

MEMORANDUM

To: Interested Parties

From: Eliazar Chacha, Alicia Bannon, and Stephen Spaulding*

Re: Constitutional Analysis of Proposals for Statutory Supreme Court Term Limits

Date: July 14, 2026

Supreme Court reform is increasingly receiving attention from members of the public, political leaders, and scholars.¹ One of the leading proposals is the adoption of 18-year term limits for Supreme Court Justices.² Rooted in the principle that no one should have so much public power for life, Supreme Court term limits enhance the Court’s democratic accountability while also preserving judicial independence.³ Term limits also enjoy supermajority support among the

* Eliazar Chacha is senior counsel in the Kohlberg Center on the U.S. Supreme Court at the Brennan Center for Justice, Alicia Bannon is the director of the Kohlberg Center and the Brennan Center’s Judiciary Program, and Stephen Spaulding is the managing director of the Kohlberg Center. The authors gratefully acknowledge the contributions of Thomas Berry, Olatunde Johnson, Judge Timothy K. Lewis (ret.), Michael Milov-Cordoba, Cristina Rodríguez, Kermit Roosevelt, Michael Waldman, Wendy Weiser, Thomas Wolf, and Judge Diane Wood (ret.), whose feedback substantially improved this memorandum. Please note that the views and conclusions expressed in this memorandum do not necessarily reflect those of the reviewers. The authors also thank Margo D’Agostino and Tara Jones for their research and citation checking and Elise Marton for editing. This memorandum builds on the prior research of Michael Milov-Cordoba and Chihiro Isozaki, and the authors gratefully acknowledge the significance of that earlier work. The Brennan Center also extends deep gratitude to Jim Kohlberg, who made this memorandum possible.

¹ See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 12–20 (2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf.

² See, e.g., AM. ACAD. OF ARTS & SCI., THE CASE FOR SUPREME COURT TERM LIMITS 2 (Oct. 25, 2023), https://www.amacad.org/sites/default/files/publication/downloads/2023_SCOTUS-Term-Limits.pdf (“Our recommendation centers on an eighteen-year term imposed via statute.”).

³ ALICIA BANNON & MICHAEL MILOV-CORDOBA, SUPREME COURT TERM LIMITS, BRENNAN CTR. FOR JUST. 2 (June 20, 2023), https://www.brennancenter.org/media/11236/download/BCJ-146%20SCOTUS_TermLimits.pdf?inline=1 (“Such a system would enhance the democratic link between the Court and the public, making the institution more reflective of changing public values while preserving judicial independence.”).

public, with bipartisan majorities in favor of the reform.⁴ In recent years, members of Congress have introduced several bills to establish Supreme Court term limits by statute.⁵

While colloquially described as “term limits,” these proposals do not actually remove Supreme Court Justices from office after a fixed term but rather alter their duties according to a fixed schedule. Under the leading proposals, Justices would serve in active service on the Court for 18 years,⁶ with duties similar to those that currently exist for Justices.⁷ Following this phase of active service, Justices would transition to senior status, during which they would retain their judicial office but have altered responsibilities, such as serving on lower courts,⁸ stepping in to hear Supreme Court cases when other Justices recuse themselves,⁹ and, in some proposals, hearing Supreme Court cases brought under the Court’s original jurisdiction.¹⁰ A Justice’s transition to senior status would create a new vacancy on the Court.¹¹

One question that has been raised about these Supreme Court term limit proposals is whether they can be implemented by statute consistent with the requirements of the Constitution.¹² This memorandum provides a detailed constitutional analysis of statutory Supreme Court term limits, including addressing thoughtful counterarguments and objections that some have raised.

⁴ See Brandon L. Bartels, *Public Opinion on Term Limits and Other Supreme Court Reforms*, BRENNAN CTR. FOR JUST. (March 24, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/public-opinion-term-limits-and-other-supreme-court-reforms>; see also *Public Polling on the Supreme Court*, BRENNAN CTR. FOR JUST. (March 3, 2026), <https://www.brennancenter.org/our-work/research-reports/public-polling-supreme-court>; Kevin Conway, *New Marquette Law School national survey finds 61% think Trump wins almost always or most of the time at the Supreme Court*, MARQUETTE TODAY (June 4, 2026), <https://today.marquette.edu/2026/06/new-marquette-law-school-national-survey-finds-61-think-trump-wins-almost-always-or-most-of-the-time-at-the-supreme-court/> (“Term limits for justices enjoy strong bipartisan support, with 73% of Republicans, 71% of independents, and 87% of Democrats in favor.”).

⁵ See, e.g., Supreme Court Tenure Establishment and Retirement Modernization Act, H.R. 3544, 119th Cong. (2025); Supreme Court Biennial Appointments and Term Limits Act of 2023, S. 3096, 118th Cong. (2023); Supreme Court Term Limits and Regular Appointments Act of 2025, H.R. 1074, 119th Cong. (2025).

⁶ *Id.*

⁷ See *infra* Part I.

⁸ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 11.

⁹ BANNON & MILOV-CORDOBA, *supra* note 3, at 4 (“Under this system, senior justices would no longer regularly decide cases on the Court’s docket. Instead..., [they could] step[] in to hear cases on the Supreme Court’s docket upon a recusal by an active justice or in the event of an unexpected vacancy.”).

¹⁰ See *id.* (citing Jack Balkin, *Don’t Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>).

¹¹ See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., *supra* note 1, at 112–13.

