that date, in which case Justices might serve slightly fewer than eighteen years, given the time it would take for confirmation.

Third, drafters must also address how to fill seats that become vacant due to retirement, death, or impeachment before the end of a Justice's eighteen-year term. Once every Justice has been appointed to an eighteen-year seat, this situation is not likely to occur often. Only one Justice appointed in the last fifty years has served fewer than eighteen years.³⁴ We identify three options.

The first is to leave those seats unfilled for the remainder of the term, thereby preventing any President from having more than two appointments in a presidential term. That option would leave the Court to function without a full complement of Justices for what might be extended periods; it would also mean the Court would likely have to function for periods with an even number of Justices. The Court has functioned occasionally with an even number of Justices, as it did for fourteen months after Justice Scalia's death. Some argue that an even-numbered Court encourages the Justices to deliberate more to find common ground, in an effort to avoid leaving the Court unable to decide a case. In addition, the Court would not be able to find state or national action unconstitutional absent greater consensus than a 5-4 decision entails. But a significant cost of having an evenly divided Court is that it could prevent the Court from ensuring that federal law is uniform throughout the country. If the courts of appeals are divided on an issue, for example, there would be no higher judicial authority to resolve that difference, if the Court itself is evenly divided on the issue. The same law could be held constitutional in one part of the country and unconstitutional in another.

A second option is that the sitting President, with Senate confirmation, would have the power to appoint a candidate to fill out only the remainder of the original eighteen-year term. Some witnesses testified that confirmation in this context should require a supermajority Senate vote.³⁵ The justification for that higher hurdle is that seats that become vacant before the end of an eighteen-year term reintroduce a random element into the timing of appointments by allowing certain Presidents to make more than two appointments. On this view, those appointments should succeed only if they are backed by a significant consensus in the Senate. Although a supermajority requirement might lead some seats to remain vacant (as in the first option), no President would be deprived of the right to make two regularly scheduled appointments in a

presidential term. If the amendment does permit the President to fill out the term of seats that become vacant prematurely, the drafters might consider prohibiting the person appointed from being reappointed to a full eighteen-year term.

A third option depends on how the amendment treats Justices who have reached the end of their eighteen-year terms. The amendment might define these individuals as “Senior Justices,” who continue to hold offices as Article III judges. Given that these Justices have all been confirmed by the Senate, the amendment could give the President the option to designate a Senior Justice, if one is available, to fill out an eighteen-year term that has become vacant prematurely. If unilateral presidential designation is undesirable, the amendment could instead require the Senate to confirm the President’s choice (if no Senior Justices are available, one of the first two options would have to apply).

C. Designing the Transition to Fixed-Term Appointments

How to structure the Court’s transition to fixed-term appointments presents significant practical challenges. The most significant options that have been proposed are discussed below. For purposes of this analysis, our discussion will assume an eighteen-year term with regular presidential nominations in years one and three of a President’s term.

1. Sitting Justices Retire on a Fixed Schedule That the Amendment Establishes

Under this approach, once the amendment takes effect, the most senior Justice would retire in year one of the first presidential term in which the amendment takes effect. The next most senior Justice would retire in year three, and so on. This strategy is the conceptually cleanest structure for the transition. Were this approach adopted, sixteen years after the first Justice is appointed to a term-limited seat, the full Court would consist entirely of Justices serving eighteen-year terms. For instance, if the amendment took effect in 2025, the most junior Justice on the current Court would retire in 2041, after twenty-one years of service. If this were done through a constitutional amendment, the Commission does not perceive there to be any significant constitutional issues in applying the amendment to sitting Justices.

2. Sitting Justices Remain on the Court as New Term-Limited Justices Are Appointed

The Commission is aware that while the simplest approach would be to apply a term limits amendment to the sitting Justices, this strategy might generate political conflict that would make passage of an amendment difficult.

If the amendment is designed not to apply to currently sitting Justices, the Court could expand temporarily. New Justices would start being appointed every two years for eighteen-year terms after the amendment’s effective date. As legacy Justices leave, their seats would not be filled as long as at least nine Justices would remain on the Court. It is likely that the Court would never drop below nine Justices. One study concludes that, under this approach, it would take around thirty-five years until the full Court consisted entirely of Justices serving for fixed terms.³⁶

This approach does come with potential costs, however. It would likely produce a considerably expanded Court for a period of years. In Chapter 2, we consider some of the consequences of a larger bench, including that it could hamper the Court's decisionmaking (depending on how large the expansion is). That said, as we also note in that Chapter, many of the highest courts in other democracies have eleven or more members, and in many cases they function effectively by sitting in panels, a prospect we also explore in some depth in Chapter 2.³⁷ On the other hand, no state supreme court has more than nine judges and only seven are even that large; most have seven judges and seventeen have five.³⁸ As one former federal judge testified to the Commission, above a certain size, effective collective deliberation becomes more difficult.³⁹ In addition, in some years, the Court might also have an even number of Justices, which would raise the issues discussed above about the pros and cons of an even-numbered Court.⁴⁰ It is also uncertain how the public would perceive a Court if its size fluctuated from year to year for many years. Closely divided decisions on a Court that sometimes has nine members, sometimes eleven, sometimes thirteen, might make the Court appear less stable and generate perceptions that outcomes turn on the fortuity of how many Justices happen to be on the Court at any particular moment.

3. New Term-Limited Justices Are Appointed Only When Currently Sitting Justices Vacate Their Seats

Another alternative proposed in academic work on this issue is that current Justices continue to serve for life and new appointments are made only when the seat of a currently sitting Justice becomes vacant.⁴¹ The amendment would still establish a schedule of regular eighteen-year appointments, into which retirements of currently sitting Justices would then have to be integrated. For example, if a currently sitting Justice retires before the date for vacating that seat occurs, the President nominates a Justice who would serve the next eighteen-year slot that is scheduled to become available. Suppose under the amendment the first three eighteen-year terms would arise in 2025, 2027, and 2029. If a currently sitting Justice leaves the bench in 2024, the President would nominate a Justice whose term would be nineteen years (2024-2025 plus the eighteen-year term that begins in 2025). If the next sitting Justice leaves in 2025, the President would nominate a Justice whose term would be twenty years (2025-2027 plus the eighteen-year term that begins in 2027). If another seat does not open up until 2031, the President would nominate a Justice who would serve for only sixteen years (filling the term that was scheduled to begin in 2029 and end in 2047).

This proposal would avoid temporary expansion of the Court, but it would also generate the longest time interval before the full Court was composed of Justices serving eighteen-year terms. One major study estimates that, under this proposal, it might take around fifty-two years before the Court reached the point that all Justices were serving eighteen-year terms.⁴² The additional complexities just noted about timing of appointments might also be considered a cost of this proposal.

