

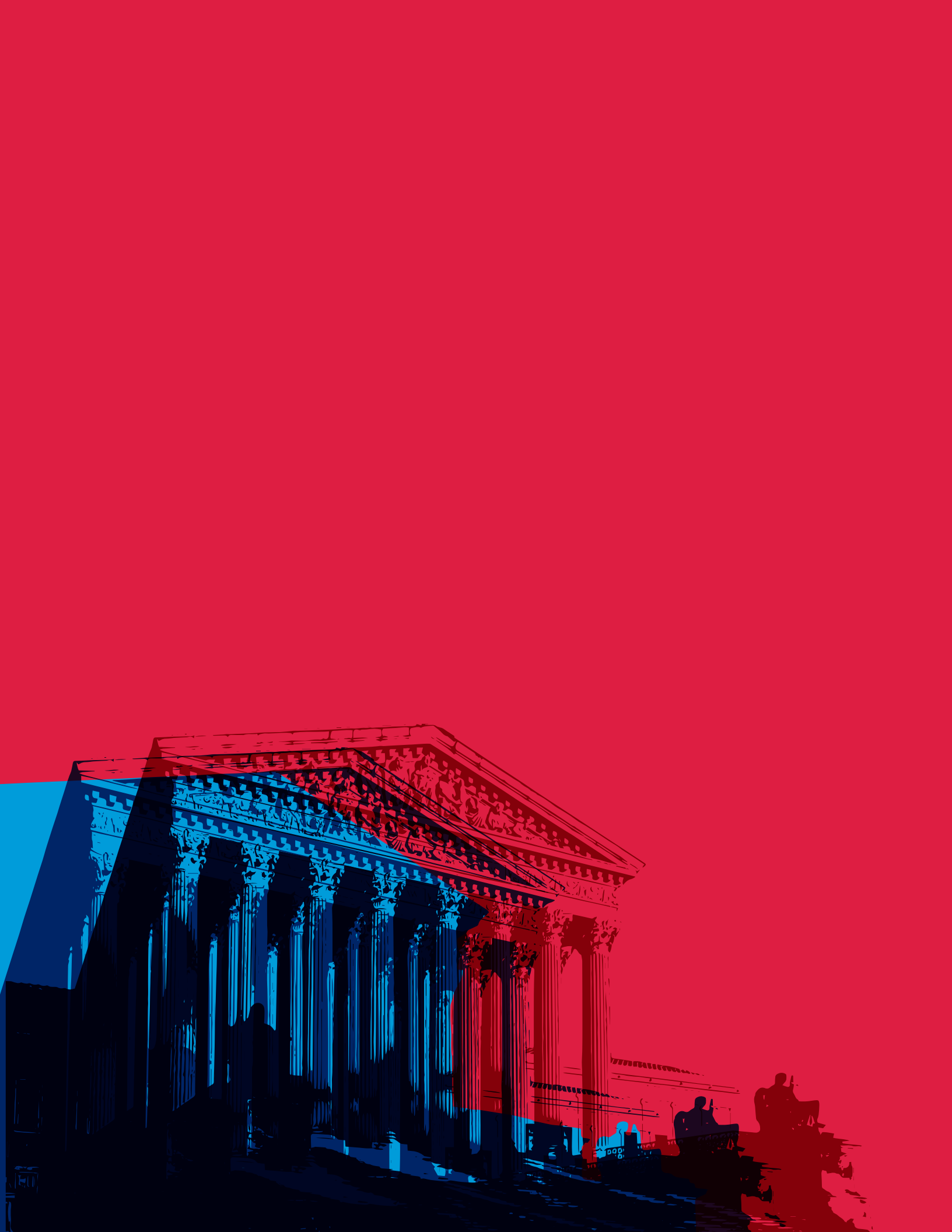
AMERICAN ACADEMY
OF ARTS & SCIENCES

THE CASE FOR **SUPREME COURT TERM LIMITS**

A paper by the
U.S. Supreme Court Working Group



AN OUR COMMON PURPOSE PUBLICATION



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AMERICAN ACADEMY OF ARTS & SCIENCES
Cambridge, Massachusetts

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OUR COMMON PURPOSE



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A LETTER FROM THE PRESIDENT OF THE AMERICAN ACADEMY

The Academy's work on issues related to Supreme Court reform dates back to 2018, with the establishment of the bipartisan Commission on the Practice of Democratic Citizenship. The Commission's 2020 final report, *Our Common Purpose: Reinventing American Democracy for the 21st Century*, recommended term limits as a means to depoliticize the appointment process and realign the Court with the framers' expectations. In doing so, the Commission became part of a robust, decades-long discourse on the drawbacks of life tenure and proposals for reform. The U.S. Supreme Court Working Group convened in the spring of 2022 to address key questions left unresolved both by the Commission and by existing literature and to lay out a comprehensive, nonpartisan path forward.

As this work progressed, a series of major decisions reshaped public perceptions of the Supreme Court. The legal and cultural significance of these rulings, combined with the fact that they have occurred in an era of increasing partisanship and social distrust, has made debates about the future of the Court more politically fraught than they might have been even a few years ago. Increasingly, Americans' views on the Court depend on their political party affiliation and their ideological agreement with recent decisions. All of this has undoubtedly made nonpartisan Court reform more challenging to achieve.

In light of these developments, the Academy is deeply grateful to all of the members of the working group for the thoughtfulness, dedication, and bipartisan spirit they consistently brought to this process. Through many months of deliberation, these impressive scholars and practitioners remained cognizant of—but not influenced by—the context in which they worked. They were gracious in sharing their time and expertise, and the consensus they reached, which is outlined in the pages that follow, will serve to strengthen our constitutional democracy for the good of all Americans.

Special thanks go to Seth Davis of UC Berkeley School of Law, Daniel Epps of Washington University School of Law, Caroline Fredrickson of Georgetown Law School and the Brennan Center for Justice, and Kermit Roosevelt III of the University of Pennsylvania Carey Law School, who took the lead in drafting this paper. The Academy is grateful also to Judge Diane Wood, who served both on the Commission and on the working group, and whose guidance has been invaluable to both.

Thank you to the cochairs of the Commission on the Practice of Democratic Citizenship—Danielle Allen of Harvard University, Stephen Heintz of the Rockefeller Brothers Fund, and Eric Liu of Citizen University—for their leadership and support as the Academy works to advance the recommendations in the *Our Common Purpose* report.

A LETTER FROM THE PRESIDENT OF THE AMERICAN ACADEMY

Thank you also to the Academy staff who served this working group and contributed to this publication, including Zachey Klinger, Jessica Lieberman, Peter Robinson, Phyllis Bendell, and Scott Raymond.

In addition to the working group members listed in this publication, there were other scholars and experts who participated in working group meetings but have asked not to be credited. In many instances, their perspectives helped to shape this paper, and the Academy thanks them for their contributions.