¹² See, e.g., Scott Bomboy, *Can Congress enact Supreme Court term limits without a constitutional amendment?*, NAT’L CONST. CTR. (July 31, 2024), <https://constitutioncenter.org/blog/can-congress-enact-supreme-court-term-limits-without-a-constitutional-amendment>.

Consistent with the findings of dozens of constitutional scholars and retired judges, it concludes that the leading term limit proposals can be implemented by statute.¹³ Doing so is consistent with the Constitution’s text and structure; with the manner in which Congress has long regulated the Court, including the existing system of senior judges; and with the values of judicial independence that animate Article III and its Good Behavior Clause.¹⁴

¹³ More than 60 constitutional scholars and retired judges have concluded that term limits structured via this “senior justice” model can be implemented by statute consistent with the requirements of the U.S. Constitution. *See* Letter from Bruce Ackerman *et al.* to Congressional Leadership (Oct. 16, 2024), *compiled in Letter to Congress – Constitutional Scholars and Retired Judges Ask Congress to Pass Supreme Court Term Limits*, BRENNAN CTR. FOR JUST. (Oct. 17, 2024), <https://www.brennancenter.org/our-work/research-reports/letter-congress-constitutional-scholars-and-retired-judges-ask-congress> (letter from 57 constitutional scholars and retired judges); Diane P. Wood, *Why Term Limits for Supreme Court Justices Make Sense*, BRENNAN CTR. FOR JUST. (Aug. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/why-term-limits-supreme-court-justices-make-sense>; Nancy Gertner, *The Constitution Allows for Term-Limited Supreme Court Justices*, BRENNAN CTR. FOR JUST. (Dec. 19, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/constitution-allows-term-limited-supreme-court-justices>; AM. ACAD. OF ARTS & SCI., *supra* note 2; Akhil Amar, *Term Limits / Time Rules for Future Justices: Eighteen Arguments for Eighteen Years*, 9 CATO SUP. CT. REV. 9, 18 (2022), <https://www.cato.org/sites/cato.org/files/2023-09/cato-supreme-court-review-1.pdf>; Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1324 (2007); Kermit Roosevelt, *Why SCOTUS Term Limits Will Lead to a Fairer Court*, TIME (Jul. 29, 2024), <https://time.com/7005039/scotus-term-limits-fairer-court-essay/>.

¹⁴ *See* U.S. CONST. art. III, § 1.

Table of Contents

I. Description of leading proposals for statutory term limits	5
II. Relevant constitutional provisions	7
III. Analysis: The constitutionality of statutory Supreme Court term limits	8
A. Establishing a system of active and senior Justices comports with the Constitution’s requirement that Justices hold office during “good Behaviour”	11
1. Congress can modify and reduce judicial duties consistent with the Good Behavior Clause.....	13
2. Reduced and modified duties for senior Justices comport with the “office” of Supreme Court Justice.....	18
B. Congress can also modify the Justices’ duties through its authority to regulate the Court’s appellate jurisdiction	22
C. The fact that Congress historically has allowed Justices to decide when to leave active service does not mean that an alternative system is unconstitutional.....	26
D. Additional constitutional considerations.....	29
1. Existing term limit proposals are consistent with the establishment of “one” Supreme Court under the Constitution	29
2. Supreme Court term limits are consistent with the Appointments Clause and do not impact any vested property interest	32
3. The active/senior Justice system would not unconstitutionally remove the Chief Justice from office	37
4. Regular appointments are consistent with the Constitution	38
IV. Conclusion	39

I. Description of leading proposals for statutory term limits

Proposals that implement Supreme Court term limits via statute generally have two components that operate in tandem: (1) They divide a Justice's service into two phases, and (2) they regularize Supreme Court appointments by creating two vacancies during each four-year presidential term.¹⁵

First, these proposals generally restructure Justices' duties such that their service would consist of two phases: an initial 18-year period of "active" service, followed by a phase of reduced and modified duties for the balance of a Justice's tenure.¹⁶ During the active phase, Justices would fully participate in the Court's operations, including certiorari decisions, oral arguments, consideration of applications to the Court's emergency docket, and the resolution of cases.

After 18 years of active service, Justices' duties would change. Consistent with the Constitution's Good Behavior Clause, Justices would continue to hold their office, including retaining their judicial commission, salary, and status as employees of the federal judiciary. However, they would not participate in considering the full set of cases on the Supreme Court's merits docket. Rather, they would perform a mix of new and existing judicial duties. For instance, in many proposals, senior Justices would be eligible to sit by designation on lower federal courts — as retired Justices already do under the current system¹⁷ — drawing on their experience to assist the courts of appeals or district courts as needed.¹⁸ They might also assume administrative or managerial responsibilities, including advising or assisting the Chief Justice in overseeing the operation of the federal judiciary.¹⁹ Most proposals would also task senior Justices

¹⁵ See, e.g., AM. ACAD. OF ARTS & SCI., *supra* note 2.

¹⁶ See, e.g., Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025) ("Each justice shall serve in regular active service for 18 years beginning on the day on which the justice is sworn in, after which the justice shall be deemed to have retired from regular active service under section 371."); Supreme Court Term Limits and Regular Appointments Act of 2025, H.R. 1074, 119th Cong. (2025) ("After a Justice has served 18 years, that Justice shall be deemed a Justice retired from regular active service under section 371(b).").

¹⁷ 28 U.S.C. § 294.