4. Addressing Seats Held by Currently Sitting Justices That Become Vacated Prematurely

If the amendment applies to currently sitting Justices, as in the first option above, a distinct issue arises concerning seats of those Justices that might become vacant prematurely. For

example, a currently sitting Justice whose term would be scheduled to end in 2033 might vacate their seat in 2025. This is a more likely scenario than that a new Justice appointed to an eighteen-year term would vacate that seat prematurely. Simply for reasons of age, it is more likely that a Justice on the current Court would leave office eight years before a scheduled end-of-term date than would a newly appointed eighteen-year term Justice.

One option is the same as discussed earlier: the seat could remain vacant. But in this context, that could leave the Court with fewer than nine Justices, and possibly an even number of Justices, for an extended time—eight years, in the example above.

If the seat that becomes vacant is the next one the sitting President would be entitled to fill in any event during the four-year term, the President could be given the power to nominate the Justice to fill that seat. That Justice would then serve eighteen years plus the small amount of additional time involved; if a currently sitting Justice's term is scheduled to end in 2027, but ends in 2026, the new Justice would serve one year plus the new eighteen-year term. Given that a new Justice under this scenario would never serve more than twenty years, the normal presidential nomination and Senate confirmation process might be appropriate (that is, without a supermajority requirement).

If the President has not yet filled any of the two allocated seats, and the Justice who leaves is the one whose term would expire in year three of the administration, there are two options for addressing that scenario. In the first, the amendment would treat this situation as if the President is filling the first of two seats. The Justice who would otherwise be scheduled to retire first during that term would instead stay on until the term ends of the Justice scheduled to retire in year three—the Justice who has left prematurely. At that point, that Justice retires and the President fills the second seat. The second option is that the President appoints a Justice to fill out the remainder of the term for the Justice who left early plus eighteen years. When the term of the Justice scheduled to retire in year one of the administration ends, the President fills that term as well. The first option reduces possibilities of strategic retirements, but might be considered overly complex.

In any other context, the current President should at most have the authority to appoint a replacement only for the rest of the term that the departing Justice was scheduled to serve. Under the theory behind the term limits amendment, no President should get to make more than two 18-year appointments in any single Presidential term. With respect to the replacement Justice, moreover, the options discussed earlier might be appropriate. First, a supermajority vote requirement in the Senate might be appropriate. Second, if there are "senior" Supreme Court Justices, one could be designated to serve out the remainder of the scheduled term.

D. Constraints on Justices Who Have Fully Retired After Finishing Their Term of Service

Many countries that impose term limits or retirement ages on judges of their highest courts also impose constraints on the post-service activities of those judges. There are two main reasons for imposing such constraints. The most important is to avoid undermining the fact and appearance of judicial independence by eliminating the likelihood of Justices' altering their

behavior in their last years of a term on the Court to enhance certain post-term employment opportunities. In addition, certain post-term positions might be detrimental to the public's sense of the integrity and professionalism of the Court.

In order to address these concerns, the amendment could specify that at the end of their terms, Justices have the option of retaining the office of an Article III judge and remaining available to serve by designation on any of the lower federal courts; to serve by designation on the Supreme Court if a Justice in an eighteen-year seat vacates that seat prematurely; or to perform other federal judicial functions. The amendment could also specify that upon completion of their terms, Justices would continue to receive a pension for life commensurate with their salaries on the bench. But these two provisions would not solve the problem fully. With term limits, some Justices will complete service at younger ages than the current average age at which Justices leave the Court. Some will prefer to relinquish their Article III commission and work in other capacities.

Former Justices who have chosen to retire fully from the bench could be barred from certain kinds of employment. The prospect of high-level government employment is a particular concern, given the risk of public perceptions that a Justice will have ruled in certain ways late in their term to curry favor with the sitting government. Retired Justices could be prohibited from involvement in legal matters that had been the subject of proceedings before the Court and, perhaps, closely related matters.⁴³ Former Justices could also be barred from working on any matters before the Court. Service in roles such as mediator, arbitrator, or law school lecturer, on the other hand, are most compatible with the role of a retired Justice. While some of these concerns should be addressed in any constitutional amendment—such as whether term-limited Justices retain the option of remaining Article III judges—others might be appropriately handled through legislation.

V. Enacting Term Limits through Statute

Members of the Commission are divided about whether Congress has the power under the Constitution to create the equivalent of term limits by statute. Some believe that a statutory solution is within Congress's powers. Others believe that no statutory solution is constitutional, or that any statute would raise so many difficult constitutional problems that it would be unwise to proceed through statute.

In this section, we consider the primary statutory approach and two alternative approaches. In all three proposals, Presidents appoint new Justices in the first and third years of their terms in office. As noted in the introduction to this Chapter, we focus on these proposals to ground our analysis rather than to endorse these proposals over all others. In addition, because the Commissioners are divided as to whether it would be constitutional to implement term limits via statute, we offer what we take to be the best argument for each position but do not seek to resolve the matter. We also examine some of the prudential concerns arising from these proposals.

The main focus of our analysis is the so-called Junior/Senior Justice proposal. It creates the functional equivalent of term limits by providing that, after eighteen years of service, Justices become Senior Justices and stop participating in the ordinary work of the Court. This proposal features elements common to other proposals that scholars and advocates have offered,⁴⁴ and the constitutional issues we discuss here are also common to those proposals. The two alternative solutions—the Original/Appellate Jurisdiction proposal and the Designated Justices proposal—attempt to address potential constitutional problems with the Junior/Senior Justice proposal, but they raise their own sets of constitutional issues.

In all three proposals, Justices would spend an 18-year nonrenewable term participating in the ordinary work of the Supreme Court. After that period, they would perform a different or a subsidiary set of duties.

A. The Junior and Senior Justices Proposal

In the Junior/Senior Justice proposal, Congress passes a statute that provides that, after 18 years of service as a “Junior Justice” deciding cases, each Justice would assume senior status. Thereafter, these “Senior Justices” would no longer participate regularly in the ordinary work of the Court. But they would perform other duties, including sitting by designation in the lower federal courts and assisting the Chief Justice with administrative duties. Congress could specify these duties by statute, or it could leave it to the Justices themselves to decide on them through an internal rule.⁴⁵

If the duties of Senior Justices were not sufficiently germane to the office of a Supreme Court Justice, the change in duties might amount to appointment to a new office. This would require a new nomination by the President and confirmation by the Senate. However, it is not clear that the germaneness requirement applies to the prospective redefinition of an office. In any case, the Supreme Court’s understanding of germaneness appears to be very broad. In *Weiss v. United States*, 510 U.S. 163 (1994), for example, the Court held that the duties of a military judge were sufficiently germane to the duties of a commissioned officer that the officer could be designated to serve as a judge without going through the appointments process.