Finally, the Academy's ongoing work to advance the *Our Common Purpose* recommendations would not be possible without the generous support of the S. D. Bechtel, Jr. Foundation, the Rockefeller Brothers Fund, the John S. and James L. Knight Foundation, the William and Flora Hewlett Foundation, the Ford Foundation, the Conrad N. Hilton Foundation, the Suzanne Nora Johnson and David G. Johnson Foundation, the Clary Family Charitable Fund, Alan and Lauren Dachs, Sara Lee Schupf and the Lubin Family Foundation, Joan and Irwin Jacobs, David M. Rubenstein, and Patti Saris. Many thanks to these supporters for their belief in this work and for their ongoing commitment to strengthening American democracy.

Sincerely,

David W. Oxtoby

President, American Academy of Arts and Sciences





INTRODUCTION

As they advocated for the adoption of the Constitution to supplant the Articles of Confederation, Alexander Hamilton and James Madison described the judicial branch as far less to be feared than the legislative or executive branches.¹ Without the power of the purse or military might, the Supreme Court could depend only on the people's willingness to abide by its rulings. The "least dangerous branch," however, has grown in power and importance over the course of American history, with many now believing it to be far more powerful than a polarized and paralyzed Congress or even the presidency.²

In recent decades, criticism of the Court's arrogation of powers to itself has been widespread and sparked by its striking down of broadly popular legislative enactments, enshrining or withdrawing fundamental rights and liberties, handicapping the work of the federal and state governments, and creating and extending doctrines to protect political minorities from losing power or law enforcement from being subject to constitutional constraints. These criticisms have been bipartisan and long-standing and are mirrored by the slide in popular support for the Court and a growing belief in its partisan or ideological biases.³

Along with the criticisms of the Court, scholars and advocates have outlined key reforms to try to wall off the Supreme Court from partisan pressures. One of the most widely supported is the proposal to introduce a set term of service for Supreme Court justices in order to create regularity in the appointments process, lower the political intensity of nomination battles, and restore a shared vision of the impartiality of the Court.

In 2018, the bipartisan Commission on the Practice of Democratic Citizenship, a project of the American Academy of Arts and Sciences (the

Academy), launched an effort to develop responses to the weaknesses and vulnerabilities in our political and civic life and to enable more Americans to participate as effective citizens in a diverse twenty-first-century democracy.⁴ This effort included a review of the Supreme Court and its role in our current political crisis. When the Commission issued its thirty-one recommendations for strengthening democracy in the report *Our Common Purpose: Reinventing American Democracy for the 21st Century*, the recommendations included the proposal for eighteen-year Supreme Court term limits.⁵

To further the effort to advance this idea, the Academy convened a working group of top experts in the field of constitutional law and Supreme Court reform to develop a comprehensive proposal for enactment of eighteen-year term limits for U.S. Supreme Court justices. In this moment when the rhetoric surrounding Court reform is becoming increasingly politicized, the members of this group feel that the need for a dedicated body to lay out a thoughtful, nonpartisan path forward on this important reform is clear. This paper is the result of the working group's yearlong deliberations and is intended to fill that void.

INTRODUCTION

The paper first describes why eighteen-year term limits are a vital reform, one that would positively impact on the polarization and partisanship created by life tenure by reducing the incentives for strategic retirements and political campaign-style efforts focused on the nominations process, and by improving the reputation of the judicial system itself. This reform is not only broadly supported by scholars, the legal community, and the public; it would also put the United States in the company of most other nations, as well as all but one of the states of the United States.

The paper then examines various proposals offered to create limited terms for justices and lays out our vision for the best possible approach, one that is both constitutionally viable and achievable in a reasonable time frame. Our recommendation centers

on an eighteen-year term imposed via statute. In the sections below, we explain why a statute would be constitutional, how it would work, including the transition period and need for a short period of Court expansion,⁶ the role of “senior justices,” dealing with unexpected vacancies, and overcoming possible Senate obstruction.

Our consensus position is that this proposal presents the strongest and most broadly supported reform for a Supreme Court that has been much buffeted by reputational challenges and the political polarization that has been so prevalent in the nation. Adoption of eighteen-year term limits will not solve all of our problems, but it would go a long way toward restoring the actual and perceived legitimacy and impartiality of our highest court.

“With increased lifespans since the eighteenth century, a justice may serve for a generation or longer, often decades more than the framers are likely to have imagined. Add to the mix the deepening polarization on the Court . . . and the actuarial luck of the draw, with one president filling many Supreme Court vacancies and another president few or none, and it is no wonder the power to make Supreme Court appointments has become such a contentious part of the presidential election process.”

**—OUR COMMON PURPOSE:
REINVENTING AMERICAN DEMOCRACY
FOR THE 21ST CENTURY**



BACKGROUND

Note on Terminology

The reform discussed in this paper is popularly known as “term limits,” and, due to the ubiquity of that phrase, we use it here. However, we caution that it does not accurately reflect the content of our proposal. The plan outlined in the following pages intentionally avoids limiting the amount of time that Supreme Court justices may serve in their roles. Instead, the system we propose would merely alter the job duties associated with the role of Supreme Court justice over the course of a life term.

The working group considered numerous alternative names for this arrangement, including “time rules,” “bifurcated terms,” “staggered terms,” “rotating service,” and “phased service.” Several members of our group feel that, of these, “phased service” best captures the nature of the proposal. However, since “term limits” is the name most used by the public, the media, and other scholars, some felt that adopting a new name could be unnecessarily confusing. We encourage continued consideration of alternative terms that more accurately reflect the reform.

The Working Group

The bipartisan working group that produced this paper consists of top constitutional scholars and political scientists from across the country. The Academy convened this diverse group in June 2022 as an independent offshoot of its efforts to advance the recommendations of *Our Common Purpose: Reinventing American Democracy for the 21st Century*, the 2020 report of the Academy’s bipartisan, multidisciplinary Commission on the Practice of Democratic

Citizenship.⁷ That report contends that political institutions, civic culture, and civil society reinforce one another, and that progress must urgently be made across all three areas to build a healthier democracy. To that end, the bipartisan Commission reached unanimous agreement on six broad strategies and thirty-one specific recommendations to improve American democracy.⁸ Among these are eighteen-year terms for Supreme Court justices. In advocating this reform, the Commission observed that,

with increased lifespans since the eighteenth century, a justice may serve for a generation or longer, often decades more than the framers are likely to have imagined. Add to the mix the deepening polarization on the Court, in which most high-profile and high-impact decisions are 5–4 rulings, and the actuarial luck of the draw, with one president filling many Supreme Court vacancies and another president few or none, and it is no wonder the power to make Supreme Court appointments has become such a contentious part of the presidential election process.⁹

The Commission went on to state that a system of regularized, eighteen-year terms could help reduce the stakes of the nomination process and “help move the Court toward a less partisan future.”¹⁰ The Commission also asserted that this might be accomplished without running afoul of the Constitution’s life tenure requirement by transferring justices to “senior status” with reduced duties at the end of their eighteen-year terms, rather than forcing their retirement.¹¹ However, the Commission left open a great number of questions as to how such a system would work. For instance: How would a transition to term limits be handled? What should be the scope

of justices' post-term duties? How would unexpected vacancies be filled? The Academy convened this working group to try to resolve these and other crucial questions. The working group deliberated over eight months, systematically working through these issues and reaching consensus on each. This paper summarizes the conclusions the group has drawn.

