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OPINIONS ON JUDICIAL REFORM: A REVIEW OF THE 2021 SUPREME COURT COMMISSION

By Matthew Germer

EXECUTIVE SUMMARY

In April 2021, President Joe Biden created the Presidential Commission on the Supreme Court of the United States to evaluate many of the most popular ideas for reforming the Supreme Court. After receiving thousands of public comments and hearing hours of testimony, the Commission released its final report, which outlined the history of the Court and the likely consequences of various reform ideas, including adding justices to the Court, limiting judicial terms, setting ethical standards and improving courtroom transparency. The two most significant reforms, adding justices and setting term limits, received substantial attention from the Commission and press alike; however, these reforms are unlikely to achieve their aims and, instead, would create new, thornier problems that could undermine public trust in the Court. More prudent reforms, such as improved ethical and transparency standards, would likely increase public trust if properly implemented. Finally, though it was not an issue considered by the Commission, the public would also benefit from reforms to lower federal courts such as improving access to electronic court records and filling judicial vacancies.

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INTRODUCTION

During the 2020 U.S. presidential campaign, then-candidate Joe Biden announced that, as president, he would create a commission to study potential reforms to the Supreme Court.[1] Making good on his campaign promise, three months after his inauguration, President Biden issued an executive order to create a commission to research and draft a report on three broad topics: "an account of the contemporary commentary and debate" about the Supreme Court's role and the current nomination process; a "historical background" of other times when potential Court reforms were seriously considered; and a review of the arguments "for and against Supreme Court reform."[2]

Throughout 2021, the Presidential Commission on the Supreme Court of the United States (the "Commission") met six times, received thousands of public comments and heard testimony from dozens of scholars and activists.[3] In December 2021, the Commission submitted its final report to President Biden.[4]

The report consists of five chapters summarizing the current debate of whether to reform the structure or processes of the Court and scrutinizing several of the most common proposals. Chapter One highlights past efforts to reform the Court. Chapters Two and Three discuss the two most commonly

1. Annie Linskey, "Biden, squeezed on the Supreme Court, promises a commission to consider changes," *The Washington Post*, Oct. 22, 2020. https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html.

2. President Joseph R. Biden, "Executive Order on the Establishment of the Presidential Commission on the Supreme Court of the United States," The White House, April 9, 2021. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/09/executive-order-on-the-establishment-of-the-presidential-commission-on-the-supreme-court-of-the-united-states.

3. Presidential Commission on the Supreme Court of the United States, "Public Meetings," The White House, last accessed March 14, 2022. https://www.whitehouse.gov/pcscotus/public-meetings; Presidential Commission on the Supreme Court of the United States, "Commission charge and public comment policy," Public Comments, Docket No. PCSCOTUS-2021-0001, June 14, 2021. https://www.regulations.gov/document/PCSCOTUS-2021-0001-0003/comment.

4. Bob Bauer et al., *Final Report*, Presidential Commission on the Supreme Court of the United States (December 2021). https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

proposed Court reforms—increasing the number of justices and implementing term limits. Chapter Four looks at other reforms that would "reduce the power" of the judiciary, like jurisdiction stripping and imposing supermajority voting requirements for decisions. The final chapter considers changes to the inner workings of the Court, including how the Court handles emergency orders, regulates its own ethics requirements and provides public access to arguments and decisions.

In recent years, the R Street Institute has published numerous studies and commentaries on potential reforms to the Supreme Court and the entire federal judiciary, including several of the reforms addressed in the Commission's report.[5] This paper provides an overview of many of the reforms debated by the Commission and provides an analysis of the reforms we consider to be imprudent and those we believe should be seriously considered. Further, this report looks beyond the Supreme Court and provides suggestions for meaningful reforms to the entire federal judiciary.

With so much attention placed upon the Court and with highly anticipated, politically charged rulings on the horizon, the reforms evaluated in this report are sure to be discussed and debated for years to come.[6]

UNPACKING THE LIMITS OF THE MOST POPULAR REFORMS

When the Supreme Court Commission issued its 294-page report in December 2021, nearly one-third of it addressed two sweeping reforms: increasing the size of the Court and instituting term limits for the justices. Judicial activists have spent years pushing these reforms as potential cure-alls for the problems of the Court.[7] However, the commission rightly recognized that these two reforms would be difficult to implement and come with substantial downsides. Ultimately, court packing and term limits are not the right way forward for judicial reform.

More Court Packing, Less Justice

The U.S. Constitution provides no specific direction about the number of justices on the Supreme Court. Article III specifies only that the "judicial Power of the United States, shall be vested in one supreme Court."[8] Without clear constitutional parameters, the size of the Court has fluctuated many times in our nation's history before eventually settling at nine members in the late 19th century.

At the dawn of the republic, the first Congress set the size of the Court at six members.[9] Change occurred shortly after with the Federalist, lame-duck Congress shrinking the size of the Court to five in order to reduce the influence of Democratic-Republican president-elect Thomas Jefferson.[10] The change was short-lived, as the new Democratic-Republican Congress immediately expanded the Court back to six the next year.[11] Over the next century, as the size of the country grew and additional states joined the Union, Congress added three more members to the Supreme Court to address capacity at the highest court but also to serve as judges on the lower courts.[12] By 1863, during the height of the Civil War, Congress added a 10th justice to the Court to expand President Abraham Lincoln's influence on the body.[13] After a subsequent reduction under Democratic President Andrew Johnson, Congress ultimately set the total number of justices at nine in 1869.[14] It has remained at that number ever since.

