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ARGUMENTS AGAINST 18-YEAR TERM LIMITS FOR THE SUPREME COURT

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INTRODUCTION

After Justice Brett Kavanaugh’s contentious Supreme Court confirmation, there were numerous cries among politicians and commentators for the need to “lower the temperature” around the Supreme Court.¹ The pleas were apt. Justice Kavanaugh’s confirmation was unprecedented for its media attention and the partisan divide it created among politicians and the public. For weeks, front-page articles in the nation’s leading newspapers and online journals covered the daily ins and outs of Senate procedure, feisty tweets and dueling press releases, and the

CONTENTS

Introduction	1
Arguments Against 18-Year Term Limits	2
They do not promise an equal opportunity to appoint justices	2
They would only increase the politicization of the Supreme Court	4
They would create numerous conflicts of interest and increase public cynicism	5
Positives are greatly outweighed by negatives	6
Conclusion	8
About the Author	8

Chart 1: Vote Counts by Supreme Court Nominee Since 1993 4

political rage brewing around the Capitol.² The public was also sharply divided. Days before the final vote, public polling indicated that 88 percent of Republicans supported his confirmation, while 83 percent of Democrats did not.³

There are many alleged reasons for such rancor. Some believe it was the result of ever-escalating partisan judicial confirmations. In support, they cite the nearly unanimous votes for Justices Antonin Scalia and Ruth Bader Ginsberg—compared to the recent party-line votes for Justices Neil Gorsuch and Brett Kavanaugh.⁴ Others claim the political hostilities during Justice Kavanaugh’s confirmation were more likely in response to fears that he would be a much more conservative jurist than his predecessor, Justice Anthony Kennedy and thus would solidify the court’s 5-4 conservative bloc.

Irrespective of the reasons, many across the ideological spectrum have looked to various reforms that could lower the political tensions around future confirmations. In addition

2. See, e.g., Frank Thorp, “How a Kavanaugh Senate vote could play out this week,” *NBC News*, Oct. 2, 2018. <https://www.nbcnews.com/politics/congress/how-kavanaugh-senate-vote-could-play-out-week-n915901>; Brett Samuels, “Judiciary Dems call on GOP counterparts to correct Kavanaugh tweets,” *The Hill*, Oct. 3, 2018. <https://thehill.com/homenews/senate/409778-senate-judiciary-dems-call-on-gop-counterparts-to-correct-kavanaugh-tweets>; Office of Sen. Chuck Grassley, “Grassley: With FBI Work Complete, It’s Time to Vote,” Press Release, Oct. 4, 2018. <https://www.judiciary.senate.gov/press/rep/releases/grassley-with-fbi-work-complete-its-time-to-vote>; Office of Sen. Dianne Feinstein, “Feinstein Statement on ‘Appalling’ Republican Attacks on Sexual Assault Survivors,” Press Release, Oct. 3, 2018. <https://www.judiciary.senate.gov/press/dem/releases/feinstein-statement-on-appalling-republican-attacks-on-sexual-assault-survivors>; Caroline Simon and John Bacon, “‘We are your voters!’ Energized Kavanaugh protestors put swing vote lawmakers on notice,” *USA Today*, Oct. 4, 2018. <https://www.usatoday.com/story/news/politics/2018/10/04/brett-kavanaugh-protesters-target-supreme-court-nominee-again/1519917002>.

3. Including Independents, 48 percent of Americans opposed now-Justice Kavanaugh’s nomination, 41 percent supported the nomination and only 11 percent were unsure. See: “NPR/PBS NewsHour/Marist Poll Results,” Oct. 1, 2018, p. 33. http://maristpoll.marist.edu/wp-content/uploads/2018/10/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_1810021305.pdf#page=33.

4. “Supreme Court Nominations: present-1789.” U.S. Senate, accessed Nov. 28, 2018. <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

1. See, e.g., Melissa Heelan Stanzione, “Kavanaugh Saga Amplifies Call for Supreme Court Term Limits,” *Bloomberg Law*, Oct. 13, 2018. <https://www.bna.com/kavanaugh-saga-amplifies-n73014483272>.

to reforming the confirmation process via amending Senate rules,⁵ a number have looked to reforming the court itself. From a review of recent commentary and scholarly articles, one of the most prevalent reforms offered is the implementation of 18-year term limits for Supreme Court Justices.⁶

The suggestion of 18-year term limits is not new. Variations of the same proposal have been flouted by scholars and commentators for over 30 years.⁷ And although each presents their own perspective to the debate, proponents nevertheless agree that term limits offer numerous advantages to the Constitution's current guarantee of life tenure "during good behavior."⁸

The most claimed advantage of 18-year, staggered term limits is that it results in an open court seat every two years—promising two vacancies each presidential term. The benefits, proponents allege, are numerous, including that it will "eliminate occasional hot spots of multiple vacancies" and over time, decrease the political temperature surrounding judicial confirmations.⁹ Further purported advantages include fewer politically strategic retirements, greater incentives to nominate senior and established nominees and more opportunity to add greater diversity to the Court.

