Legal Experts Propose Limiting Justices' Powers, Terms

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If we had it to do all over again, would we appoint Supreme Court justices for life? Allow the chief justice to keep the job forever? Let the court have the final word on which cases it hears and those it declines?

A group of prominent law professors and jurists thinks not, and the group says in a letter to congressional leaders that there is no reason Congress should consider the operation of the high court sacrosanct.

"We do not suggest, and would oppose, any interference with the substance of the court's work," says the letter, which was organized by Duke University law professor Paul D. Carrington and signed by 33 others from different stations on the political spectrum.

But the group said Congress has every right to address how the court *operates*, "a subject it appears not to have seriously considered for at least seventy years."

Carrington said the four proposals in the letter -- sent to the chairmen and ranking minority-party members of the congressional judiciary committees, Attorney General Eric H.

Holder Jr., and Vice President Biden -- are drawn from various studies, commissions and reform efforts that have foundered in the past.

He's not particularly optimistic they will fare any better now and notes that even this group was not unanimous on any of the proposals. "The politics of this are very difficult," he said. "Nothing on this is really going to happen until someone invests his or her career on the issue."

He's confident of one other thing: "I'm sure the justices would hate it."

For starters, the group proposes a form of term limits, moving justices to senior status after 18 years on the court. The proposal says that justices now linger so long that it diminishes the likelihood that the court's decisions "will reflect the moral and political values of the contemporary citizens they govern."

To get around the Constitution's prescription that justices serve for life, the group would let justices stay on the court in a senior role -- filling in on a case, perhaps, or dispatched to lower courts -- or lure them into retirement with promises of hefty bonuses.

It would set up a regular rotation on the court by providing for the nomination of a new justice by the president with each new two-year term of Congress. If that results in more than the current nine justices, only the nine most junior would hear cases.

The new policy would not take effect until those already on the court are off, but the current tenure of the court suggests what a radical change that would be. Four of the court's justices -- John Paul Stevens, Antonin Scalia, Anthony M. Kennedy and David H. Souter -- have already surpassed the 18-year mark, and Clarence Thomas gets there later this year. Ruth Bader Ginsburg and Stephen G. Breyer are not far behind.

University of Chicago professor Eric Posner said the Constitution's call for lifetime appointments is one element of American democracy that is never copied by other countries, perhaps because "it is very undemocratic."

"People who wield an enormous amount of power should not have lifetime appointments," Posner said.

Relatedly, the group calls for the justice who serves as chief to be limited to seven years in the job, because it has "extended into numerous other political, administrative and non-judicial roles calling for a measure of special accountability."

The third proposal deals with the removal of justices in failing health "who are increasingly prone to remain in office and retain their political power even if no longer able to perform their office."

It did not name names. But it said the chief justice should have the duty of advising such a justice to resign and promptly report that fact to the Judicial Conference of the United States (if the chief is the one in

question, it falls to other justices to report him).

And the proposal would deprive the justices of one of their greatest powers: deciding which cases they hear. Justices now comb through the thousands of petitions for certiorari they receive each year, and in recent years have declared a declining portion of them worthy of their time.

The court issued 67 merit opinions last term, the lowest number since the 1950s. The number of cases the court will decide this term is a bit higher.

"It is increasingly difficult to justify absolute independence for justices whose chief work is expressing and imposing on the public laws on topics of their choice," the proposal said.

It envisions a "Certiorari Division" made up of senior justices and appellate judges who would review the petitions and send 80 to 100 each year for the Supreme Court to decide, whether it wanted to or not.

"They don't have to decide anything they don't want to decide," Carrington said, which adds to a perception that the court is "not just powerful but arrogant."

Carrington said the group sent the proposals to Holder because the Justice Department once had an office that looked into judicial reform and to Biden because of his experience on the Senate Judiciary Committee.

The group sent the proposals as statutory texts, it said, in hopes they would not be treated as "mere political or scholarly utterances." In other words, Carrington said, the approach seemed better "than writing another law review article."

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