Despite the relative stability of the size of the Court over the last 150 years, the size and membership of the Court has remained a hot topic of debate. In 1937, after the conservative, "Lochner-era" Court ruled against many of President Franklin D. Roosevelt's "New Deal" reforms, Roosevelt threatened to add up to six additional members to the Court to tilt the balance of power in his favor—a threat that came to be known as "court packing."[15] Although Roosevelt's Democratic Party held a supermajority of seats in Congress, the plan was widely condemned in the media, and the majority party fractured over the issue. Ultimately, the combination of congressional pushback and the timely jurisprudential "switch" by Justice Owen Roberts ended the court-packing debate and maintained the nine-member Court.[16]

Recently, court packing has experienced a revival among judicial reform activists due to escalating frustrations with

5. See, e.g., Anthony Marcum and Sarah Turberville, "Packing Supreme Court with more seats does nothing for democracy," *The Hill*, Jan. 26, 2019. https://thehill.com/opinion/judiciary/427113-packing-supreme-court-with-more-seats-does-nothing-for-democracy.

6. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 945 F.3d 265 (5th Cir. 2019), *argued*, No. 19-1392 (U.S. Dec. 1, 2021).

7. See, e.g., Ian Millhiser, "The most radical Democratic plan to fix the Supreme Court yet," *Vox*, Jan. 31, 2020. https://www.vox.com/2020/1/31/21115114/court-packing-supreme-court-tom-steyer-mitch-mcconnell.

8. U.S. Const. art. III, § 1.

9.Bauer et al., p. 67. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

10. Ibid.

11. Ibid, p. 68.

12. Ibid.

13. Ibid, p. 69.

14. Ibid.

15. Ibid.

16. John Q. Barrett, "Attribution Time: Cal Tinney's 1937 Quip, 'A Switch in Time'll Save Nine,'" *Oklahoma Law Review* 73 (Winter 2021), pp. 229-242. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586608.

President Donald J. Trump's successful nomination of three justices. First, after conservative justice Antonin Scalia's passing in 2016, Senate Majority Leader Mitch McConnell refused to consider President Barack Obama's nomination of Merrick Garland. This gamble paid off, as Trump won the 2016 election and Republicans held the Senate, resulting in the elevation of conservative Neil Gorsuch to the Court.[17] Next, in 2018, the frequent "swing-vote" justice Anthony Kennedy retired, giving Republicans the opportunity to add a more reliably conservative jurist on the Court and secure a more stable 5-4 conservative majority.[18] The Democrats' frustrations around the shifting balance of the Court came to a head during the confirmation process for President Trump's choice, Brett Kavanaugh, with extended hearings, protests and media coverage in response to sexual assault allegations against the nominee.[19] Finally, in 2020, liberal stalwart Justice Ruth Bader Ginsburg's passing left a third vacancy for President Trump to fill.[20] With little time to act before the 2020 election, the Republican Senate quickly confirmed Justice Amy Coney Barrett, locking in a 6-3 conservative Court.[21] In just four years, the Court moved from a potential 5-4 liberal majority if Justice Garland had been confirmed to a 6-3 conservative majority—with each of the confirmations leaving a sour taste in the mouths of Democrats.

Though distinct from Roosevelt's threats to "court pack" by adding members, many Democrats have begun to refer to Trump's three Supreme Court appointments as a form of court packing and have argued that these confirmations warrant an expansion in the size of the Court in response.[22] It was this call for expansion that led 2020 Democratic presidential nominees to declare their positions on expanding the Court, which included Biden's promise to create a Supreme Court Commission. With calls for expanding the size of the Court as the *raison d'être* for the Commission, the final report covered the topic in great detail.

Unfortunately for court-packing advocates, the idea has little merit. Although the Commission took painful strides to present balanced arguments for and against court packing, the arguments against it are clearly stronger.[23] Both the politics and the pragmatism of such a move make it a non-starter.

First, any plan designed to swing the jurisprudential bent of the Court through court packing would almost certainly require one-party control of the presidency and Congress. While such periods of unified control have existed at times over the last few decades of American history, their durations have been short and the political pushback costly. Since 1980, Democrats have only held unanimous power for three two-year stints (1993-1995, 2009-2011 and 2021-2023), and Republicans have held it for two multiyear periods (2003-2007 and 2017-2019).[24] Thus, the window for expanding the Court would likely be very tight.

Second, court packing struggles to gain meaningful public support. According to an April 2021 poll, 68 percent of Americans oppose the idea.[25] This is likely in part because Americans have become comfortable with a nine-member Court over the last 150 years. Although Congress has the power to change the number of justices, nine has become a "constitutional norm or convention."[26] With this inertia and without strong public support, expansion likely would consume nearly all of the political capital available to a majority during a unified period, eliminating its ability to pass other policy priorities. Perhaps this is why expanding the Court is seen as "something that just isn't done."[27]

Third, the Commission correctly recognized that court packing would create a vicious cycle between the parties. "Opponents of Court packing at this moment warn that it would also almost certainly generate a continuous cycle of future expansions," the report warned.[28] Looking again at the periods of unified control over the last 40 years, it is clear that not only are the windows short, but they also tend to bounce back and forth between the parties (Democrats from 1993-1995, Republicans from 2003-2007, Democrats from 2009-2011, etc.). Even if the idea of court packing enjoyed broad popularity, the frequent oscillation between party control would result in continual and unsustainable expansion. The only practical solution to this problem would be a sustained period during which one party is locked out of unified con-

17. Ian Millhiser, "What Trump has done to the courts, explained," *Vox*, Sept. 29, 2020. https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges.