¹⁸ See Jessica Gresko, *Supreme Court Justice Breyer Has Options as a Retiree*, ASSOCIATED PRESS (July 7, 2022), <https://apnews.com/article/ketanji-brown-jackson-covid-us-supreme-court-entertainment-health-697d7a86ed921ff50a32e049b7ba057c>.

¹⁹ See, e.g., BANNON & MILOV-CORDOBA, *supra* note 3, at 1 ("Among other things, senior justices would ... assist with the management and administration of the federal courts.").

with duties that only Supreme Court Justices can perform, including sitting temporarily on the Supreme Court in limited circumstances, such as when a recusal, illness, or vacancy would otherwise leave the Court with fewer than nine members,²⁰ or serving as a circuit Justice to resolve emergency petitions and administrative requests.²¹ Some proposals further provide that all Justices, senior and active, would continue to adjudicate cases brought under the Supreme Court’s original jurisdiction, a category of cases that the Constitution provides the Supreme Court hear as a trial court.²² Under this framework, only the nine most recently appointed Justices would hear cases under the Court’s appellate jurisdiction, but all Justices would hear cases under the Court’s original jurisdiction.²³

The two-phase tenure structure established in these proposals works in concert with a regularized appointments regime, under which a new Supreme Court seat becomes available in the first and third years of a president’s four-year term as a Justice completes 18 years of active service.²⁴ With nine active Justices serving staggered 18-year terms, this framework produces a stable appointment cadence wherein each president nominates two Justices per presidential term.²⁵ If a Justice does not complete their 18-year active term due to death, illness, or early retirement, some proposals direct the Chief Justice to appoint a Justice who has retired from regular service to temporarily serve as an associate Justice, often through a randomized process.²⁶ Others

²⁰ *Id.* at 4 (stating senior justices could “step[] in to hear cases on the Supreme Court’s docket upon a recusal by an active justice or in the event of an unexpected vacancy”).

²¹ *See* AM. ACAD. OF ARTS & SCI., *supra* note 2, at 11 (noting that existing law “provides that retired justices, if willing, may be designated by the [C]hief [J]ustice to sit as judges in any circuit and to act as circuit judges.” (citing 28 U.S.C. § 294)).

²² U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). *See also* *Jurisdiction: Original, Supreme Court*, FED. JUD. CTR., <https://www.fjc.gov/history/work-courts/jurisdiction-original-supreme-court> (last visited June 1, 2026).

²³ *See, e.g.*, Supreme Court Biennial Appointments and Term Limits Act of 2023, S. 3096, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/3096/text>; *see also* Jack Balkin, *Don’t Pack the Court. Regularize Appointments*, BALKINIZATION (Oct. 5, 2020), <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.

²⁴ BANNON & MILOV-CORDOBA, *supra* note 3, at 11.

²⁵ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 10 (“Eighteen-year terms will allow two nominations per presidential term, for a maximum of four nominations per president.”).

²⁶ *See, e.g.*, Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025) (“In the event that the number of justices of the Supreme Court falls below that provided in section 1 due to vacancy, disability, or disqualification, a justice of the Supreme Court who has retired from regular service under section 371 but retained their office shall be chosen by the Chief Justice through a publicly transparent and randomized process to serve as an associate justice until the number of justices who have not retired from regular service equals that provided in section 1.”).

designate the most recent senior Justice to serve temporarily until the next scheduled appointment.²⁷

With respect to the transition to a system of Supreme Court term limits, the leading proposals vary. Some would allow currently sitting Justices to retain their existing active status on the Court for life, while new Justices would be seated for 18-year terms according to the schedule of regular appointments.²⁸ Other models apply the reform to current members of the Court, with a new Justice transitioning to senior status every two years in order of length of service.²⁹ This memorandum concludes that both approaches are constitutional because they preserve the Justices' office, life tenure, and salary protections while altering only the duties associated with service on the Court.

II. Relevant constitutional provisions

The statutory proposals for Supreme Court term limits implicate several constitutional provisions. For reference, this memorandum lays out the relevant constitutional text below.

Impeachment Trials Clause, Article I, Section 3, Clause 6

*The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.*³⁰

Necessary and Proper Clause, Article I, Section 8, Clause 18

*The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.*³¹

²⁷ BANNON & MILOV-CORDOBA, *supra* note 3, at 5.

²⁸ See, e.g., Supreme Court Term Limits and Regular Appointments Act of 2025, H.R. 1074, 119th Cong. (2025).

²⁹ See, e.g., Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025).

³⁰ U.S. CONST. art. I, § 3, cl. 6.

³¹ U.S. CONST. art. I, § 8, cl. 18.

Appointments Clause, Article II, Section 2, Clause 2

*He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.*³²

Vesting Clause, Article III, Section I

*The Judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.*³³

Good Behavior Clause and Compensation Clause, Article III, Section I

*The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*³⁴

Jurisdiction Clause and Exceptions Clause, Article III, Section 2

*In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.*³⁵

III. Analysis: The constitutionality of statutory Supreme Court term limits

Article III of the Constitution establishes the federal judicial branch, including the Supreme Court. However, the Constitution says remarkably little about how either the Supreme Court or the judicial branch writ large should operate. Rather, the framers empowered Congress, through

³² U.S. CONST. art. II, § 2, cl. 2.

³³ U.S. CONST. art. III, § 1.

