On Grievance 9

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Undergraduate Essay Competition
April 16, 2023

In the indictment of the British government that would become America's founding document, Thomas Jefferson famously provides a series of grievances to serve as justification for America's newly pronounced independence. Appearing ninth in a list of twenty-seven, Jefferson accuses the King of "[having] made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries." The conversation that surrounds term limits for Supreme Court justices hence strikes at the foundational ideals of our country. Lifetime tenure is rooted in a deep revolutionary tradition that emphasizes the need for checks, balances, and accountability in government. That tradition is called into question, however, when one considers the balance actually realized by lifetime tenure for justices and the increasingly politicized circus that characterizes the Supreme Court nomination process. Despite popular calls to change the term for justices to 18-year, nonrenewable appointments, the political feasibility of passing a constitutional amendment to that end is limited. Alternatives like placing more justices on the Court and a merit-based appointment process offer more realistic solutions.

America's founding fathers craved a government that could protect people from themselves. As James Madison proverbially writes in his defense of the Constitution, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[5] Lifetime tenure for Supreme Court justices is just one particular manifestation of that core philosophy. Alexander Hamilton conceived of the Court as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[5] Anything short of lifetime appointments, it seemed, would inevitably work against that purpose, undermining the independence necessary for the Court to perform its duties. Hamilton observes, "Liberty can have nothing to fear from the judiciary alone, but would have everything to fear

from its union with either of the other departments."[5] Periodic appointments grant too much power to those making them; justices would decide cases from fear of displeasing the executive or legislative branches, or, should the people make appointments directly, justices would be overly concerned with the popularity of their opinions. That justices "shall hold their offices during good behavior" is thus ratified in the U.S. Constitution.

Although few disagree with the notion that the judiciary must exist independently of the other branches of government, whether life tenure is a necessary condition for that objective is hardly a settled matter. Several issues with indefinite terms are readily discernible upon analysis of the state of the Supreme Court in the U.S. today. Most apparent is the outsized role fortune and timing have in composing the ideological makeup of the Court. In the past two decades, the Supreme Court has required states to protect same-sex marriage, weakened the Voting Rights Act, decided in favor of race-based affirmative action programs, and, most recently, allowed state governments to limit access to abortion. Many of the outcomes in those cases would have been different with the shift of one or two votes.[4] This precariousness is compounded by the absurd role timing plays in determining the views of justices that are nominated to the Court. A president's ability to select justices depends entirely on when vacancies occur. Erwin Chemerinsky, a UC-Berkeley professor of law and legal scholar, observes this phenomenon in his book *The Case Against the Supreme Court*, writing, "Jimmy Carter, for example, had no vacancies to fill, whereas Richard Nixon got to select four justices in his first two years in office and reshaped the Supreme Court in a way that lasted for decades."[3] Indefinite terms allow for certain individuals to wield considerable power for decades and ensure the lasting political makeup of the Court is subject to forces akin to a coin flip. The modern influence of the Court has caused the stakes of nominations to reach unprecedented highs, resulting in political

controversy each time a vacancy must be filled. The nomination process is now strictly partisan. As Columbia law professor Jamal Greene notes, "Amy Coney Barrett, was the first nominee to be confirmed with votes from only one party. The previous nominee, Brett Kavanaugh, received only one vote from a Democratic senator; Neil Gorsuch received three."[4] Impassiveness to be expected from the judicial branch has been compromised by the windfall associated with nominations, an effect largely attributable to the insistence of America's founders on lifetime tenure.

The most popular proposal for reform to the tenure of Supreme Court justices is a fixed, nonrenewable 18-year term. The independence of the Court would be preserved by the impermissibility of having justices serve more than one term. Regular nominations hearings at fixed two-year intervals would depoliticize the process by lowering the associated stakes. The likelihood that justices could exercise influence over the ideology of their replacement by timing their retirement – an undemocratic practice that has become common - would diminish significantly. Any imagined effectiveness of the proposal is undercut, however, by the practical impossibility of making it happen. The direct provision for lifetime terms in the U.S. Constitution means that reform in that area requires a constitutional amendment; a politically inconceivable accomplishment. Reforms to other aspects of the Court offer more realistic approaches to dealing with the issues facing the institution. Increasing the number of justices to address the role fortune has in determining the ideological makeup of the Court is one such example. More justices make it more likely that the overall balance of the Court will be moderate. Another possible reform is to the nomination process itself. Certain states, like Alaska and California, have successfully adopted merit-based appointment processes for state justices that depend on the recommendations of ideologically neutral councils. Jimmy Carter

implemented a merit-selection panel for federal court of appeals vacancies that depended on sophisticated guidelines developed by the U.S. Department of Justice and had the effect of drastically increasing the diversity of the bench. While no constitutional restriction exists for these reforms, the likelihood of lasting change is low. Reagan ultimately did away with Carter's merit-based appointment process and the conversation about increasing the number of justices often spirals into paranoia.

Despite the tendency to cynicism and hopelessness that so often characterizes reasonable conversation about reform in American politics, there are actual solutions to the issues facing the Supreme Court that could be enacted tomorrow. Change happens at the level of the individual voter or constituent. Legislators can be encouraged and compelled to approach these conversations with a level-headed perspective. Respect for the history and wisdom behind the structure of traditional institutions is not incompatible with the possibility for improvement. Such is the nature of the law. Few Americans do not feel the national embarrassment of the circus brought on by the current nominations process for the Court. Most scoff at the idea that the vote of one elite lawyer can impact their fundamental rights for decades. If we are to embrace our tradition of accountability and balance, we would do well to not accept things as they are. Americans ought to let their grievances be heard.

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