18. Jacob Pramuk and Marty Steinberg, "Anthony Kennedy retiring from Supreme Court," CNBC, June 27, 2018. https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html.

19. Sheryl Gay Stolberg, "Kavanaugh Is Sworn In After Close Confirmation Vote in Senate," *The New York Times*, Oct. 6, 2018. https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

20. Nina Totenberg, "Justice Ruth Bader Ginsburg, Champion Of Gender Equality, Dies at 87," NPR, Sept. 18, 2020. https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87.

21. Barbara Sprunt, "Amy Coney Barrett confirmed to Supreme Court, takes constitutional oath," NPR, Oct. 26, 2020. https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court.

22. See, e.g., Nik DeCosta-Klipa, "Ed Markey introduces bill to add four seats to the Supreme Court," Boston.com, April 15, 2021. https://www.boston.com/news/politics/2021/04/15/ed-markey-supreme-court-bill.

23.Bauer et al., pp. 74-84. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

24. History, Art & Archives, "Party Government Since 1857," United States House of Representatives, last accessed March 14, 2022. https://history.house.gov/Institution/Presidents-Coinciding/Party-Government.

25. "April 2021 National Voter Poll," Mason-Dixon Polling & Strategy, April 23, 2021. https://firstliberty.org/wp-content/uploads/2021/04/National421FinalPollResults.pdf.

26.Bauer et al., p. 80. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

27. Ibid.

28. Ibid, p. 82.

trol over the federal government, allowing the expanded size time to calcify into a new norm. Given recent history and ongoing trends toward negative partisanship, an extended time of single-party control is unlikely.[29]

Finally, court packing is not only a political and pragmatic problem, but it also creates dangerous incentives within the judiciary. Justices are elevated to the Supreme Court to exercise their judgment and "say what the law is."[30] They are appointed rather than elected to the Court in order to be shielded from political influence, leaving "political questions" to the other, more publicly accountable branches.[31] Unfortunately, as exemplified by Justice Owen Roberts in 1937, justices may feel pressured to side with the more politically popular outcome under the threat of expansion.[32] Although responding to public pressure is often healthy for a democracy, the rule of law requires that the judiciary be free from public pressure. In fact, many of the Court's most commendable decisions were made in the face of substantial political pressure (e.g., *Brown v. Board of Education*), while some of the most lamentable decisions enjoyed broad popular support at the time (e.g., *Korematsu v. United States*).[33] The Constitution itself addresses the downsides of unrestrained democracy by creating a government of limited powers and outlining a myriad of rights that cannot be stripped away by democratic action. Ultimately, opponents of expansion are correct that "[i]n the long run … putting judges under the thumb of sitting politicians is unlikely to serve the broader interests of a democratic constitutional order."[34]

Expanding the Court is a tempting prospect for judicial reformers upset with the current jurisprudential balance of the Court, especially in light of the controversies surrounding the three most recent appointees. However, court packing is untenable both politically and pragmatically and creates unhealthy incentives for our republic. Despite substantial pressure from court-packing advocates, the Commission wisely stayed away from endorsing it as a reform option.

The Limits of Defined Judicial Terms

The Commission also assessed judicial term limit proposals. Although term limits may offer some benefits, those benefits are unfortunately outweighed by the unintended consequences, risks and perverse incentives they would create. Article III of the Constitution states that federal judges "hold their offices during good behavior."[35] Thus, so long as a judge is not removed from office, federal judgeships are considered to be lifetime appointments. Over the course of American history, this provision has resulted in some very long judicial tenures. For example, Judge Henry Potter sat on the bench from age 35 in 1801 until his death at age 91 in 1857, a term that spanned 56 years and 13 presidents.[36] More recently, Justice Stephen Breyer, who is set to retire from duty just after the publishing of this report, has served on the judiciary for over four decades after first being appointed by President Jimmy Carter in 1980.[37] Moreover, senior status can extend judicial terms even longer. For example, Judge Gerald Bard Tjoflat, who was first appointed by Richard Nixon in 1970, moved to senior status in 2019 and continues to hear a small docket of cases at age 92.[38]

Advocates of term limits point to the many downsides of such long lifetime appointments.[39] First, lifetime appointments are unpredictable and may fail to create a judiciary that is responsive to a democratic system of government. Second, the randomness inherent in a lifetime system may grant too much power to some presidents to shape the judiciary, while others have less power. Third, greater turnover on the bench may bring new voices and experiences into deliberations, including greater generational diversity. Finally, advocates argue that the sum total of these changes would enhance the legitimacy of the Court in the eyes of the public.

The most common proposal, and the one considered in depth by the Commission, places a cap on Supreme Court terms at 18 years.[40] With nine justices, an 18-year term creates a vacancy on the Court every two years, or twice per presidential term. Thus, absent an untimely vacancy, each president would have an equal opportunity to influence the composition of the Court. Similarly, voters would know that each election for president would bring with it two new justices and that each election for senator would bring three.

Looking back over the last three complete presidential administrations, such a system would have granted George W. Bush four justices, Obama four justices and Trump two justices (one of which would have replaced a Bush justice).

29. Lee Drutman, "How Hatred Came To Dominate American Politics," FiveThirtyEight, Oct. 5, 2020. https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics.

30. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

31. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

32. Barrett. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586608.

33. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954); cf., *Korematsu v. United States*, 323 U.S. 214 (1944).

34. Bauer et al., p. 83. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

35. U.S. Const. art III, § 1.

36. "Potter, Henry," Federal Judicial Center, last accessed March 14, 2022. https://www.fjc.gov/history/judges/potter-henry.

37. "Breyer, Stephen Gerald," Federal Judicial Center, last accessed March 14, 2022. https://www.fjc.gov/history/judges/breyer-stephen-gerald.

38. "Tjoflat, Gerald Bard," Federal Judicial Center, last accessed March 14, 2022. https://www.fjc.gov/history/judges/tjoflat-gerald-bard.

39. Bauer et al., pp. 112-117. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

40. Ibid.

Presumably, this would lead to a Court reflecting a slight conservative lean (5-4), which matches the three terms of Republican executive leadership compared to two for the Democrats. As Biden enters his second year, he would gain the opportunity to replace one of the Bush justices and flip the Court to a liberal majority.

Instead, at the time of publication, the Court consists of one George H.W. Bush appointee, one Clinton appointee, two George W. Bush appointees, two Obama appointees and three Trump appointees.[41] (Biden is set to replace the Clinton appointee shortly.)[42] The net result is a Court predominantly appointed by Republicans (6-3) with the two previous two-term presidents, George W. Bush and Obama, each appointing fewer justices than one-term president Trump.

Perhaps it is not surprising, then, that a majority of Americans, particularly those who support the Democratic Party, are frustrated with the imbalances created by the current lifetime appointments and would support term limits.[43]

Although term limits may have some attractive features in theory, these features fail to hold up under scrutiny: Term limits would not only require a constitutional amendment—a substantial burden to their implementation—but, in practice, they may not create predictable vacancies or resolve the underlying political toxicity associated with Supreme Court appointments. Instead, they would create conflicts of interest. This is why a number of commissioners and jurists—including former judges—have offered substantial warnings about the implementation of term limits.[44]

First and foremost, term limits would require a constitutional amendment to implement. As explained above, Article III of the Constitution establishes that that federal judges "hold their offices during good behavior," and "[t]his is universally understood to mean that federal judges have life tenure."[45] Accordingly, term limits could not be imposed by statute under the current construction of the Constitution. Instead, as outlined in Article V, imposing term limits would require two-thirds support of both houses of Congress or a convention of the states, followed by ratification of three-fourths of state legislatures.[46] While the Constitution has been amended numerous times in the history of the country, there is no political endeavor in the United States that requires greater effort, which is why no amendment has been created and passed in the last 50 years.[47]

Yet even if the constitutional hurdles were surmountable, term limits may not guarantee a predictable process. First, depending on the details of a term-limited system, justices can, and likely would, still choose to retire strategically: A justice might see shifting political winds and opt to retire in year 16 or 17 to ensure a replacement decision remains in the hands of a more ideologically aligned president and senate. Even given lifetime appointments, justices under the current system regularly retire with such strategic considerations. For example, Justice Anthony Kennedy, a largely conservative-leaning justice, retired in 2018 while Republicans controlled both the White House and Senate.[48] In so doing, Kennedy ensured that one of his protégés, Brett Kavanaugh, could replace him on the Court. Similarly, as of the time of this paper, Justice Stephen Breyer is set to retire at the end of the current term, allowing the Democratically controlled White House and Senate to replace him with another progressive jurist before Republicans potentially take control of the Senate in 2023.[49]

Without safeguards in the structure of term limits, these strategic retirements would likely continue and, in fact, could become more common. Under lifetime appointments, an aging justice has flexibility around retirement and could choose to stay in their seat, despite a desire to retire, until political winds shift once more in their favor. Conversely, a justice with a set term would have no such flexibility and, as the end of the term approaches, the strategic implications of staying in the seat would become quite clear. Therefore, unlike a justice appointed for life, a term-limited justice would be even more likely to retire strategically, consequently undercutting the very benefits of term limits. Some advocates of judicial term limits have proposed that vacancies should be filled only for the remainder of the term.[50] Such a

41. "Current Members," Supreme Court of the United States, last accessed March 15, 2022. https://www.supremecourt.gov/about/biographies.aspx.

42. Katie Rogers, "Biden Picks Ketanji Brown Jackson for Supreme Court," *The New York Times*, Feb. 25, 2022. https://www.nytimes.com/2022/02/25/us/politics/ketanji-brown-jackson-supreme-court.html.

43. Chris Kahn, "Most Americans want to end lifetime Supreme Court appointments," *Reuters*, April 18, 2021. https://www.reuters.com/business/legal/most-americans-want-end-lifetime-supreme-court-appointments-2021-04-18; "Most Oppose 'Packing' Supreme Court But Favor Term Limits for Justices," Rasmussen Reports, Oct. 1, 2020. https://www.rasmussenreports.com/public_content/politics/general_politics/september_2020/most_oppose_packing_supreme_court_but_favor_term_limits_for_justices.

44. See, e.g., Adam White, "Separate Statement of Commissioner Adam White," The White House, Dec. 15, 2021. https://www.whitehouse.gov/wp-content/uploads/2021/12/White-Statement.pdf.

45. Anthony Marcum, "Supreme Court term limits would increase political tensions around justices, not ease them," *USA Today*, Oct. 13, 2020. https://www.usatoday.com/story/opinion/2020/10/13/scotus-term-limits-political-temperature-even-higher-column/5873219002.