³⁴ *Id.*

³⁵ U.S. CONST. art. III, § 2.

its powers under the Necessary and Proper Clause, to implement the Court’s judicial powers through legislation.³⁶

Congress’s powers are broad. As Chief Justice John Marshall famously observed in *McCulloch v. Maryland*, the Necessary and Proper Clause authorizes Congress to use “any means which tended directly to the execution of the Constitutional powers of the Government.”³⁷ It grants Congress “the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.”³⁸

From the nation’s founding, Congress has used its powers to regulate the structure and operation of the Supreme Court. As constitutional scholar Akhil Amar, a professor at Yale Law School, has explained, “Ever since the Founding, Congress has used [the Necessary and Proper Clause] to properly prescribe . . . the size, shape, and responsibilities of the Supreme Court; the powers and duties of Supreme Court members, both in active service and after voluntary retirement from active service; the rules of procedure and evidence operative in the Supreme Court; the timing of Supreme Court sittings; and a myriad other kindred matters.”³⁹

Among other things, Congress has altered the size of the Supreme Court six times, with the number of Justices ranging from 5 to 10.⁴⁰ Additionally, it has set the timing of the Court’s

³⁶ See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 457 (2013) (“As a textual matter, then, Congress’s power to manage the federal courts arises from the gaps in Article III, coupled with its Article I authority to ‘make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States.’ These sources of authority justify a wide range of legislation concerning judicial administration. . . .”).

³⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 419 (1819) (unanimously upholding Congress’s power to charter the Second Bank of the United States).

³⁸ *Id.* at 415 (citing the Necessary and Proper Clause); see also *United States v. Comstock*, 560 U.S. 126, 133 (2010) (“First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation.”); *Sabri v. United States*, 541 U.S. 600, 605 (2004) (finding Congress has authority under the Necessary and Proper Clause to legislate against corruption threatening federal spending programs); *Jinks v. Richland Cnty.*, 538 U.S. 456, 461–462 (2003) (holding Congress has the power under the Necessary and Proper Clause to toll limitations periods for state-law claims brought in state court).

³⁹ Amar, *supra* note 13, at 9–10.

⁴⁰ *About the Court: The Court as an Institution*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/institution.aspx> (last visited Jun. 1, 2026); JOANNA R. LAMPE, CONG. RSCH. SERV., “COURT PACKING”: LEGISLATIVE CONTROL OVER THE SIZE OF THE SUPREME COURT (2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10562>.

terms,⁴¹ including canceling the Court’s 1802 sitting altogether;⁴² established quorum⁴³ and recusal requirements;⁴⁴ and set the amount and form of judicial compensation.⁴⁵ It has also defined and repeatedly changed the Court’s appellate jurisdiction and regulated how that jurisdiction operates, including first granting the Court the power of discretionary appellate review in 1891.⁴⁶ Congress has also repeatedly altered Justices’ duties, including establishing a system in 1937, still in effect today, whereby Justices can retire from active service with reduced duties while retaining their judicial offices.⁴⁷

At the same time, Congress’s authority is constrained by a set of constitutional provisions that, as Alexander Hamilton emphasized in Federalist No. 78, were designed to protect judges from being “overpowered, awed, or influenced by” the political branches and from succumbing to the “ill humors” of temporary political majorities.⁴⁸ Specifically, Article III provides that federal judges shall hold their offices during good behavior and that their compensation may not be

⁴¹ Current law requires that “[t]he Supreme Court shall hold a regular session at the seat of government commencing on the first Monday in October of each year.” 28 U.S.C. § 2.

⁴² Steve Vladeck, a professor at Georgetown University Law Center, has detailed the political context surrounding the elimination of the Court’s 1802 sitting, “where one of the cases the [J]ustices would’ve considered involved a challenge to the constitutionality of Congress’s elimination of the standalone circuit judgeships the lame-duck Federalists had created (and then filled) in 1801. By cancelling the Court’s 1802 sitting, the (now-Jeffersonian-controlled) Congress forced the [J]ustices to resume circuit-riding . . . before they had a chance to re-take the full bench in person” Steve Vladeck, 225. *How Congress Used to Leverage the Court*, ONE FIRST (May 4, 2026), <https://www.stevevladeck.com/p/225-how-congress-used-to-leverage>.

⁴³ 28 U.S.C. § 1.

⁴⁴ 28 U.S.C. § 455. Congress has imposed similar recusal obligations since the early years of the Republic. *See* Act of Mar. 2, 1793, ch. 22, § 11, 1 Stat. 333, 335.

⁴⁵ *See* Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 (setting forth stated annual salary figures for the Chief and Associate Justices of the Supreme Court and for each of the district judges and declaring these salaries to be payable on a quarterly basis at the treasury); *see also* James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 MICH. L. REV. 1, 4–6 (2008) (analyzing Congress’s choice to provide for fixed salaries for judges, rather than a fee-based system, and noting that Justices were required to pay their own expenses when traveling to ride circuit).

⁴⁶ Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 73 (1996).

⁴⁷ Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1241 (2021), <https://scholarlycommons.law.northwestern.edu/nulr/vol115/iss4/5/> (“In 1937, senior status was extended to Supreme Court [J]ustices.” (citing Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24)); *see also* *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges> (“Congress extended [the option of senior status] to Supreme Court justices in 1937, although [J]ustices following this path . . . do not continue to decide cases at the Supreme Court level.”) (last visited June 1, 2026).