Problematic Features of Life Tenure with Uniform Job Duties

Article III of the Constitution entitles federal judges to hold their offices for life “during good Behaviour.” Because average lifespans have increased dramatically, a life term today is potentially much longer than it was when the Constitution was drafted. The average American life expectancy in 2021 was 76.1 years.¹² By contrast, historians estimate that the average life expectancy at birth for an American white male in the late eighteenth century was just over half that, around 44 years.¹³ If one survived past childhood, the odds of a long life improved, but a 25-year-old white male in 1790 still could expect to live only to the age of approximately 63.¹⁴ Given the increase in life expectancies since that time, the concomitant increase in Supreme Court terms is not surprising. While the median length of service for justices historically is 18.5 years, those appointed after 1990 who have left the bench served, on average, for 26.3 years.¹⁵ The average age upon leaving the Supreme Court has also increased.¹⁶

In addition, because a sitting justice must vacate a seat for an appointment opportunity to arise, new Supreme Court appointments are not evenly distributed across presidencies. Rather, they arise due to a combination of random chance (what *Our Common Purpose* terms “actuarial luck of the draw”) and strategic behavior by the justices.¹⁷ Thus, while some presidents have nominated as many as four justices in a single term, others have nominated none.¹⁸ This variation at best “serves no obvious structural purpose.”¹⁹ At worst, it creates a sense of unfairness among voters who fail to see their electoral will reflected in the Court.²⁰

These characteristics of the current system combine both to undermine the effectiveness of the democratic check on the Court exerted by the appointment and confirmation process and to increase the stakes of each individual nomination. As Steven Calabresi and James Lindgren explained in a 2006 paper, presidents fortunate enough to be in office during a “hot spot” in which numerous vacancies become open in quick succession can “contribute to the Court being out of step with the American people’s understanding for long periods of time.”²¹ Meanwhile, “the irregular occurrence of vacancies on the Supreme Court means that when one does arise, the stakes are enormous, for neither the President nor the Senate can know when the next vacancy might arise.”²² For this reason, “Supreme Court appointments have become politically contentious not only because the justices exercise great power but because they exercise it for so long.”²³

The current system also encourages, or at least permits, certain types of problematic strategic behavior. It is advantageous for presidents to nominate jurists who are young and thus might serve longer-than-average terms.²⁴ While including younger members on the bench might yield some benefits, the systematic exclusion of the nation’s most experienced legal minds from our top court is far from ideal.

Even more troubling, justices may time their retirements to maximize the chance that an ideologically aligned successor will be confirmed. While the motivations behind any individual justice’s retirement decision are difficult to know, the evidence for this type of behavior is ample. Justices are more likely to retire while the president is of the same party that nominated them than when the president is of the opposite party.²⁵ More directly, on multiple occasions justices have made known their partisan reasons for retiring (or not retiring) through public or private statements.²⁶ In one particularly colorful example, Justice Thurgood Marshall joked with his clerks that, if he passed away during the Republican administrations of the late 1980s and early 1990s, they should “prop [him] up and keep on voting.”²⁷ Older justices also face public pressure campaigns

to encourage them to retire during ideologically friendly administrations.²⁸ Before Justice Stephen Breyer stepped down in 2021, for instance, a billboard truck emblazoned with “retire, Breyer” circled the Supreme Court building.²⁹

Strategic retirements are concerning for two main reasons. First, they allow justices to shape the Court well past their own tenure.³⁰ Second, even the perception that justices time their retirements for partisan reasons may reinforce the belief that the Court is a partisan body, undermining its legitimacy.³¹ Partisanship increasingly colors Americans’ views of the Court, and Americans increasingly view the Court as a partisan institution. Some arguably political aspects of the Court’s current role could not have been foreseen by the drafters of the Constitution in 1787. For instance, since 1925, the Supreme Court’s jurisdiction has been almost entirely discretionary. The justices cull through approximately seven thousand cases a year and pick the seventy (i.e., 1 percent) that seem most important. This is an inherently policy-based process that may influence perceptions of the Court as a nonpolitical body.

Finally, the United States is unique in granting lifetime tenure to Supreme Court justices.³² Most established democratic nations and all but one U.S. state have either fixed terms or mandatory retirement for judges on their highest courts. Domestically, Rhode Island is the only state with unchecked life tenure for its state supreme court.³³

Public Views of the Court

As high levels of partisan polarization and decreasing public trust have come to characterize the American political landscape, the Court and its legitimacy have also become increasingly controversial. The Pew Research Center reports that more Americans have a negative view of the Supreme Court (49 percent) than at any time in its three decades of polling the subject.³⁴ Gallup, likewise, reports that trust in the judicial branch is at its lowest level (46 percent) since it began polling the question in 1972.³⁵

Meanwhile, the partisan gap in views of the Court is the largest it has ever been: 73 percent of Republicans view the Court favorably, compared with 28 percent of Democrats.³⁶ Only about one-third of Americans say they believe the Court does a good or excellent job of keeping personal politics out of decision-making.³⁷ In contrast, two-thirds of Americans—including majorities of voters from both major parties—support term limits for Supreme Court justices.³⁸

Prior Scholarship on Term Limits

While *Our Common Purpose* inspired the creation of this working group, efforts to reimagine life tenure on the Supreme Court long predate that report. Thomas Jefferson, for example, believed life tenure to be incompatible with a republican form of government and favored four- or six-year terms for federal judges.³⁹ In the modern era, term-limit proposals have come from across the ideological spectrum and vary widely in their details.⁴⁰ While most have recommended eighteen-year terms, a few have suggested terms that are longer or shorter.⁴¹ Existing proposals take divergent approaches to how and when a transition to time-limited terms would take place, the extent to which currently serving justices would be impacted, and how unexpected vacancies would be filled.⁴² Items like the method for designating a chief justice and whether steps should be taken to reduce the chance of a Senate impasse have been addressed by some proposals but not others.⁴³

One question that is central to the modern debate is whether adjustments to the current system can be accomplished by statute. While some scholars have concluded that a constitutional amendment is the best (or only) pathway for reform, others have agreed with the view, first popularized in a 2002 *Washington Post* op-ed, that “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.”⁴⁴ Proponents of this view generally agree that removing justices from the bench after a set number of

67% of Americans—including **57% of Republicans** and **82% of Democrats**—support term limits for Supreme Court justices, according to The Associated Press-NORC Center for Public Affairs Research. The partisan gap in support for the Supreme Court is the widest it has been in decades, according to the Pew Research Center. **73% of Republicans** say they have a favorable view of the Court, while only **28% of Democrats** share that view.

years would require a change to the Constitution. However, they believe that similar benefits may be achieved by adjusting the justices’ job duties or jurisdiction within constitutional limitations.