But term limits will not achieve the goals its proponents intend. There are several reasons why. First, term limits do not promise presidents an equal opportunity to appoint justices. Even with terms, vacancies will often remain random. Indeed, justices will not always complete their set terms and the term limits do nothing to prevent Senate machinations, such as purposefully delaying a confirmation vote. Second,

term limits would do little to decrease the politicization of the Supreme Court. On the contrary, it would do the opposite by inextricably tying the fate of the Supreme Court to every partisan election. Third, term limits would offer justices unprecedented post-judicial opportunities, creating numerous conflicts of interest for the Court and increasing public cynicism toward the judiciary. Finally, the actual benefits of term limits—like the opportunity for a more-diverse judiciary—are greatly outweighed by its negatives, which should be fatal to its implementation.

ARGUMENTS AGAINST 18-YEAR TERM LIMITS

They do not promise an equal opportunity to appoint justices

It is seemingly random when a new justice joins the Supreme Court. In two terms, President Ronald Reagan saw four justices confirmed, while President Bill Clinton saw only two. Like President Clinton, President Barack Obama had two justices confirmed in his eight years, while President Donald Trump accomplished the same in only 17 months.¹⁰

Proponents argue that term limits would stop such a phenomenon. Staggered, 18-year term limits would promise an open Supreme Court seat every two years, offering two new justices every presidential term. As a result, it is reasoned that term limits will offer consistent—and fair—opportunities for presidents to nominate justices to the Court.¹¹ But this reasoning is based on a myriad of assumptions, including that justices will nearly always complete their 18-year terms and the Senate will always confirm a president's nominee.

Consider retirements. Proponents of 18-year terms argue that retirements would be incredibly rare because justices would not be serving on the Court in their later years. They also contend that term limits would stop justices from strategically retiring, leaving the Court during a particular administration with hopes that the president will select a like-minded jurist. This is not the case.

With term limits, presidents—and justices—have even more of an opportunity to quickly change the ideological direction of the Court. In two terms, one president could—at a minimum—nominate four justices. If *one* additional justice were to prematurely leave the Court, the same president could nominate five justices—a majority. This could be a frequent occurrence. According to one actuarial study, with 18-year term limits, a two-term president would have a 43 percent

5. Reforms include restoring the 60-vote filibuster and enforcing strict deadlines for the Senate to vote on a president's judicial nominees. See, e.g., Fix the Court (@FixTheCourt), "We can fix the #SCOTUS confirmation mess! 1. Restore 60-vote threshold 2. Nominees' docs can't be withheld unless active nat'l security concerns 3. Senate has 180 days to act. If they don't, nominee is automatically confirmed on day 181," October 4, 2018, 1:13PM. Tweet: <https://twitter.com/FixTheCourt/status/1047897527389970432>.

6. The present study only discusses 18-year term limits for Supreme Court justices, as most recent proponents of term limits have settled on 18 years.

7. See, e.g., Philip D. Oliver, "Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court," *Ohio State Law Journal* 47:4 (1986), pp. 799-834. https://kb.osu.edu/bitstream/handle/1811/64322/OSLJ_V47N4_0799.pdf; Henry Paul Monaghan, "The Confirmation Process: Law or Politics?", *Harvard Law Review* 101 (1988), pp. 1202-12. https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1776&context=faculty_scholarship; James E. DiTullio and John B. Schochet, "Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms," *Virginia Law Review* 90 (2004), pp. 1093-1149. <http://www.virginialawreview.org/sites/virginialawreview.org/files/1093.pdf>; Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy* 29:3 (2006), pp. 769-879. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121; Ben Feuer, "Why the Supreme Court needs 18-year term limits," *L.A. Times*, July 18, 2017. <http://www.latimes.com/opinion/op-ed/la-oe-feuer-supreme-court-term-limits-anthony-kennedy-20170718-story.html>.

8. U.S. Const. art. III, § 1. It should be noted that among proponents, there is a debate about how term limits should be implemented. The majority view is that such a plan would require a constitutional amendment. See, Calabresi and Lindgren, p. 824. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121.

9. *Ibid.*, p. 834.