⁴⁸ THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* Cramton, *supra* note 13 at 1335 (arguing the “function and purpose” of good behavior-tenure is “to ensure that federal judges acted in a judicial capacity that was not subject to the influence or control of the political branches of the federal government”).

diminished during their continuance in office.⁴⁹ These protections are intended to ensure that judges decide cases according to the law without fear of being targeted for adverse treatment by Congress or the president.⁵⁰

This memorandum concludes that statutory term limits, as implemented through a system wherein the Justices' duties are divided into an active phase and a phase with reduced and modified responsibilities, falls within Congress's broad powers to regulate the Court under the Necessary and Proper Clause and is consistent with the requirements of the Constitution, including Article III's judicial independence protections.

A. Establishing a system of active and senior Justices comports with the Constitution's requirement that Justices hold office during "good Behaviour"

The most significant constitutional question raised by proposals for statutory Supreme Court term limits is whether they are consistent with the requirement, under Article III of the Constitution, that Justices "shall hold their Offices during good Behaviour."⁵¹ Constitutional text, long-standing practice, and Supreme Court precedent all provide substantial support for the conclusion that such a reform is constitutional.

At the outset, it is worth noting that the Constitution does not define "good Behaviour."⁵² Indeed, some scholars argue the Good Behavior Clause was not intended to mandate life tenure for judges at all, but rather to protect judges against being removed at will by the president or

⁴⁹ U.S. CONST. art. III, § 1.

⁵⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing good behavior tenure is "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws"); THE FEDERALIST NO. 79 (Alexander Hamilton) (advancing need for salary protections by explaining that "a power over a man's subsistence amounts to power over his will" and that federal judges will be "secured in their places for life" so long as "they behave properly"); see also, e.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 967–68 (2007) (referring to judicial independence as "decisional independence," which is "an individual judge's ability to issue a ruling without fear of sanctions").

⁵¹ See, e.g., David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute"*, 83 WASH. U. L.Q. 1397, 1421 (2005) ("The Constitution prevents Congress from tinkering with life tenure through the ordinary legislative process."); James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096 (2004) ("Ending life tenure would require a constitutional amendment.").

⁵² Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 639–40 (2005) ("The Constitution does not directly address the question of what 'good Behaviour' means.").

Congress.⁵³ However, the prevailing view today is that the Good Behavior Clause ensures life tenure for all Article III judges, in order to insulate them from political retaliation and removal except through impeachment.⁵⁴ This memorandum adopts this prevailing view as its starting point.

The question, then, is whether Justices retain their offices during good behavior in a system in which they continue to perform judicial duties after 18 years — including duties that only Supreme Court Justices can perform, like serving as a circuit Justice⁵⁵ — but no longer regularly participate in hearing Supreme Court cases, or only regularly hear those cases brought under the Court’s original jurisdiction. A close look at Supreme Court precedent and long-standing practice with respect to the use of senior judges, alongside the text and structure of Article III of the Constitution, indicates that reduced and modified duties of this kind do not constitute a removal from office and thus comport with the requirements of good behavior tenure. As retired Federal District Judge Nancy Gertner has argued, “Term limit proposals avoid the constitutional problem [of good behavior tenure] by requiring that a [J]ustice not leave judicial service entirely, but rather take on new duties.”⁵⁶

⁵³ See, e.g., David R. Dow & Sanat Mehta, *Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?*, 16 DUKE J. CONST. L & PUB. POL’Y 89, 106 (2021) (“The evidence, in short, is not that the Framers believed the good behavior clause had any specific meaning, or that it was tantamount to life tenure, but simply that they regarded this standard as one that would insure political insulation of the judicial branch.”); Cramton, *supra* note 13 at 1334 (stating the “function and purpose” of good-behavior tenure is to preserve judicial independence—or in other words “to ensure that federal judges acted in a judicial capacity that was not subject to the influence or control of the political branches of the federal government”); SANFORD LEVINSON, LIFE TENURE AND THE SUPREME COURT: WHAT IS TO BE DONE?, in REFORMING THE COURT: TERM LIMITS FOR JUSTICES 379 (2006) (“Neither the text nor the presumed purpose of [Article III] rules out the following argument: The ‘good behaviour’ clause guarantees that judges, whatever their term of service, cannot be removed from office for partisan political reasons that would, by definition, threaten the very idea of judicial independence. . . . One could argue that the ‘good behaviour’ clause is a protection against partisan impeachment, but most definitely not an assignment of the office literally for life.”).

⁵⁴ See THE FEDERALIST NO. 79 (Alexander Hamilton) (suggesting federal judges will be “secured in their places for life” so long as “they behave properly”); see also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (explaining that Article III courts “are presided over by judges appointed for life, subject only to removal by impeachment”); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion of Brennan, J.) (“The ‘good Behaviour’ Clause guarantees that Art[icle] III judges shall enjoy life tenure, subject only to removal by impeachment.”); *United States v. Hatter*, 532 U.S. 557, 567 (2001) (explaining that the Good Behavior Clause grants federal judges “the practical equivalent of life tenure”).

⁵⁵ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 11. (“[Senior Justices] should also be available to perform duties that only Supreme Court justices can perform. One such duty, also found in 28 U.S.C. § 294, is serving as a circuit justice.”).

⁵⁶ Gertner, *supra* note 13.

1. Congress can modify and reduce judicial duties consistent with the Good Behavior Clause

Significantly, proposals for Supreme Court term limits closely resemble the existing system of senior judges codified in 28 U.S.C. § 371,⁵⁷ wherein judges — including Supreme Court Justices — “may retain the office but retire from regular active service”⁵⁸ so long as they continue to perform “substantial” administrative or judicial duties.⁵⁹ This long-established system provides strong support for the view that Congress has the power to establish term limits through the creation of a senior phase of duties for Justices, without running afoul of the Good Behavior Clause.