46. U.S. Const. art. V.

47. "26th Amendment: Right to Vote at 18," National Constitution Center, last accessed March 14, 2022. https://constitutioncenter.org/interactive-constitution/amendment/amendment-xxvi.

48. Jacob Pramuk and Marty Steinberg, "Anthony Kennedy retiring from Supreme Court," CNBC, June 27, 2018. https://www.cnbc.com/2018/06/27/anthony-kennedy-retiring-from-supreme-court.html.

49. Pete Williams, "Justice Stephen Breyer to retire from Supreme Court, paving way for Biden appointment," NBC News, Jan. 26, 2022. https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042.

50. Bauer et al., p. 116. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

provision would be vital to any term-limits proposal to help deter strategic retirements.

Furthermore, term limits fail to ensure predictability due to strategic decisions beyond the justices' control. For example, the majority party in the Senate could choose to reject a judicial nominee or delay confirmation and leave the seat vacant in anticipation of winning back the White House at the next election. To be clear, this is a tactic employed under the status quo as well, but the practice would not be deterred by term limits.[51] Instead, with set term expirations, gamesmanship within the Senate may increase if vacancies were set to occur within each election cycle. In addition, justices may pass away unexpectedly or need to step away because of illness or injury. Thus, given all of the strategic factors utilized by justices and senators, along with the randomness of life, it is unlikely that term limits would create a more predictable appointment process.

Not only do term limits fail to ensure predictability, but they also are not likely to reduce political temperatures around Court appointments or increase the Court's legitimacy in the eyes of the public. Since Robert Bork's failed nomination in 1987, Supreme Court nominations and confirmations have gained increased attention from the American public.[52] Tracking the "horse race" between potential nominees and tuning in for Senate Judiciary Committee confirmation hearings have gone from a niche hobby for court-watchers and Washington, D.C. insiders to front-page news and the subject of kitchen-table conversations.

There is no better example of this trend than the attention around the nomination and confirmation of Brett Kavanaugh in 2018. In the wake of swing-justice Anthony Kennedy's retirement from the Court, Trump nominated D.C. Circuit Judge Brett Kavanaugh to the high court. Following sexual assault allegations against Kavanaugh, more than 20 million Americans watched the Senate Judiciary Committee confirmation hearing on television, along with millions more who streamed the hearing online.[53] Public polling indicated that more than half of registered voters tuned in to watch some portion of the confirmation hearings.[54] Undoubtedly, the sexual assault allegations investigated as part of the confirmation process played a strong role in generating public interest, but Kavanaugh's is not the only recent confirmation to garner substantial public attention. More than 75 percent of poll respondents indicated that they were following the 2017 confirmation of Neil Gorsuch, and 72 percent reported paying attention to Amy Coney Barrett's confirmation in 2020.[55]

Unfortunately, Supreme Court Confirmation hearings have become spectacles with attention-grabbing public demonstrations and protests.[56] However, the driver for the elevated political intensity around confirmations is not the Court but Congress. As explained by Sen. Ben Sasse (R-Neb.) during the Kavanaugh confirmation hearings, the increased public attention on the Court is primarily the result of a "self-neutered" Congress that has become unable to legislate, leaving the executive and judicial branches to legislate in their place through executive orders, administrative law and judicial opinions.[57] As a result, judicial confirmation hearings take on increased importance to political observers and have accordingly become all-day exhibitions filled with speeches, soundbite-driven questions and heated tempers. Adding term limits to the Court would do nothing to resolve the escalating politicization of Supreme Court appointments because the problem is with Congress, not with the Court.

Finally, term limits present a concern that impacts not only the reputation of the institution but the litigants as well: conflicts of interest. Under the current lifetime-appointment system, sitting on the Supreme Court is likely the last job a justice will have. However, with judicial term limits, even with a federal pension, justices may find themselves in the uncomfortable position of planning for future employment after their term expires, creating actual or perceived conflicts of interest.

With the average Supreme Court justice joining the Court in their early 50s, a term-limited appointment could expire with several years of additional working time before retire-

51. Ariane de Vogue, "How McConnell won, and Obama lost, the Merrick Garland fight," CNN, Nov. 9, 2016. https://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html.

52. Nina Totenberg, "Robert Bork's Supreme Court Nomination 'Changed Everything, Maybe Forever,'" NPR, Dec. 19, 2012. https://www.npr.org/sections/itsallpolitics/2012/12/19/167645600/robert-borks-supreme-court-nomination-changed-everything-maybe-forever.

53. Reuters Staff, "More than 20 million Americans glued to Kavanaugh hearing telecast," *Reuters*, Sept. 28, 2018. https://www.reuters.com/article/us-usa-court-kavanaugh-ratings/more-than-20-million-americans-glued-to-kavanaugh-hearing-telecasts-idUSKCN1M82MI.

54. "National Tracking Poll #180978," Morning Consult and Politico, Sept. 28-29, 2018, p. 116. https://morningconsult.com/wp-content/uploads/2018/10/180978_crosstabs_POLITICO_FINAL.pdf.

55. "February 2017 Political Survey," Pew Research Center, Feb. 7-12, 2017. https://assets.pewresearch.org/wp-content/uploads/sites/12/2017/02/16111030/2-16-2017_Gorsuch_topline_for_release.pdf; "National Tracking Poll #2010102," Morning Consult and Politico, Oct. 16-18, 2020, p. 232. https://assets.morningconsult.com/wp-uploads/2020/10/21073523/2010102_crosstabs_POLITICO_RVs_v1_AUTO.pdf.

