

Supreme Fallacy: Why U.S. Justices Need Term Limits¹

Joseph P. Mulvey

The United States Constitution is a vague document, and it is the job of the Supreme Court to interpret it. Ironically, the Supreme Court is affected by the vagueness of the Constitution. When the framers composed the document, although they strived for a balanced government, they put the least amount of emphasis on the judicial branch. Compared to the legislative and executive branches, it was considered inferior. Things have changed. Now, if not superior, the judiciary is as powerful as its counterparts. It consists of the federal and state court systems, ranging from trial courts to appellate courts to the Supreme Court, the highest legal authority in all the land. When the framers established the Constitution, they were less particular regarding regulations for the members of the Court. They gave the Supreme Court justices lifetime tenures. As long as a justice maintained “good behavior,” they would be able to preserve their position on the Court until retirement, resignation or death. It is the only position within the three branches of government without a fixed term. The president is up for reelection every four years, the Senators and Representatives are up for reelection every two years, but the Supreme Court justices are never up for reelection. A Supreme Court justice should be given a fixed term. The ability for change is necessary for a progressive society. It is natural for a politician to be

¹ I would like to thank Professor Terry Randolph for educating me on the U.S. government and challenging me to write a paper on the Supreme Court, Dr. Valerie Burks for encouraging me to take part in *Sabiduria* and to submit an essay of my own, and Jean Joseph and Leslie Taylor for being helpful in the process of revising my paper and getting it published.

connected to a certain political party, ideology, or religion. Without tenure limitations, these connections will never be broken. There will be no change in the Supreme Court or in the United States. Without tenure limitations, justices can remain on the Court for a long time, maybe even too long, leaving more competent replacements out of contention. With the final say on the most important decisions affecting American lives, it is important that the Court remain unbiased and fair. It is important that the justices remain just.

The Supreme Court has developed into a political powerhouse. From the Royal Exchange Building in New York City to the Old City Hall in Philadelphia, even to the basement of the U.S. Capitol in Washington D.C., the Supreme Court enjoyed many homes from 1790 to 1935 before finding its permanent residence. A headquarter was built specifically for the Supreme Court; it was across the street from the U.S. Capitol, the building of the basement it once occupied (*The Supreme Court* 242-51). To be exact, there have been eleven different locations the Court has held its hearings since its inception nearly 219 years ago according to a manuscript by the Commission on the Bicentennial of the Constitution. The new building symbolized just how powerful the Court had become. The architect, Cass Gilbert, referred to the structure as “the greatest tribunal in the world” (Toobin 1-8).

In an ancient Roman basilica, a tribune was a raised platform for the seats of the magistrates (“Tribune”). In modern day America, a tribune is a political pedestal hoisting nine of the most powerful figures in the world. These nine include the chief justice and the eight associate justices of the Supreme Court, also known as the high court (O’Connor and Sabato 317). These nine are currently known as the Roberts Court after Chief Justice John Glover Roberts Jr., who was appointed to the position by President George W. Bush in September of 2005 (323). The Court always takes the name of its chief, as is stated in the textbook *Essentials*

of American Government. With the development of the Supreme Court came new meaning to the idea of lifetime tenures. A Court so powerful should not be granted unlimited access to the nation's judicial supremacy.

By looking at the makeup of the Court, one sees certain trends that begin to develop, trends that, if not given a chance for change, turn into molds and can prove hazardous over time. Some trends that can be looked at in further detail are religion, party affiliation, ideological background, and education.

The beliefs associated with religion and politics can affect the ruling a justice makes on a case; such issues that fall victim to this are abortion and same-sex marriage. While religion may have played a role in the Court ruling placing limitations on abortion in *Roe vs. Wade*, it certainly played a role in the national ban on gay marriage (O'Brien 113, 136). Journalist Mark Neisse explains how Hawaii, along with four other states, legalized gay marriage after frustration with the Court's unwillingness to comply; Hawaii has "adopted the nation's first 'defense of marriage' constitutional amendment." It is rare for believers to change or alter their faith, but if it plays a large enough role in important rulings, it is necessary for the Court to change or alter its look by periodically replacing its members.

Chief Roberts is a Roman Catholic, as are current justices Antonin Scalia, Anthony Kennedy, both appointed by President Ronald Reagan, Clarence Thomas, appointed by the first George Bush, Samuel A. Alito Jr., appointed by the second George Bush, and the newest member of the court, Sonia Sotomayor, appointed by current President Barack Obama (O'Brien 58-61). Exactly two-thirds of the current justices are Roman Catholic; that is quite profound, David O'Brien tells us in his book *Storm Center*, considering that there have only been thirteen Catholics, including the current six, out of the 111 justices ever to serve on the Supreme Court

(59). Ruth Bader Ginsburg, one of two women on the Court, and Stephen Breyer, who were both appointed by President Bill Clinton, are the only current justices of Jewish faith. John Paul Stevens, the justice with the most seniority on the Court, appointed in 1975 by President Gerald Ford, is a nondenominational Protestant (60-61).