10. "Supreme Court Nominations: present-1789." <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

11. See, e.g., Kermit Roosevelt III and Ruth-Helen Vassilas, "Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments," *American Constitution Society Issue Brief*, June 2017, p. 9. https://www.acslaw.org/wp-content/uploads/2017/06/Coming_to_Terms.pdf.

chance of appointing a court majority.¹² The study further notes that: “In the history of the republic, only five presidents—aside from George Washington, who assembled the court from scratch—have been able to appoint more than five justices. The last president to do that was Eisenhower.”¹³

With such political opportunity, term limits give justices an even-greater incentive to politically time their retirements. Take the following hypothetical. A justice has served 16 years on the Court and a presidential election is set to occur before her 18-year term is completed. This justice has a choice: She can retire now and allow the current president to name her successor or she can finish her soon-to-be-completed term. Her choice could fall on two considerations: First, how much more can she accomplish on the bench? Of course, with terms, the story of her judicial tenure is mostly written. And depending on the makeup of the Court, her current impact could already be inconsequential. The second consideration is who the president is. If he or she would more likely nominate a like-minded jurist, a justice could easily rationalize that 18 additional years of similar jurisprudence would outweigh an additional two years of uncertainty.

Term limits would make this scenario uncomfortably common, which demonstrates that their goal of consistent, apolitical vacancies could be easily quashed by pragmatic, ideological considerations. Even today, without term limits, justices regularly consider the political implications of their retirements.¹⁴ And justices that do not retire under favorable political circumstances are often criticized for failing to do so.¹⁵ With term limits—which would mandate justices more frequently rotating off and on the Court in a shorter period of time—the political pressure surrounding retirements would increase as presidents and political allies would have a greater opportunity to ideologically shape it in a considerably shorter period of time. This sort of pressure also increases the odds of dubious, political deals. In exchange for retiring (and blowing up the “two justices per presidential term” plan), what could politicians offer justices? The temptations to retire early could be monumental. After all, with term limits, the justices will retire at a much younger age and will likely be considering new careers (and opportunities) after their service on the Court.¹⁶

12. David Fishbaum, “The Supreme Court Has a Longevity Problem, but Term Limits on Justices Won’t Solve It,” *Harvard Business Review*, July 13, 2018. <https://hbr.org/2018/07/the-supreme-court-has-a-longevity-problem-but-term-limits-on-justices-wont-solve-it>.

13. *Ibid.*

14. Adam Liptak, “Will Anthony Kennedy Retire? What Influences a Justice’s Decision,” *The New York Times*, Feb. 19, 2018. <https://www.nytimes.com/2018/02/19/us/politics/anthony-kennedy-retirement.html>.

15. See, e.g., Dahlia Lithwick, “Ruth Bader Ginsburg Is Irreplaceable,” *Slate*, March 19, 2014. http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/ruth_bader_ginsburg_shouldn_t_retire_she_s_irreplaceable.html.

16. Some of these potential post-judicial opportunities—and the conflicts they may offer—are discussed below.

Most proponents of term limits recognize the inevitability of unforeseen judicial vacancies and propose a fix. One of these,¹⁷ as presented by law professors Steven Calabresi and James Lindgren, would have the president name “an interim Justice [...] to be appointed through the regular confirmation process [...] to fill the remainder of the deceased or retired Justice’s term.”¹⁸

There are several problems with this proposed fix. For one, could the public accept a Supreme Court justice who, unlike their peers, would only serve a few years—or months—on the Court? Moreover, what would be the mindset of an interim justice? Would an interim justice view their role differently than the role of full, associate justice? Would this affect their decision-making—either being hesitant to dissent or overzealous in presenting their own legal view? And with these concerns, could even the most qualified candidates choose to decline the nomination?

Irrespective of these concerns, the proposal for interim justices would still fail to deliver on the purported goal of term limits to have two new justices each presidential term. Indeed, the appointment of a temporary justice—like any other justice—relies on timely Senate confirmation, which is far from guaranteed. This is not a speculative concern. In 2016, President Obama named Circuit Judge Merrick Garland to replace Justice Antonin Scalia, who died earlier that year.¹⁹ But Senate Republicans, who maintained a majority in the Senate, refused to vote on the nomination and the vacancy remained until President Trump’s nominee, now-Justice Neil Gorsuch, was confirmed the following year. That same year, some Republican Senators claimed they would stall all Supreme Court nominations if Hillary Clinton won the presidency.²⁰ Even if these claims were conjecture, Senate Republicans enjoyed the numbers to do so.²¹

Under term limits, if one political party managed to block a Supreme Court nominee as Republicans did in 2016,

17. Another proposed fix is to have a senior justice return to the court whenever a vacancy arises. See, e.g., Alan Morrison, “Debate: Supreme Court Justices Should Be Subject to Term Limits,” *National Constitution Center*, March 8, 2017. <https://www.youtube.com/watch?v=F9kCV0JeuVg>. This proposal, however, raises additional concerns: Which senior justice (presuming there is more than one) should return? Who decides? Is such an interim nomination—without advice and consent of the Senate—constitutional?

18. Calabresi and Lindgren, p. 827. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121.

19. Ron Elving, “What Happened With Merrick Garland In 2016 And Why It Matters Now,” *NPR*, June 29, 2018. <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now>.