Congress first created the senior judge system in 1919, providing that lower court judges who met certain age and tenure requirements could retire from “regular active service on the bench” while continuing to receive their full judicial salary.⁶⁰ These senior judges could “be called upon to perform such judicial duties as such retired judge may be willing to take.”⁶¹ As discussed below, in 1934, the Supreme Court unanimously held that Congress had the power to alter judicial duties in this way and that senior judges retained their offices under Article III of the Constitution.⁶² In 1937, Congress expanded the senior judges law to apply to Supreme Court Justices.⁶³ The current version of the law provides that Justices who retire from active service can continue to receive their full salary if they participate in cases involving work in the trial

⁵⁷ 28 U.S.C. § 371; Hon. Frederic Block, *Senior Status: An 'Active' Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 536 (2007) (“Senior status is not to be confused with full retirement or resignation. Provided they render “substantial service” to the courts, which may be satisfied by simply doing the same work as an active judge for three months per year, senior judges continue to perform the same judicial duties and receive the same salary as active judges.”) (citing 28 U.S.C. § 371(e)(1)).

⁵⁸ 28 U.S.C. § 371(b)(1).

⁵⁹ 28 U.S.C. § 371(e)(1)(B); 28 U.S.C. § 371(e)(1)(D).

⁶⁰ Act of February 25, ch. 29, § 6, 40 Stat. 1157 (1919) (codified as amended at 28 U.S.C. § 375).

⁶¹ *Id.*

⁶² *Booth v. United States*, 291 U.S. 339, 350 (1934).

⁶³ Levy, *supra* note 47, at 1241 (“In 1937, senior status was extended to Supreme Court justices.” (citing Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24)); *see also Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges> (“Congress extended [the option of senior status] to Supreme Court justices in 1937, although [J]ustices following this path . . . do not continue to decide cases at the Supreme Court level.”) (last visited June 1, 2026).

courts or courts of appeals, or perform substantial administrative duties, for the equivalent of three months of the calendar year.⁶⁴

In 1934, the Supreme Court unanimously held in *Booth v. United States*⁶⁵ that judges who assume senior status retain their judicial offices.⁶⁶ Judge Wilbur F. Booth served for nearly eleven years as a federal district court judge before he was elevated to the Eighth Circuit in March 1925, where he served an additional six years before retiring from active service on January 1, 1932, under the precursor to today's senior judge statute. Congress amended that statute one year later in the Independent Offices Appropriation Act, reducing payments to judges who had either resigned (and received a judicial pension) or assumed senior status.⁶⁷ Judge Booth, who was continuing to perform judicial duties as a senior judge, challenged the law after his pay was reduced.⁶⁸ The Court granted certiorari to consider: (1) whether a senior judge continues in office within the meaning of Article III, Section 1, which prohibits diminution of compensation during a judge's continuation in office; and (2) whether the diminution of senior judge salaries violated the same provision.⁶⁹

Writing for the Court, Justice Owen Roberts held that a judge who retires from active service under the 1919 statute “does not relinquish his office” for purposes of Article III of the Constitution.⁷⁰ The Court noted that it was well known that senior judges “have, in fact, discharged a large measure of the duties which would be incumbent on them, if still in regular

⁶⁴ 28 U.S.C. § 371(e). One potential constitutional objection to the current senior judges system has been raised by David Stras and Ryan Scott, who argue that the senior judges statute is unconstitutional because judges who assume senior status “no longer have the right to perform judicial duties. Other Article III judges have discretion to decide whether to allow senior judges to sit on any court, including their ‘home’ court. The possibility that a senior judge could be barred from performing judicial duties amounts to a constructive removal from office, which violates the tenure protection of Article III.” David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORN. L. REV. 453, 481 (2007) (internal citations omitted). The authors note, however, that this objection can easily be avoided by “sever[ing] [28 U.S.C.] § 294(a) to the extent that it prohibits senior [J]ustices from serving on the lower courts without designation and assignment by the Chief Justice of the United States.” *Id.* at 518 n.422.

⁶⁵ 291 U.S. 339, 350 (1934).

⁶⁶ In *Booth v. United States*, the Court considered two related claims that had been certified from the Court of Claims: one by U.S. Circuit Judge Wilbur F. Booth and the other by U.S. District Judge Charles F. Amidon of the District of North Dakota. Judge Amidon met the requirements to retire after serving continuously for thirty years but filed his lawsuit when his pay was also reduced by fifteen percent under the Independent Offices Appropriation Act of 1933. *See id.* at 346–47.

⁶⁷ *See id.* at 346, 349–51 (quoting the judicial retirement statute, then codified at 28 U.S.C. § 375 (1928)).

⁶⁸ *See id.* at 347.

⁶⁹ *See id.* at 346.

