

Separate Statement of Commissioner Adam White

December 15, 2021

The Supreme Court was established for an indispensable constitutional purpose: to decide cases under the rule of law. Any attempt to understand the Court must begin from that premise. And any attempt to reform the Court for other purposes would be recklessly shortsighted. The only reforms worthy of our Constitution, and worthy of two centuries' statesmen and citizens who sustained it, must answer a simple question: would the changes improve the Court's capacity to function as a *court*?

But the most prominent "reforms" described in the Commission's report, unfortunately, would serve much different purposes. So I write separately, to highlight some of their most dangerous aspects.

Court-Packing

Court-packing is anathema to constitutional government. While Congress is empowered by the Constitution to add seats to the Court, the history of Court expansion is one of admirable self-restraint by Congress. Over the nation's first century, Congress largely set the Court's size by reference to the judiciary's genuine needs, particularly in terms of the justices' old circuit-riding duties in a fast-growing continental republic. Since 1869, the Court's size has remained stable, and for one and a half centuries the nine-justice bench has proved conducive to the justices' work of deliberation, decision, and explanation.

To pack the Court would impair the Court, not improve it: destabilizing it, further politicizing it, and complicating its basic work of hearing and deciding cases under the rule of law. And one needs a willing suspension of disbelief not to see that Court-packing would inaugurate an era of re-packing, destroying the Court's function and character as a court of law.

Term Limits

Proposals for judicial term limits have some superficial appeal: given the much longer lifespans with which we are blessed, a justice appointed today with life tenure can serve on the Court much longer than early justices generally did. But upon closer inspection, judicial term limits are much more problematic—especially when they are intended to allocate appointments on the calendar of presidential terms.

By tying Supreme Court vacancies and appointments directly and exclusively to the outcomes of presidential elections, a term-limits framework would further corrode the appearance of judicial neutrality and independence, making the Court a spoil not just of politics, but of *presidential* politics exclusively.

And to reliably deliver Supreme Court appointments to the president, a term-limit framework would need a constitutional amendment preventing the Senate from disagreeing with a president's preferences (as the Commission's report describes candidly). In an era when Congress needs to be reinvigorated, advocates for judicial term limits would only further diminish it.

Reform, Restraint, and Self-Restraint

The Supreme Court was designed to exercise “neither force nor will, but merely judgment.” The Court's judgments necessarily entail some discretion, when laws are written without perfect clarity or foresight. But aspects of the Court's work now involves vaster discretion, and reforms limiting its discretion may help the Court to function better as a court of law.

First, the Court's power to select its own cases is almost entirely discretionary, which complicates and politicizes the Court's work. Legislation setting clearer standards for granting writs of certiorari, or mandating judicial review of more kinds of cases, could help to make the Court's caseload less a matter of judicial will and more a matter of judicial duty.

Second, the Supreme Court and lower courts' power to grant preliminary injunctive relief, often with nationwide effect, would benefit from legislation that more clearly defines and constrains this aspect of judicial power and discretion. This has become a major issue of constitutional adjudication and administration, needing Congress's attention.

But a third problem can be solved only by judges themselves. The Constitution's provision for judicial tenure makes judicial retirement largely a matter of judicial discretion. And judges increasingly time their retirements to maximize the chance of being replaced by a similarly minded appointee. The trend is understandable, but in an era when political parties have polarized on judicial method and principle, the trend also risks undermining the public's trust in judicial neutrality. Given the profound problems inherent in any system of judicial term limits, the burden falls on judges themselves to explain their retirement decisions, and to minimize the dangers of partisan alignment.

This, finally, points to a broader and more fundamental challenge. The most dangerous constitutional problems of our time reflect a lack of self-restraint—within our institutions, and toward them. Criticism of the Court is replete with loose talk of “legitimacy,” but judicial legitimacy is not simply a matter of the heckler's veto. It requires much of the justices, our elected leaders, and the American people ourselves. For all three, the most important reforms will be self-reforms, undertaken with a spirit of self-restraint.