20. Nina Totenberg, “Sen. McCain Says Republicans Will Block All Court Nominations If Clinton Wins,” *NPR*, Oct. 17, 2016. <https://www.npr.org/2016/10/17/498328520/sen-mccain-says-republicans-will-block-all-court-nominations-if-clinton-wins>; and Burgess Everett, “Cruz: GOP may block Supreme Court nominees indefinitely,” *Politico*, Oct. 26, 2016. <https://www.politico.com/story/2016/10/cruz-supreme-court-blockade-230363>.

21. See “Party Division,” U.S. Senate, accessed Nov. 28, 2018. <https://www.senate.gov/history/partydiv.htm>.

observers should expect the opposing party to eventually respond in kind. Indeed, as one political commentator has noted, the Senate’s past is “a reminder that judicial battles never end, and revenge is always potentially just around the corner.”²² Such predictable “revenge” dooms the benefits of 18-year term limits and its promise to deliver consistent judicial vacancies and confirmations.

They would only increase the politicization of the Supreme Court

In addition to purportedly offering consistent and routine vacancies, proponents of 18-year term limits argue that the plan would “reduce the intensity of the politics associated with confirmations at the Supreme Court level.”²³ This is doubtful, however, as term limits would inextricably tie political campaigns to the fate of the Court, turning the judiciary into a highly-partisan topic in nearly every campaign.

The 2016 presidential election exemplifies this concern. During the 2016 cycle, both Donald Trump and Hillary Clinton promised to nominate judges who would vote in certain ways. Candidate-Trump promised²⁴ to nominate judges who would overturn *Roe v. Wade*,²⁵ a case now synonymous with abortion rights; Candidate-Clinton promised²⁶ to nominate judges who would overturn *Citizens United*,²⁷ a landmark case concerning campaign finance regulations.

Although presidential candidates in past campaigns have made similar promises,²⁸ the 2016 election was especially unique: Due to Justice Scalia’s death and Judge Garland’s failed confirmation, there was a vacancy on the Court during the pendency of the campaign and voters were well cognizant that either Clinton or Trump would name the next nominee to the Supreme Court.

Term limits would recreate this 2016 scenario every presidential election—and perhaps to an even worse, more-polar-

ized degree. Public polling helps frame the potential public intensity. Compared to decades past, Americans’ view of the Court today is largely shaped by their personal politics. In August 2000, just nine months after the contentious *Bush v. Gore* decision,²⁹ 62 percent of Americans approved of “the way the Supreme Court [was] handling its job;” 29 percent did not—a 33 percent gap.³⁰ Ten years later, the gap had narrowed to 12 percent.³¹ By September 2016, during the heat of the presidential campaign, the Court’s approval and disapproval number had flipped: 45 percent approved of the Court and 47 percent did not. Interestingly, these numbers nearly match the ultimate voting percentage each presidential candidate received two months later: On election day, Donald Trump received 45.9 percent of the vote while Hillary Clinton received 48 percent.³²

As summarized by Gallup, in recent times, “Republicans’ and Democrats’ ratings of the Supreme Court have each fluctuated over time seemingly based on decisions handed down by the court, changes in which party occupies the White House and the appointment of justices to the court.”³³ And the public’s growing partisan view of the Court seems to mirror the Senate’s growing partisan treatment of nominees. Indeed, nearly every confirmation vote since 1993 has narrowed—following stricter party-line votes—starting with Justice Ruth Bader Ginsburg’s 96-3 vote and culminating with Justice Brett Kavanaugh’s 50-48 confirmation.³⁴

CHART I: VOTE COUNTS BY SUPREME COURT NOMINEE (SINCE 1993)

NOMINEE	YEAR	VOTE
Ruth Bader Ginsburg	1993	96-3
Stephen G. Breyer	1994	87-9
John G. Roberts, Jr.	2005	78-22
Samuel A. Alito, Jr.	2005	58-42
Sonia Sotomayor	2009	68-31
Elena Kagan	2010	63-37
Neil M. Gorsuch	2016	54-45
Brett Kavanaugh	2018	50-48

Although the politicization of the Court has grown in recent years, it was rarely on the public’s mind during election time.

22. Bill Scher, “On the Courts, What Goes Around Has Always Come Around,” *RealClear Politics*, Oct. 1, 2018. https://www.realclearpolitics.com/articles/2018/10/01/on_the_courts_what_goes_around_has_always_come_around_138210.html.

23. Calabresi and Lindgren, p. 836. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=70112.

24. Dan Mangan, “Trump: I’ll appoint Supreme Court justices to overturn *Roe v. Wade* abortion case,” *CNBC*, Oct. 19, 2017. <https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>.

25. 410 U.S. 113 (1973).