⁷⁰ *Id.* at 350.

active service.”⁷¹ Such “judicial acts would be illegal unless he who performed them held the office of a judge.”⁷² To rule that a senior judge could perform judicial duties “and yet not hold the office of a judge,” the Court explained, would be “a contradiction in terms.”⁷³ Therefore, the Court concluded, a senior judge “does not surrender his commission, but continues to act under it,” and senior judges could not have their salaries reduced under Article III, Section 1.⁷⁴

In its analysis, the Court drew a sharp distinction between removing a judge from office, which would be unconstitutional, and reducing a judge’s duties. “Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it,” the Court explained.⁷⁵ As a working group of scholars and retired judges convened by the American Academy of Arts and Sciences explained in a 2023 paper endorsing statutory term limits, *Booth* adopted the view that because senior judges still performed judicial duties, they “were still judges [under the Constitution]: they still held the office.”⁷⁶ In 1948, Congress revised the senior judge statute to state explicitly that any eligible judge or Justice “may retain the office but retire from regular active service.”⁷⁷ These words were added, citing *Booth*, to “clarify the difference between resignation and retirement. Resignation results in loss of the judge’s office, while retirement does not.”⁷⁸

While the Supreme Court has not squarely considered the constitutionality of the senior judge system since *Booth*, it has reaffirmed its reasoning. In the 2003 Supreme Court case *Nguyen v. United States*,⁷⁹ the Court considered a challenge to an appellate panel that included an active circuit judge, a senior circuit judge, and an active Article IV territorial judge from the Mariana

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 350–51.

⁷⁵ *Id.* at 351.

⁷⁶ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 8.

⁷⁷ See Act of June 25, 1948, ch. 646, § 371, 62 Stat. 903; see also 28 U.S.C. § 371(b)(1); 28 U.S.C. § 294(b) (“Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned”); Jackson, *supra* note 50, at 993 (“In the twentieth century, it became possible for federal judges to retire from full service without resigning by taking ‘senior status.’”).

⁷⁸ See 28 U.S.C. § 371 (Historical and Revision Notes).

⁷⁹ 539 U.S. 69 (2003).

Islands.⁸⁰ The Court held that the presence of an Article IV judge violated federal law. In doing so, however, the Court also confirmed that, under the 1948 senior judges statute that applies to both lower court judges and Supreme Court Justices, both the active judges and the senior circuit judge were, “of course, life-tenured Article III judges who serve during ‘good Behaviour’ for compensation that may not be diminished while in office.”⁸¹ Lower courts have also entertained recent challenges to the senior judge system as codified in the 1948 statute, and all have held that the senior judge system is constitutional.⁸²

While *Booth* itself addressed a statute that applied only to lower court judges, its reasoning applies with equal force to Supreme Court Justices, to whom the senior judge statute has applied since 1937.⁸³ Article III’s Good Behavior Clause, which the Court relied upon, applies to “Judges, both of the supreme and inferior Courts.”⁸⁴ Moreover, relying upon the senior judges statute, there is a long-standing tradition of Supreme Court Justices sitting by designation on lower federal courts after retiring from active service, including Justices Potter Stewart, Lewis F. Powell, Jr., Byron White, Sandra Day O’Connor, David Souter, and Stephen Breyer.⁸⁵ As the Supreme Court has recognized, this kind of “longstanding practice . . . can inform our determination of what the law is.”⁸⁶ Collectively, Justices who have retired from active service have heard more than 1,300 cases while sitting as judges on the courts of appeal and district courts.⁸⁷ If those Justices had lost their judicial office upon retiring from active service, then it

⁸⁰ *Id.*

⁸¹ *Id.* at 72.

⁸² See, e.g., *Bank of N.Y. Mellon v. Stafne*, 824 F. App’x 536, 536 (9th Cir. 2020); *Steckel v. Lurie*, 185 F.2d 921, 925 (6th Cir. 1950); *Hoang v. Bank of Am., N.A.*, No. C17-0874JLR, 2021 WL 615299, at *1 (W.D. Wash. Feb. 17, 2021), *aff’d*, 820 F. App’x 594, 595 (9th Cir. 2020); *Rodgers v. Knight*, No. 2:13-04033-CV-C-NKL, 2013 WL 12184288, at *1 (W.D. Mo. July 1, 2013), *aff’d*, 781 F.3d 932 (8th Cir. 2015); *Ezor v. Yee*, No. CV 22-840 JVS (AGR), 2023 WL 2554162, at *2 (C.D. Cal. Mar. 2, 2023); *Stafne v. Burnside*, No. C16-0753-JCC, 2022 WL 2073074, at *2 (W.D. Wash. June 9, 2022); *Bluwav Sys., LLC v. Durney*, No. 09-13878, 2012 WL 5392301, at *1 (E.D. Mich. Nov. 5, 2012).

⁸³ Levy, *supra* note 47, at 1241 (“In 1937, senior status was extended to Supreme Court [J]ustices.” (citing Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24)).

⁸⁴ U.S. CONST. art. III, § 1.

⁸⁵ See E. Jon A. Gryskiewicz, *The Semi-Retirement of Senior Supreme Court Justices: Examining Their Service on the Courts of Appeals*, 11 SETON HALL CIRC. REV. 285 (2015), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1144&context=circuit_review; Nate Raymond, *Retired U.S. Supreme Court Justice Breyer to Hear Cases on Appeals Court*, REUTERS (Apr. 5, 2024), <https://www.reuters.com/legal/government/retired-us-supreme-court-justice-breyer-hear-cases-appeals-court-2024-04-05/>.

⁸⁶ *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 525 (2014) (internal citations and quotation marks omitted).