Modeling of the possible effects of various term-limit proposals has shown that they generally reduce the likelihood of extreme ideological imbalance in either direction on the Court and lead to greater stability and predictability by decreasing variance in the number of justices appointed by each president.⁴⁵ The time required before these benefits take hold depends on the mechanism of transition set out in the proposal.⁴⁶ Other specifics, such as the manner in which unexpected vacancies are filled, also impact the degree to which these positive outcomes are achieved.⁴⁷

Presidential Commission on the Supreme Court of the United States

In April 2021, President Joe Biden issued an executive order creating the Presidential Commission on the Supreme Court of the United States.⁴⁸ That body was charged with producing an “analysis of the principal arguments in the contemporary public

debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals,” including term limits. The Presidential Commission’s final report comprehensively lays out the arguments for and against term limits. Because the Commission interpreted its mandate as prohibiting it from taking a position on any reform, however, it stopped short of making judgments as to the strength of those arguments or suggesting new approaches.

This working group’s deliberations were shaped considerably by the work of the Presidential Commission and its final report.⁴⁹ The working group’s proposal tracks the debates and open questions outlined in the Presidential Commission’s report with the aim of building on that work and recommending resolutions to those questions and concerns.



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Enactment Method

The working group believes that our recommended reform should be implemented by means of a statute rather than a constitutional amendment.

Two main issues need to be considered in the choice between enactment via statute and enactment via constitutional amendment. The first is the likelihood of adopting the desired measure. Constitutional amendment is notoriously difficult, requiring a two-thirds supermajority in each house of Congress, followed by ratification by three-quarters of the states. The working group agrees that, given this very high bar and the high level of polarization present in federal politics, a constitutional amendment is unlikely to succeed. Thus, while enacting Supreme Court reform in an amendment rather than a statute might have some benefits—it would, for instance, be harder for subsequent actors to repeal or modify—we do not believe that an amendment is a realistic option in the foreseeable future.

The second consideration is the legality of the different paths. A constitutional amendment, if ratified, would be a valid part of the Constitution. A statute, on the other hand, might be challenged on the grounds that it conflicted with the Constitution, and a court that agreed with the challenge would invalidate the statute. The working group acknowledges that legitimate concerns can be raised about the constitutionality of a statutory reform. For multiple reasons, however, we believe that the proposal may be implemented by statute without violating the Constitution.

The main concern raised by critics of the statutory solution is that the Constitution provides, in

Article III, Section 1, that federal judges “shall hold their Offices during good Behaviour.” The working group agrees that this provision creates life tenure for federal judges: absent resignation, they may be removed from office only via impeachment. Thus, we agree that a statute that provided that Supreme Court justices would be removed from office after a period of eighteen years would be unconstitutional because it would violate the Good Behavior Clause.

The key question, then, is whether a modification of duties that takes a justice out of the Court’s ordinary work addressing the merits of cases after a period of eighteen years constitutes a removal from office. The working group acknowledges the force of the intuition that a justice who no longer participates in the ordinary work of the Court no longer holds the office, and some of us held that view when we began studying the issue. However, closer analysis reveals that our current practice and Supreme Court precedent support the idea that the proposed modification of duties is not a removal from office. Nor does the proposal threaten the underlying value of judicial independence.

Since the nation’s founding, Congress has exercised its power under the Necessary and Proper Clause of Article I to structure and organize the federal judiciary. It has set the number of justices, specified the Court’s jurisdiction, set its quorum requirements, and modified the duties of the justices with respect to participation in lower-court decisions (the practice known as circuit riding).

In 1869, Congress created the first pensions for federal judges, apparently out of a concern that financial exigency led judges to remain in office despite

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mental or physical infirmity.⁵⁰ That statute provided that judges who met certain age and service requirements could “resign [the] office” and for the remainder of their lives receive a pension equivalent to the salary they received at the time of resignation. In 1919, Congress created another option: “instead of resigning,” the statute provided, “any judge other than a Justice of the Supreme Court” who met the age and service requirements could “retire [at full salary] from regular active service on the bench.” Such judges could “nevertheless be called upon . . . to perform such judicial duties . . . as such retired judge may be willing to undertake.”⁵¹

By providing that retired judges could still perform judicial duties, Congress implied that retired judges were still judges: they still held the office. Explicit endorsement of that view by the Supreme Court came fifteen years later, in *Booth v. United States*.⁵² Wilbur Booth was an Eighth Circuit judge who retired in 1932 under the 1919 statute. He continued to receive his full salary and continued hearing cases in the Eighth Circuit. In 1933, however, Congress enacted a statute reducing the compensation of retired judges. Booth challenged this statute, arguing that it violated the Article III, Section 1 provision that the compensation of federal judges “shall not be diminished during their Continuance in Office.”

The government argued that because retired judges performed different duties than active judges, and indeed were “under no obligation to perform any judicial duties whatever,” they did not remain in office.⁵³ The duties of an active judge, Solicitor General James Biggs asserted, “are an integral part of the constitutional office of judge.”⁵⁴

The Supreme Court disagreed. “By retiring pursuant to the statute,” Justice Owen Roberts wrote for a unanimous Court, “a judge does not relinquish his office. The language is that he may retire from regular active service. . . . 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.”⁵⁵ The Constitution, according to Roberts, recognized the distinction between removal from office and alteration of duties:

“Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it.”⁵⁶

In 1948, Congress revised the judicial retirement statute again, expanding it to include Supreme Court justices and stating explicitly that a retiring judge or justice “may retain his office but retire from regular active service.”⁵⁷ The wording of the revision was “used to clarify the difference between resignation and retirement. Resignation results in loss of the judge’s office, while retirement does not.”⁵⁸ The notes cite *Booth* in support of the distinction.⁵⁹

Current 28 U.S.C. § 371 is essentially the same, and the Supreme Court has more recently reaffirmed that judges who have taken senior status still hold the office to which they were appointed. In 2003, in *Nguyen v. United States*, the Court described senior judges as “of course, life-tenured Article III judges who serve during ‘good Behavior’ for compensation that may not be diminished while in office.”⁶⁰

Both Supreme Court precedent and long-standing practice, then, support the idea that lower-court judges who take senior status retain the office. The same statute now governs Supreme Court justices, and thus under the logic of *Booth*, retired justices also retain their offices. They may decide cases on the Courts of Appeals, and they may serve as circuit justices.⁶¹ For them to do these things if they were not justices of the Supreme Court would be illegal.⁶²

Judges and justices retire voluntarily under the current statutory regime, whereas our proposed reform would make the decision mandatory after eighteen years of active service. Why voluntariness is relevant to the analysis is not clear. The Good Behavior Clause provides that judges may not be removed from office during good behavior. If a change in duties does not amount to removal from office, Congress may impose that change without running afoul of the Good Behavior Clause.

