HAS THE TIME COME TO REFORM THE SUPREME COURT?

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They say records are made to be broken, but this year, Chief Judge Merrick Garland of the D.C. Circuit set (actually more like shattered) a record he surely could have done without: the longest tenure for a Supreme Court nominee awaiting confirmation in American history. Justice Louis Brandeis had held that dubious honor for decades, but Garland broke it in July, and then his nomination continued to languish before the Senate for months afterward (four, as of the date of this writing).

Editor's Note: This article was written in September, well before the results of the election were known.

It does not take a rocket scientist to understand why. The Senate's refusal to take up his nomination is not a reflection on Judge Garland, a highly respected jurist who has received praise from across the political spectrum—including from reliable conservatives like Senator Orrin Hatch, Republican of Utah, who has described Garland as "a fine man" and encouraged President Barack Obama to nominate him. It is now clear that Senate Republicans would not have confirmed *anyone* President Obama plausibly would have nominated to fill Justice Antonin Scalia's seat. And if the shoe had been on the other foot—if Democrats had controlled the Senate during the final year of a Republican administration, after the unexpected death of a liberal stalwart on the Court—the political pressure on Senate Democrats to do the same would likewise have been enormous, maybe irresistible.

We live in an age of intense partisan polarization, significant judicial involvement in public policy matters, and (at least by historical standards) long life expectancy. Put it all together, and it means there is *a lot* riding on each Supreme Court vacancy, in part because Supreme Court justices, who enjoy life tenure, serve for a very long time. A 2006 study by Steven G. Calabresi and James Lindgren of Northwestern University noted that, since 1970, justices have held their jobs for an average of just over twenty-six years, compared to an average of about fifteen years before 1970. Most justices would like to have a long stay on the Court—which is understandable; it's not a bad gig—but also prefer to time their departures strategically, to ensure the appointment of a like-minded successor. Some justices manage to achieve both objectives, but others are not so lucky.

Is this system really a desirable one? Who, after all, would say that important public issues should routinely be decided by a disproportionately elderly group of nine lawyers, with apocalyptic confirmation battles and case outcomes often hinging, as they did this term, on the health of particular septuagenarian or octogenarian individuals? Probably not too many people. But can anything be done about it? As it turns out, in recent years, a number of scholars and Court watchers have offered proposals for reforming the Supreme Court appointment and tenure process. These ideas are a long way from being enacted, but they deserve to be taken seriously, and are not as farfetched as you might think.

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OPTIONS FOR REFORM

There is no shortage of ideas for "fixing" the Court. They tend to fall into two broad categories: first, abolishing life tenure for justices, and second, expanding the membership of the Court to allow for regular and more frequent (and thus presumably less contested) nominations and appointments.

Start with the idea of imposing term limits on Supreme Court justices, an option that has gained in popularity in the wake of Justice Scalia's death. The president and members of Congress serve only for fixed terms; why shouldn't justices do the same?

A common proposal in this vein is to give each justice a single eighteen-year term in office. Assuming that new term-limited justices are nominated and confirmed at staggered, two-year intervals, such a proposal would eventually produce a system where one justice leaves office and is replaced every other year. Justices would come and go at a predictable pace, and during a four-year term each president would have the chance to appoint two new justices. The hope is that establishing a predictable schedule for turning over the Supreme Court's membership would lower the stakes enough to remove (or at least reduce) the political furor over each appointment. This might in part explain the widespread support proposals like this have already garnered in political and judicial circles. In recent years, several presidential candidates have endorsed the idea, including Rick Perry, Ben Carson, and Rand Paul. So have a wide variety of scholars, including Erwin Chemerinsky of UC Irvine and Orin Kerr of George Washington University. And even a sitting Supreme Court justice, Justice Stephen Breyer, has expressed public support (in principle) for term limits—so long as the terms are sufficiently lengthy. An eighteen-year term should be enough to give each justice an opportunity to make an impact on the law.

A related idea is to impose an age limit on Supreme Court justices—as proposed by (among others) Richard Epstein of the University of Chicago and New York University. Justices would be required to retire at, say, age seventy—regardless of when they were appointed, and regardless of how long they had served by the time they reached that age. Unlike a term-limits proposal, such a mandatory-retirement provision would not solve the (potential) problem of justices serving on the Court for decades at a time. After all, presidents could respond to such a requirement by simply appointing younger justices. But it might go a long way toward ensuring that new nominations and appointments occur more frequently and predictably; which, again, might soften the political deadlock surrounding each individual nomination. Another advantage: there is ample precedent for judicial age limitations. More than thirty states and the District of Columbia require judges to retire by a certain age—typically seventy, but sometimes older. These judicial age limitations have survived legal challenges. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991). But this approach would have the downside of creating a strong disincentive to nominate older, but still well-regarded, jurists, like Judge Garland (age sixty-three when he was nominated).

