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Hailey B. Petrick

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An Argument for Supreme Court Term Limits

** By Hailey B. Petrick*



The United States Supreme Court is meant to be above politics, but in reality, it has been politicized since its inception.[1] Republican presidents appoint conservative justices while Democrats appoint liberal justices.[2] Currently, six of the nine Supreme Court justices have been appointed by a Republican president, even though a Republican nominee has not won the popular vote in a presidential election since 2004, effectively creating a Court that is already politically stacked against the preference of a majority of Americans.[3] Even Justice Neil Gorsuch, a Republican-appointed Supreme Court Justice, stated that the framers did not want "nine old people in Washington sitting in robes telling everybody else how to live." [4]

The need to reform and depoliticize the Supreme Court structure has gained support in recent years. Recent polls have found that most voters believed the 2020 presidential election winner should have appointed the next Supreme Court Justice, replacing the late Justice Ruth Bader Ginsburg.[5] However, this belief was not considered, and Amy Coney Barrett was appointed in a rushed confirmation hearing days before the 2020 election.[6] The Supreme Court was never meant to be political, and current events highlight that a remedy is urgently needed.

One proposed reform initiative is to increase the overall number of justices on the Supreme Court, a concept known as "court-packing." [7] The Supreme Court is established under Article III of the U.S. Constitution, which does not stipulate the number of justices on the

Supreme Court.^[8] Article III, Section 1, establishes that Congress determines the number of Supreme Court justices.^[9] The number of justices has been nine since 1869.^[10]

Another suggested reform is enacting term limits for justices. The Constitution states that justices “shall hold their office during good behavior.”^[11] Some argue that this grants justices life tenure, while others argue that the Constitution does not expressly grant life tenure, and introducing term limits does not contravene the text.^[12]

Court-packing critics argue that it is dangerous to tamper with the mechanisms of democracy to “thwart a single political figure.”^[13] In 1937, President Roosevelt (FDR) famously attempted to pack the Court to pass his progressive New Deal legislation but was opposed by Congress.^[14] While one conservative justice did switch his vote, upholding New Deal legislation, FDR eventually appointed nine liberal justices because five conservative justices died or retired during his presidency.^[15] Critics argue that in a functional democracy, the problems fix themselves. Any court reform has lasting repercussions that will outlive any current crisis. Court-packing might only exacerbate the current partisanship and divide between Senate Republicans and Democrats. Even if Democrats were able to court pack, Republicans predictably would retaliate and do the same the next time they had a majority. The problem of a politicalized Supreme Court would go on with no end in sight.

Court-packing would “serve chiefly to lock in a broken status quo – preserving the standing of Supreme Court justices as royalty but vying to confirm left-leaning monarchs rather than right-wing ones.”^[16] If Democrats achieve a majority in Congress, court-packing is not the only option available to them. Instead, a nonpartisan system, such as term limits, could be imposed. Most Americans support Supreme Court term limits, while only 32% of Americans support court-packing. A PBS poll found that 77% of Americans favored restrictions on Supreme Court Justices’ term limits.^[17] Recently, House Democrats introduced the Supreme Court Term Limits and Regular Appointments Act of 2020, which, if passed, would establish an 18-year term limit for Supreme Court Justices.^[18] This Act would allow a President to nominate and appoint two justices per four-year term.^[19] While current justices are exempt, if there are more than nine justices on the Court after a new justice is appointed and sworn into office, future justices who have served on the Court the longest would be deemed retired from regular active service.^[20] The retired justice would be designated a senior justice and may continue to serve as a judge on any federal court if able and willing.^[21] If there is a vacancy on the Court due to death, disability, or removal, the most senior retired justice would be assigned to serve on the Supreme Court until a new appointment occurs.^[22]

With a lifetime appointment, a justice can push his or her personal beliefs for decades without accountability. On average, current justices serve 28 years, which is longer than the average at any other point in U.S. history.^[23] Justices are forced to extend their retirement with life tenure until a President with their same ideological beliefs is elected. With a term limit, presidents would not be as pressured to pick the youngest judge just because they can serve on the Court for decades. Hopefully, this incentivizes presidents to pick the most qualified candidate, regardless of age.

