



# SOME EVEN HAVE TERM LIMITS

*Why the Supreme Court Should Join Much of the Rest of the Federal Government and Reject Lifetime Tenure*

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### Contents

|                         |   |
|-------------------------|---|
| Executive Summary ..... | 3 |
| Executive Branch .....  | 4 |
| Legislative Branch..... | 5 |
| Judiciary .....         | 6 |
| Conclusion .....        | 7 |

*Cover photos (top to bottom): U.S. Court of Appeals for the D.C. Circuit building, where the FISA Court sits; CFPB Director Richard Cordray and former FBI Director James Comey; the U.S. Capitol building*

Fix the Court is a non-partisan grassroots organization created to take the Supreme Court to task for its lack of transparency and accountability and to push Chief Justice John Roberts and the court’s associate justices to enact basic yet critical reforms to make the court more open. FTC educates Americans about the various problems plaguing the court and is building a national movement to demand change with a common voice.

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## EXECUTIVE SUMMARY

**This may come as a surprise, but it's not just the President of the United States** whose tenure in office is restricted by law.

This fact seems to **contradict the popular notion that non-elective government jobs** – whether in the bureaucracy or at the U.S. Supreme Court – **are yours for the keeping**. While no one can force your postman (probably) or your federal appeals court judge (definitely) to step down, **top officials in all three branches must leave their leadership posts** – or must leave their jobs entirely – **after they have served a designated amount of time**.

Besides the presidency, the two term-limited positions most in the news these days are also in the executive branch: **FBI director and Consumer Financial Protection Bureau director**. The former – **so long as he or she is not fired** – serves for 10 years, i.e., for a term that, by law, must stretch across at least two, if not three, presidencies. The latter serves for five years, for the time being, as **the constitutionality of the position is being tested in federal court as of this writing**. As you will see in this report, numerous other executive branch positions have term limits.

As for the legislative branch, you may recall that much was said during the campaign last year about the benefits of limiting the number of terms members of Congress could serve. Although several bills and resolutions on the subject have been introduced in both houses since the start of the year, **none has received a single committee hearing, let alone a committee or floor vote**.

That said, **term limits play a significant role in the way that both parties have doled out leadership positions** in the last two decades, requiring committee and subcommittee chairmen to give up their posts after reaching a certain length of service.

But the most crucial point – or the largest surprise – in this report is that **term limits exist within various levels of the judiciary**, for both Article I and Article III judges.

Individuals appointed to the Foreign Intelligence Surveillance Court, often called the FISA Court, **serve for a single, staggered seven-year terms**. Federal magistrate judges, who assist district judges in their day-to-day and pre-trial duties, **serve terms of only eight years**. Federal judges who serve on the U.S. Sentencing Commission are themselves not term limited in their primary roles, yet they **may serve on the commission for only 12 years**.

A handful of other judicial examples will also be discussed in the report.

Like Fix the Court's [Sept. 2016](#) study on foreign courts of last resort and its [May 2017](#) examination of state supreme courts, this report will demonstrate that **limiting the tenure of a polity's top officials is not only common but also feasible and prudent** – so long as the terms are sufficiently lengthy and those subject to limited tenures have sufficient guarantees of independence.

## EXECUTIVE BRANCH

The President may be the only executive branch official whose tenure is limited by the Constitution, but **dozens of other positions in the executive branch have terms of service that are restricted by statute.**

**Those in charge of federal monetary policy have limited tenures.** The five appointed members of the Board of Governors of the Federal Reserve serve single, staggered 14-year terms by law, and the five commissioners of the Securities and Exchange Commission serve single, staggered five-year terms, though Fed governors and SEC commissioners may serve past their terms until Congress and the President agree on a successor. Members of the Internal Revenue Service Oversight Board each have five-year terms with a two-term limit.

The six members of the Federal Election Commission (three Democrats, three Republicans) each serve for a single six-year term without the possibility of reappointment.

**Numerous key positions in the military have term limits.** The chairman of the Joint Chiefs of Staff may serve up to three two-year terms, though there is a “time of war” exception, meaning that if the U.S. is at war, the limit to the number of reappointments may be waived.

**Similar provisions exist for the other members of the Joint Chiefs.** The vice chairman serves a two-year term with a three-term limit. The Chief of Naval Operations, the Commandant of the Marine Corps and the chiefs of staff of the Army, Air Force and National Guard serve four-year terms, with a single possible reappointment.

Members of various executive branch boards that **oversee U.S. policy on agriculture, oceans and even the arts are subject to term limits.** For example, members of the National Organic Standards Board, appointed by the Secretary of Agriculture, serve five-year terms. Members of the National Sea Grant Advisory Board, part of the National Oceanic and Atmospheric Administration, may serve only two four-year terms. And members of the National Council on the Arts serve single six-year terms.

