



US Supreme Court, Steve, 28 Aug 2009, flickr.

Taking Back the Constitution – Part 4 – Court terms?

Donald N. Anderson
20 October 2013

Term Limits

The next three columns feature term limits for the: federal courts, the Congress, and federal employment. Our Constitution tries to balance power so one part of the government cannot develop tyrannical power. That balance is particularly important when limiting federal employment. Many people consider the long-term staff to be the permanent government.

Terms for justices of the U.S. Supreme Court?

Since 1951, the President of the United States has been limited to two terms by the 22nd amendment to our Constitution.

No comparable limits restrict the longevity of other federal office holders. In particular federal judges serve for life unless they resign or are impeached.

In the sections below, I will discuss the possibility of limited terms for the Supreme Court and the constitutional amendment that would be required.

Why a limited term?

As of August 2013, Justices of the Supreme Court have served an average of 15 years on the Supreme Court. Elena Kagan has served 3 years on the court; Antonin Scalia has served for 26 years.

The number of justices who are appointed by each President is completely determined by the wishes of the sitting judges and their health.

In the era of the “Warren Court” (Earl Warren served as Chief Justice from 1953 to 1969), the Court took a more active role in formulating new interpretations of the Constitution. This “activist” role rankled those who felt significant changes should be debated in Congress and submitted to the states via the formal amendment process. Since that time, appointments to the Court have been more carefully scrutinized. The political fight escalated even more with the nomination of Robert Bork by President Ronald Reagan in 1987. Bork was a very prominent legal scholar and advocated interpreting the Constitution as closely as possible to the intent of its authors and adopters. This threatened to discard a number of liberal nostrums that had been considered part of Constitutional law by the Warren Court.

Both conservatives and liberals in the U.S. Senate, as well as the President, have since tried to push the court toward their philosophies. The conservatives want a careful historical reading of the Constitution with changes only through the amendment process. Liberals want the Court to take a more active role in formulating new meanings for the law – adhering closer to legislated changes. This has led to horrific fights over many nominations culminating in the rejection of some Presidential nominees.

Thus we have come to an era in which the President’s appointments are severely scrutinized, since they have strong political effects over a long and indefinite period.

There is motivation for a President to select justices who are young enough to serve a very long time.¹ They are his a major legacy to carry one philosophy forward into future Presidencies.

While not able to cure all these problems with the current appointment system, a limited term introduces some predictability, but permits the use of very experienced judges.

How long a term?

Life terms were provided so Justices would not be subject to the pressures of doing the currently popular thing, or to consider their next job. They could focus their attention only on the law. I propose a relatively long, single term, with lifetime compensation.

Because these justices serve far longer without review than any other federal office holder, it is important to spread their appointments out across multiple Presidents. In this way, the appointment process may well permit many philosophies to arrive at the Court.

A 27-year term permits a new justice every three years, and every President will have at least one Supreme Court appointment.ⁱⁱ A one-term President would get one or two appointments and a two-term President would get two or three appointments. Thus, no President would be able to appoint a majority to the court.

Fixed terms

A term would begin every three years and expire 27 years later. If a vacancy occurred by death, resignation, or impeachment, the original President would make an appointment to fill the remainder of that term with no re-appointments permitted. Retirement compensation would still be for life, but the proportion of their salary awarded would be in proportion to the number of years of a full term served. Court terms would start in July of years that are divisible exactly by three to move the appointments at least five months away from the political election. The year 2016 is exactly divisible by three.

Other than the Supreme Court

Federal justices below the Supreme Court shall serve a single 18-year term. In this way, no President could appoint a majority of judges. They may not serve another Federal Court term, but can be appointed to the Supreme Court. Lifetime compensation after a full term shall be 2/3 of the compensation for judges in the highest position they attained. Service for less than a full term shall see lifetime compensation proportionally reduced. Appointment to the Supreme Court shall not affect this compensation except to delay its start until service on the Supreme Court is complete.

A suggested amendment

Each justice of the Supreme Court shall be nominated to a single 27-year term. Terms would end on June 30 of every year exactly divisible by three. Justices completing their term may not be reappointed, but shall continue to be compensated at the same level as current justices for the remainder of their life.

Nomination shall be made by the President sitting when a term ends, or his designee. Only if that President, through death or disability, is unable to make the appointment, shall this duty devolve on his designee or list of designees.

Justices of the Court at the beginning of each three-year term shall select a Chief Justice, except that justices who are in their first three years or last three years on the Court shall not be eligible.

The positions of justices who do not complete their terms, may be filled by nominations of the President who appointed them or his designee. Those fulfilling partial terms shall not be eligible for reappointment. Lifetime compensation shall be that part of a current justice's salary, as years of service are part of a full term.

In transition to the new fixed terms, the oldest existing justice would be retired as each new justice is confirmed.

Justices appointed to courts other than the Supreme Court shall serve a maximum of 18 years in all appointments. Lifetime compensation after a full term shall be 2/3 the current

compensation for the highest appointment held. Service for less than a full term shall cause the compensation amount to be proportionally reduced. This service shall not prevent appointment to the Supreme Court, in which case lifetime compensation shall be delayed until they leave the Supreme Court.

If this transition rule had been in effect in 2013, Justice Ginsberg would have retired this year after 20 years service on the Supreme Court,ⁱⁱⁱ the remaining justices would have retired after an average of 27 years service on the Court, and none before their 80th birthday.

Justice Ginsburg would receive lifetime compensation of 20/28 of a Supreme Court salary plus 13/18 of 2/3 of an Appeals Court salary.

ⁱ In the third column of this series I suggested a minimum age of 50 years to serve on the Supreme Court. There currently is no age limitation.

ⁱⁱ Mark Levin in his very fine recent book *The Liberty Amendments: Restoring the American Republic* (Published 13 August 2013) suggests in Chapter 4 that Supreme Court justices serve a single 12 year term. I retain my original 28 year term because it prevents a two-term president from appointing a majority of the justices.

ⁱⁱⁱ Justice Ginsburg would receive lifetime compensation of 20/28 of a Supreme Court salary plus 13/18 of 2/3 of an Appeals Court salary. At present (1913) salary levels that would be about \$241,619 per year.