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SHOULD U.S. SUPREME COURT JUSTICES BE TERM-LIMITED?: A Dialogue

[\(/legal-commentary/akhil-amar-and-vikram-amar-archive\)](/legal-commentary/akhil-amar-and-vikram-amar-archive) **By AKHIL REED AMAR AND VIKRAM DAVID AMAR** [\(/legal-commentary/akhil-amar-and-vikram-amar-archive\)](/legal-commentary/akhil-amar-and-vikram-amar-archive)
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Vikram David Amar: In our [column two weeks ago \(/legal-commentary/judicial-elections-and-the-first-amendment.html\)](/legal-commentary/judicial-elections-and-the-first-amendment.html), we analyzed a recent Supreme Court case, *Republican Party of Minnesota v. White* (<https://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=01-521>), involving state judicial elections. That same day I noticed that you and Steve Calabresi published an op-ed in the *Washington Post* (<https://www.washingtonpost.com/wp-dyn/articles/A34023-2002Aug18.html>) on a related topic: life tenure for federal judges, who of course are not elected, but appointed.

Akhil Reed Amar: You're right to see the topics as related. Lots of critics think judicial elections threaten judicial impartiality and the appearance of impartiality. Justice O'Connor, in fact, wrote a separate opinion in *White* criticizing this entire mode of picking judges, and praising the federal model of executive appointment, senate confirmation and life tenure as a far better way to secure judicial impartiality and its appearance.

And that's where the *Washington Post* piece comes in. Steve and I argue that - contrary to Justice O'Connor's view - in some ways, the federal model of life tenure, at least for the Supreme Court, is a suboptimal way of achieving judicial impartiality and its appearance.

Begin by noting that only one of the fifty states copies the federal life-tenure model for its highest court, and that none of the major world democracies abroad does so. That is at least suggestive that perhaps the federal system isn't as wonderful as Justice O'Connor seems to think.

Vik: We've made a [similar argument about the electoral college \(/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html\)](/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html): if it's so great, why is it the case that not a single state copies it for the governor's election, nor does a single other major world democracy use it to pick its president? But surely you don't think that federal judges should be elected the way many state judges are?

Vik: What's the difference between the consequences of life tenure and those of a relatively lengthy fixed term such as the one you propose?

Akhil: Here's the irony: life tenure is supposed to insulate federal judges from politics so that they will act apolitically in deciding cases. In reality, though, life tenure encourages Supreme Court Justices to be overly mindful of politics—in particular the partisan political landscape of the White House and the Senate—in deciding when to retire.

Consider, for example, the Court's three most senior Justices. Justice Stevens holds views unlikely to be shared by any person President Bush would appoint to replace him. Isn't he understandably tempted to delay his retirement - if he possibly can - until a Democrat or more moderate Republican occupies the Oval Office? On the other side, both Chief Justice Rehnquist and Justice O'Connor might be tempted to hold on, for now, to give the Republicans a chance to the Republicans regain control of the Senate this November and thus give President Bush more latitude in judicial appointments than he now has with the Senate in the hands of the Democrats.

In [previous columns \(/legal-commentary/the-ground-rules-of-the-appointments-game.html\)](#), you and I have mapped out some of the ground rules of the appointments game between partisan Presidents and partisan Senators; but I wonder whether the Justices should be playing this game and getting sucked into partisan politics.

And even if these incentives I'm talking about don't actually affect judicial resignation decisions in the slightest, the public perception of their doing so is inescapable, and creates costs of its own. Remember, many of the Justices in *White* were worried not just about the reality of judicial impartiality but also its appearance. But all these problems would be solved if we moved to fixed terms so that Justices would be limited in their ability to politically time their exits.

Vik: You and Steve made another interesting point when you observed that no one on the Court has stepped down in the last eight years and that never before in history have the same nine Justices served together so long.

Akhil: Of course, there was an even longer stretch between appointments in the early 1800s, but the Court was smaller then, with fewer possibilities for vacancies.

Vik: Here are some additional facts about vacancies that I've dug up (with Steve's help, and that of his Northwestern colleague, Jim Lindgren.). Between 1789 and 1970, the average time between Supreme Court vacancies was 1.93 years; between 1971 and 2000, it went up about 50% to 2.98 years.

The big reasons for that, of course, are that Justices are living - and thus serving - much longer. The average age at departure for Supreme Court Justices from 1789 to 1970 was 68.5 years; whereas from 1971 to 2000, it was 78.8 years. From 1789 to 1970, the average Justice served on the Court 15 years, whereas from 1971 to 2000, Justices who left had served an average of a whopping 25.5 years.

Akhil: And they also may tend to pick very young - and stealth - candidates in order to extend their legacy as much as possible. This problem, too, would be solved by an 18-year term limit.

Vik: O.K. Let's talk about ways to implement term limits for Supreme Court Justices. Amending the Constitution right away isn't necessary. A clever statutory solution might satisfy the Constitution. Under the statute, judges would technically sit on the Supreme Court

"by designation" for a fixed number of years after which they would have the option to serve the remainder of their life tenure on some lower federal court. The Justices would be federal judges with life tenure - but not all of that tenure would be served on the Supreme Court.

Akhil: And as Gregg Easterbrook has reminded me, any such approach may benefit the lower federal courts, by having former Supreme Court Justices sharing their talents and experiences with the judges whose decisions are reviewed on high.

Vik: Perhaps. And there are other, non-constitutional, fixes that may be possible. The Senate could insist that all future Court nominees publicly agree to term limits, or risk nonconfirmation. While legally unenforceable, such commitments by Justices would likely be honored.

And unlike promises to rule certain ways on certain cases-which you and I have criticized elsewhere (</legal-commentary/the-ground-rules-of-the-appointments-game.html>)-a term limits pledge would not raise judicial independence or due process problems. Congress could also restructure salaries, pensions, office space and other perks to give future justices incentives to live by their word.

Akhil: You were right to say "future justices." Any changes should be completely prospective, rather than retrospective: they should be applicable only to the future nominees of both parties and all ideologies, and to no present sitting Justices. This will avoid any perception that the term limits idea is being used to oust disliked current Justices.

Indeed, ideally, politicians should declare their preference for Supreme Court term limits before the next Court vacancy comes up, so as to avoid even the appearance of outcome-manipulation. This should be an issue on which the parties can agree: One of the reasons Steve and I decided to coauthor our OpEd was to make clear that ours is not a partisan proposal. He's a Reagan Republican and I'm a registered Democrat.

Vik: Even if you had such a system in place, couldn't Justices still act strategically by leaving BEFORE their 18 years were up, if to do so would be to give their seat to a "friendly" President and Senate?

Akhil: They could, in the same way that Presidents Reagan and Clinton COULD have resigned in the last years of their second terms to give their Vice Presidents the mantle of incumbency when those Vice Presidents themselves ran for the White House the next year. If overtly political Presidents can be encouraged not to act in this manipulative way, surely we can hope for and expect the same grace from our Supreme Court Justices.

Akhil: That is precisely why we should think about ways to work within the Constitution itself. The Congressional fixes we have been discussing - and perhaps an alternative, or complementary, solution in which Court itself develops some of its own retirement guidelines to change the culture and tradition of the place - would be just as effective as a ramped-up amendment process. Just as our previous column on Minnesota's judicial election regime pointed out, there's almost always more than one way to get where you want to constitutionally go.
