

Drop the Lifetime Tenure for Justices on High Court

July 17, 2009 Kent Rutter, Mark Trachtenberg

Wouldn't it be nice if the words "Supreme Court confirmation hearings" weren't so often found in the same sentence as "circus"?

The Sotomayor hearings are hardly changing the situation. As the Associated Press observed on the first day, "From its opening moments, the hearing was drenched in racial politics." Twice during the opening remarks, the hearing was interrupted by protesters shouting "Abortion is murder!" A big-top atmosphere pervades the hearings, even though the outcome is virtually assured.

There is a way to reduce the huge stakes and partisan bloodletting associated with modern-day confirmation hearings. Instead of lifetime tenure, each justice could be appointed to a finite term. If the justices served for 18 years, every president could appoint two justices during each four-year term.

Term limits would lessen the pressures that accompany lifetime appointments. Sotomayor is 55, while Justice John Paul Stevens remains vibrant as he approaches 90. If confirmed, Sotomayor could easily remain on the court until the 2040s, perhaps casting the deciding vote in hundreds of landmark cases. Yet even the most probing questions cannot accurately predict how Sotomayor would rule on the most important constitutional issues whatever they may be 35 years from now.

In addition to lowering the political temperature at confirmation hearings, term limits would offer several advantages over the current system.

First, by ensuring that each president has an equal opportunity to appoint justices, the proposal would reduce the arbitrariness of the current system and make the court more reflective of the changing political world. No longer would we have a system in which one president (Nixon) could appoint four justices in a single term, while another (Carter) does not appoint any. No longer could we go 11 years without a single appointment, as we did between 1994 and 2005. And no longer would we have a court in which four of the nine justices were appointed more than 18 years ago, as will be the case when the fall term begins.

Second, the current system effectively disqualifies the most experienced candidates those in their 60s and 70s because presidents understandably want their imprimatur on the Court to last as long as possible. With the lone exception of Justice Ruth Bader Ginsburg, who was 60 when appointed, all of the current justices were in their mid-50s or younger when appointed, and Justice Clarence Thomas was only 43. Under a revised system, more experienced candidates held in high esteem, like Larry Tribe or David Tatel on the Democratic side, or J. Harvie Wilkinson III on the Republican side, could receive serious consideration.

Third, the proposal would reduce the risk of justices remaining on the court as their faculties diminish, either because they are unaware of their limitations or are holding out until a like-minded president is elected. This risk is not hypothetical. Justice William O. Douglas did not immediately resign even after suffering a serious stroke in 1974, and his colleagues refused to count his vote in any decision in which it would have affected the outcome of the case. A law professor recently documented several other instances of physical or mental decline among older justices.

We have no illusions about the difficulty of implementing this proposal. It would most likely require a constitutional amendment, although some scholars believe it could be implemented by statute. Tricky questions ? such as how to handle a transition to the 18-year system and how to address midterm deaths or retirements ? would have to be answered in a way that would not disadvantage either political party.

But a coalition of liberal and conservative law professors has endorsed this idea, which deserves careful consideration by both parties. Term limits would be consistent with the expectations of the framers of the Constitution, who lived at a time when the average life expectancy was less than 50 years.

And if confirmation hearings become less of a circus, that would be a positive side effect.

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