26. Peter Overby, “Presidential Candidates Pledge to Undo ‘Citizens United.’ But Can They?,” *NPR*, Feb. 14, 2016. <https://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they>.

27. 558 U.S. 310 (2010).

28. In contrast, past campaigns have used less-explicit language when discussing the rubric for their potential court nominees, instead using buzzwords like favoring judges with “empathy” or avoiding “activist judges.” See, e.g., Neil A. Lewis, “Stark Contrast Between McCain and Obama in Judicial Wars,” *The New York Times*, May 28, 2008. <https://www.nytimes.com/2008/05/28/us/politics/28judges.html>.

29. 531 U.S. 98 (2000).

30. “Supreme Court,” Gallup, accessed Nov. 28, 2018. <https://news.gallup.com/poll/4732/supreme-court.aspx>.

31. *Ibid.*

32. “Presidential Election Results: Donald J. Trump Wins,” *The New York Times*, Aug. 9, 2017. <https://www.nytimes.com/elections/2016/results/president>.

33. Megan Brenan, “Supreme Court Approval Highest Since 2009,” Gallup, July 18, 2018. <https://news.gallup.com/poll/237269/supreme-court-approval-highest-2009.aspx>.

34. See: “Supreme Court Nominations: present-1789,” U.S. Senate, accessed Nov. 28, 2018. <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

In Pew Research polls listing the most important issues of the 2008 and 2012 presidential campaigns, topics like the economy, education, abortion, environment and trade all made the list.³⁵ The Supreme Court did not. But during the 2016 campaign, the Supreme Court finally made the list, with 65 percent of voters stating that Supreme Court appointments were “very important” to their vote. Astonishingly, the fate of the Supreme Court beat out abortion (45 percent), environment (52 percent), and trade (57 percent) and fell only one percent behind education and two percent behind social security on Americans’ priority list that year.³⁶

The only difference between the 2008 and 2012 campaigns compared to the most recent presidential race was an ongoing Supreme Court vacancy and increased political rhetoric that heavily focused on filling the open seat. Because of the high, reoccurring stakes term limits will have on the Court, more politicians and interest groups will follow the 2016 playbook of politicizing it during campaigns—and perhaps even to a worse degree. After all, with two guaranteed vacancies each presidential term, politicians and interest groups will be able to spend significant time strategizing, fundraising and campaigning heavily on the issue in every election. Similar pressure may even seep into off-cycle Senate races, where Senators will face even greater pressure to support (or oppose) certain nominees.

The recent midterm election is perhaps emblematic of this new road. After the election, several political commentators noted that a majority of the most venerable Senate Democrats who voted against Kavanaugh’s confirmation lost, while the lone Democratic Senator who did vote for Kavanaugh—Sen. Joe Manchin (W.Va.)—prevailed.³⁷ Although it is likely—and perhaps more plausible—that a myriad of other factors led to this result,³⁸ it will not prevent candidates and interest groups from concluding that the Kavanaugh nomination impacted these elections, only reinforcing the notion that politicizing the Court is a successful campaign issue.

With term limits, such politicization would only worsen—as vacancy battles would be guaranteed to occur every other

year in the Senate. Proponents see this as an advantage, arguing that routine vacancies will ultimately “reduce the stakes of the nomination process.” But, in Congress, simply because Senators routinely face an issue does not reduce the political stakes. The federal budget process is a prime example. Although creating a budget is routine, it has not stopped Congress from forcing shutdowns and numerous continuing resolutions.

In short, because term limits marry courts and campaigns, politicians will continue to campaign on the courts for votes (as they did in 2016) and an already-politicized topic (as shown in polling data) will become even more intense.

They would create numerous conflicts of interest and increase public cynicism

Among the grievances levied against King George III in the Declaration of Independence was that he had “made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.”³⁹ In other words, the King had disregarded judicial independence.

In the *Federalist Papers*, Alexander Hamilton argued that because “the judiciary is beyond comparison the weakest of the three [branches] of [federal] power” and had “neither force nor will, but merely judgment,” it must have “complete independence” from Congress and the Presidency.⁴⁰ The best chance for such independence, Hamilton reasoned, was to ensure that Congress could not punish judges by slashing salaries or removing them from office, except by impeachment.⁴¹

After all, according to Hamilton, “a power over a man’s subsistence amounts to a power over his will.”⁴²

In 2001, 212 years after the Constitution’s ratification, Justice Stephen Breyer summarized Hamilton’s vision and the rationale behind Article III:

[The] guarantees of compensation and life tenure exist, not to benefit the judges, but as a limitation imposed in the public interest. They promote the public weal in part by helping to induce “learned” men and women to quit the lucrative pursuits of the private sector, but more importantly by helping to secure an independence of mind and spirit necessary if judges are to maintain that nice adjustment between

35. See: “Section 3: Issues and the 2008 Election,” Pew Research Center, Aug. 21, 2008. <http://www.people-press.org/2008/08/21/section-3-issues-and-the-2008-election>; “Section 2: Issues of the 2012 Campaign,” Pew Research Center, April 17, 2012. <http://www.people-press.org/2012/04/17/section-2-issues-of-the-2012-campaign>.

