

Breaking the Stalemate on Supreme Court Term Limits with Delayed Implementation Legislation

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This concise essay proposes a novel solution to the current stalemate regarding Supreme Court term limits. Namely, through delayed implementation the existing incentives against such legislation are ameliorated. This essay provides the logic behind taking such an approach and addresses likely criticism. Finally, the ability of applying such a strategy to other political issues—and the positive bipartisan environment that might follow—is discussed.

INTRODUCTION

A majority of voters support term limits for Supreme Court justices (hereinafter term limits).¹ Numerous plans have been proposed for how best to implement such term limits² accompanied by persuasive arguments for the practice.³ But there is a daunting hurdle to the implementation of such term limits. Namely, in the short term, they would inevitably favor one political party over the other. This unfortunate situation all but ensures that, while both political parties may favor term limits at some point in time, they are unlikely to favor them concurrently. To make matters worse, the political party most disadvantaged by implementing term limits would generally be the party with the most power (thus further stacking the deck against the

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¹ *Most Oppose ‘Packing’ Supreme Court but Favor Term Limits for Justices*, RASMUSSEN REPS (Oct. 1, 2020), <https://perma.cc/5FAR-F5WG>.

² *Term Limits*, FIX THE CT., <https://perma.cc/ANJ4-Y4SV> (last visited Oct. 12, 2023).

³ Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), <https://perma.cc/594J-KBK2>.

legislation being passed). Fortunately, there is a negotiation tactic that can be implemented to avoid this stalemate. This concise essay explains how such a negotiation tactic could apply to the present situation to reach a rare, bipartisan agreement on term limits. Additionally, this essay addresses likely objections to such a solution and additional, ancillary benefits from the practice.

Various negotiation principles solve otherwise fatal zero-sum-game stalemates by applying a solution whereby an agreement is first reached behind a veil of ignorance. It is only after the agreement is made that the veil is lifted and the parties then learn which side benefited from the agreement. The simplest example of this principle is the utilization of a coin flip.⁴ While neither side will normally agree to the undesirable end of a binary option, they may both be willing to agree to a fifty-fifty chance of such a result. This is because before the coin flip each side has a fair and equal probability of either the desirable or undesirable result. This basic principle can be implemented in a variety of ways for a variety of problems.

A variation on this same principle can be adapted to address the current stalemate regarding term limits. Namely, by simply making the term limit legislation effective at some future date when the political party in power is unknowable. For example, term limit legislation could be passed in 2021 with an effective date of 2029. Because neither party in 2021 would be able to accurately predict which party would be appointing justices in 2029, this would effectively remove the incentive of one political party to resist term limit legislation in order to avoid the immediate negative effects.

It should be noted that this policy would ultimately result in one party being disadvantaged over the other. Whoever happened to be president in 2029 when the term limits became effective would see his Supreme Court appointments disadvantaged by the term limits. But regardless, the relevant point is that neither side would know which party would be disadvantaged at the time the decision was made. This is similar to a couple who agrees to flip a coin to determine who gets to pick what movie to watch. The strategy would ultimately advantage one side over the other. But the relevant point is that—at the time the agreement was made—neither side could have known who would be advantaged and who would be disadvantaged.

H.R. 8424 serves as an example of how attempts to immediately implement term limits inevitably favor one political party over the other (and thus do not attain bipartisan support).⁵ The Bill was proposed at a time when then-former Vice President Joe Biden was heavily favored to win the

⁴ DAVID S. HAMES, NEGOTIATION: CLOSING DEALS, SETTling DISPUTES, AND MAKING TEAM DECISIONS 97 (2011).

⁵ Supreme Court Term Limits and Regular Appointments Act, H.R. 8424, 116th Cong. (2020).

2020 presidential election.⁶ The provisions of the legislation would have conveniently taken effect at the beginning of Biden's first term, allowing him to appoint two Supreme Court justices in his first four years. This is more than the modern average of 1.3 appointments per four years.⁷ The partisan result of this Bill is further demonstrated by considering who introduced it—three democrats⁸—and who supports it—mostly liberals and few conservatives.⁹

I. Potential Criticisms

The delayed implementation solution to the current term limit stalemate is not without its criticisms, some much better than others. For an example of the latter, a term limit advocate may posit that term limits are so highly desirable that plans with immediate implementation should be pursued, not proposals that will only take effect in the distant future. This reasoning would be valid if there was good reason to believe that term limit legislation with immediate implementation was feasible. History—and the current makeup of Congress¹⁰—cast major doubt on such wishful thinking. It is ironic that this same argument against delayed implementation of term limits could have been made with equal veracity nine years ago. And if the very delayed implementation plan being criticized had been passed nine years ago, we would have term limits today. Simply put, it is far better to enact legislation that fixes this problem in nine years if the only other option is to perpetuate the current gridlock indefinitely.

The strongest criticism against the proposed solution in this essay involves theories of how it is not as neutral as it first appears. For example, imagine a scenario in which it was not politically expedient for legislators of one party to agree to the immediate implementation of term limits, but they nevertheless voiced their agreement for term limits that would become effective in nine years. Such an admission could open these legislators up to

⁶ See Louis Jacobson, *Biden Increases Electoral College Lead over Trump*, U.S. NEWS & WORLD REP. (Sept. 29, 2020, 5:27 PM), <https://perma.cc/KHL6-8AKC> (discussing election odds on September 29, 2020). The Bill was introduced on September 29, 2020.

