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The Case for Supreme Court Term Limits Just Got a Lot Better

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The most striking detail in the recent investigation by The New York Times into another potential Supreme Court breach is not the evidence that Justice Samuel Alito or his wife may have leaked information to conservative friends in 2014 about the outcome of Burwell v. Hobby Lobby Stores, which extended "religious liberty" to the actions of family-owned corporations.

No, the most striking detail is the extent to which a number of Republican justices, Alito included, appear to have been the targets of a sophisticated and well-funded influence operation designed to notch as many legal and constitutional victories for moneyed and conservative interests as the justices were willing to give.

My colleagues in the newsroom, Jodi Kantor and Jo Becker, describe a kind of revolving door, where wealthy donors to conservative causes invite justices to meals, vacation homes and private clubs; where they contribute money to the Supreme Court Historical Society for the purpose of meeting with and influencing the justices; and where the former head of one such influence operation, Faith and Action, went as far as to purchase a building across the street from the court so that he could cultivate the people who worked there.

Alito denies the allegation that he divulged any information on the court's proceedings, telling The Times that the claim that friends of his were "told the outcome of the decision in the Hobby Lobby case, or the authorship of the opinion of the court, by me or my wife, is completely false." Alito also denied the accusation to The Washington Post in similar terms.

But I want to shift gears for a moment in any case.

The framers of the Constitution wanted an independent judiciary — strong enough to resist corruption as well as the influence of public opinion. As such, federal judges enjoy tenure during "good behavior." Barring impeachment and conviction, they cannot be removed.

But what if lifetime tenure, rather than leading judges away from temptation, makes it easier to tempt them? In an era in which the Supreme Court is as powerful as it has ever been — and which, not coincidentally, the wealthiest Americans have an almost unbreakable grip on our politics — what if lifetime tenure, rather than raising the barriers to corruption, makes it easier to influence the court by giving interested parties the time and space to operate? And beyond the question of undue influence, what if lifetime tenure works too well to sever the court from the public, rendering it both unaccountable and dangerous to the popular foundations of American government?

Lifetime tenure for federal judges was a real innovation in American government. Most states were much less keen to give judges near-total independence from the public at large. In some states, judges were appointed to fixed terms; in others, they were on annual contracts to be renewed at the discretion of the legislature. And still other states gave their legislature the power to remove judges from the bench for any reason.

Much of this flowed from the conventional wisdom, among Anglo-Americans in the earliest years of the Republic, that all public officials should be as responsive to the people as was possible.

The American Revolution had convinced many ordinary citizens, the historian Terry Bouton notes in an essay for the volume "Revolutionary Founders: Rebels, Radicals, and Reformers in the Making of the Nation," that they had "a right to monitor government, to shape policy, and to regulate government if they believed their leaders were not responding to the popular will."

In terms of institutions, and the structure of political representation, this meant short terms of office (delegates to the Confederation Congress served for one year), binding instructions for lawmakers (so that they could not act too independently of their communities) and mandatory "rotation," or term limits.

Mandatory rotation was especially critical. “Elections, especially of representatives and counsellors, should be annual, there not being in the whole circle of the sciences a maxim more infallible than this, ‘where annual elections end, there slavery begins,’” John Adams wrote in 1776, as British North America erupted into open conflict. “These great men, in this respect, should be one a year—‘Like bubbles on the sea of matter borne, They rise, they break, and to that sea return.’ ”

Most state constitutions of the era made some provision for mandatory rotation. The Pennsylvania Constitution of 1776, for example, deemed it essential to preventing “an inconvenient aristocracy of entrenched officials.” The Maryland Declaration of Rights, written that same year, required mandatory rotation of the executive, stating that “a long continuance in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in those departments, is one of the best securities of permanent freedom.” And under the Articles of Confederation, no person could serve as a delegate to Congress “for more than three years in any term of six years.”

Despite this consensus — so strong that even the more aristocratically inclined Alexander Hamilton endorsed it in a 1782 congressional committee report — there is no provision for anything like mandatory rotation in the federal Constitution.

What happened?

Some of it was practical. James Madison had also endorsed mandatory rotation in that 1782 report, but between then and 1787 he had a change of heart on the question, as a result of instability in the fragile Confederation government.

According to the legal scholar Michael J. Klarman, Madison was worried that mandatory rotation was producing “a change in the federal councils not favorable to those catholic arrangements on which the harmony and stability of the union must greatly depend.” Madison also observed that “experience constantly teaches that new members of a public body do not feel the necessary respect or responsibility for the acts of their predecessors, and that a change of members and of circumstances often proves fatal to consistency and stability of public measures.”

Some of it was ideological. The Constitution was written to *restrain* democratic energy and popular unrest in the American republic. The *point* was to put substantial distance between federal officers and elected officials and the people they were supposed to serve.

And some of it, among those delegates who backed rotation in theory, was probably a miscalculation. Mandatory rotation was still the norm in most states. The Philadelphia delegates might have assumed that this would also be the norm in the new national government, even without explicit mention in the Constitution. They were wrong. The United States has mostly moved away from the expectation of mandatory rotation, with many lawmakers and judges serving long terms in office.

There is much to be said for the stability and continuity — and in the modern era, the expertise and skill — that comes with serving in office or on the bench for long periods of time. And yet the Revolutionary generation had a point worth considering. Long tenure — and in the case of judges, permanent tenure — can go beyond independence to breed a kind of arrogance and contempt for the public.

Set aside the issue of Supreme Court leaks and we see this with Justice Alito himself, who has repeatedly gone to public forums to chastise, even mock, his liberal critics, as if he owes nothing to them or the people they represent.

Most Americans today support Supreme Court term limits. Their reasons vary, but one of the more popular ones is that term limits can help lower the temperature of confirmation battles and reduce the nearly existential stakes of any given appointment.

But looking back to early America, I think there is a better reason to want to pull the judiciary, and the Supreme Court, a little closer to the people. As the antifederalist writer Brutus observed in the midst of the battle to ratify the Constitution, an independent judiciary of this strength, power and lack of accountability is “altogether unprecedented in a free country.”

“This power in the judicial,” Brutus warned, “will enable them to mould the government, into almost any shape they please.”