

Term Limits for the High Court

+ Add to list

By Akhil Reed Amar and
Steven G. Calabresi
August 9, 2002

Supreme Court Justices traditionally announce their retirements in summer, but this summer no one is budging. Nor has anyone budged since the most junior justice, Stephen Breyer, joined the court eight years ago this week. Never before have any nine justices served together for so long a stretch.

America's political clock and internal court rules explain why senior justices might prefer to stay put—*for now*. But such explanations also call into question the wisdom of judicial life tenure as currently practiced. Whenever the next court vacancy occurs, Congress should try to nudge the justices toward a better model of judicial independence based on fixed judicial terms.

Currently each justice is tempted to time his or her departure with one eye on the political calendar and one finger in the political wind. For example, Justice John Paul Stevens, age 82, holds many liberal legal views that would probably not be shared by any replacement nominated by President Bush. Why should Stevens retire now rather than wait?

The court's other two most senior members, Chief Justice William Rehnquist, 77, and Justice Sandra Day O'Connor, 72, generally hold conservative legal views compatible with those of likely Bush appointees. But the Senate is now controlled by Democrats, who might contest a conservative appointee. Why not wait until after

this November's elections, when the Republicans may regain control?

If justices actually make such partisan calculations, the independence of the judicial mind from raw politics is lessened. Even if they resist the temptation to think like pols, the public perception of their doing so is hard to escape, especially in the shadow of *Bush v. Gore*.

Above and beyond specific issues of political timing, the court's seniority system gives more experienced justices increased power to speak for the court and thus encourages justices to stay past their prime. Perverse incentives also exist at the other end of the age spectrum: Life tenure encourages presidents to nominate young candidates with minimal paper trails and maximal potential to shape the future.

Only one of the 50 states copies the federal government's particular brand of unelected life tenure for its highest court, and no major democracy abroad does so. Most state and foreign constitutions prescribe a fixed number of years in office or a mandatory retirement age or both.

Although the federal Constitution itself vests justices with life tenure, there are a variety of measures, short of amending the Constitution, by which Congress and the president could move future justices toward a tradition of fixed terms -- say, 18 years. For example, some commentators have proposed a clever statutory solution under which 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.

Alternatively, the Senate could insist that all future court

nominees publicly agree to term limits, or risk nonconfirmation. Though such agreements would be legally unenforceable, justices would feel honor-bound to keep their word. Unlike a promise to rule a certain way on a particular case or issue, a promise to resign on a fixed date comports with judicial integrity. Congress could also restructure judicial salaries, pensions, office space and other perks to give future justices incentives to honor their promises.

Current justices should not be affected; the system should be purely prospective, applicable to all future nominees of both parties and all ideologies. Ideally, politicians should announce their preference for this fixed-date retirement system even before the next vacancy arises, so that all concerned understand that it's nothing personal.

Beginning with George Washington, early presidents established a tradition of leaving after two terms even though the Constitution permitted them to run again. Similarly, future justices could, with a little nudging, establish a tradition of leaving after a fixed term or at a set age. Once this tradition took root, the Constitution might eventually be formally amended to codify it. Or perhaps the justices themselves might collectively codify retirement guidelines in court rules modifying the seniority system or creating an ethical norm of retirement at certain milestones, just as the House in 1994 adopted internal term limits for certain committee chairs.

A justice seeking to outfox the new system might be tempted to resign before the end of his or her term whenever early resignation might offer advantage to a preferred successor. Such manipulation should be deterred by a general sense of fair play. In an analogous situation, a president might be tempted to resign a few months before the end of his final term, thus placing his handpicked vice president in power before the November election. Yet all past presidents facing this situation—most recently,

Eisenhower, Johnson, Reagan and Clinton{ndash}have spurned this sort of manipulation. If even elected presidents pursue nonpolitical exit strategies, America should demand no less from unelected justices.

Akhil Reed Amar teaches law at Yale and clerked for then-Judge (now-Justice) Stephen Breyer. Steven G. Calabresi teaches law at Northwestern and clerked for Justice Antonin Scalia.

 **0 Comments**