

Opinion: Supreme Court term limits wouldn't solve anything

Opinion by J. Harvie Wilkinson III

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Imposing term limits on Supreme Court justices is a terrible idea that threatens to become more popular by the day. The latest support for this misguided change comes from President Biden's Commission on the Supreme Court, which on Thursday released a draft expressing sympathy for the idea of doing away with lifetime tenure, noting backing for that change across the ideological spectrum.

"In fact, in its survey of the existing literature on Supreme Court term limits, the Commission discovered few works arguing against term limits," the draft said.

Let me help fill that void. Eighteen-year terms, however spaced and staggered, will cure none of the faults and only exacerbate the weaknesses that critics perceive in the modern court. They will make the institution appear more, not less, political in the eyes of the public. Confirmation battles will become more numerous but no less feverish, because 18 years is long enough to inflame partisan confirmation passions, especially if the court is closely divided.

The change would leave the court shorthanded too often, if confirmation delays set in. That risks leaving the court with an even number of eight members, hardly an ideal composition for any institution predicated on majority rule. And the certainty that a seat will become vacant when the clock chimes the magical hour will only make the court the subject of more continuing political parlor talk than it is already.

It is easy to imagine the strategic games the justices may be tempted to engage in, smuggling through such-and-such a precedent — or overruling it — before so-and-so leaves the bench. While the proponents of term limits envision a smooth and orderly opening of vacancies, what happens when a justice dies or strategically retires before

the expiration of his or her term?

One of the arguments for term limits is that the current system encourages presidents to select unduly youthful nominees, to maximize the time they will have on the bench. What in the world is wrong with youth? Youthful nominees add intellectual vitality and generational diversity to the bench. The past seven justices were 48, 53, 49, 50, 54, 55 and 50 when nominated. These 50-something “youthful nominees” have had plenty of time to acquire professional distinction, and someone hopelessly callow would face confirmation difficulties on that very account. As for the danger of justices with declining mental powers remaining on the court, there exist a plethora of internal and external pressures that can readily be deployed in the service of a dignified exit.

The revolving door already breeds enormous public cynicism toward Washington. How unseemly it would be for term-limited justices to resume plying their trade — a prospect that I doubt a cooling-off period will wholly prevent. The dignity of individual justices is essential to the court’s ability to command institutional respect. The gainful pursuits so much a part of American commercial life will not be what the public welcomes in that tribunal most dedicated to detachment.

The president’s commission noted that “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.” That is not a drawback. Judges subject to bribery and intimidation in foreign countries have often come to think of the Supreme Court as the ideal of judicial independence. While I cannot prove that life tenure is crucial to the court’s animating international power, it is what makes the court different and distinct from the finite terms and tenures of the Washington officials who come and go.

Neither the court nor its members are above rigorous scrutiny and criticism. Yet when we inch this institution toward ordinariness, law itself loses something of its stature. It is true the court has made its share of tragic mistakes. Balancing the shameful chapters of *Dred Scott*, *Plessy* and *Korematsu* against the glorious moments of *Marbury* and *Brown* is no easy task. It is always easy, however, to jump from dissatisfaction with outcomes to an insistence on institutional change, overlooking the fact that court majorities are inevitably, like all others, cyclical and transient. For all their unquestioned devotion to the rule of law, the justices are aware that they stray far beyond public consensus at their peril.

It seems inevitable that an elite institution in a democratic republic will suffer the slings and arrows of populist discontent. The wonder of it all may be that the institution of lifetime tenure has persisted for so long. Proponents of changing that rule may take satisfaction in humbling the justices ever so slightly, or believe that instituting term limits would forestall more radical change, such as expanding the size of the court.

But this seemingly small dent in judicial tenure is without precedent in this country's history. It will invite further and more dangerous tinkering and alteration of the court's structure in years to come.

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