The Justices already perform the duties listed above and that would pertain to Senior Justices under the proposal. Current federal law authorizes Justices to sit on circuit courts.⁴⁶ And as a historical matter, federal law long *required* the Justices to sit on other federal courts in addition to hearing cases on the Supreme Court. For almost all of the first hundred years of the Republic, Supreme Court Justices “rode circuit”: they heard and decided cases in the lower federal courts. With the Judiciary Act of 1801, Congress abolished circuit riding, only to reinstate it in the Repeal Act of 1802 after control of Congress changed hands. The Supreme Court rejected a constitutional challenge to the 1802 Act in *Stuart v. Laird*,⁴⁷ in which the challenger sought to reverse a circuit court’s judgment partly on the ground that “the judges of the supreme court have no right to sit as circuit judges, not being appointed as such.”⁴⁸ The Supreme Court responded that circuit riding was so well established that its validity was no longer open to question: “practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”⁴⁹ Justices continued to have circuit-riding duties until the late nineteenth century.⁵⁰

Existing practice and precedent offer a model for the types of duties Senior Justices might perform. 28 U.S.C. § 371 provides two options for federal judges, including Supreme Court Justices, who meet certain service and age requirements. They may “retire from the office” under § 371(a), at which point they no longer hold the office of federal judge or Justice but continue to receive an annuity equivalent to their salary at the time of retirement. Or they may “retain the office but retire from regular active service” under § 371(b) and “continue to receive the salary of the office” if they perform a different set of duties, which they may select from a list set out in later sections. Listed duties include “a caseload involving courtroom participation,” “substantial judicial duties not involving courtroom participation,” “substantial administrative duties directly related to the operation of the courts,” or “substantial duties for a Federal or State governmental entity.” For lower court judges, the status created in § 371(b) is usually called senior status.

Under the current rules, judges who take senior status need not sit on any cases at all. They may, however, sit by designation within their own circuit at the discretion of the chief judge or judicial council of their circuit. They may also sit by designation in other circuits at the discretion of the Chief Justice upon presentation of a certificate of necessity by the chief judge or circuit justice of the other circuit. Supreme Court Justices who retire from regular active service (and take the analogue of senior status for lower court judges) are not allowed to participate in any decisions or actions of the Court, but they may sit by designation in the lower federal courts.⁵¹

As with a constitutional amendment, drafters of a Junior/Senior Justice statute would have to make decisions about whether it would apply to sitting Justices, when the appointments of term-limited Justices would begin, how to handle vacancies that arose outside of the scheduled process, and whether there should be restrictions on the future employment of former Justices. The discussion of these issues in the constitutional amendment section applies equally to such a statute, with the caveat that applying the statute to sitting Justices might raise additional constitutional questions, as noted below.

1. *Constitutional issues raised by the Junior/Senior Justice proposal: The Good Behavior and Appointments Clauses*

Article III, Section 1 provides that: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”⁵² The Appointments Clause of Article II, Section 2 provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law”⁵³ The issues raised under these constitutional provisions by any term limits statute are complex, and what follows is a brief review of the relevant considerations. Commissioners disagree about the proper resolution of the questions raised.

Those who believe that the Junior/Senior Justice proposal is unconstitutional start with the Good Behavior Clause, which is conventionally interpreted to give federal judges “life tenure”: Federal judges hold their offices for an indefinite period that ends only when they die,

voluntarily resign, or are involuntarily removed through the process of impeachment and conviction. Although the Good Behavior Clause does not specify the details of the “offices” that federal judges hold, the Appointments Clause arguably recognizes a separate office of “Judge[] of the supreme Court” that is different from other federal judicial offices. If so, people who have been appointed to the Supreme Court must remain “Judges of the supreme Court.” People who believe that the Junior/Senior Justice proposal is unconstitutional argue that Senior Justices (who would be barred from participating in the ordinary work of the Court after eighteen years) do not remain “Judges of the supreme Court” in the sense that the Constitution requires.

Proponents of the Junior/Senior Justice proposal believe that Congress may redefine the office prospectively. Thus, for all new appointments made after the statute takes effect, the office of Justice of the Supreme Court would mean serving as a Junior Justice for the first eighteen years and serving as a Senior Justice thereafter. All Justices would have the same duties and powers, but the nature of these duties would change over time. Under this approach, every Justice, unless they retire, would eventually become a Senior Justice if they stay on the Court after eighteen years. Note that under the terms of this argument, the statutory changes would not apply to sitting Justices.

The debate hinges on the nature of the “office” of Justice of the Supreme Court that the Constitution creates and whether a statute that contemplates that the Justices’ duties will change after eighteen years removes them from that office in violation of the Good Behavior Clause. Proponents, relying on the senior status statute, 28 U.S.C. § 371(b) and (e), conclude that a change in duties does not necessarily involve a change in office because senior status judges still hold their office. For the same reason, they believe that deciding cases is not essential to continuing to hold office as a federal judge, and that deciding Supreme Court cases is not essential to continuing to hold the office of a Supreme Court Justice.

In support of this conclusion, proponents argue that the Supreme Court approved this system for senior judges in *Booth v. United States*.⁵⁴ In *Booth*, a unanimous Supreme Court held that a lower court federal judge who retired under the predecessor of § 371(b) “remains in office” within the meaning of Article III, Section 1.⁵⁵ The Court pointed out that senior judges exercise the judicial power of the United States in deciding cases when designated to do so. “It is scarcely necessary to say that a retired judge’s judicial acts would be illegal unless he who performed them held the office of judge. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as a federal judge and yet not hold the office of a judge.”⁵⁶ On one reading of *Booth*, a statutory change of duties does not remove a judge from office as long as “[t]he purpose is . . . that he shall continue . . . to perform judicial service.”⁵⁷ The Supreme Court reaffirmed this reasoning in 2003 in *Nguyen v. United States*.⁵⁸

Booth thus distinguishes between a *change in duties*, which is within the power of Congress, and *removal from office* or *reduction in compensation*, which are not: “Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it.”⁵⁹ Moreover, those who believe statutory term limits are constitutional argue that the reasoning of *Booth* and *Nguyen* also extends to retired Justices. Retired Justices such as David Souter and Sandra Day O’Connor have often participated in Courts of Appeals decisions pursuant to 28 U.S.C. § 294. When they do, proponents of the

Junior/Senior Justice proposal believe they are best understood as having retained their office as Supreme Court Justices because they are exercising federal power and they have not been appointed to any new office. Hence, proponents conclude, Senior Justices retain the office of Justice of the Supreme Court even if their duties have changed and no longer include participation in the ordinary work of the Court. Others believe retired Justices still hold federal judicial office, which is required under *Booth* if they are to exercise federal judicial power, but that they do not necessarily continue to occupy the constitutional office of Supreme Court Justice.⁶⁰

Setting *Booth* aside, critics believe that the best understanding of the Constitution forbids the change in duties that the Junior/Senior Justice proposal entails. One constitutional scholar puts the argument this way: “To say there is a particular office of Supreme Court Justice, as opposed to federal judge in general, is to say that the Constitution contemplates some connection between the justices and the work of the Court.”⁶¹ On one view, because the Court is a decisionmaking body in which members participate and deliberate together, the ability to “participat[e] in substantially all the body’s final decisions” is a necessary constitutional feature of holding the office of “Judge[] of the supreme Court.”⁶² Because the Junior/Senior Justice proposal eliminates the right to participate in the Court’s decisions after eighteen years, some think it marks a change in office that violates the Good Behavior Clause.