Any reform to the Supreme Court will have a lasting effect domestically and internationally. The Supreme Court decides issues ranging from abortion, healthcare, climate change, to whether a president can unilaterally negotiate a global agreement such as the Iran nuclear deal.^[24] While the Act is not perfect, it is crucial to creating an apolitical Supreme Court and over two dozen constitutional law experts have endorsed it.^[25] Longer terms have led to justices being out of touch with the American population and have increasingly politicized the Court, which holds immense power over American life. A president should not be able to shift the ideology of the Supreme Court for decades because of mere chance while in office. This Act would restore predictability to the nomination process and is generally supported by both Republicans and Democrats.^[26] While this Act is largely symbolic, term limits have the potential to return balance to the Supreme Court.

* Hailey B. Petrick is a second-year student at Benjamin N. Cardozo School of Law with an interest in Private Equity and Real Estate Law. She received her B.A. in Sociology with minors in Psychology and Social Innovation & Social Entrepreneurship from Tulane University.

[1]James D. Zirin, *Beyond Court Packing: The Supreme Court Has Always Been Political*, Time(Nov. 2, 2020, 5:13 PM), <https://time.com/5906442/court-packing-election-history/>.

[2]*Id.*

[3]*Id.*

[4]Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court Justices Should Have Term Limits*, CNN (Sept. 30, 2019, 5:23 PM), <https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas/index.html>.

[5]Zack Budryk, *Majority of Voters Want Presidential Election Winner to Pick Next Supreme Court Justice: Poll*, The Hill(Sept. 27, 2020, 8:44 AM), <https://thehill.com/regulation/court-battles/518467-majority-of-voters-want-presidential-election-winner-to-pick-next>; Tal Axelrod, *Poll: 57 Percent of Americans Think Next President, Senate Should Fill Ginsburg Vacancy*, The Hill(Sept. 25, 2020, 3:03 AM), <https://thehill.com/homenews/senate/518257-poll-57-percent-of-americans-think-next-president-senate-should-fill-ginsburg>.

[6]*Id.*

[7]David Noll, *What Is Court Packing*, Rutgers Today(Oct. 27, 2020), <https://www.rutgers.edu/news/what-court-packing>.

[8]U.S. Const.art. III, § 1.

[9]*Id.*

[10]Walter Shapiro, *The Case Against Court-Packing*, Brennan Center for Justice(June 24, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/case-against-court-packing>.

[11]U.S. Const.art. III, § 1.

[12]Term Limits, Fix The Court(Sept. 29, 2020), <https://fixthecourt.com/fix/term-limits>.

[13]Shapiro, *supra* note 10.

[14]Zirin, *supra* note 1.

[15]*Id.*

[16]Ryan D. Doerfler & Samuel Moyn, *Making the Supreme Court Safe for Democracy*, The New Republic(Oct. 13, 2020), <https://newrepublic.com/article/159710/supreme-court-reform-court-packing-diminish-power>.

[17]Jeffery Martin, *Only 32% of Americans Support Increasing Number of Supreme Court Justices: Poll*, Newsweek(Sept. 25, 2020),<https://www.newsweek.com/only-32-americans-support-increasing-number-supreme-court-justices-poll-1534200>; *New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines*, Fix The Court(June 10, 2020), <https://fixthecourt.com/2020/06/latest-scotus-term-limits-poll/>.

[18]H.R. 8424, 116th Cong. (2020).

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.*

[23]Term Limits, Fix The Court(Sept. 29, 2020), <https://fixthecourt.com/fix/term-limits>.

[24]Michael Hirsh, *Scholars Fear a More Nationalist Supreme Court Under Barrett*, Foreign Policy(Oct. 14, 2020, 4:05 PM), <https://foreignpolicy.com/2020/10/14/amy-coney-barrett-supreme-court-nationalist-international-law-trump/>.

[25]Jessica Corbett, *More than 2 Dozen Constitutional Law Experts Endorsed a Bill to Create 18-Year Term Limits for Supreme Court*, AlterNet (Oct. 25, 2020), <https://www.alternet.org/2020/10/more-than-2-dozen-constitutional-law-experts-just-endorsed-a-bill-to-create-18-year-term-limits-for-supreme-court/>.

[26] *Conservative Thinkers Renew Their Support for SCOTUS Term Limits*, Fix The Court (Dec. 5, 2019), <https://fixthecourt.com/2019/12/conservative-thinkers-endorse-scotus-term-limits/>.