56. Clémence Michallon, "Handmaid's Tale protestors gather outside Supreme Court to oppose Amy Coney Barret confirmation," *The Independent*, Oct. 12, 2020. https://www.independent.co.uk/arts-entertainment/tv/news/amy-coney-barrett-confirmation-hearings-senate-vote-handmaids-tale-protests-b992825.html.

57. Ben Sasse, "Sasse on Kavanaugh Hearing, 'We Can And We Should Do Better Than This,'" Sept. 4, 2018. https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this.

ment.[58] "This gap between the bench and retirement could create untold future conflicts and uncomfortable perceptions about the Court" as justices decide cases involving litigants and law firms that may employ them in the future.[59] Further, as a well-informed, financially stable and politically connected person looking for one final career in public service, a justice might be tempted to run for public office. This would create yet another potential conflict of interest with litigants and further politicize the Court in the public's eyes as justices contemplate the personal political ramifications of their decisions. "If the argument for term limits is to improve the Court's perception, term limits may perhaps make it worse."[60]

With the benefits of term limits largely overwhelmed by the strategic and ethical problems they create, a number of commissioners and leading jurists made their concerns about the idea known to the public. During an October 2021 public hearing, for example, Commissioner and American Enterprise Institute scholar Adam White stated that he originally thought term limits had merit, but after studying the issue, thought the idea offered "profound risks."[61] Commissioner and Harvard Law School professor Laurence Tribe also initially favored term limits but ultimately agreed that they may not be a good idea.[62] Similarly, after the report was finalized, former federal judges Thomas B. Griffith and David F. Levi released statements criticizing term limits, arguing that the idea lacked "substantial merit."[63]

Supreme Court term limits are a tempting reform option for those seeking to resolve the problems created by lifetime appointments. The idea is not entirely without merit. Unfortunately, judicial term limits come up short and create far more problems than they resolve.

CONSIDERING MORE PRUDENT REFORMS

Aside from adding members to the Court and establishing term limits, certain more prudent reforms could help address problems within the judiciary without substantial obstacles to implementation or dramatic unintended consequences. First, the Court would stand to benefit from an internally enforced set of ethical standards. It would also benefit from maintaining the transparency provided by the live audio streams put in place during the COVID-19 pandemic restrictions. Outside of the Supreme Court itself, the entire judiciary would benefit from improved access to electronic court records as well as an increase in the number of judgeships throughout the country. These reforms may not be as politically splashy as the previously discussed sweeping reforms, but they would address real needs within the judicial branch and greatly benefit the public interest.

Raising Judicial Ethical Standards

One of the best ways for the Supreme Court to strengthen itself as an institution worthy of public trust would be for the justices to implement an internal—but public—ethical code of conduct.

Unlike lower court judges who "are schooled on the ethical duties they assume as part of their initial judicial training curriculum," Supreme Court justices "are the only members of the federal judiciary who are not covered by a code of conduct."[64] This creates a gap in public trust. In the past, justices have sought to assuage these concerns by emphasizing that each justice consults and follows the code of conduct written for lower courts to guide their own obligations.[65] Unfortunately, such a standard has been murky in practice, with litigants and reformers identifying a number of actual and perceived conflicts of interest among sitting justices.[66]

The Supreme Court sits in a unique and precarious position when it comes to ethical standards within the judiciary. Unlike lower court judges who are subject to appellate review, no higher court can review the ethical behavior of a justice. Furthermore, while Congress can and does regulate the lower courts under Article III, Section 1 of the U.S. Constitution, they do not hold similar power over the Supreme Court.[67] Congress is left only with the power of

58. 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. https://www.pewresearch.org/fact-tank/2017/02/08/younger-supreme-court-appointees-stay-on-the-bench-longer-but-there-are-plenty-of-exceptions.

59. Anthony Marcum, "Supreme Court Term Limits and the Revolving Door Problem," R Street Institute, April 27, 2021. https://www.rstreet.org/2021/04/27/supreme-court-term-limits-and-the-revolving-door-problem.

60. Ibid.

61. Robert Barnes and Ann E. Marimow, "Adding justices or term limits sparks sharp debate on Supreme Court commission," *The Washington Post*, Oct. 15, 2021. https://www.washingtonpost.com/politics/courts_law/commission-on-supreme-court-warns-of-political-dangers-in-reform-proposals/2021/10/14/7a4c1d2a-2d45-11ec-baf4-d7a4e075eb90_story.html.

62. Jessica Gresko, "Supreme Court commission talks positively of shorter terms," AP News, Oct. 15, 2021. https://apnews.com/article/us-supreme-court-judiciary-term-limits-congress-f5362dc896887a9ed7b09e7450863ada.

63. Thomas B. Griffith and David F. Levi, "Statement by former federal judges Thomas B. Griffith and David F. Levi," The White House, December 2021. https://www.whitehouse.gov/wp-content/uploads/2021/12/Griffith-Levi-Statement.pdf.

64. John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary*, Supreme Court of the United States, 2021. https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf; Bauer et al., p. 216. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

65. Bauer et al., p. 216. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

66. "Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interest," Fix the Court, Jan. 18, 2022. https://fixthecourt.com/2022/01/recent-times-justice-failed-recuse-despite-clear-conflict-interest.