Critics have also discussed an alternative understanding of what it means to be a “Judge[] of the supreme Court”: Instead of participating in substantially all of the Court’s final decisions, perhaps each Justice must be able to participate in *an equal share* of the Court’s work. There is a sense in which the Junior/Senior Justice proposal establishes equality among the Justices, because each Justice has the same powers for the same period of time. But even so, critics argue that “the proposal is not consistent with the Constitution’s idea of a term” (and with the prevailing view that the Good Behaviour Clause prevents Congress from imposing straightforward term limits).⁶³ In the critics’ view, Congress cannot establish a time limit after which Justices lose the ability to participate equally in the Court’s decisions, even if all Justices are subject to the same time limit.

To the extent that the proponents’ argument rests on the precedential authority of *Booth*, critics believe that the precedent is limited. *Booth* involved the Compensation Clause of Article III and the issue was whether Congress could cut the pay of lower federal court judges who had *voluntarily* taken what we now call senior status. As permitted by a 1919 amendment to the Judicial Code, they had chosen to “retire . . . from regular active service on the bench” but had not “resign[ed] [their] office,”⁶⁴ and they continued to hear cases or perform other judicial duties. The Court held that Congress could not constitutionally reduce their compensation because they still remained in office and exercised federal judicial power. Thus, critics of statutory term limits argue, *Booth* only holds that when judges *voluntarily* take senior status, but continue to hear cases, Congress may not reduce their compensation under the Compensation Clause. According to critics, it does not follow that Congress can *require* life-tenured Supreme Court Justices to stop participating in the Supreme Court’s exercises of judicial power after eighteen years.⁶⁵

Proponents argue that if judges who have elected senior status “[c]ontinu[e] in Office” within the meaning of the Compensation Clause, then a statute requiring judges to take senior

status after eighteen years would not deprive them of their “Offices” within the meaning of the Good Behaviour Clause. In the proponents’ view, moreover, *Booth* and subsequent established practice with respect to retired Justices foreclose the critics’ arguments about the essential nature of the offices of “Judges of the supreme Court.” According to proponents, there is no meaningful legal distinction between Supreme Court Justices and other federal judges as to whether they retain their judicial office after Senior status, and whether or not that status is voluntarily chosen or imposed by statute. On this view, substantial participation or equal participation in all merits decisions is therefore not “inherent” in the nature of the office of Supreme Court Justice. The critics’ assertion to the contrary, proponents argue, is belied by practice.

Critics respond that practice does not support allowing Congress to *mandate* a reduction in duties after a certain number of years. And the fact that our current practices make a reasonable accommodation for voluntary decisions does not mean that those practices establish a general principle that extends to a new set of arrangements in which Justices have no say in the matter.

Indeed, critics believe that the argument from history favors their position. Throughout most of American history, members of Congress have assumed that the only constitutional way to achieve term limits for Supreme Court Justices is through constitutional amendment. Starting as early as 1807,⁶⁶ and continuing to the present, more than two hundred proposals have been introduced in Congress to amend the Constitution to establish term limits for Supreme Court Justices or for federal judges more generally—sometimes in conjunction with other changes, sometimes as a stand-alone measure. But the first bill to establish the functional equivalent of term limits by statute was not introduced until 2020.⁶⁷ The very idea of mandating term limits by statute is a recent innovation.

B. An Alternative Proposal: Original/Appellate Jurisdiction

An alternative to the Junior/Senior Justice proposal is the Original/Appellate Jurisdiction proposal, under which all Justices continue to hear original jurisdiction cases throughout their tenure in office, but only the nine most Junior Justices in service hear cases brought to the Court under its appellate jurisdiction.⁶⁸ The Court hears only a small number of cases through original jurisdiction every year. Most cases, and almost all of the controversial cases, come before the Court through its discretionary appellate jurisdiction. In addition to participating in cases involving original jurisdiction, Senior Justices may also perform other duties, as in the Junior/Senior Justice proposal above or under the current retirement statute. This proposal does not separate appellate jurisdiction cases for reasons of efficiency. Rather, the proposal offers another way of creating the effective equivalent of term limits that might avoid some of the constitutional problems of the main proposal.

The central argument for the Original/Appellate proposal is that it can be linked to a specific textual provision in the Constitution. Article III, Section 2 of the Constitution gives Congress the power to regulate the Court’s appellate jurisdiction: “[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”⁶⁹ In *Marbury v. Madison*,⁷⁰ the Court held that the Exceptions and Regulations Clause applied only to the Court’s appellate jurisdiction and that Congress could not alter the Court’s original jurisdiction.⁷¹ The proposal argues, accordingly,

that although Congress must allow all Justices to hear all cases arising out of original jurisdiction, it may provide, as a regulation of appellate jurisdiction, that only Junior Justices hear appeals.

Although this proposal invokes a different congressional power, it raises some of the same constitutional issues discussed above. No matter which enumerated power Congress is exercising, Congress's statutes must comport with the Good Behaviour Clause and the Appointments Clause. If critics are correct that everyone who holds the office of "Judge[] of the supreme Court" must be able to participate in substantially all of the Court's final decisions, or must remain eligible to participate in an equal share of the Court's work, then the Original/Appellate proposal would be vulnerable to the same objections as the Junior/Senior Justice proposal.

Critics may raise several additional objections. First, critics will argue that the Exceptions and Regulations Clause gives Congress the power to change the *scope* of the Supreme Court's appellate jurisdiction, but not the *personnel* who decide appeals. Put another way, the Clause allows Congress to decide *what* appeals the Court can hear, but not *who* hears the appeal.

Proponents, in turn, will argue this does not attend to the distinction between "exceptions" to and "regulations" of appellate jurisdiction that appears in the text of Article III. "Exceptions" to appellate jurisdiction involve limiting *what* cases the Court may hear. But "regulations" of appellate jurisdiction may also include deciding *how* the Court hears appeals and *who* hears them. The Supreme Court has never addressed this precise issue.

A second objection is that the Original/Appellate proposal creates two panels. One panel, consisting of all of the Justices, hears original jurisdiction cases. The other, consisting only of the nine Justices most junior in service, hears appellate cases. As we discuss in Chapter 2 at greater length, there is an argument that this aspect of the proposal would violate the provision in Article III, Section 1 that "[t]he judicial Power of the United States, shall be vested in one supreme Court."⁷² From a textual point of view, if there is "one" Supreme Court, then perhaps the Justices must participate together in deciding merits cases and may not decide cases in separate panels.

A third objection to the Original/Appellate proposal is that, like all other proposals for Supreme Court panels, it gives Congress too much power to gerrymander the Justices by subject matter to attempt to manipulate the outcome of particular cases. If Congress may divide cases in this way, why not in other ways that would undermine the Court's integrity and independence? For example, Congress might create a special panel that heard only cases involving abortion or the environment.

