

Can Congress Create Term Limits for the Supreme Court?



By Paul Engel

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- Since attempts to pack the Supreme Court has failed, is there another way for the politicians to take control of the court?
- What are the constitutional issues with attempting to place term limits on the court via legislation rather than amending the Constitution?
- There is more to this legislation than just limiting the terms of Supreme Court Justices.

After years of trying to pack the Supreme Court, there's been a new attempt to take control of the third branch of government. Rather than placing extra justices on the court (all of which would be appointed by the current President), they want to set term limits for, and a complicated method of, appointing justices. Is any of this constitutional? How will Congress and the courts react to this abuse of power? Will the American people meekly sit back and watch while the Constitution is once again set aside by Congress for political ends? What would happen to America if this legislation is allowed to see the light of day?

Term limits in general are a controversial subject. Many believe that allowing people to remain in an office for extended periods of time is detrimental to the republic, while others value the experience that comes with time in service. Still, when it comes to offices created by the Constitution of

the United States, is legislation all that is required to establish term limits? A brief look at our history should provide the answer.

Presidential Term Limits

After serving two terms, Franklin D. Roosevelt told the Democratic convention that he would run only if drafted. Roosevelt won nomination on the first ballot then won a decisive victory over Wendell Willkie, becoming the only President to serve more than eight years. Term limits became an issue during Roosevelt's 1944 campaign against Thomas Dewey. As Dewey put it:

" four terms, or sixteen years is the most dangerous threat to our freedom ever proposed."

FDR, Dewey, and the Election of 1944. – Jordan, David M. (2011)

Though he won the 1944 election, President Roosevelt died just 82 days after his fourth inauguration on April 12, 1945. However, after the mid-term elections in 1946, Republicans took control of both the House of Representatives and the Senate by campaigning on the issue of Presidential term limits. To fulfill their election promise, Congress did not simply offer legislation, but a resolution to amend the Constitution itself. The language that was sent to the states became the Twenty-Second Amendment.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

[U.S. Constitution, Amendment XXII](#)

Why was it necessary for Congress to propose a constitutional

amendment to impose term limits on the President? Because the language of the Constitution does not place a limit on the number of terms a President serves.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

U.S. Constitution, Article II, Section 1, Clause 1

Since only laws of the United States made pursuant to the Constitution can be valid, the only way to impose term limits on the President was by an amendment.

Supreme Court Term Limits

The first problem with H.R. 5140 is the fact that it violates the supreme law of the land.

This Act may be cited as the “Supreme Court Term Limits and Regular Appointments Act of 2021”.

H.R. 5140, Section 1

Congress does not have the legal authority to set term limits on the Supreme Court of the United States. Congress can determine the number of justices, primarily by the advice and consent of the Senate, but there is nothing in the Constitution that allows Congress to set term limits or to force a justice to step down except via the impeachment process that requires the bad actions of the justice.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,

U.S. Constitution, Article III, Section 1

This legislation starts by establishing a schedule for appointing justices to the Supreme Court.

“The President shall, during the first and third years after a year in which there is a Presidential election, nominate, and by and with the advice and consent of the Senate, appoint one Justice of the Supreme Court.

H.R. 5140, Section 2

Right off the bat, we run into several problems. First, Congress does not have the legal authority to force the President to nominate federal justices. While the President is required to execute the laws of the United States, that does not include when they infringe on the powers delegated to him by the Constitution.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court,

U.S. Constitution, Article II, Section 2, Clause 2

The second problem this section of the legislation creates is too many justices. Congress has placed a limit on the number of Justices at nine.

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.

28 U.S.C. §1

So how would Congress deal with this particular problem? By effectively replacing all of the justices.

“(a) In General.—Except as provided in subsection (c), the panel of justices exercising Judicial power in Cases and Controversies shall comprise the nine most junior Justices.

“(b) Deemed Retired.—After a Justice has served 18 years, that Justice shall be deemed a Justice retired from regular active service under section 371(b).”

“(c) Exception.—No Justice appointed before the date of enactment of this Act shall be counted toward the panel of nine Justices described in subsection (a), nor shall they be required to retire from regular active service under subsection (b).”

[H.R. 5140, Section 2](#)

So Congress plans to simply “put out to pasture” the most senior justices as they add new ones? Did you notice this panel of nine justices are not exercising the powers of the Supreme Court, but judicial powers in general? Furthermore, subsection (c) says that the current justices are not counted toward the panel of nine justices who are to exercise the judicial power. Does that mean they are immediately removed from the court, even if they’ve served less than 18 years? It does say they will not be required to retire, but they cannot serve on the panel, so what would they be doing? Also, since the currently sitting justices could not be on this panel, does that mean we effectively start with one justice on the Supreme Court, and wait for years for more to be appointed?

“If the Senate does not exercise its advice and consent authority with respect to a President’s nominee to the Supreme Court within 120 days after the nomination, the Senate shall be deemed to have waived its advice and consent authority with respect to such nominee, and the nominee shall be seated as a Justice of the Supreme Court.”

[H.R. 5140, Section 2](#)

H.R. 5140 wants to put a 120 day time limit on the Senate’s advice and consent role, but what defines the Senate exercising its authority to advice and consent? Would the Senate Majority Leader be advising the Senate to not hear

nominations by exercising its advice authority? Would there have to be a vote? Isn't this infringing on the authority of the Senate to set their own rules for their own proceedings?

Each House may determine the Rules of its Proceedings, ...

U.S. Constitution, Article I, Section 5, Clause 2

As another insult to the Constitution, this legislation would create a new type of justice called a "Senior Justice". Just what would the "Senior Justice" do?

"(a) Any Chief Justice of the United States or Associate Justice of the Supreme Court who has retired from regular active service under section 371(b) of this title shall be known and designated as a Senior Justice and may continue to perform such judicial duties as such Justice is willing and able to undertake, when designated and assigned by the Chief Justice of the United States.";

H.R. 5140, Section 3

I'm not sure quite what to call this? Semi-retirement? This does, however, give us a clue as to what this legislation is all about, and what the ultimate goals of the sponsors are.

Conclusion

While the official title of this legislation is "Supreme Court Term Limits and Regular Appointments Act of 2021", it should be called "The Reinvent the Federal Judiciary Act". Not only is Congress claiming the authority to change the duration of a justice's service, but also how and when they are appointed, by creating a "post court" position they may fill.

Whether you think there should be term limits for justices on the Supreme Court, or federal judges in general, it cannot legally be done by simple legislation. What these Congressmen want to do requires an amendment to the Constitution. If there's one thing that has become obvious, it's that Congress

has become disconnected from the Constitution, their oaths of office, and any semblance of the rule of law.

If you support the Constitution, and want representatives who do the same, then you must contact your Representative and Senators to either demand that this legislation be turned into a proposal for a Constitutional amendment or simply discarded on the ash heap of history. If Congress can reshape the judiciary by simply passing legislation, why not the entire government? Why bother with a Constitutional Convention? Just let Congress recreate the United States in its own image. Wouldn't that be awful?

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