On a more controversial note, **enter Richard Cordray and James Comey.**

Cordray is the director of Consumer Financial Protection Bureau – an agency established by the 2010 Dodd-Frank Act that looked to curb the abuses on Wall Street that led to the 2008 financial crisis – and as director, he gets a single five-year term, though by statute he may serve as director after the expiration of the term until a successor has been appointed.

**The constitutionality of the CFPB is being debated by the D.C. Circuit** as of this writing, so it is entirely possible that the agency and the director position will not exist for much longer.



Comey is the former director of the Federal Bureau of Investigation who was fired by President Trump in May, ostensibly for not ending the Bureau's investigation into collusion between Trump associates and Russian operatives in the lead-up to the 2016 election. FBI directors – **or the ones that are not too meddling in the eyes of the White House** – have terms of 10 years and may not be reappointed.

The idea behind the length of the term is that individuals in this position should be apolitical and should serve terms that span more than one president – **a theory that supporters of Supreme Court term limits, including [Fix the Court](#), have espoused under similar reasoning.**

## LEGISLATIVE BRANCH

**Members of Congress are not bound by term limits** despite numerous attempts in the last three Congresses – and even more robust efforts in the early 1990s – to limit U.S. senators' and representatives' length of service.

**The Supreme Court weighed in on this topic 22 years ago** as state legislatures were passing laws and amendments to prevent residents from holding a congressional seat for more than three successive terms. A four-term member of Congress from Arkansas, Ray Thornton, sued based on his state's 1992 term limits amendment, and in 1995 **the high court held that the amendment was unconstitutional and that no state could pass a law limiting the number of terms** federally elected officials could hold.

Since then, **the most aggressive congressional term limits campaign began in 2011 when the Republicans won back the U.S. House.** In that year and in the next three Congresses, members of the GOP have introduced bills, resolutions and constitutional amendments calling for U.S. representatives to be term limited out of office after four or six years and U.S. senators to be forced out after 12 or 18 years. None of these proposals has received a committee vote, let alone a floor vote.

Though the GOP caucus has not successfully implemented congressional term limits by statute or amendment, they do exist by rule in the legislative branch, as **members of the House and Senate may serve only for six years as a chairman of a committee or subcommittee.** In the House, serving as ranking member counts toward that six-year limit; in the Senate, it does not.

This rule was instituted following the Republican takeover of the House in 1995 as an effort to insert newer members into leadership roles sooner rather than later. When the Democrats took back the House following the 2006 election, **they maintained the six-year rule, much to the shock of some of the party's senior members.**

In a few cases, **this rule has effectively term limited some members** who chose to leave Congress after their chairmanships had expired. In 2014 Ways and Means Chairman Dave Camp, Armed Services Chairman Buck McKeon and Natural Resources Chairman Doc Hastings all decided to return home over remaining in Congress without their gavels.

Additionally, there are numerous examples of **members of Congress leaving Washington due to a self-imposed term limit**. In the most recent election, Rep. Mike Fitzpatrick of Pennsylvania declined to run for reelection, saying his four terms (2005-2007 and 2011-2017) were enough. His brother Brian moved to the district in order to run to succeed him. Brian won the seat and **even introduced a term limits amendment in the 115<sup>th</sup> Congress**, as brother Mike had done before him.

One more term-limited position with purview in the legislative branch: the inspector general for the U.S. Capitol Police, who has **a five-year term and a three-term limit**.

## JUDICIARY<sup>1</sup>

The ironic thing about this report is that although U.S. Supreme Court justices at the moment may serve for life, **hundreds of federal judges – albeit ones that are not specifically mentioned in Article III of the Constitution – are subject to term limits**. These term-limited judges, collectively referred to as Article I judges, sit on bankruptcy, tax and military courts across the country.

The largest group of them, U.S. magistrate judges, have their roots in the 18<sup>th</sup> century acts that established the federal courts system. Over time, circuit commissioners, as they were called from the early 19<sup>th</sup> century onward, **went from simply taking bail in federal criminal cases to taking depositions in civil cases to issuing arrest warrants**.

When the rules for circuit commissioners were updated in 1968, **they were given even greater authority** (and the title of “magistrate”). Nowadays, magistrates assist district judges in conducting pretrial and discovery proceedings, review *habeas* petitions and act as special masters.

The 560 federal magistrate judges <sup>2</sup> who serve today are appointed by a majority vote of the district’s judges and **serve terms of only eight years if full-time, four years if part-time**. They may be reappointed.