Proponents might respond that whether a general power to divide the Court into panels poses dangers, the Constitution itself creates a distinction between the Supreme Court's original and appellate jurisdiction. This provision offers a bright-line rule, which, according to *Marbury v. Madison*, Congress may not vary. When Congress follows this bright-line rule, there is no danger to judicial independence. Congress cannot expand or contract the Court's original jurisdiction. Therefore, the proposal does not assume that Congress has a general power to create

panels of the Court. It simply argues that this one, which matches distinctions already present in the text of Article III, is constitutionally valid.

C. An Alternate Proposal: Designated Supreme Court Justices

The third proposal attempts to respond to the concern that the Junior/Senior Justice proposal effectively removes Justices from their offices. Instead, it proposes that Presidents henceforth only appoint judges from the lower federal courts to sit by designation on the Supreme Court for a non-renewable term of eighteen years. The relevant statute will specify that one of the duties of lower federal court judges (or some statutorily demarcated subset of these judges) is that they may be called upon to serve by designation on the Supreme Court for eighteen years, after which point they would return to their original court.⁷³

Under this proposal, Presidents would no longer appoint anyone to the office of “Judge[] of the supreme Court.” Instead, Presidents would simply designate lower court judges to serve on the Court temporarily. The statute could provide that the designation is subject to the ordinary advice and consent process. If the designation does not amount to appointment to a different office (see the discussion below), advice and consent would not be required by the Constitution, but Congress might nevertheless provide for it.

One main objection to the Designated Justices proposal is a textual argument. As noted previously, the Appointments Clause of Article II contemplates a separate office of “Judge[] of the supreme Court.” Therefore, critics will assert that the judges who sit and decide cases on the Supreme Court must hold the office of “Judges of the supreme Court.”

Proponents will respond that the existence of a separate office of “Judge of the Supreme Court” does not mean that someone not appointed to that office is forbidden to serve on the Supreme Court by designation. Federal judges often serve on different courts by designation without receiving new commissions. Retired Supreme Court Justices serve on appellate and district courts; appellate judges serve as district judges, and district judges serve as appellate judges by designation. In addition, Supreme Court seats have been filled on a temporary basis through recess appointments without a lifetime appointment, and even without Senate confirmation. The Vacancies Clause of Article II, Section 2, Clause 3, which applies to federal offices generally, provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”⁷⁴ Over three hundred federal judges, including fifteen Supreme Court Justices, have been appointed through this process.⁷⁵ Lower federal courts have approved of its constitutionality.⁷⁶ If Presidents may temporarily fill Supreme Court vacancies without the Senate’s advice and consent, the argument goes, a fortiori they should be permitted to do so with the Senate’s advice and consent.⁷⁷

Critics will say that the Constitution distinguishes the Supreme Court from other federal courts and that everyone who sits on the Supreme Court must hold the office of “Judge[] of the supreme Court” (whether pursuant to a regular appointment under the Appointments Clause, which lasts during good behavior, or a recess appointment under the Vacancies Clause, which lasts for at most two years). Critics may also note that in the vast majority of cases, when a

President has made recess appointments to either the lower courts or the Supreme Court, Congress has subsequently confirmed these judges and Justices to lifetime appointments.⁷⁸ And when judges sit by designation on other courts, they usually remain only for a short time, and sometimes only for a single case. This practice, critics of this proposal will argue, is very different than a statutory designation lasting eighteen years, which would cover a sizeable proportion—and often a majority—of any federal judge’s career. There is nothing temporary about such appointments, and hence they cannot be justified by existing practice.

A second main objection to the designated Justices proposal is rooted in past practice: No person who does not hold the office of Justice of the Supreme Court has ever sat on or decided a case before the Supreme Court.⁷⁹ Justices have indeed sat on lower federal courts from the beginning of the Republic, and Justices who take senior status sit by designation today. Nevertheless, the opposite has never occurred—lower federal court judges have never sat by designation on the Supreme Court. The novelty of the practice suggests that it is unconstitutional.

Proponents will respond that if Justices may “move down” and sit on lower courts by designation, there is no reason why lower court judges may not “move up” by designation. In fact, district court judges often sit by designation on circuit courts of appeals. Proponents would assert, therefore, that district and circuit court judges should also be able to sit by designation on the Supreme Court. The novelty of a practice does not by itself prove that it is unconstitutional; otherwise, a host of federal laws that exercised constitutional powers in new ways would be unconstitutional.⁸⁰

VI. Addressing the Risk of Repeated Confirmation Impasse

Reform of the general structure of Presidential nomination and Senate confirmation is not squarely within the Commission’s remit. Nonetheless, as noted in the introduction to this Chapter, it is essential that any term limits proposal provide an acceptable mechanism for resolving the problem of repeated confirmation impasses. Absent such a mechanism, the repeated failure of the Senate to confirm a nominee would undermine a major justification for staggered term limits: that each President be entitled to the same number of regular appointments. Designing a structure to address the risk of impasse, however, is not an easy matter.

A. Term Limits by Constitutional Amendment and the Confirmation Process

The options for designing a mechanism to avoid a confirmation impasse are different and broader in the context of designing an amendment as opposed to a statute. Some have suggested that a constitutional amendment should provide that a nominee will be deemed confirmed if the Senate does not vote to disapprove within a specified time (four months after nomination might be the appropriate deadline).⁸¹ This might be a good idea as a starting point, but more is required to address the risk of the Senate repeatedly voting down successive nominees for a particular eighteen-year seat.

To begin to address this potential concern, the amendment would first have to define the circumstances that trigger any fallback mechanism. For instance, the trigger might be the Senate voting down two consecutive nominees. This trigger may be particularly apt if the amendment also adopts the provision deeming a nominee automatically confirmed if the Senate fails to vote at all after a set time. If that time is set at four months, then this fallback mechanism would come into play after roughly eight months of a confirmation impasse. Another option would be to trigger the fallback mechanism at a set amount of time after the date the President nominates a person for the particular eighteen-year position.

The Commission is not aware of any scholarship that explores in-depth the issue of an appropriate design for a fallback mechanism. Witnesses offered a few brief suggestions. One is that the President present three nominees to the Senate; if the Senate rejects all three, the President is then empowered to choose one of those to sit on the Court.⁸² But Presidents could easily game this system, choosing two figures the Senate would never approve and thereby effectively gaining unilateral power to fill the seat. Another possibility would be for the amendment to specify that the Senate cannot conduct other business while a nomination is pending.⁸³ But this approach would preclude the Senate from acting on any number of urgent issues that might arise, including those involving our national security.

From an institutional-design perspective, the challenge is that any backup mechanism that stays within the traditional President-Senate framework risks giving either too much unilateral power to the President or too much blocking power to the Senate. The solution might need to rest with an institution that sits outside this framework. One possibility is that, in case of a prolonged impasse, the chief judges of the twelve non-specialized federal courts of appeals (or a subset of them) could be assigned one of two roles.⁸⁴ On one approach, once this fallback mechanism is triggered, this body of chief judges would become the confirmation body for the President's choice. Two institutions of the government would thus still be required to confirm a Justice. A subsidiary issue to consider is whether the President should be precluded from nominating any individual whose appointment to the Court the Senate has affirmatively rejected.