The issue of involuntary retirement did surface in the *Booth* arguments. Congress could not compel

a judge to retire against his will, Solicitor General Biggs claimed, because that would remove him from office. Therefore, a judge who retired voluntarily must also leave the office.⁶³ Biggs was right, we believe, to link the two situations: either both voluntary and involuntary retirements remove the judge from office, or neither does. Biggs was wrong about voluntary retirement, however. The Supreme Court clearly and unanimously held that retired judges do retain the office. Biggs was thus wrong about involuntary retirement too. Removal from office is the threshold issue for Good Behavior Clause analysis. Because a retired judge retains the office, Congress can compel judges to retire, at least as far as the Good Behavior Clause is concerned. Critics of a statutory solution suggest that, if Congress could provide that all justices will take senior status after eighteen years of active service, it could impose retirement at will on justices who issue unpopular decisions. We do not believe that follows. We do not believe that Congress could use retirement to punish justices any more than it could use other measures, short of removal from office, such as prohibiting disfavored justices from hiring law clerks.

Thus, a blanket rule of eighteen years of active service followed by senior status, imposed as a prospective matter on future justices and not those currently sitting, does not undermine the independence of the judiciary. Judicial independence requires that judges be free to decide cases without fear or favor, secure in the knowledge that they can be neither rewarded nor punished for their decisions. Eighteen-year terms of active service do not compromise that principle, and a prospective implementation has no predictable partisan effect.

The position of chief justice raises one additional issue. A chief justice who takes senior status under our proposal will no longer be chief justice—she would not, for instance, preside over an impeachment trial of the president. If the position of chief justice is a distinct constitutional office, retirement would remove the chief justice from that office, creating a Good Behavior Clause problem that does not arise with associate justices.

The Constitution does not clearly indicate whether the position of chief justice is a distinct office. It distinguishes between the chief and other justices in only one way, assigning to the chief responsibility for presiding over the impeachment of the president. The overwhelming similarity between the justices might suggest that the chief is merely first among equals. Indeed, the Constitution makes no separate provision for appointment as chief and mentions only “judges of the Supreme Court” when describing the presidential appointment power. Admittedly, our appointment practice treats the chief justice position as distinct—an associate justice elevated to the position of chief goes through the nomination and confirmation process, unlike a Court of Appeals judge becoming chief judge. But thinking more about that practice leads us to conclude that “chief justice” is not a distinct office.

Suppose that the chief justice died during a presidential impeachment. The process could not continue without a presiding judge, who, according to the Constitution, must be the chief justice. But only the president can nominate judges to the Supreme Court, so if “chief justice” is a distinct office, the Constitution gives the president the power to thwart his impeachment in such circumstances by declining to make a nomination. We doubt that the Constitution commands such a result, and reading “chief justice” as simply the designation of the justice who serves as chief, rather than a distinct office, seems a simple and straightforward way to avoid it.

The working group acknowledges that other interpretations are possible and that predicting litigation outcomes is a different process than constitutional interpretation. We believe, nonetheless, that the analysis we offer here is the most plausible and straightforward. (For comparison, critics of the statutory solution sometimes suggest that judges are appointed to multiple offices and relinquish only one upon retirement, maintaining that this partial relinquishment cannot be compelled because of the Good Behavior Clause.⁶⁴ This strikes us as counterintuitive and bizarrely complex.) We also believe that courts adhering to well-established precedent

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and practice are likely to uphold a statute enacting our proposed reform.

Basic Mechanics: Term Length

The working group believes that eighteen-year terms are the ideal length for a Supreme Court term. Under our proposal, justices would serve an eighteen-year term of regular active service and thereafter assume senior status in the manner contemplated by 28 U.S.C. § 371.

Eighteen-year terms are the best way to achieve the benefits of staggered terms on the Court. This term length is the most commonly discussed option with the clearest bipartisan public support. It preserves judicial independence while ensuring that the Court's membership will over time be responsive to democratic elections. Unlike the alternatives, such as twelve-year terms, our proposal tracks the historical average term length, allows individual justices to develop their own voice, and ultimately locks in the current size of the Court.

Judicial term limits are common in both state courts and foreign judicial systems. Nearly all U.S. states have term limits for the judges of their highest courts. Across the globe, constitutional democracies typically have either term limits or age limits on high court service. Staggered terms of active service would thus bring the Supreme Court more in line with not only the state courts but also other leading constitutional democracies.

An eighteen-year term of active service on the Court is the most frequently discussed and publicly polled proposal, and for good reason. Article III's guarantee of tenure during "good Behaviour" ensures that federal judges are independent from political influence and other external pressures. Eighteen-year terms of active service, followed by senior status, preserve this judicial independence no less than the current system of life tenure without phased service. Our proposal has the advantage of greater long-term responsiveness of the Court's membership to

the results of elections for the presidency and the Senate. The result is a system that better reconciles the authority of the Court to decide legal questions that arise from social and political controversies with our system of representative democracy.

History also counsels in favor of eighteen-year terms. Over the broad sweep of U.S. history, justices have on average served about eighteen years (approximately 17.5 years, in fact). But, as noted above, as life spans have increased, justices have served for longer periods, including several decades or more for some. As a result, the stakes of nominations are much higher, causing rancor around the nomination process to increase. Returning term lengths to the historical norm may help to reduce this supercharged partisan conflict around judicial nominations.

As compared with the alternatives, eighteen-year terms minimize the risks often associated with term-limit proposals. Eighteen-year terms will allow two nominations per presidential term, for a maximum of four nominations per president. By contrast, shorter periods could allow two-term presidents to appoint a majority of the Court and would not do enough to lessen partisan conflicts. For example, the most commonly discussed alternative—twelve-year terms—would empower a two-term president to appoint six justices. Eighteen-year terms of active service, with no president able to appoint a majority of justices, would be more stable and less politically charged by comparison.

Our proposal's relative stability is also conducive to the justices' own work and the work of the Court as a whole. Individual justices need time to develop their own voices. Eighteen years, roughly the historical average of service on the Court, is a long enough term of active service to allow justices to do just that. At the same time, staggered terms of active service will enrich the Court's collective work by regularly introducing justices who bring new perspectives.

Finally, our proposal will make it more difficult to "pack the Court" in the future. An eighteen-year

term of active service has an obvious mathematical relationship to the current size of the Court. While we envision a short-term expansion of the Court's membership, as discussed further below, the ultimate consequence of eighteen-year staggered terms will be to reinforce the stability of a nine-justice Court.

Role of Senior Justices

Current law (28 U.S.C. § 371) provides two options for judges and justices who meet certain age and service requirements. They may “retire from the office” and receive an annuity equal to their salary upon retirement. Or they may “retain the office but retire from regular active service” and continue to receive the salary of the office if they meet certain requirements. A lower court judge who has retired from regular active service is called a senior judge, according to 28 U.S.C. § 294. Justices who retire from regular active service are called retired justices.