67. U.S. Const. art. III, § 1; 28 U.S.C. § 445 (2018).

impeachment, which has been attempted just once and is extremely difficult to pursue.[68]

Therefore, the best and most practical way for the Court to adopt and adhere to a code of conduct is to publicly declare one for itself and to vigorously enforce it among its members. As identified by the Commission report, such a code could mirror the standards for lower courts and include clear standards for recusal as well as a review process for recusal decisions.[69] And although the review process may be divisive, the Commission noted that "some state supreme courts have a referral process for recusal decisions and the process appears to work without undue friction or burden in that setting."[70]

Ultimately, the decision to implement and uphold a code of conduct for the Supreme Court lies with the justices themselves. For the sake of the institution's reputation, the Court should adopt and adhere to a robust set of ethical standards of its own accord.

Ensuring Clearer Courtroom Transparency

A code of conduct is not the only self-imposed reform that would benefit the Court's legitimacy; ensuring sufficient transparency around courtroom proceedings would help as well.

Members of the Court have long opposed televised access to oral argument, as articulated pointedly by the late Justice David Souter: "I think the case is so strong that I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body."[71] Justice Souter's antipathy for cameras in the courtroom stemmed from his experience as a New Hampshire judge, where he believed that cameras affected the questions a judge felt comfortable asking and led to grandstanding litigators.[72] Chief Justice Roberts has largely followed in his former colleague's footsteps and disallowed video feeds of oral arguments for the same reasons.[73]

The Commissioners acknowledged the reasons for hesitancy around video streams of court proceedings, but they also recognized that the Court has made progress on transparency in recent years to great effect.[74] In particular, the Commission looked favorably on the live audio streaming of arguments that was adopted during the COVID-19 pandemic restrictions. Before the pandemic, only those present in the room, largely on a first-come, first-served basis, could listen to oral arguments; however, during the pandemic, the justices sat for arguments remotely, and the Court streamed audio of the arguments online for listeners across the country. Those interested in Supreme Court oral arguments no longer needed to be present in Washington, D.C., nor did they need to brave the elements and camp out overnight just for a chance to listen to the country's most accomplished litigators argue some of the Court's most famous cases.[75] This audio streaming service was well received and has thus far not created any of the problems posed by Justice Souter.[76]

Thus far, in the two terms that have allowed it, audio-only livestreaming has represented a fair compromise that provides greater transparency while alleviating concerns about cameras in the courtroom. The Court should therefore continue this practice while ensuring that Justice Souter's fears that the Court would become "part of the entertainment industry" never come to fruition.

Improving Access to Electronic Court Records

Looking beyond the reforms to the Supreme Court analyzed by the Commission, Congress and the Court have the opportunity to make the lower courts more effective as well. They can start with increasing public access to electronic court records. As noted in the Commission report, "The Court's opinions are available online for anyone to read or download, as are its orders, including decisions on petitions for certiorari."[77] Such access for lower court records, however, is not so simple.

The Public Access to Court Electronic Records System (PACER) is an online database of federal court documents managed by the federal judiciary and "is the only publicly accessible electronic collection of case and docket information from federal appellate, district and bankrupt-

68. "The Only Impeachment of a Supreme Court Justice," Richmond Law Library, last accessed March 14, 2022. https://law-richmond.libguides.com/c.php?g=984378&p=7121124.

69. Bauer et al., p. 217-224. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf; 28 U.S.C. § 445 (2018).

70. Bauer et al., p. 224. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

71. Associated Press, "On Cameras in Supreme Court, Souter Says, 'Over My Dead Body,'" *The New York Times*, March 30, 1996. https://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html.

72. Ibid.

73. "Cameras in the Court: Chief Justice John Roberts," C-SPAN, last accessed March 14, 2022. https://www.c-span.org/supremeCourt/camerasInTheCourt.

74. Bauer et al., p. 225. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

75. Elise Hu, "100 Hours On The Supreme Court's Sidewalk: Camping Out For A Seat To History," NPR, March 24, 2013. https://www.npr.org/sections/thetwo-way/2013/03/24/175195917/100-hours-on-the-supreme-court-s-sidewalk-camping-out-for-a-seat-to-history.

76. "No More Lines: Millions Stream Live Supreme Court Arguments," Project on Government Oversight, Sept. 3, 2021. https://www.pogo.org/database/no-more-lines-millions-stream-live-supreme-court-arguments.

77. Bauer et al., p. 225. https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.

cy courts."[78] Unfortunately, the system's paywall and lack of responsible management has stymied its usefulness as a public tool. PACER's fee system, which charges 10 cents per page, places a burden on the public and results in revenues that far exceed its mandated authority under the E-Government Act of 2002, which allows the judiciary to collect money "only to the extent necessary ... to reimburse expenses incurred in providing [its] services."[79]

Fortunately, Congress has exhibited a bipartisan willingness to reform PACER and make court records free to the public. In the Senate, Sen. Rob Portman (R-Ohio) joined with bipartisan sponsors to introduce the Open Courts Act, which would fund free public access to court records by allowing the judiciary to increase PACER fees.[80] The bill passed the Judiciary Committee in December 2021. Meanwhile, Rep. Hank Johnson (D-Ga.) also joined with bipartisan sponsors to introduce the bill in the House.[81]

The federal judiciary has consistently pushed back against these reforms, arguing that the proposals would increase the cost of electronic records access for PACER users, that internal efforts are already underway to reform PACER and that a free electronic database would be a windfall for for-profit legal databases like Westlaw and Lexis.[82] Reform advocates have countered that the judiciary has been too slow to reform and is only acting in response to congressional pressure, noting that concerns over costs and access should be set aside in favor of greater public access.[83]

At the end of the day, cost-free public access to electronic court records should be a top priority for lawmakers and judicial reformers. Bipartisan consensus in Congress has become increasingly rare, but, as outlined above, both parties have shown interest in expanding access to court records. [84] Congress should not let this opportunity go to waste.