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Still others have floated a different kind of plan: rather than having a fixed number of justices, appointments could be scheduled at regular intervals (say, every two years), with the Court expanding and contracting in size as justices come every couple years and go whenever they choose. To be sure, there would be a lot of details to work out. How many justices would hear each case—all of them, or just a subset? If the latter, how would case assignments work? Would there be some sort of *en banc* process? These questions are complex, but by no means insurmountable. The federal circuit courts of appeals have long experience handling panel and *en banc* assignments and could serve as a model. If each justice were to serve an average of twenty-five years, the Court's membership eventually would stabilize around twelve or thirteen justices, hardly an exorbitant number. Indeed, several high courts around the world are of similar size—the Supreme Court of the United Kingdom, for example, has twelve permanent members, and the International Court of Justice (the United Nations' primary judicial organ) is even bigger, with fifteen members.

GETTING FROM HERE TO THERE

Perhaps the most attractive feature of this last proposal is that it would not require a constitutional amendment. There is nothing magical about the number nine: only since 1869 has the Supreme Court's membership been fixed at that number. Before that, the Court had featured six, ten, and eight justices. Congress could expand the Court's membership tomorrow if it wanted to. If members of the opposition party balked at handing new appointments to a particular president, the effective date of any reform could be put off by eight or twelve years so that no one would know which party (if either) would benefit from the change.

As for the other proposals described above, the Constitution poses a major obstacle. Article III guarantees justices life tenure, so any plan for term limits, a mandatory retirement age, or something similar would require a constitutional amendment. By design, that is difficult to achieve. Just twenty-seven amendments to the Constitution have been enacted in 227 years, and only one in the past 45 years. Only if leaders of both major parties, all across the country, supported the proposal would it stand a chance. But even that might not be enough, and at any rate the current atmosphere of distrust and partisanship prevailing in Washington makes it seem like a remote prospect.

In the face of the difficulty of amending the Constitution, some scholars have suggested that Article III does not necessarily foreclose *all* term or age limitations on Supreme Court justices. For example, Roger Cramton of Cornell University and Paul Carrington of Duke University have written about a statutory proposal that would mandate eighteen-year "active" terms of service for Supreme Court justices, with new justices receiving appointments every two years. Once a justice's "active" term runs out, the justice keeps her life tenure—but would transition to a "senior" justice role, in which she could, for example, ride the circuits as an appellate judge, or fill in on the Supreme Court when (because of recusals or other circumstances) there are not nine "active" justices to hear a case. Cramton and Carrington have argued that their proposal would not require a constitutional amendment because no justice would be denied life tenure. But that's not so clear. Article III, after all, guarantees that Supreme Court justices "shall hold their *Offices* during good Behaviour," and it certainly seems like a justice forcibly relegated to "senior" status has exchanged one "office" for another. (Although it would put the Court in a very awkward position were it ever asked to rule on the constitutionality of a statute along the lines of the Cramton–Carrington proposal.)

Finally, it remains unclear whether there is sufficient public or political appetite for any serious effort at Supreme Court reform, which no doubt is much more interesting to lawyers and law professors than it is to everyday voters. It is difficult to envision a groundswell of grassroots activism forcing elected officials to act on this issue. But if political elites of both parties decide the time is ripe for Supreme Court reform, the public may be ready to go along. A 2015 Reuters-Ipsos poll found that 66 percent of respondents favored a *ten*-year term limit for Supreme Court justices, while only 17 percent supported the current life-tenure system. There is little reason to believe that a proposal for eighteen-year terms for justices would garner major public opposition, particularly if it had broad bipartisan support in Congress.

But, at least for the moment, such a proposal remains hypothetical. Congress has yet to seriously consider any proposal for Supreme Court reform, nor did the issue arise during the 2016 general election campaign (which is perhaps not surprising, given that public policy issues in general played only a minor role during the 2016 election cycle).

Supreme Court reform is not a panacea for the politicization of the appointment and confirmation process. Part of the solution surely lies with the justices themselves: if they redoubled their efforts to compromise and forge consensus, even on contentious issues, that could help reduce the

intensity of future confirmation battles. They could even consider developing an informal tradition of stepping down after a certain number of years, similar to the tradition George Washington set by declining to run for a third presidential term, though there is no indication the justices are interested in doing so.

In the long run, however, there may be no good alternative to reforming the appointment and confirmation process. Republicans managed to run out the clock on Judge Garland after Justice Scalia's death in February of an election year. It remains to be seen what will happen when a vacancy arises during the early or middle part of a presidential term and the opposition party controls the Senate. If the same tactic were to work over an even longer period—and who's to say it wouldn't?—a shorthanded Supreme Court could become a regular occurrence. At some point, leaders of both parties might come to see it as being in their long-term interest to avoid that situation. But that will come as cold comfort to Judge Garland—unless, of course, he finds his way onto the Court after all.

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