



## House Dems call for Supreme Court term limits: Here are the pros and cons

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The idea of term limits for Supreme Court justices is gaining steam following the death of Justice Ruth Bader Ginsburg and the contentious political fight to fill her seat.

Originally intended to ensure a "steady, upright, and impartial administration of the laws," as Alexander Hamilton said in Federalist No. 78, many now argue the lifetime appointment to the Supreme Court has had the opposite effect. Rather than putting the court above the political fray, it has been sunk into partisan politics.

Advocates of term limits have long argued that eliminating the lifetime appointment would lead to fewer bitter political fights over vacancies and that would help preserve the legitimacy and independence of the court.

Those are among the arguments being made by several Democratic members of Congress who are introducing legislation next week to limit the term of a Supreme Court justice to 18 years.

"We can't face a national crisis every time a vacancy occurs on the Supreme Court," said Rep. Rho Khanna, D-Calif., the bill's lead sponsor. "It's time to standardize and democratize the Supreme Court."

The Supreme Court Term Limits and Regular Appointments Act would ensure that, over time, a court vacancy would open up every two years, allowing each president to nominate two justices per four-year term.

This would "restore a measure of balance," said Rep. Don Beyer, D-Va.

The legislation marks the first time lawmakers have tried to create a Supreme Court term limit by statute and without a constitutional amendment to Article III. Legal experts who support and oppose the reform have said the lifetime appointment clause likely cannot be changed without amending the Constitution.

Absent term limits, a president's opportunity to appoint a Supreme Court justice has more to do with sheer luck than anything else. One president from one party could get the opportunity to

nominate several justices, while another president may not have one—although Jimmy Carter was the only president to serve a full term without an appointment.

Still, Republicans have been luckier than Democrats in recent decades. Since 1976, Republicans held the presidency for 24 years and appointed 15 justices. Democrats held the presidency for 20 years and appointed only four justices.

The death of Justice Ginsburg demonstrated how unpredictable and politically fraught court vacancies can be. President Donald Trump is preparing to announce his Supreme Court pick Saturday afternoon. The GOP Senate majority appears to have the votes for Trump to confirm his third justice before the Nov. 3 election or shortly after, shoring up a 6-3 conservative majority on the court.

Democrats, outraged at Republicans for refusing an election-year hearing for President Barack Obama's Supreme Court pick, have threatened to do what they can to block the nomination. Critics have questioned why Ginsburg didn't step down in 2013 when Democrats controlled the White House and Senate. Meanwhile, a majority of Americans said they believe it should be up to the winner of the next election to fill the vacant seat.

At least some of the chaos around the current Supreme Court vacancy would be avoided if justices were subject to term limits, explained Ilya Shapiro, a constitutional scholar at the Cato Institute and author of the book "Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court."

Regularizing the appointment of justices would increase public confidence, according to Shapiro. "You would have regular vacancies rather than an arbitrary or irregular system where retirements or deaths happen all of a sudden—sometimes in a presidential election year."

Having a steady rotation would also eliminate politically-timed retirements or justices trying to outlive presidents, he continued, adding, "Ginsburg certainly is not the only one who tried that."

The idea of judicial term limits has seen support across the political spectrum, including from Republican Sens. Marco Rubio of Florida, Josh Hawley of Minnesota and Ted Cruz of Texas. In academia, Yale Law professor Steve Calabresi, a self-declared libertarian-conservative, recently argued that imposing term limits would "end what has become a poisonous process" and "depoliticize the court and judicial selection."

Others are skeptical that the type of bitter partisan infighting about the court would go away if there were term limits and guaranteed appointments.

"I think the whole idea is to lower the political temperature surrounding the courts and our confirmation hearings," said Anthony Marcum, a resident fellow at the R Street Institute. "The problem is, not only are these plans unconstitutional, but I fear they'll have the exact opposite results."

Rather than making confirmations less contentious, they'll be permanently tied to every presidential race and Senate race, putting an even bigger political spotlight on the court,

according to Marcum. "You won't take away the political pressure on the courts, you'll make it even worse."

Under the proposal, a president serving two terms could appoint up to four justices. Marcum advised that could throw the court off-balance ideologically within a short period of time, especially if two presidents of the same party served two back-to-back terms. "You could very well go from eight Scalias to eight Ginsburgs in a relatively short period of time," he said. "That sort of back and forth is not what people anticipate in these 18-year terms."

If the court becomes overwhelmingly one-sided, there are fears that the majority could take advantage of its position to overturn precedent. Suzanna Sherry, a constitutional law professor at Vanderbilt Law School warned that welcoming a new justice to the court every two years "could wreak havoc on doctrinal stability."

The current model of lifetime appointments has generally ensured gradual changes to the court. But a constant churn of justices could make "sudden and radical changes," Sherry wrote. That could mean landmark decisions, like *Roe v. Wade*, which established abortions rights across the U.S., could suffer "whiplash," being overturned then reinstated depending on which party was in the White House and if it held a supermajority in the Senate.

Advocates of term limits have downplayed these risks, noting it will still be based on the natural rotation in the White House and Senate. More often than not, presidents have had to deal with a divided government. One would have to go back to the Roosevelt and Truman administrations to find a time when one party controlled both the Senate and the White House for a full eight years.

Another popular argument for term limits is that lifetime appointments undermine public faith in the institution of the Supreme Court. In a statement in support of the House bill, Gabe Roth, the executive director of the nonpartisan group Fix the Court, said the reform could help to "restore confidence in the high court and in the rule of law."

As an institution, the Supreme Court enjoys much higher approval ratings than the presidency or Congress. According to a recent Pew Research poll, a majority of Americans (70%) said they had a favorable view of the Supreme Court. Roughly two-thirds believe the court is ideologically moderate rather than too far to the left or the right.

Yet even a few Supreme Court justices have voiced support for term limits. Justice Stephen Breyer said a finite term would make his life "a lot simpler."

In 1983, when he was working in the Reagan White House, Chief Justice John Roberts cited longevity as a reason to consider term limits. "Setting a term of, say, 15 years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence," he said, noting that a turnover of judges would also be "healthy."

Research from the consulting firm Oliver Wyman suggests that in the coming decades the rate of turnover for federal judges is likely to slow down further.

When the Constitution was adopted, life expectancy was lower and judicial turnover was higher. Since George Washington selected John Jay to be the first Supreme Court justice in 1789, there

have been 119 appointments to the court. In the past 100 years, only 48 justices have been appointed—through Justice Brett Kavanaugh. Over the next 100 years, there could be as few as 25 appointments.