Although Catholics have a slight edge in the Court, it does not compare to the sheer dominance the Republican Party has over the most powerful judiciary in all the land. Six of the nine justices are Republican; the only two Democrats, also the only two of Jewish faith, were appointed in 1993 and 1994 by President Clinton, and the only Independent was recently appointed by President Obama (Lazarus 235). The executive branch may be controlled by the Democrats with newly elected President Obama, and the legislative branch may be controlled by the Democrats with a Democratic majority House and Senate, but the judicial branch is definitely being controlled by the Republicans. And, with the Republicans comes conservatism.

A conservative is defined as someone disposed to preserve existing conditions and to limit change (“Conservative”). President Obama’s main campaign theme was “Change,” but without the support of the Supreme Court, none will be implemented. A mathematical experiment conducted by Professors Alexander Tahk of Stanford University and Stephen Jessee of the University of Texas titled the Supreme Court Ideology Project shows that all of the justices, except for John Paul Stevens, have a mostly conservative point of view. Justice Stevens also happens to be the oldest member on the Court; the only hope for liberals lies in the hands of the 89-year-old. The Supreme Court Ideology Project, done using Bayesian statistics with a 95 percent confidence interval, even shows that the two Democrats of the Court have a more conservative perspective than a liberal one (Jessee and Tahk).

John Paul Stevens is a prime example of a justice not making rulings congruent with his ideological affiliations, causing some to wonder whether or not he played up to a certain role in order to get appointed to the Court, then, once official, showed his true colors. Orin Kerr, in an article titled “Volkh Conspiracy,” said Justice Stevens “has proven to be surprisingly liberal and has kept the court from moving further to the right.” Presidents must be careful when appointing a justice to the Court because of the lifetime tenure; if they make a mistake, there is no correcting it.

Most of the affiliations listed have another one that attempts to counter it. The Republicans have the Democrats, the Catholics have the Jews and Protestants, and the conservatives have the liberals. The one bond with the least opposition is education – eight of the nine justices graduated from either Harvard or Yale (Mauro). Actually, this trend gets dominant with time. In the Court’s history, about half of the 111 justices graduated from an Ivy League. In the beginning the percentage was much less before rising to 70 in the 1950s. Now, it is almost at 90 percent, the highest ever (McGilvray). Every justice appointed since 1970, since John Paul Stevens, has graduated from an Ivy League. Stevens graduated from Northwestern University School of Law (O’Brien 87). This trend may not change with tenure limitations. It may be a bigger problem, possibly a bias. However, with tenure limitations, we would get to see if more people get a chance to become justices regardless of the emblem on their diploma.

Aside from simple affiliations, there are many, to quote author Jeffrey Rosen, complex “personalities and rivalries that define” the Supreme Court; these complexities can grow on the Court and cause hindrance without potential justices being given a chance to shine. Despite opposing ideologies and party affiliations, it is not quite as simple as conservative versus liberal, Republican versus Democratic. The Supreme Court has its role players, and some justices may

have more power than others (7-8). Seniority is very important on the Court, and when two new faces joined the long table in 2005 and one in 2009, it shook things up dramatically, Jeffrey Toobin explains in his book *The Nine*. After the death of Chief Justice William Rehnquist and the retirement of Associate Justice Sandra Day O'Connor, both in 2005, President Bush was left with the task of appointing two suitable replacements. Those who followed politics were curious to see how new Chief Justice Roberts and Associate Justice Alito would affect the Court (318). They were curious which judge of the nine would act as the swing vote, since Sandra Day O'Connor was known as the long time swing vote (323). They were also curious if the senior justices would have more power than the two newly appointed ones. This is another area where lifetime tenure causes problems, with senior judges having superiority over newcomers.

Just recently, President Obama appointed Justice Sotomayor after the retirement of former justice David Souter. According to Charlie Savage of the New York Times, Sotomayor becomes the first Hispanic and the third woman in the history of the Supreme Court. We may very well be seeing the significance of tenure for justices, either in a good way or a bad one. "Change" definitely is happening; a Hispanic female from a single parent family in a housing project is now a justice (Savage). So, should Justice Sotomayor be allowed to remain a member of the Court for the rest of her life?