Under § 371, the chief justice must certify that justices who have retired from regular active service have, if able, carried a caseload during the prior calendar year equivalent to three months of regular active service, or have performed substantial judicial duties, or have carried out administrative duties directly related to the operation of the courts, or have completed substantial duties for a federal or state governmental entity. Section 294 provides that retired justices, if willing, may be designated by the chief justice to sit as judges in any circuit and to act as circuit justices.

Under our proposal, justices who complete an eighteen-year term of regular active service (during which they would be called “active justices” or “justices”) would then assume senior status essentially as contemplated by § 371. They would be called “senior justices” in the same way that lower court judges are called “senior judges.” They would no longer participate in the ordinary work of the Supreme Court, but they would be eligible to fulfill other judicial duties if they so choose.

Some elements of their duties should be spelled out by statute, as some duties of retired justices currently are. Senior justices should be available to sit in the circuits by designation, as retired justices now are under 28 U.S.C. § 294. They should also be available to perform duties that only Supreme Court justices can perform. One such duty, also found in 28 U.S.C. § 294, is serving as a circuit justice. Others could be added, such as participation in *certiorari* work or Supreme Court-specific administrative tasks. Senior justices might be available to participate in Supreme Court merits decisions if the Court would otherwise lack a quorum. They might write *per curiam* opinions in summary reversals.⁶⁵ Precise details should be determined by the chief justice, as they currently are for retired justices.

Tracking the existing practice and statutory framework for retired justices is the easiest and most straightforward way to allow for regular turnover of active justices while observing the limits of the Good Behavior Clause. Current law and practice recognize the key distinction between removing a judge from office and changing the judge's duties. A judge who retires from the office under 28 U.S.C. § 371(a) no longer holds the office to which they were appointed, loses the constitutional salary protection of Article III, Section 1, and cannot exercise the judicial power of the United States. A judge cannot be retired from the office by operation of law consistent with the Good Behavior Clause. A judge who retires from regular active service and takes senior status under § 371(b) does continue to hold the office, retains their salary protection, and may exercise the judicial power of the United States. 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.⁶⁶ This suggests that a law providing for senior status by operation of law after a fixed period would not violate the Good Behavior Clause if senior status amounted to a change in duties rather than a removal from office.

Providing that retired justices still exercise the judicial power of the United States by deciding cases in

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the circuits would support the point that they still hold the office of federal judge. Providing that they perform duties limited to Supreme Court justices would support the point that they still hold the office of Supreme Court justice.⁶⁷ Both of these are features of the current statutory framework: retired justices may sit by designation in the circuits, something only federal judges can do; and they may serve as circuit justices, something only Supreme Court justices can do. Participation of the chief justice in defining other duties would help ensure Supreme Court buy-in.

Transition to Term Limits

The working group believes that, for term limits to work effectively, a transition plan must choose among approaches that would 1) expand the Court to allow immediate appointments by future presidents, 2) force current justices to retire to keep the number of active justices at nine, or 3) take far too long to put in place (for example, by waiting for all current justices to retire at their pleasure). Members of the working group agreed that, to navigate these challenges, a short-term expansion of the Court will be necessary as future presidents appoint two justices per term.

The working group agreed to a plan that sets term limits of eighteen years of “active service” for future justices, with two new justices added in each presidential term. At the end of their active service, the justices would serve in a senior capacity. Should the Court—due to sickness, retirement, or recusal—shrink below nine for any pending case, the justice who most recently entered senior status could be tapped to fill in.

One of the more difficult questions in the implementation of a term-limit proposal is how to phase in the plan and what to do about the currently sitting justices. Some members of the working group favor Court expansion, which would allow presidents going forward to appoint two justices as outlined in the plan. Others are adamantly opposed to

“Court packing” yet favor term limits. But to simply wait until all current justices retire would delay the implementation of term limits for an unacceptable period. Adam Chilton, Daniel Epps, Kyle Rozema, and Maya Sen calculate that, if current justices remain as full-time justices, without additional appointments, term limits would not be in place for all justices before an average of fifty-two years and possibly for as many as sixty-nine years.⁶⁸ Thus, the authors conclude, such an approach to the transition would “continue to allow for unequal influence on the Court across presidential terms during the transition period, which is one of the key issues term limits are intended to address.”⁶⁹

The solution to this dilemma is to allow for a temporary expansion of the Court, beginning as soon as term limits are adopted. Such an approach would take approximately twenty-five years to come into effect.⁷⁰ With the new justices serving eighteen-year terms, the size of the Court would eventually shrink back to nine and remain there. The solution, while making no one perfectly happy, thus gains general approval.

In practice, the plan may be implemented over time as shown in the timeline on the following page. That timeline is based upon the following assumptions:

- Current justices would not be subject to the new term-limit law.
- Current justices would serve, as did many of their predecessors, to the age of approximately seventy-five.
- Retirements during presidential election years will continue to be rare.

Projected Timeline (as developed by Fix the Court)

Current Supreme Court:

Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson (9 justices)

2023: Term-limit law passes. Add Justice A: Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A (10 justices)

2025: Thomas retires (34-year term). Add Justice B: Roberts, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B (10 justices)

2027: Alito retires (21-year term). Add Justice C: Roberts, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C (10 justices)

2029: Sotomayor retires (20-year term). Add Justice D: Roberts, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D (10 justices)

2030: Roberts retires (25-year term), bringing to the fore the issue of the selection of chief justice. (9 justices)

2031: Add Justice E: Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E (10 justices)

2033: Add Justice F: Kagan, Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F (11 justices)

2035: Kagan retires (25-year term). Add Justice G: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G (11 justices)

2037: Add Justice H: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G, H (12 justices)

2039: Add Justice I: Gorsuch, Kavanaugh, Barrett, Jackson, A, B, C, D, E, F, G, H, I (13 justices)

2041: Justice A retires (18 years after appointment). Kavanaugh retires (23-year term). Add Justice J: Gorsuch, Barrett, Jackson, B, C, D, E, F, G, H, I, J (12 justices)

2042: Gorsuch retires (25-year term). (11 justices)

2043: Justice B retires. Add Justice K: Barrett, Jackson, C, D, E, F, G, H, I, J, K (11 justices)

2045: Jackson retires (23-year term). Justice C retires. Add Justice L: Barrett, D, E, F, G, H, I, J, K, L (10 justices)

2047: Barrett retires (27-year term). Justice D retires. Add Justice M: E, F, G, H, I, J, K, L, M (9 justices becomes permanent)⁷¹

Dealing with Unexpected Vacancies

A problem that is likely to arise at some point is an unexpected vacancy on the Court. Although eighteen-year terms are relatively short in comparison to the several-decades-long tenures of some recent justices, a justice could unexpectedly die or be unable to finish her term for health reasons before her eighteen-year term expired. A justice might also choose to resign early to pursue some other professional opportunity.

The working group concludes that, when such an unexpected vacancy occurs, the president should be permitted to nominate a replacement, subject to Senate confirmation, to fill out the remainder of the departing justice's eighteen-year term. That is, if a sitting justice decides to resign in her sixteenth year of service, the president would appoint a replacement who would serve for the final two years of the departing justice's term (and not a new eighteen-year term).