78. Submitted Statement for the Record of Anthony Marcum, U.S. House Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, Hearing on The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts, Sept. 26, 2019. https://www.rstreet.org/2019/09/26/statement-to-the-subcommittee-on-courts-intellectual-property-and-the-internet-on-why-pacer-is-a-barrier-to-federal-court-accessibility.

79. 28 U.S.C. § 1913 note (2018).

80. S.B. 2614, Open Courts Act, 117th Congress. https://www.congress.gov/bill/117th-congress/senate-bill/2614/all-actions.

81. H.R. 5844, Open Courts Act, 117th Congress. https://www.congress.gov/bill/117th-congress/house-bill/5844.

82. Roslynn R. Mauskopf, "Letter to Honorable Henry C. "Hank" Johnson, Jr.," Judicial Conference of the United States, Jan. 11, 2022. https://www.uscourts.gov/sites/default/files/letter_to_chairman_henry_johnson_january_2022_0.pdf.

83. Anthony Marcum and Gabe Roth, "SCOTUS Says States Can't Monetize Access to Certain Legal Documents. What Does That Mean for PACER?," Fix the Court, April 28, 2020. https://fixthecourt.com/2020/04/pacerparallels.

84. Frank Newport, "Bringing About More Compromise in Congress," Gallup, Oct. 10, 2018. https://news.gallup.com/opinion/polling-matters/243566/bringing-compromise-congress.aspx.

Deciding on More Judgeships

Although some in Congress may have their eyes on expanding the Supreme Court, they should look instead to adding federal judges throughout the rest of the country. Many district courts are facing a capacity crisis: Caseloads have been growing without a sufficient increase in judges. Federal court filings have expanded dramatically over the last 30 years, but as of March 2022, the federal judiciary had 74 judicial vacancies, 28 of which were considered "judicial emergencies"—a designation made when the number of cases per judge becomes excessive.[85]

With these vacancies, Americans seeking relief in court are left without swift recourse and suffer as a result of partisan gridlock.[86] Because the president of one party picks nominees, lawmakers of the opposing party have historically been reluctant to support legislation that would add judgeships.[87] To overcome this challenge, some creativity may be required. One way to reduce partisan gridlock could be to increase judgeships in a staggered manner over a series of years, spanning multiple presidential elections.[88] This could still result in one party controlling the entire nomination process or the process being stymied by partisanship; however, it could also provide a path forward if members of Congress recognize that the pendular nature of American politics would likely result in a balance of influence for both parties.

Although not within the Commission's scope of research, resolving the judicial vacancy crisis would affect far more litigants than any Supreme Court reform and should remain a priority for judicial reformers of all stripes.

CONCLUSION

President Biden created the Supreme Court Commission to outline the historical and current problems with the role of the Supreme Court and its nomination process and to explore potential reform options with leaders in the legal community. On the reform front, the Commission devoted ample time to two unwise ideas: adding justices to the Court and implementing term limits. Both of these reforms fail to

85. "Judicial Vacancies," United States Courts, last accessed March 14, 2022. https://www.uscourts.gov/judges-judgeships/judicial-vacancies; Anthony Marcum, "A problem '30 years in the making,'" R Street Institute, Feb. 25, 2021. https://www.rstreet.org/2021/02/25/a-problem-30-years-in-the-making; "Judicial Emergencies," United States Courts, last accessed March 14, 2022. https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies; "Judicial Emergency Definition," United States Courts, last accessed March 14, 2022. https://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition.

86. Anthony Marcum, "Why Federal Magistrate Judges Can Improve Judicial Capacity," *University of Cincinnati Law Review* 88:4 (2019), pp. 1009-1036. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3467625.

87. See, e.g., Seung Min Kim, "McConnell's historic judge blockade," *Politico*, July 14, 2016. https://www.politico.com/story/2016/07/mitch-mcconnell-judges-225455.

88. Anthony Marcum, "The Right—and Wrong—path for new Judgeship Legislation," R Street Institute, Aug. 3, 2021. https://www.rstreet.org/2021/08/03/the-right-and-wrong-path-for-new-judgeship-legislation.

resolve their intended problems and instead open the Court to greater politicization and reduced public trust. Instead, the judiciary would benefit from more targeted reforms: creating a judicial code of conduct, ensuring greater courtroom transparency, improving access to electronic records in lower courts and filling vacant judgeships in the lower courts. While not as attention-grabbing as court packing or term limits, these prudent reforms would bolster the reputation of the judiciary, meaningfully improve the administration of the courts and benefit all Americans. The president, Congress and the Supreme Court should make a concerted effort to implement these reforms for the liberty and justice of us all.

ABOUT THE AUTHOR

Matthew Germer is a fellow within the Governance Program at the R Street Institute. He previously served as policy counsel & strategic planning coordinator for the Republican Caucus of the Washington State House of Representatives where he advised on civil and criminal justice policy.