36. See: “4. Top Voting issues in 2016 election,” Pew Research Center, July 7, 2016. <http://www.people-press.org/2016/07/07/4-top-voting-issues-in-2016-election>.

37. See, e.g., Guy Benson, “Kavanaugh Mattered: GOP Makes Senate Gains, as Key Red State Democrats Lose,” *Townhall*, Nov. 7, 2018. <https://townhall.com/tipsheet/guybenenson/2018/11/07/kavanaugh-mattered-gop-gains-in-senate-as-key-red-state-democratic-no-votes-lose-n2535462>.

38. See Christal Hayes and William Cummings, “Democratic Senators lost in battleground states after voting against Kavanaugh,” *USA Today*, Nov. 7, 2018. <https://www.usatoday.com/story/news/politics/elections/2018/11/07/kavanaugh-effect-midterm-elections/1915457002>. As a caveat, Sen. Jon Tester (D-Mont.) voted against Kavanaugh’s confirmation and still prevailed in his Montana Senate race.

39. “The Declaration of Independence,” ¶ 11, July 4, 1776. <http://americainclass.org/sources/makingrevolution/rebellion/text8/decindep.pdf>. (Capitalizations altered).

40. Alexander Hamilton, *The Federalist Papers* No. 78,” May 28, 1788. http://avalon.law.yale.edu/18th_century/fed78.asp. (Capitalizations altered).

41. See Alexander Hamilton, *The Federalist Papers* No. 79,” May 28, 1788. http://avalon.law.yale.edu/18th_century/fed79.asp.

42. *Ibid.* (Capitalizations altered).

individual rights and governmental powers which constitutes political liberty.⁴³

The undercurrent of these legal and historical arguments reveals another fault of 18-year term limits. With term limits, most justices will have a myriad of opportunities after their terms, most which will offer high financial benefits. This will create unprecedented conflicts of interest for the Court and will surely increase public cynicism toward the judiciary. This is dangerous, as the only true power the Court holds is legitimacy. Without it, there is little weight behind its opinions and greater incentive for the President or Congress to ignore its rulings—crippling our typical notion of separation of powers.

Consider this hypothetical. Two large smartphone manufacturers—Company A and Company B—are engaged in decades of litigation. A small segment of the case reaches the Supreme Court, resting on a complicated question of statutory interpretation. The Court issues a divided ruling, where only five justices agree with the results of the decision, and four write lengthy, passionate dissents. A few years later, a justice who voted with the majority is term limited. Weeks later, Company B—the victor in the prior court case—announces that the term-limited justice has joined their board of directors.

Here is another. A Midwestern state sues the Environmental Protection Agency, protesting certain federal regulations. The Supreme Court ultimately rules for the EPA, but one justice writes a blistering dissent. That dissenting justice is term limited the next year. Days after leaving the bench, the justice announces that she is running for Senate in the same Midwestern state, arguing that she always defended states' rights on the bench and will continue to do so in Congress.

These examples may seem strange to consider but former judges routinely run for federal office,⁴⁴ and past members of Congress often join corporate boards or lobbying firms after

leaving Capitol Hill.⁴⁵ With term limits, former Supreme Court justices could do the same, and more.⁴⁶

Importantly, conflicts of interest may be *real* or *perceived*. Even if a justice's decision to side with Company B or a certain Midwestern state was innocent and based on a genuine interpretation of the law, the perception is what matters. Term limits provide too many opportunities for such conflicts. And these, in turn, damage the notion of judicial independence because—fairly or unfairly—it helps question the Court's partiality.⁴⁷

Some contend these fears are overblown. They note, for example, that most states and foreign nations do not follow Article III's provision of life tenure “during good behavior” and instead have term limits or mandatory retirement ages.⁴⁸ But if such a distinction is important, then it follows that *all* federal courts (the Supreme Court—in addition to lower circuit and district courts) should be term limited. Yet most proposals only place terms on the Supreme Court.⁴⁹ Why? According to one article, it is partially because “neither circuit nor district court judges exercise the level of unreviewable political power enjoyed by Supreme Court justices.”⁵⁰ This argument, though, does not appreciate the relatively few controversies heard by the Supreme Court in a given year and the tremendous discretion lower courts have in sentences and non-dispositive judgements. Moreover, the Supreme Court's “level of unreviewable political power” is exactly why the Court must be firmly divided from political interference (and any potential conflicts of interest).