The working group considered several options for dealing with unexpected vacancies. One possibility was having vacancies filled by one, or a combination, of the senior justices. The working group concluded, however, that this option was problematic because it would create incentives for the president to select very young nominees in the hope that her chosen justices would have more opportunities to serve if unexpected vacancies arose after their retirement. Another possibility is that an unexpected vacancy could arise (particularly during the early years after the proposal was implemented), at a time when no senior justice was available, willing, and able to serve out the departing justice's term.

Giving the president the opportunity to appoint a replacement who would serve for a full, new eighteen-year term is also untenable. That option would create an incentive for strategic retirement, as a justice ideologically sympathetic to the president would know that she could give the president an opportunity to extend her influence on the Court for another eighteen years. Moreover, having

a new eighteen-year term begin whenever a vacancy arose would disrupt the staggered nature of the eighteen-year terms.

Giving the president the chance to fill out the departing justice's term is the best compromise. It creates no incentive for strategic retirement, as a sitting justice will know that—at best—she will be replaced by a justice with similar ideology for the remainder of her term. That is, retiring early provides no strategic advantage. To be sure, giving the incumbent president this opportunity does introduce into the process a degree of randomness, something the working group's proposal seeks to eliminate. If the president is of a different party than the president who appointed the departing justice, the ideological composition of the Court may no longer perfectly correspond to the results of previous presidential elections. Nonetheless, the working group did not identify a better solution. Moreover, the downsides of giving a president an additional appointment, while real, seem relatively small because justices seem more likely to resign or die unexpectedly later in their terms—making the impact of an additional appointment less consequential.

Selection of Chief Justice

The working group believes that the Court should not have a specifically designated chief justice who serves for an eighteen-year term. Rather, the working group recommends that the chief justice be selected from among the active justices for a substantially shorter term of service (for example, two or four years). We discuss three possible methods of selection that would achieve the goals of our proposal, including regularity in the appointments process, a reduction of the political intensity of nominations, and the role of chance in the composition of the Court.

The working group's recommendation begins with the premise that the chief justice does not occupy a distinct office under the Constitution. Rather, the chief justice is one of the “judges of the Supreme

Court”—a first among equals playing a role with unique responsibilities, including presiding over the impeachment of the president. The Constitution no more requires that the impeachment of a president come to a halt if the chief justice dies than it requires that the chief justice be appointed as a distinct officeholder.

The working group believes that any method of selection for the chief justice should reflect three goals. First, the method should reduce the stakes of judicial appointments by regularizing the process and reducing the role of chance in the selection of the chief justice. Second, the method should be as straightforward as possible and consistent with the ideal of a nine-justice Court with members serving eighteen-year terms of active service. Third, the method should ensure that chief justices have the experience necessary to succeed in that role.

Taken together, the first two goals point decisively toward selecting the chief justice from among the active justices for a term shorter than eighteen years. That is, no justice should be appointed by the president and confirmed by the Senate specifically as a chief justice for an eighteen-year term. This approach will reduce the political stakes and the role of chance in filling the chief justice role. And it would be consistent with the ideal of a nine-justice Court with each justice serving eighteen years of active regular service—an ideal that would not be practically achievable with eighteen-year terms for the chief justice.

Experience is the principal concern favoring a longer term for the chief justice. Just as any justice needs time to find their voice, so, too, does the chief justice need time to find their footing in the unique administrative role. We believe, however, that an eighteen-year term is not necessary for a chief justice to succeed in the role. The experience of many comparable courts bears this out. In a plurality of states (twenty-three), the chief of the highest court is elected by sitting judges for terms that range from one to eight years. Other countries provide similar examples. The president of the Constitutional Court

of Italy serves for a three-year term, for example, while the president of the Constitutional Court of France serves a nine-year term. The UK Supreme Court, which assumed the judicial functions of the House of Lords, has had four presidents in its relatively brief history, none of whom have served longer than five years. While some high courts have longer (or shorter) terms than these examples, the U.S. Supreme Court is an outlier in the length of the term that a modern chief justice can expect to serve. We believe that a carefully designed selection process can ensure that the chief justice is well set to succeed for a shorter term of leadership.

One possibility is to elevate the most senior justice to the chief justice role every two years with the next-most-senior justice taking on a “vice chief” role. This approach is not unprecedented: the UK Supreme Court, for example, has both a president and a deputy president, who are the senior and second-most-senior judges, respectively. The chief/vice chief method ensures equality among the justices, who each would have an opportunity to serve as vice chief and chief justice during their eighteen-year term of service. It thus would reduce the stakes for any one appointment, not to mention the role of chance in the selection of the chief justice.

At the same time, the chief/vice chief method would prepare justices to succeed in their two-year terms at the apex of the Court. While serving as vice chief, the next-most-senior justice would learn the chief’s duties. Moreover, because each justice would know that they will someday serve as chief justice, they would have time to prepare even prior to their elevation to the vice chief role.

A second possibility would strike a different balance between equality among each of the appointed justices and the experience of each chief justice. In this approach, the first justice nominated by each president would serve as chief justice for a four-year period at the conclusion of their eighteen-year term. This approach might minimize disruptions of the chief justice’s administrative role by lengthening the period that each chief serves. Because, however,

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some justices would not serve as chief justice under this proposal, it prioritizes equality not among justices but across presidencies.

A third possibility is for the sitting justices to elect the chief justice at regular intervals from among the nine justices on active service. Perhaps the strongest argument for this is the experience of other high courts. Twenty-three states select the chiefs of their highest courts by a vote of the sitting judges. Such an approach has the virtue of drawing upon the experience and expertise of the justices themselves, who are likely to have many reasons to wish to select a chief who is likely to succeed in the role. At the same time, the election method would be more complicated than the selection methods we have already discussed. One concern is that a bloc of justices might continue to elect the same person for multiple terms in a row. We do not think, however, that this risk is as great as it might seem because under our proposal the balance of power on the Court is likely to shift relatively frequently.

Reducing the Chance of a Senate Impasse

One important question when considering any term-limit plan is what to do about the possibility of a Senate impasse. What should happen if the Senate simply refuses to confirm a president's nominee to the Court? This possibility threatens to undermine a term-limit plan, at least if the goal is to regularize appointments and coordinate the composition of the Court with the outcomes of presidential elections. And it is a realistic possibility when the Senate is not held by the president's party.


The Constitution unquestionably gives the Senate an important role in shaping Supreme Court appointments. Article II, Section 1 provides that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” Positions vary as to when and whether the Senate can properly refuse even to consider a president's nominee, but one can

reasonably believe that the Senate's “advice and consent” power includes the right to withhold consent.

The working group deals with this problem as follows. First, passage of the statutory reform should include an amendment to the Senate's rules committing that body to hold a hearing and a vote on any presidential nominee within a set period. The working group recognizes that, even if the Senate holds a hearing and a vote, this does not guarantee that the Senate will actually confirm a president's nominee. But the working group believes that asking the Senate to at least go through a public process is appropriate.