Many people would argue that she should. The main reason, according to U.S. News & World Report journalist John Farrell, is that changing the tenure of justices would result in changing the Constitution. The Founders believed that lifetime tenures were necessary in order for justices to get the job done. Justices would not have to worry about doing shady dealing with lobbyists in order to have an advantage come reelection; their decisions would be logical and unbiased. People also might argue along the lines of "why fix what isn't broken." This current

method has been in existence for hundreds of years over a course of more than a hundred justices (Farrell).

However, a newcomer can have an unfair advantage as well; an example is President Bush's nomination of his friend Harriet Miers to the court in 2005. Having no prior experience as a judge, the Senate denied her appointment to the Supreme Court (Rosen 211-213). The danger of lifetime tenure could have been evident had she been appointed. What also sparked interest, according to Henry Hogue from the Congressional Research Service, was the appointment of Chief Justice Roberts. President Bush first nominated him as an associate justice, then, before the Senate voted on it, withdrew the name and nominated Roberts as chief justice. A justice must be nominated by the president and approved by the Senate (Hogue). For a justice not to take a seat on the Court after being nominated by the president, they are either not confirmed by the Senate, which happened 36 times out of the 158 total nominations, they decline the offer, or the President withdraws the nomination. After being appointed, Chief Roberts, now the youngest justice, took the senior role on the Court with no seniority.

Without even going into detail on whether or not some of these older members of the Court are still competent and coherent, the age of some justices does raise curiosity about the direction the Court will take. Since "til' death do us part" is the basis of a justice's tenure, a President's possibility of appointing members comes down to pure chance. It is unlikely that many, if any, changes will take place during a president's reign if the Court is full of more youthful members; barring tragedy, they will spend a long time in office. Justice Stevens is 89 years old; he would be 93 by the end of President Obama's first term and 97 by the end of his second term if reelected (Powe 147). Justice Ginsburg is 76 years old and recently underwent surgery for pancreatic cancer (149). Chief Roberts and Justice Alito, the two newly appointed

judges, are the youngest members of the Court in their late 50's. Jeff Jacoby, writer for The Boston Globe, says, "It is now almost routine for justices to cling to power long past their prime." According to the Centers for Disease Control and Prevention, the average life expectancy for an American is 77.8 years of age; six of the nine justices are at least in their 70s. The direction of the Court could take a more liberal, Democratic approach within the next few years, considering the ages of the justices, but it is unfortunate that is what it comes down to. The three presidents before Obama each appointed two justices to the Supreme Court, a number that has turned into an average but not a guarantee; for example, Nixon appointed four justices, while Carter did not appoint any (Jacoby).

One thing that may be a result of the ages of justices is the lack of unity and certainty in the Court. Jeffrey Rosen writes in his book *The Supreme Court* that the number of full opinion votes has gone down with what he calls "the geriatric court." The swing voter plays a crucial role in a divided Supreme Court. Since the departure of Sandra Day O'Connor, Justice Kennedy has stepped up as the expected swing vote (212-214). This new Roberts Court has seen a rise in the number of 5-4 decisions on cases. An assessment of the new Court done by Legal Times magazine shows the importance of certain members. Justice Kennedy voted in the majority in 100 percent of the 5-4 decisions during the first full term of the Roberts Court. Chief Roberts only voted in the majority in two-thirds of those cases. Stevens and Ginsburg, the two oldest members of the Court, voted in the majority in less than two-thirds of the cases, less than any other member of the Court (Mauro). The fact that the two oldest justices failed to agree with their counterparts raises some serious questions about their accountability.

Lifetime tenure is a serious issue for a number of reasons. Edward Lazarus, in an article for Find Law, listed some of the main hindrances of justices spending too much time on the

bench. Aside from hanging onto their jobs too long “despite significantly diminished capabilities,” he believes that the small number of cases the Court looks at annually, usually only about 75 cases per term, and the significant role that clerks play in the process, makes it possible for justices to preside for the long ride. Lazarus’ book *Closed Chambers* describes how current Chief Justice Roberts was a long time clerk of former Chief Justice Rehnquist. The proficiency and consistency of clerks, who do a wide array of things from researching cases to acting as personal assistants, takes much of the work load off the justices’ shoulders (191).

The most alarming thing is the rising number of years being served by justices now as opposed to past decades. According to Peter Lattman, writer for the Wall Street Journal, the meaning of life tenure has changed; what used to be an average of less than 15 years, with vacancies on the court every two years, has turned into justices serving for more than a quarter-century. He cites since no American state grants judges on their high court life tenures, the judges on the highest court should not be granted them. Because of the growing tenures, many people have proposed 18-year fixed terms as a solution (Lattman). In “Reforming the Court,” a compilation of essays by political scholars regarding the issue, the difficulty of implementing such a fixed term has been put into question. Some minds on the matter say the only way for a change to be made is through a constitutional amendment, while others say it can be achieved through a simple congressional statutory enactment (Carrington and Cramton).