A second option would be to give the chief judges (or a subset of them) the power to directly designate a Justice after a prolonged impasse. The amendment could also limit the chief judges to selecting a sitting federal court of appeals judge. These are the individuals with appropriate experience whose fitness for the Court the chief judges would be in the best position to evaluate. Good reasons might exist to appoint to the Court persons other than federal court of appeals judges. But empowering the chief judges to directly appoint anyone in the country to the Court would put enormous discretion in the hands of this body. Limiting the set of potential appointees to existing court of appeals judges would substantially constrain this power. Because this fallback mechanism would come into play only when the Senate repeatedly rejects a President's nominees, it is not likely to affect the majority of seats on the Court.

If one worries that the knowledge of the sitting chief judges' identities would shape the actions of the President or the Senate, this power could be given to a random selection of seven or five of the chief judges. An advantage of using the chief judges (or a subset of them) is that the amendment would not have to design from scratch a new, independent institution to serve as the fallback mechanism. Given the complexities of designing such a new institution, as well as

questions about how well the public would accept that institution, the easier course may be to use a set of actors who have been Senate confirmed already and for whom a selection mechanism also already exists.⁸⁵

An amendment could instead provide that, if the Senate rejected one nominee, the threshold for confirmation of the next nominee for that seat would decrease. Alternatively, the amendment could provide that if the Senate fails to confirm a nominee by a certain point, the President would have the power to designate any sitting federal judge (or any circuit judge) to fill that eighteen-year seat. But both of these options might be thought to give too much power to the President.

B. Term Limits by Statute and the Confirmation Process

If term limits are implemented by a statute rather than a constitutional amendment, modifications to the confirmation process must be consistent with the current constitutional framework, which gives the President the power to select a nominee and the Senate the power to approve or disapprove. It might still be possible to create a backup mechanism of the sort discussed above, but such a mechanism would have to be understood as a delegation of authority by the Senate and/or the President. The constitutionality of such a delegation is not clear, and the relevant actor might also be able to revoke it unilaterally, undoing most of its benefits.

It might also be possible to deal with the possibility of a prolonged impasse within the existing framework. For instance, a statute might prescribe that the threshold for confirmation decreases each time the Senate refuses to confirm a nominee. The constitutionality of such a statute is unclear, however, given that the Constitution gives each chamber the power over its own rules and procedures.⁸⁶ The Senate could instead incorporate such a policy into its own Senate rules; a later Senate, however, could change that rule. Alternatively, consistent with the Designated Justices proposal set out above, a statute might provide that in the event of an impasse, the President could designate a lower court judge to fill the Supreme Court vacancy for an eighteen-year term without Senate confirmation. This statute would be subject to many of the same constitutional concerns as the Designated Justices proposal, although it would operate with respect to only some seats rather than all of them.

Last, a statute might provide that if the Senate fails to confirm one or both of a President's scheduled appointments, the next President of a different party would lose a corresponding number of appointments. While making party affiliation relevant to the operation of the statute is problematic, this proposal does seem constitutional and reasonably effective, but it poses the danger that an extended impasse would shrink the Court. Moreover, what is effected by statute can also be undone by statute. This alternative thus could become another front in the polarized and destabilizing partisan contestation of the times.

VII. Prudential and Concluding Considerations

A final set of concerns about enacting term limits via statute rather than a constitutional amendment are prudential. If Congress has the power to change the composition of the Court by statute, it could mean that Congress has considerable flexibility in altering the duties of the

Justices. Once Congress has exercised the power to change the Court's composition by statute in order to regularize appointments, Congress might seek to do so for other purposes. If federal statutes can validly restrict members of the Supreme Court to a very limited set of duties after a certain number of years, Congress might try to establish other criteria for imposing similar limits on a subset of Justices. Even if one focuses entirely on term limits, moreover, the group of Supreme Court practitioners cited in the introduction to this Chapter warns that "a statutory solution would be inherently unstable"; over the years, Congress might amend the system depending on whether Congress and the White House are in the same hands at the moment.⁸⁷ Critics argue that it is precisely to avoid such risks that the Constitution does not permit Congress to impose term limits by statute. On this view, the degree of consensus required for a constitutional amendment provides important security against the composition of the Court being manipulated for partisan or ideological reasons.

Given Congress's other powers, proponents believe that recognizing the power of Congress to regularize appointments would not add more risk than it is worth—and as a practical matter, if the reform were adopted with strong bipartisan support, the precedent established by the statute might not carry over to other situations. In any event, if a future Congress sought to enact laws governing the Court in ways that threatened judicial independence, the Court might strike them down as violations of the structural separation of powers principle. Or it might decide that they were not "proper" within the meaning of the constitutional provision authorizing Congress to enact such laws as are "necessary and proper" to carry into execution the judicial power. Proponents believe that the Court can defend itself against such measures far more easily than it can defend against court-packing.

For some members of the Commission, the existence of constitutional doubt is in itself a reason to employ a constitutional amendment. They worry that a statute altering the Court's composition will generate greater uncertainty and mistrust than other constitutional questions. When litigants eventually challenge a term limits statute, there may be strong disagreements about even which Justices should participate in the decision. No matter which way the Court comes out on the question, these Commissioners worry that the Court's legitimacy, or perceptions of its legitimacy, will be undermined.

Members of the Commission who support a statutory solution believe these concerns are overblown. They do not believe that a term limits statute would be any more destabilizing than a host of other issues that the Court has confronted over the years. They also think that inaction carries its own risks, and that the appointments process now displays a degree of dysfunction that makes remedial action urgent.

At a minimum, the contestability of statutory approaches counsels in favor of serious deliberation by Congress if it chooses to consider this route. In these deliberations, we hope that Congress would keep in mind the central structural values of our Constitution, particularly the principle of judicial independence, and consider what future Congresses, armed with the same constitutional powers, might someday attempt. Indeed, in recent years, we have seen democratic governments "regress" or "backslide" with respect to judicial independence. This has come about through electoral majorities using their power to restructure previously independent institutions, including courts, to favor the political agendas of those governments. Comparative

political scientists have concluded that the democratic systems most resistant to this prospect are those in which an electoral majority is not sufficient to change the fundamental structure of institutions such as the courts. For some Commission members, this is a significant reason as a policy matter that Congress should not open the door to changing the composition of the Court by statute, even if it has the constitutional power to do so.

Others believe that the democratic regress we should be concerned about consists more in the ability of an electoral *minority*—a party that wins a minority of presidential elections—to take control of the Court and retain it through strategic retirements and confirmation hardball. These Commissioners worry that, without adequate resistance from the Court, such a party could further distort the democratic process through various devices at both the state and federal level.⁸⁸ Some Commissioners believe that term limits represent an appropriately calibrated solution to that problem and will help the Court defend our democracy against actual or potential regress.