Positives are greatly outweighed by negatives

With life tenure, there is an incentive for presidents to nominate younger jurists, as they are more likely to stay on the

43. *United States v. Hatter*, 532 U.S. 557, 568 (2001). (Quotation marks and citations omitted).

44. See Meena Venkataramanan, “A number of judges are running for Congress,” *ABC News*, July 10, 2018. <https://abcnews.go.com/Politics/number-judges-running-congress/story?id=56467663>. In addition, there have been numerous Supreme Court justices who also served in Congress but their terms preceded their service on the court. See, e.g., “Senators Who Served on the Supreme Court,” U.S. Senate, accessed Nov. 18, 2018. https://www.senate.gov/senators/Supreme_Court.htm; and “House Members Who Became U.S. Supreme Court Justices,” U.S. House of Representatives, accessed Nov. 28, 2018. <https://history.house.gov/People/Other-Office/Supreme-Court>. Only one person—William Howard Taft—has served as both President and a Supreme Court justice. See, e.g., Erick Trickey, “Chief Justice, Not President, Was William Howard Taft's Dream Job,” *Smithsonian.com*, Dec. 5, 2016. <https://www.smithsonianmag.com/history/chief-justice-not-president-was-william-howard-tafts-dream-job-180961279>.

45. See, e.g., Russell Berman, “An Exodus From Congress Tests the Lure of Lobbying,” *The Atlantic*, May 1, 2018. <https://www.theatlantic.com/politics/archive/2018/05/lobbying-the-job-of-choice-for-retired-members-of-congress/558851>; Eric Pianin, “These Ex-Congress Members Are Making Big Bucks on Corporate Boards,” *The Fiscal Times*, Oct. 18, 2016. <http://www.thefiscaltimes.com/2016/10/18/These-Ex-Congress-Members-Are-Making-Big-Bucks-Corporate-Boards>.

46. For example, justices could even return to practicing law. Today, elite firms offer \$300,000+ signing bonuses to former Supreme Court law clerks. See, e.g., Staci Zaretsky, “Supreme Court Clerk Bonuses Hit An Incredible New High,” *Above the Law*, Aug. 22, 2017. <https://abovethelaw.com/2017/08/supreme-court-clerk-bonuses-hit-an-incredible-new-high>. What could be the going rate for a former Supreme Court justice?

47. To limit potential conflicts, some plans provide that term-limited judges may continue to serve on lower federal courts. See Calabresi and Lindgren, pp. 824-25. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121. This potential fix, however, does little to patch the firehose of potential opportunities that justices will have after their terms are up on the highest court.

48. *Ibid.*, n. 10.

49. *Ibid.*; and DiTullio and Schochet, n. 11. <http://www.virginialawreview.org/sites/virginialawreview.org/files/1093.pdf>.

50. DiTullio and Schochet, n. 11. <http://www.virginialawreview.org/sites/virginialawreview.org/files/1093.pdf>.

bench for longer.⁵¹ Coupled with longer life expectancies, this allows justices the opportunity to serve on the Court for longer than ever before. Some argue these long tenures are antithetical to the framers' wishes and make justices increasingly less accountable to the public.

These worries, however, are overstated. Supreme Court justices are never free from scrutiny or political repercussions. Even after confirmation, Congress always has the power to limit the Court's power, either by impeaching justices,⁵² limiting its jurisdiction⁵³ or changing its size.⁵⁴ In addition, term limits do little to remedy the alleged problem of little democratic accountability: Eighteen guaranteed years is still a significant length of time on the bench. Finally, court tenures have only seen a gradual increase in the past few decades.⁵⁵ And long court tenures are not exclusive to the 20th or 21st century. Of the 25 justices who have served on the Court for 25 or more years, over half served during the 19th century.⁵⁶

Nevertheless, 18-year term limits would offer one positive reform: It would broaden the potential pool of justices and allows presidents the opportunity to name more diverse candidates to the Court. In recent years, in addition to only looking to nominees in their late 40s or early 50s, recent presidents have only seriously considered nominees with very specific backgrounds. The current makeup of the Court exemplifies this. Today, every Supreme Court justice attended either Harvard or Yale law school.⁵⁷ After law school, a majority of the current justices secured prestigious clerkships at the Supreme Court, and later spent time working as

federal government lawyers.⁵⁸ And eight of the nine justices were circuit judges before their nomination.⁵⁹

This was not always the case. Past justices have been politicians, military veterans and criminal defense lawyers.⁶⁰ None are today. But having justices with a diverse array of personal and professional backgrounds could be beneficial for the Court, as it could mitigate the perils of groupthink and allow justices to be "more creative and effective."⁶¹ Term limits offer a greater opportunity for such diversity. It is simple math: More justices rotating over a shorter period will create greater opportunities to name more diverse jurists. Yet, for the reasons indicated above, an increased turnover of justices—with the speculative hope for a more diverse judiciary—is not enough to mitigate the perils of 18-year term limits. Moreover, the swift, repeated turnover of Supreme Court justices uniquely leads to another problem: general uncertainty about the state of American law.