Elsewhere in Article I courts, the 352 U.S. Bankruptcy Court judges are appointed for a term of 14 years. The 19 U.S. Tax Court judges serve 15-year terms, as do the 16 judges on the U.S. Court of Federal Claims. **Judges on all three courts may be reappointed**.

At the federal district and appeals court level, **though the position of “judge” is not term limited, the position of “chief judge” is**. The chief judge of a U.S. district court or court of appeals serves for a term of seven years or until age 70, whichever occurs first.

Members of the U.S. Sentencing Commission, an independent judicial branch agency that promulgates sentencing guidelines for federal courts, **serve six-year terms with the possibility of a single**

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<sup>1</sup> “Judiciary” and not “judicial branch” because this section will describe both Article I and Article III judges.

<sup>2</sup> For comparison’s sake, there are 179 circuit court judges and 677 district judges.

**reappointment.** At least three of the seven USSC members must be federal judges, and Justice Stephen Breyer, back when he sat on the First Circuit Court of Appeals, served on the USSC for four years <sup>3</sup>.

(Breyer was also chief judge of the First Circuit starting in 1990. Had he not been elevated to the Supreme Court in 1994, **he would have been term limited in his former role in 1997.**)

The 11 federal judges who are appointed by the Chief Justice of the United States to the Foreign Intelligence Surveillance Court, often called the FISA Court, **serve for a single, staggered seven-year term.** The newest FISA Court judge, Robert Kugler of the District of New Jersey, who was appointed by Chief Justice Roberts this spring, will serve until May 2024.

The judges on the three-judge panel called the FISA Court of Review similarly serve single, staggered seven-year terms.

## CONCLUSION

**Term limits are as much a part of the federal government as FOIAs and apple pie** (made from apples inspected by the USDA).

In each branch, officials in numerous positions of power are restricted in the amount of time they are legally or customarily allowed to serve. **That the Supreme Court is not part of this arrangement should change – by convention, by statute or by amendment.**

Nowhere in the Constitution, nor the Federalist Papers, nor in any other writing at the time of our country's founding was there a **presumption that Supreme Court justices would serve for close to three decades**, which in the last half century has become the rule rather than the exception.

Elsewhere in government, the **average length of tenure in the U.S. House is currently 9.4 years; in the U.S. Senate, it's 10.1 years.** Article I federal judges – who are subject to the same laws and precedents as their Article III counterparts yet are also subject to term limits – serve slightly longer on average than federal legislators. **Yet rarely do magistrates, bankruptcy judges and tax judges approach three decades on the job.**

Outside of Washington, there is **wide understanding that those in powerful positions do not get to serve in them for life.** An S&P 500 CEO, for example, serves on average **only 7.4 years**, according to 2014 statistics. Judges in the courts of last resort in nearly every other democratic country in the world – and in 49 out of 50 states – **are either subject to a term limit, a mandatory retirement age or both.**

It should not be unreasonable, then, for the U.S. Supreme Court to participate in this system of good governance.

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<sup>3</sup> Breyer's experience here is reminiscent of how eight of the nine current justices were compelled to follow the Code of Conduct for U.S. Judges in their previous roles yet were no longer bound by the code once they were confirmed to SCOTUS.

We will leave you with the justices' – five current and two former – own words on term limits, which may help show the way toward **a more modern and accountable system of tenure**.

**Chief Justice John Roberts** ([link](#))

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. It would also provide a more regular and greater degree of turnover among the judges.

**Justice Clarence Thomas** ([link](#))

It's one of the hard parts of being on the court, watching what happens to your colleagues as time goes by. I've always said that the hard part was watching your colleagues get older and pass away.

**Justice Ruth Bader Ginsburg** ([link](#))

As long as I can do the job full steam [I'll stay]. I think I'll recognize when the time comes that I can't any longer.

**Justice Stephen Breyer** ([link](#))

If there were a long term – 18, 20 years, something like that – I'd say that was fine. In fact, it'd make my life a lot simpler, to tell you the truth.

**Justice Samuel Alito** ([link](#))

If I had been a delegate to the Constitutional Convention [...], I would narrow the range of possibilities down to either life tenure or a long term of years, so that the judiciary would be insulated from being swayed by popular opinion during a particular period.

**Justice Antonin Scalia** ([link](#))

You always wonder whether you're losing your grip and whether your current opinions are not as good as your old ones.

**Justice Sandra Day O'Connor** ([link](#))

Because it is an unfortunate fact of life that physical and mental capacity sometimes diminish with age, the people may wish to replace some older judges in order to satisfy the legitimate, indeed compelling, public interest in maintaining a judiciary fully capable of performing judges' demanding tasks.