¹ See, e.g., *Presidential Commission on the Supreme Court of the United States 2* (July 20, 2021) (written testimony of Akhil Amar, Yale Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf>; *Presidential Commission on the Supreme Court of the United States 6* (June 30, 2021) (written testimony of Michael W. McConnell, Stanford Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/06/McConnell-SCOTUS-Commission-Testimony.pdf>.

² *Presidential Commission on the Supreme Court of the United States 5* (July 16, 2021) (written testimony of the Supreme Court Practitioners' Committee), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf>.

³ *Term Limits: The Justices' Own Answer to the Broken SCOTUS Confirmation Process*, FIX THE CT. (July 7, 2019), <https://fixthecourt.com/2019/07/termlimits>.

⁴ See, e.g., Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits>; Lee Drutman, *It's Time for Term Limits for Supreme Court Justices*, VOX (June 27, 2018), <https://www.vox.com/platform/amp/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement>.

⁵ Compare Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, NAT'L CONST. CTR., https://constitutioncenter.org/media/files/The_Conservative_Constitution.pdf, with Caroline Fredrickson, Jamal Greene & Melissa Murray, *The Progressive Constitution*, NAT'L CONST. CTR., https://constitutioncenter.org/media/files/The_Progressive_Constitution.pdf.

⁶ See Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511 (2006); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 408; William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063 (1990); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1397 (2005). One scholar who testified to the commission, and had also been against term limits for the Court in the mid-2000s, now favored term limits

and explained why her view had changed since then. See *Presidential Commission on the Supreme Court of the United States* 1-2 (July 20, 2021) (written testimony of Vicki C. Jackson, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf> (citing Vicki C. Jackson, *Packages of Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 1007-08 (2007)).

⁷ See *State Supreme Courts*, BALLOTPEDIA.ORG, https://ballotpedia.org/State_supreme_courts; D.C. CODE § 11-1502 (2021).

⁸ See *State Supreme Courts*, *supra* note 7; D.C. CODE § 11-1502 (2021).

⁹ See *State Supreme Courts*, *supra* note 7.

¹⁰ See Jackson Testimony, *supra* note 6, at 1; *Presidential Commission on the Supreme Court of the United States* 3 (June 25, 2021) (written testimony of Rosalind Dixon, University of New South Wales), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf> (“[T]he Justices continue to enjoy lifetime appointment, without being subject to any form of term limit or mandatory retirement age, in ways that are increasingly unusual in global terms.”).

¹¹ *Presidential Commission on the Supreme Court of the United States* 3 (July 20, 2021) (written testimony of Tom Ginsburg, University of Chicago Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf>.

¹² *Id.* at 2.

¹³ See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. POL’Y 769, 778-79 (2006). Nevertheless, Supreme Court vacancies have always occurred irregularly. See Allison Rabkin Golden, David Herman, Alexander Nocks, Ayoub Ouederni & Kaveri Sharma, *Vacancies and Tenures on the Supreme Court: A Response to Calabresi and Lindgren* (2021) (on file with the Presidential Commission on the Supreme Court of the United States).

¹⁴ Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1316-20 (2007).

¹⁵ Supreme Court Practitioners’ Committee Testimony, *supra* note 2, at 78-82; *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx.

¹⁶ David Ingold, *Eighty Is the New 70 as Supreme Court Justices Serve Longer and Longer*, BLOOMBERG (Apr. 7, 2017), <https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure> (“In 1900, justices tended to be in their late 50s when they joined the court. Today, the average age is about five years younger, and President Donald Trump’s nomination of Gorsuch, currently 49 years old, only furthers that trend.”); see also *Presidential Commission on the Supreme Court of the United States* 5 (June 30, 2021) (written testimony of Maya Sen, John F. Kennedy School of Government, Harvard University), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Sen-Written-Testimony.pdf>.

¹⁷ Both the median and modal number of appointments are 2, and the mean is 1.83. See *Justices 1789 to Present*, *supra* note 15.

¹⁸ There have been only six if we include the Reconstruction period, in which Republicans, following Abraham Lincoln’s assassination, refused to allow any appointments by his successor, Andrew Johnson.

¹⁹ See generally Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435 (Roger C. Cramton & Paul D. Carrington eds., 2006).

²⁰ See *Presidential Commission on the Supreme Court of the United States* (July 16, 2021) (written testimony of Margaret H. Marshall, Choate Hall & Stewart LLP), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Marshall-Testimony.pdf>.

²¹ Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 160 (2019); cf. Stefanie A. Lindquist, *Judicial Activism in State Supreme Courts: Institutional Design and Judicial Behavior*, 28 STAN. L. & POL’Y REV. 61, 102 fig. 6 (2017) (indicating that the state supreme courts with either life tenure or tenure until age 70 overrule fewer precedents than state supreme courts with most other judicial retention methods).

²² See Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. (forthcoming 2021) (manuscript at 40-42).

²³ See *Presidential Commission on the Supreme Court of the United States* 12 (Oct., 2021) (written testimony of Philip Bobbitt, Columbia Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Professor-Philip-Bobbitt.pdf>; *Presidential Commission on the Supreme Court of the United States* 5 (Aug. 2, 2021) (written testimony of Michael Stokes Paulsen, University of St. Thomas School of Law),

<https://www.regulations.gov/comment/PCSCOTUS-2021-0001-2159>; *Presidential Commission on the Supreme Court of the United States* 18 (July 20, 2021) (written testimony of Randy E. Barnett, Georgetown University Law Center), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Barnett-Testimony.pdf>.

²⁴ Lee Epstein, Jack C. Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 36 (2001) (“Our analysis of non-renewable terms—an institution used quite frequently in the European context—suggests . . . it may be more effective [than life tenure] at encouraging sincere behavior on the part of justices.”). *But cf.* Burbank, *supra* note 6, at 1524 (cautioning that comparative data on this question “are potentially misleading”).

²⁵ Farnsworth, *supra* note 6, at 411.

²⁶ *Cf. id.* at 416 (“A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust.”).

²⁷ According to a committee of distinguished Supreme Court practitioners, however, “orchestrating timing within two-year windows would still often prove difficult,” and “[t]he fact that more Justices would have shorter track records” could also impede predictions. Supreme Court Practitioners’ Committee Testimony, *supra* note 2, at 86.

²⁸ See Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 291, 303–08 (Roger C. Cramton & Paul D. Carrington eds., 2006).

²⁹ Farnsworth, *supra* note 6, at 437–38.

³⁰ Burbank, *supra* note 6, at 1548; see also Hellman, *supra* note 28, at 298–303.

³¹ See Jackson Testimony, *supra* note 6, at 5; *State Supreme Courts*, *supra* note 7.

³² See Ginsburg Testimony, *supra* note 11, at 3; Zachary Elkins & Tom Ginsburg, *Characteristics of National Constitutions, Version 3.0*, COMPARATIVE CONSTITUTIONS PROJECT (May 20, 2021), <https://comparativeconstitutionsproject.org/download-data/#>.