The Supreme Court has come a long way since its days in the basement of the U.S. Capitol building. What was once the weakest link is now what keeps the chain of government from snapping. Since the Constitution established the blueprint for America, the Supreme Court has done everything in its power to uphold its democratic directives. The Supreme Court needs competent and just justices. This country cannot rely on nine self-driven justices; this country

needs a collective, cohesive bunch to determine what is and is not constitutional. Justice should not rely on Republicans versus Democrats, Catholics versus Episcopalians, or Harvard versus Yale; justice should rely on a fair and balanced Supreme Court. Fair is not a justice with life tenure; balanced is not an assortment of unchanging ideologies. The Supreme Court justices should be given fixed terms.

Works Cited

- Carrington, Paul D. and Roger C. Cramton. *Reforming the Court: Term Limits for Supreme Court Justices*. Durham, NC: Carolina Academic Press, 2006. Print.
- Commission on the Bicentennial of the United States Constitution. *The Supreme Court of the United States: Its Beginnings & Its Justices 1790-1991*. Washington D.C.: Library of Congress, 1991. Print.
- “Conservative.” “Tribunal.” *The Merriam-Webster Dictionary of the English Language*. 11th ed. 2008. Print.
- Farrell, John A. “No Supreme Court Term Limits—Even with Partisan Justices like Scalia and Thomas.” *Opinion*. U.S. News. 23 Feb. 2009. Web. 14 Oct. 2009.
- Hogue, Henry B. “Supreme Court Nominations Not Confirmed, 1789-2007.” *CRS Report for Congress*. Federation of American Scientists (FAS). 9 Jan. 2008. Web. 16 Apr. 2009.
- Jacoby, Jeff. “Supreme Court Term Limits.” *Opinion*. The Boston Globe. 7 Sep. 2005. Web. 16 Apr. 2009.
- Kerr, Orin. “Is Justice Stevens a Judicial Conservative?.” The Volokh Conspiracy. 2 Jan. 2007. Web. 16 Apr. 2009.
- Lattman, Peter. “Should Supreme Court Justices Have Life Tenure?” *Law Blog*. The Wall Street Journal. 10 Sep. 2007. Web. 9 Apr. 2009.
- Lazarus, Edward. *Closed Chambers*. New York: Times Books, 1998. Print.

Lazarus, Edward. "The Problem of Supreme Court Justices' Remaining on the Bench Too Long." *Commentary*. FindLaw. 14 Apr. 2009. Web. 16. Apr. 2009.

"Life Expectancy." Centers for Disease Control and Prevention. 2 Apr. 2009. Web. 16. Apr. 2009.

Mauro, Tony. "Four Advocates Discuss the Court's First Full term under Roberts and the Emergence of Kennedy." *Reading the Roberts Court*. Law.com. 17 Aug. 2007. Web. 9 Apr. 2009.

McGilvray, Sean. "Will We Ever See a Non-Ivy League Supreme Court Justice?" LegalGeekery. 18 June 2009. Web. 19 Oct. 2009.

Niese, Mark. "Hawaii is Latest Civil Unions Battleground." Associated Press. 22 Apr. 2009. Web. 24 Apr. 2009.

O'Brien, David M. *Storm Center: The Supreme Court in American Politics*. New York: W.W. Norton & Company, 1986. Print.

O'Connor, Karen and Larry J. Sabato. *Essentials of American Government*. New York: Pearson Longman, 2008. Print.

Powe, Lucas A. Jr. *The Supreme Court and the American Elite*. Massachusetts: Harvard University Press, 2009. Print.

Rosen, Jeffrey. *The Supreme Court: The Personalities and Rivalries that Defined America*. New York: Times Books, 2007. Print.

Savage, Charlie. "Sotomayor Sworn In As Supreme Court Justice." *Politics*. The New York Times. 8 Aug. 2009. Web. 14 Oct. 2009.

Tahk, Alexander and Stephen Jessee. "Supreme Court Ideology Project." Alexander Tahk. 2 June 2008. Web. 4 Apr. 2009.

Toobin, Jeffrey. *The Nine*. New York: Double Day, 2007. Print.

Woodward, Bob and Scott Armstrong. *The Brethren: Inside the Supreme Court*. New York: Simon and Schuster, 1979. Print.