Second, the proposal provides that the president may put forward and seek confirmation of a nominee for the Supreme Court at any point during the president's term in office. If the president obtains confirmation of a second nominee during the first half of a presidential term, however, the second justice would not actually begin serving in an active role until the term beginning after the midterm election. Thus, the president's second pick would be sworn in as a justice in the fall of the third year of the presidential term, even if confirmed substantially earlier. This feature of the proposal reduces the risk of a Senate impasse. Historically, the president's political party has tended to lose seats in the Senate in midterm elections, meaning that the president would often have a more receptive Senate during the first half of the presidential term. If, however, the Senate refuses to confirm the president's nominee or nominees during the first half of the president's term, the president will have the opportunity to make the case to voters that they should choose Senators who are more likely to confirm the president's nominees. If the Senate is held by the other political party during an entire presidential term, however, the president may need to make significant concessions in identifying a nominee, if any, that the Senate would support.

The working group has several reasons for choosing this approach. First, many creative ideas have been advanced for changes in the legal rules governing



Nearly all U.S. states have term limits for the judges of their highest courts. Across the globe, constitutional democracies typically have either term limits or age limits on high court service. Staggered terms of active service would thus bring the Supreme Court more in line with not only the state courts but also other leading constitutional democracies.

the confirmation process to prevent the possibility of a Senate impasse. The working group believes, however, that proposals that would effectively “solve” the Senate impasse problem could prove controversial and would almost certainly require a constitutional amendment. A Senate resolution, though not binding, does not face that obstacle.

Second, the working group considered modifications to the statutory proposal designed to anticipate and address the risk of a Senate impasse. One option, for example, would be to permit the president to select a senior justice to serve a new eighteen-year term. Each option, however, created new incentives and opportunities for gamesmanship and did not seem likely to eliminate the risk of impasse. The working group concluded that a Senate impasse is ultimately a political problem that must be resolved through politics, not clever institutional design. That said, the proposal reduces the risk of impasse by providing the president with an opportunity to obtain appointments during the first half of the presidential term.

Third, the working group recognizes that there is reasonable ground for disagreement about whether a Senate impasse is in fact a “problem” to be solved or whether, instead, it is simply the inevitable consequence of the constitutional choice to give the Senate, and not merely the president, a significant role in the Supreme Court appointments process. The working group did not identify an obvious reform that would consistently prevent a Senate impasse without significantly shifting the balance of power between the president and the Senate (for example, giving the president unilateral authority to select a justice when the Senate refuses to engage in its advice and consent role). One could also reasonably believe that, if a president is unable or unwilling to identify a nominee who is acceptable to the Senate during her entire presidency, that president should not have the opportunity to shape the Court.



CONCLUSION

In sum, this working group proposes moving toward a system of regular appointments of Supreme Court justices. Under this system, future presidents would be empowered to appoint two new justices during each presidential term, and a new justice would be added to the bench every two years. Giving presidents some flexibility regarding the timing of their nominations would help to prevent impasses in the Senate that could disrupt the system of regular appointments. However, we also recommend changing the Senate rules to require a vote on nominations of Supreme Court justices within a reasonable time.

Justices would serve actively for eighteen years, after which they would remain in office but take “senior” status with a diminished set of duties. The current Supreme Court justices would not be required to take senior status and would be permitted to remain in active service as long as they wish. This would temporarily expand the Court. Ultimately, however, the Court would stabilize at nine justices and remain at that size indefinitely. In the event of an unexpected vacancy on the Court, a new justice would be appointed to fill the remainder of that term. After Chief Justice Roberts leaves the bench, the chief justice role would be assumed by another active-service justice who would be selected either through a seniority system or by a vote of the sitting justices.

We believe that justices appointed under this new system would remain “in office” for purposes of the Good Behavior Clause even after the conclusion of their eighteen years of active service. In addition, currently serving justices would not be impacted by the new system and would be able to serve in active status for as long as they otherwise would have served. For these reasons, we believe this system can be implemented by statute without running afoul of the Constitution. This makes our proposal more practical than other proposals that would require an amendment. It thus puts well within reach all of the benefits of true term limits, including reducing the polarization that results from the current nominations and confirmation process.



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43. *Ibid.*
44. Amar and Calabresi, “Term Limits for Supreme Court Justices.”
45. Chilton et al., “Designing Supreme Court Term Limits,” 63.
46. *Ibid.*, 63–64.
47. *Ibid.*, 65–66.
48. PCSCOTUS Report, appendix A.
49. Several working group members either served on the Presidential Commission (Guy-Uriel Charles, Caroline Fredrickson, and Kermit Roosevelt) or provided expert testimony to it (Akhil Reed Amar, Dan Epps, Charles Fried, Amanda Hollis-Brusky, and Maya Sen). PCSCOTUS Report, appendices B and E.
50. See David R. Stras and Ryan W. Scott, “Are Senior Judges Unconstitutional?” *Cornell Law Review* 92 (2007): 473, <https://scholarship.law.cornell.edu/clr/vol92/iss3/2>.
51. Act of February 25, 1919, ch. 29, § 6, 40 Stat. 1156, 1157.
52. 291 U.S. 339 (1934).
53. 291 U.S. 341 (1934) (argument of the United States).
54. 291 U.S. 342 (1934) (argument of the United States).
55. 291 U.S. 350 (1934).
56. 291 U.S. 351 (1934).
57. See Act of June 25, 1948, ch. 646, § 371, 62 Stat. 903.
58. See 28 U.S.C. § 371 (Historical and Revision Notes).
59. 28 U.S.C. § 371.
60. 539 U.S. 69, 72 (2003).
61. See 28 U.S.C. § 294(a).
62. See 28 U.S.C. § 42 (providing that the chief justice and associate justices shall be allotted as circuit justices).
63. *Booth v. United States*, 291 U.S. 342 (argument of the United States).
64. See Stras and Scott, “Are Senior Judges Unconstitutional,” 475–478; and William Baude, “The Unconstitutionality of Justice Black,” *Texas Law Review* 98 (2019): 338–342, <https://texaslawreview.org/the-unconstitutionality-of-justice-black>.
65. Compare 28 U.S.C. § 371(e)(1)(B), which lists “writing opinions in cases that have not been orally argued” as a potential duty for senior judges.
66. 291 U.S. 339 (1934).
67. Some scholars have suggested that justices who retire assume a different office or are initially appointed to multiple offices and relinquish the office of Supreme Court justice upon retirement. See PCSCOTUS Report, 150, n. 71.
68. Chilton et al., “Designing Supreme Court Term Limits,” 6.
69. *Ibid.*
70. “One Way a SCOTUS Term Limits Bill Could Be Implemented,” *Fix the Court*, December 28, 2022, <https://fixthecourt.com/2022/12/one-way-a-scotus-term-limits-bill-could-be-implemented>.
71. *Ibid.*



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