⁷ There have been seven new justices added to the Supreme Court since January 1, 2000. *Current Members*, SUP. CT., <https://perma.cc/XQ68-NVKN> (last visited Oct. 12, 2023).

⁸ John Kruzel, *Dozens of Legal Experts Throw Weight Behind Supreme Court Term Limit Bill*, THE HILL (Oct. 23, 2020, 12:04 PM ET), <https://perma.cc/4VRP-JS7J> (stating the bill was introduced by Democratic Representatives Ro Khanna, Don Beyer, and Joe Kennedy III).

⁹ D. Benjamin Barros et al., *Letter from Campaign for Supreme Court Term Limits*, FIX THE CT. (Oct. 23, 2020), <https://perma.cc/9UPD-D54K>.

¹⁰ Jasmine Aguilera & Mini Racker, *What to Expect from the New Divided Congress*, TIME (Jan. 3, 2023, 9:38 AM EST), <https://perma.cc/HJB5-A38R> (indicating that the Democrats maintained control of the Senate, but Republicans gained control of the House. In 2023, the party controlling the White House—Democratic—does not have a majority in the House of Representatives).

criticism. They would no doubt be asked, “If you acknowledge the harms of life tenure and are in favor of term limits, why not join [the other political party] and pass them now?” Thus, in order to maintain the current practice of life tenure, legislators may feel pressured not to agree to the future implementation of term limits. Similarly, a politician may fear that voicing support for Supreme Court term limits would inevitably beg the question “If term limits are so good, then shouldn’t they also be imposed on members of Congress?”

The proposed solution in this essay relies on its neutrality for its effectiveness. However, a critic could argue that it is this same neutrality that will cause politicians not to support it. Why would politicians invest valuable resources into a policy that will not serve to promote their political party or themselves over the opposition? Rational, self-interested politicians would likely be better served investing their efforts on more beneficial endeavors, such as media appearances, strategizing, campaigning, and fundraising. Furthermore, in our current political climate, working together with the opposing political party may prove detrimental in a future primary.

A solution to this incentive problem would be to build enough public support for term limits that it is no longer a neutral matter. If the consequence from the voters for not supporting term limits was severe enough, members of Congress would be forced to act. While there is public support for term limits,¹¹ this voter-demand strategy is at risk of suffering from the same incentive problem as the one that it is trying to solve. Namely, voters have a number of issues that they feel passionately about, and term limits is likely not among them. Therefore, their time would be better spent trying to persuade members of Congress to act regarding the issues that they view as more pressing.

One final impediment to delayed term limit legislation lies in the mistrust the two political parties have for each other. Each side might be hesitant to agree to impose term limits in the future out of fear that members of the opposing party would simply revoke the legislation right before it was to become effective if they later discovered that it was not going to favor them. This is a legitimate concern, as the legislation could not be drafted to avoid such a scenario.¹² This problem could be circumvented by

¹¹ *New Poll Shows SCOTUS Term Limits Still Popular Across Party Lines*, FIX THE CT. (June 10, 2020), <https://perma.cc/4WAE-D8GE>.

¹² See *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765)) (discussing “the centuries-old concept that one legislature may not bind the legislative authority of its successors”). Compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (taking the position that legislative entrenchment is constitutional), with John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003) (taking the position that legislative entrenchment is unconstitutional).

implementing term limits through a constitutional amendment instead of legislation, but that would be even more challenging given the more stringent requirements of proposing and ratifying a constitutional amendment.

II. Additional Benefits

While the previously mentioned critiques of delayed implementation term limits are valid, it is the belief of this author that public support for—and the benefits of—implementation will be enough to overcome such objections. Furthermore, the benefits of this novel solution have the potential to extend far beyond just the issue of term limits. After the initial success of reaching a rare, bipartisan agreement on term limits, politicians may attempt to apply the same principle to other matters. Ideal candidates for this method of delayed implementation involve executive power, filibuster rules, and election law.¹³ Reaching agreements on such contentious legislation could serve to spark a bipartisan revolution. Just a few instances of political rivals working together could boost overall bipartisanship and improve public perceptions of the political process.¹⁴

CONCLUSION

This essay describes the current underlying impediment to implementing Supreme Court term limits and provides a novel, simple, and effective solution. With Democrats unable to secure a majority in the Senate in the 2020 election, such a solution is likely the only way agreement on term limits could be reached.

¹³ Potential legislation on these issues faces the same impediment as term limits. Namely, while both political parties may agree as to what the ideal solution is, they are unlikely to agree at the same time.

¹⁴ Frank Newport, *Americans Favor Compromise to Get Things Done in Washington*, GALLUP (Oct. 9, 2017), <https://perma.cc/SM5M-UPKT> (finding that fifty-four percent of Americans want politicians to compromise to get things done, while only eighteen percent prefer politicians stick to their beliefs even if little gets done).