As previously discussed, with term limits, one president could have the opportunity to nominate a majority of the Court's justices. But such a radical change in such a short time could lead to tremendous complications. Indeed, in the American common law system, the executive branch, lower courts and the public rely on judge-made precedents. But if the composition of the Court could drastically change in such a short period, it follows that its most controversial—and politically charged—cases could be overturned only a few terms after they were decided. Such rapid turnover could encourage legal gamesmanship by powerful interest groups regarding when to bring certain cases. This would roil the nation's economy and legal system, and leave the public with little faith in the Court's stability (or reliability).

As soberly summarized by Ward Farnsworth, Dean of the University of Texas School of Law: "It is useful for actors throughout the legal system, as well as the citizenry, to have a reasonably confident sense of what the Court's position

51. See Kristen Bialik and John Gramlich, "Younger Supreme Court appointees stay on the bench longer, but there are plenty of exceptions," Pew Research Center, Feb. 8, 2017. <http://www.pewresearch.org/fact-tank/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions>.

52. "The Senate's Impeachment Role," U.S. Senate, accessed Nov. 28, 2018. https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#4.

53. Sarah Herman Peck, "Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein," Congressional Research Service, Aug. 9, 2018. <https://fas.org/sgp/crs/misc/R44967.pdf>.

54. "Timelines of Federal Judicial History," Federal Judicial Center, accessed Nov. 28, 2018. <https://www.fjc.gov/history/timeline/8276>.

55. Ryan W. Scott and David R. Stras, "An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren," *Harvard Journal of Law & Public Policy* 30:3 (2007), pp. 791-830. <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1364&context=facpub>.

56. "U.S. Supreme Court Justices by Age and Tenure," *Threestory Studio*, accessed Nov. 28, 2018. http://threestory.com/scotus/scotus_all.html.

57. William Wan, "Every current Supreme Court justice attended Harvard or Yale. That's a problem, say decision-making experts," *The Washington Post*, July 11, 2018. https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/?utm_term=.19f79ff93d41.

58. Anthony Marcum, "Some takeaways from the 'Trump 25,'" *R Street Blog*, July 6, 2018. <https://www.rstreet.org/2018/07/06/some-takeaways-from-the-trump-25/>; Joan Biskupic, "Exclusive club: Harvard, Yale and former clerks dominate Supreme Court," *CNN*, Oct. 8, 2018. <https://www.cnn.com/2018/10/08/politics/supreme-court-elite-harvard-yale-clerks/index.html>.

59. *Ibid.* In addition to professional diversity, historically, the court is also overwhelmingly white and male. See, e.g., Jessica Campisi and Brandon Griggs, "Of the 113 Supreme Court justices in US history, all but 6 have been white men," *CNN*, Sept. 5, 2018. <https://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html>.

60. Wan. https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/11/every-supreme-court-justice-attended-harvard-or-yale-thats-a-problem-say-decision-making-experts/?utm_term=.19f79ff93d41.

61. *Ibid.* Justice Sotomayor has similarly argued that greater diversity on the court would allow "[a] different perspective," which "can permit you to more fully understand the arguments that are before you and help you articulate your position in a way that everyone will understand." See, e.g., Katie Reilly, "Justice Sotomayor Calls for More Supreme Court Diversity," *Time*, April 9, 2016. <http://time.com/4287655/sonia-sotomayor-supreme-court-diversity>.

on various subjects will be in the near future. Slow turnover creates that confidence. Rapid turnover would undercut it.”⁶²

CONCLUSION

Many scholars and commentators have endorsed 18-year term limits. Their primary argument is that they will decrease the politicization surrounding Supreme Court nominations and, in turn, improve the legitimacy of the Court. But this is simply not the case.

If implemented, term limits would fail to guarantee a fair apportionment of judicial vacancies or quell the political flames surrounding the Court. Instead, it would only increase the political polarization of the judiciary and potentially create various conflicts of interest that would erode the public’s confidence. And, although term limits may provide an opportunity for a more diverse Court, it risks doing so at the expense of undercutting confidence in the purposefully deliberate slow pace of judge-made law.

This paper does not disregard the legitimate concerns of polarized confirmation battles and fears of a partisan judiciary. Term limits, though, offer far more peril than promise.

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62. Ward Farnsworth, “The Regulation of Turnover on the Supreme Court,” *University of Illinois Law Review* 2005:2 (2005), p. 442. <https://illinoislawreview.org/wp-content/ilr-content/articles/2005/2/Farnsworth.pdf>.