³³ Jackson Testimony, *supra* note 6, at 5.

³⁴ See *Justices 1789 to Present*, *supra* note 15.

³⁵ McConnell Testimony, *supra* note 1, at 7.

³⁶ Chilton, Epps, Rozema & Sen, *supra* note 22, manuscript at 57.

³⁷ Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1461 (2009).

³⁸ McConnell Testimony, *supra* note 1, at 5.

³⁹ *Id.*

⁴⁰ See Chapter 2, at 25; Segall, *supra* note X, at 656; Grove, *supra* note X.

⁴¹ Calabresi & Lindgren, *supra* note 13, at 826-31.

⁴² Chilton, Epps, Rozema & Sen, *supra* note 22, manuscript at 3.

⁴³ See Jackson Testimony, *supra* note 6, at 18.

⁴⁴ See, e.g., Amar Testimony, *supra* note 1, at 3-4; Cramton, *supra* note 14, at 1323-25; H.R. 8424, 116th Cong. (2020); H.R. 5140, 117th Cong. (2021); *Term Limits, FIX THE CT.* (Sep. 29, 2020), <https://fixthecourt.com/fix/term-limits>.

⁴⁵ Amar Testimony, *supra* note 1.

⁴⁶ 28 U.S.C. § 43(b).

⁴⁷ 5 U.S. (1 Cranch) 299 (1803).

⁴⁸ *Id.* at 309.

⁴⁹ *Id.*

⁵⁰ See generally Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003).

⁵¹ See 28 U.S.C. § 294.

⁵² U.S. CONST. art. III, § 1.

⁵³ U.S. CONST. art. II, § 2.

⁵⁴ 291 U.S. 339 (1934).

⁵⁵ *Id.* at 351.

⁵⁶ *Id.* at 350.

⁵⁷ *Id.*

⁵⁸ *Nguyen v. United States*, 539 U.S. 69, 72 (2003) (noting that while judges of the District Court for the Northern Mariana Islands cannot be designated to sit on a federal court of appeals because they are not Article III judges,

senior circuit judges “are, of course, life-tenured Article III judges who serve during ‘good Behaviour’ for compensation that may not be diminished while in office”).

⁵⁹ *Booth*, 291 U.S. at 351.

⁶⁰ In the alternative, one might argue that they retain judicial office, but not office as Supreme Court Justices, or that they hold multiple judicial offices, and give up one when they take senior status. See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 475–78 (2007) (suggesting that both *Booth* and 28 U.S.C. § 371 could be read to mean that senior status judges retain judicial office without still holding the same offices that they served in before they retired); cf. William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327, 338–42 (2019) (focusing specifically on the retirement of Supreme Court Justices, and discussing the possibilities that they retain their old office, that they move into a new office, or that they started off with two offices and surrender one upon retirement). But see the discussion *infra*.

⁶¹ John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 361, 366 (Roger C. Cramton & Paul D. Carrington eds., 2006).

⁶² *Id.*

⁶³ *Id.* at 367; cf. Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 697 (1969) (“I am quite convinced that it would be unconstitutional for the Congress to attempt, by legislation, to establish a fixed term of office for judges of the federal constitutional courts.”).

⁶⁴ Act of Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157 (codified as amended at 28 U.S.C. § 375 (1934)).

⁶⁵ Because *Booth* involved the 1919 federal statute under which lower federal court judges had been deciding cases as senior judges, *Booth* also concluded that it was “too late to contend that services so performed were extra-legal and unconstitutional.” *Booth*, 291 U.S. at 351. It is unclear what weight that factor—or the practice of retired Justices sitting by designation on lower federal courts—would carry in a statute that imposes for the first time on Supreme Court Justices the new status of Senior Justices.

⁶⁶ See 17 ANNALS OF CONG. 22 (1807).

⁶⁷ See *First-Ever Measure to End Life Tenure on the Supreme Court Via Statute, Not Amendment, To Be Introduced*, FIX THE COURT (Sept. 29, 2020), <https://fixthecourt.com/2020/09/first-ever-measure-end-life-tenure-supreme-court-via-statute-not-amendment-introduced/> (referring to H.R. 8424, 116th Cong. (2020)).

⁶⁸ See Jack M. Balkin, *Don’t Pack the Court. Regularize Appointments.*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.

⁶⁹ U.S. CONST. art. III, § 2.

⁷⁰ 5 U.S. 137 (1803).

⁷¹ *Id.* at 175.

⁷² U.S. CONST. art. III, § 1.

⁷³ See Calabresi & Lindgren, *supra* note 13, at 855–58, 860 (2006) (considering the proposal but rejecting it because the work of a Supreme Court Justice is not germane to the duties of a lower court judge).

⁷⁴ U.S. CONST. art. II, § 2, cl. 3.

⁷⁵ Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointments of Article III Judges*, 97 U. VA. L. REV. 1665, 1670 (2011).

⁷⁶ See, e.g., *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (stating that “a recess appointment to the federal bench [] could exercise the judicial power of the United States”).

⁷⁷ Following President Eisenhower’s recess appointments of three Justices, the Senate passed a resolution discouraging the practice of Supreme Court recess appointments, but the primary concern there was that recess appointments bypass the advice and consent process, not that they are temporary.

⁷⁸ Motz, *supra* note 75, at 1670 (“By 2000, Presidents had made more than 300 recess appointments of Article III judges, and of those, only thirty-four had not been confirmed.”).

⁷⁹ Harrison, *supra* note 61, at 365.

⁸⁰ A final objection to the Designated Justices proposal is that it adds new duties to the office of lower federal court judge, perhaps raising the germaneness analysis set out in *Weiss v. United States*, 510 U.S. 163 (1994), discussed above. Calabresi & Lindgren, *supra* note 13, at 860 (2006) (raising this concern). This analysis might or might not apply to judges appointed after the proposal’s enactment—*Weiss* assumes without deciding that germaneness also governs the prospective addition of duties for unknown future officeholders.

⁸¹ McConnell Testimony, *supra* note 1, at 6.

⁸² Ginsburg Testimony, *supra* note 11, at 10.

⁸³ Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html> (arguing “the Senate [should] be forbidden from taking action whatsoever on any of its calendars” in the event of “[f]ailure to confirm a justice by July 1 of a president’s first or third year”).

⁸⁴ Jackson Testimony, *supra* note 6, at 11 n.30.

⁸⁵ The current federal statute that determines who serves as chief judge of a court of appeals, 28 U.S.C. § 45, is well-designed and has served the country well. To the extent there is any concern Congress might modify the statute for partisan reasons to game this fallback mechanism for Supreme Court appointments, the amendment could include the provisions of the current statute.

⁸⁶ U.S. CONST. art. I, § 5.

⁸⁷ Supreme Court Practitioners’ Testimony, *supra* note 2, at 82; *see also* Harrison, *supra* note 61, at 372 (providing examples of “gamesmanship” that could be attempted).

⁸⁸ *See generally* TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018).

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