

Out with the Old: A Case for Mandatory Retirement in the Supreme Court

By

Bryce Mitchell

When the Supreme Court was established in 1789, the Founding Fathers envisioned a court that would be free from political pressures and able to operate with independence. One way to achieve this was through lifetime tenure for justices. In the Federalist Paper No. 39, James Madison writes “The members of the judiciary department are to retain their offices by the firm tenure of good behavior”.¹ John Adams similarly echoed the sentiment that judges should hold their offices for as long as they demonstrate good behavior in his book *Thoughts on Government*, saying that judges “should always be men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness and attention” and given this should “hold estates for life in their offices” but for misbehavior “the House of Representatives, should impeach them”.² Giving judges a secure and independent tenure was seen as necessary for “complete independence of the courts of justice” which Alexander Hamilton argues is “peculiarly essential in a limited Constitution.”³

However, in this paper, I will argue that while the Founding Fathers were well-intentioned in establishing lifetime tenure, it is no longer the most effective means of maintaining court independence and a good image among the public. Instead, it should be

¹ Madison, James. 1788. “The Avalon Project : Federalist No 39.” Yale.edu. 2019. https://avalon.law.yale.edu/18th_century/fed39.asp.

² Adams, John. “Founders Online: III. Thoughts on Government, April 1776.” n.d. Founders.archives.gov. <https://founders.archives.gov/documents/Adams/06-04-02-0026-0004>.

³ Hamilton, Alexander. 1788. Hamilton, Alexander. 2019. “The Avalon Project : Federalist No 78.” Yale.edu. 2019. https://avalon.law.yale.edu/18th_century/fed78.asp.

replaced with a tenure that includes a mandatory retirement for justices at age sixty-five. This will in my view strengthen the court while still providing independence from the legislature.

When the Founding Fathers instituted lifetime tenure, a person living in Colonial America who survived to adulthood could expect to live until sometime in their sixties.⁴ Today, the average life expectancy extends well into the seventies.⁵ This means that Supreme Court judges are living much longer than the Founding Father's would have expected, and with this older age comes difficulty in transforming information into a decision and changes in cognitive ability.⁶ The idea of mandatory retirement is not novel: most countries limit the tenure of judges with either mandatory retirement or a term of years.⁷ I believe that this would ensure that the best and brightest judges will be in the highest court of the land as well as provide many other advantages.

It would make the courts less politicized. By imposing a firm mandatory retirement age, there would be no surprise retirements when a favorable political party is in charge of the Executive Branch. With the current system, judges are able to retire when it is most politically opportune. A recent example of this would be when Justice Anthony Kennedy, who retired in 2018 when then-President Trump could replace him with Brett Kavanaugh. This strategizing of retirement gives the appearance of partisanship, which tarnishes the reputation of the court and weakens its public image. The Supreme Court should refrain from this. With a mandatory retirement age of sixty-five, justices' retirements would be predicably and not subject to political

⁴ "The Life Expectancy in the New England Colonies ." 2023. <https://www.moultonborough.org/the-life-expectancy-in-the-new-england-colonies/>.

⁵ World Health Organization. 2021. "Life Expectancy at Birth, Total (Years)." World Health Organization. [https://www.who.int/data/gho/data/indicators/indicator-details/GHO/life-expectancy-at-birth-total-\(years\)](https://www.who.int/data/gho/data/indicators/indicator-details/GHO/life-expectancy-at-birth-total-(years)).

⁶Murman, Daniel. 2015. "The Impact of Age on Cognition." *Seminars in Hearing* 36 (03): 111–21. <https://doi.org/10.1055/s-0035-1555115>.

⁷ "Judicial Tenure." Federal Judicial Center, <https://judiciariesworldwide.fjc.gov/judicial-tenure>. Accessed 6 Apr. 2023.

machinations. This will free the Supreme Court from a substantial amount of scrutiny and make it less politicized.

Furthermore, lifetime tenures have resulted in increasingly longer terms, and long terms make Supreme Court confirmations higher stakes, which leads to a more political confirmation process.⁸ With the average age of recent Supreme Court appointments being late forties or early fifties,⁹ a mandatory retirement age of sixty-five would have a similar effect to a 15 or 20-year term limit. Knowing exactly when a judge will have to retire will also shift the pressure off of confirmations and onto presidential elections. The understanding would be that winning the presidency will come with the replacement of the judges who are up for retirement. Thus, the confirmation process will be de-politicized.

The turnover of judges would be more frequent. By retiring justices at sixty-five, the turnover in the Supreme Court would increase, meaning that the justices appointed would better reflect current America. As Chief Justice John Robert said, “The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then but is becoming commonplace today”¹⁰. This isolation combined with long tenures gives the public impression that the Supreme is out of touch. With a mandatory retirement age this would not be the case. The increase in turnover would create a stronger connection between the current makeup of America and the current makeup of the court.

⁸ Gupta, Divya. 2020 "The Need for Supreme Court Term Limits." Center for American Progress, <https://www.americanprogress.org/article/need-supreme-court-term-limits/>. Accessed 6 Apr. 2023.

⁹ Bloomberg.com. 2017. “SCOTUS Justices Are Serving Longer and Longer.” <https://www.bloomberg.com/graphics/2017-supreme-court-justice-tenure/>.

¹⁰ Rehnquist, William H. 1998. “The 1998 Year-End Report of the Federal Judiciary.” *Federal Sentencing Reporter* 11 (3): 134–36. <https://doi.org/10.2307/20640151>.

With the increase of the expected lifespan and the common view that the Supreme Court is increasingly politicized, a mandatory retirement at age sixty-five for Supreme Court justices is in order. The mandatory retirement age would de-politicize the Supreme Court by having a predictable retirement and also help to effectively shorten justices' terms. The increase in the frequency of turnover would prevent judges from becoming isolated and out of touch with present-day America. The makeup of the court would be more closely tied to American's support for policymakers. Finally, adding a mandatory retirement age to the supreme court would be in line with the Founders' intentions, and would simply be updating it to account for circumstances they did not foresee. Such a plan would be consistent with the Founder's vision for the independence and integrity of the judiciary, which are essential for maintaining the stability and effectiveness of the government.