⁸⁷ See Gryskiewicz, *supra* note 85, at 293–98.

would have been illegal for them to sit by designation on lower courts because they would no longer have been serving as a judge.⁸⁸

The principal distinction between the existing senior judge system and the proposed term limit system is that the latter would require Justices to assume senior status on a fixed statutory schedule, rather than at a time of their choice. This is a significant change to how Congress regulates Justices' senior status, and some critics of statutory term limits have argued that an involuntary change in duties of this kind would be unconstitutional.⁸⁹ This objection, however, is unmoored from constitutional text, which mandates only that Justices "hold [their] Office[] during good Behaviour," while leaving it to Congress to define the scope and duties of that office pursuant to its broad powers under the Necessary and Proper Clause. Supreme Court precedent and long-standing practice, including the activities of numerous retired Supreme Court Justices, reflect an understanding that modifying and reducing duties for senior judges is within Congress's power and does not constitute a removal from office. It therefore follows, as the American Academy of Arts and Sciences working group explained, that "If a change in duties does not amount to removal from office, Congress may impose that change without running afoul of the Good Behavior Clause."⁹⁰

To be sure, there are constitutional limits on Congress's power to alter Justices' duties, rooted in the separation of powers and the establishment of the "judicial power of the United States" in Article III of the Constitution. For example, Congress could not target individual Justices with a reduction in duties in retaliation for their rulings or apply such a law only to Justices appointed by a single political party. Nor could they condition judicial duties on a particular case outcome. Such actions would be unconstitutional because they are inappropriate assaults on judicial independence and the separation of powers, inconsistent with the judicial power established by the Constitution, and outside the bounds of what is "necessary and proper" for Congress to undertake.⁹¹

⁸⁸ BANNON & MILOV-CORDOBA, *supra* note 3, at 9.

⁸⁹ President Biden's Commission on the Supreme Court of the United States summarized this argument. *See* PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 1, at 133.

⁹⁰ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 8.

⁹¹ *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 383 (1989) (explaining that a separation of powers inquiry must assess whether a "provision of law impermissibly threatens the institutional integrity of the Judicial Branch")

By contrast, the Supreme Court term limit proposals discussed in this memorandum are wholly consistent with judicial independence and with the purpose of the Good Behavior Clause. As Alexander Hamilton explained in Federalist No. 78, the Good Behavior Clause is designed to provide for “permanency in office,” responding to the danger that judges would show “an improper complaisance” if they held temporary commissions that made them unwilling to “hazard the displeasure” of the individuals or bodies responsible for their continued service on the bench.⁹² Supreme Court term limit proposals raise no such concerns. The schedule for senior status is fixed, equally applicable to all Justices, and unrelated to any particular case outcome. Nor are the Justices dependent on Congress or the president for the retention of their office or salary. Indeed, there is good reason to believe that the adoption of statutory Supreme Court term limits would enhance judicial independence by addressing dysfunctions that invite attacks on the Court’s legitimacy.⁹³

2. Reduced and modified duties for senior Justices comport with the “office” of Supreme Court Justice

A related question raised by statutory term limits is whether establishing reduced and modified duties for senior Justices would unconstitutionally remove them from their *Supreme Court* office, even if those Justices continue to serve in the judicial branch.⁹⁴ The relevant constitutional

(internal quotation marks omitted); *Chandler v. Jud. Council of Tenth Cir. of U. S.*, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); *see also* AM. ACAD. OF ARTS & SCI., *supra* note 2, at 9 (“Critics of a statutory solution suggest that, if Congress could provide that all [J]ustices will take senior status after eighteen years of active service, it could impose retirement at will on [J]ustices who issue unpopular decisions. We do not believe that follows. We do not believe that Congress could use retirement to punish [J]ustices any more than it could use other measures, short of removal from office, such as prohibiting disfavored [J]ustices from hiring law clerks.”).

⁹² THE FEDERALIST NO. 78 (Alexander Hamilton).

⁹³ *See* BANNON & MILOV-CORDOBA, *supra* note 3, at 7. (discussing how strategic retirements and politically driven confirmation battles under the current system threaten judicial independence but would be mitigated under a system of Supreme Court term limits).

⁹⁴ *See, e.g.,* William Baude, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2640 (2022); William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 391 (“And it ought not require lengthy citations to agree that ‘to hold their Offices,’ means, indeed, to hold the substance of the office. It was surely not meant merely to have a name on the door, a good retirement pension, and a filigree of minor tasks (e.g., sitting on lower federal courts, being available ‘on call,’ and the like), while effectively being shoved out the end of a nine-domino tray.”); Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 416 (“It is hard to see how [J]ustices subjected to such a substantial reduction in judicial powers could still be thought to be holding judicial ‘office.’”).

language, which provides that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,”⁹⁵ is ambiguous as to whether there is a distinct office of Supreme Court justice,⁹⁶ and early practice supports the conclusion that the constitutional framers did not draw strict lines when it came to judicial offices. In the Judiciary Act of 1789, for example, Congress created three courts (district, circuit, and supreme) but only two categories of judges, with district judges and Supreme Court Justices hearing cases together in the circuit courts.⁹⁷

However, to the extent that the Constitution establishes a distinct Supreme Court office, constitutional text and long-standing practice both support the conclusion that Congress can reduce and modify Justices’ duties without it serving as a removal from their Supreme Court office. First, the critics’ view overlooks Congress’s extensive power to *define* the duties that constitute the “office” of a Supreme Court Justice. For example, beginning with the Judiciary Act of 1789 and continuing for more than a century, Congress required Supreme Court Justices to “ride circuit,” mandating that they sit alongside local district judges to hear cases across the country on the circuit courts, which were the primary trial courts of the federal judiciary.⁹⁸

⁹⁵ U.S. CONST. art. III, § 1.

⁹⁶ See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 864 (2006) (“There are two distinct readings of the language in this Clause.”); Cramton, *supra* note 13 at 1334 (“Because the text of the Constitution is ambiguous, the choice between two plausible interpretations should be influenced or controlled by a purposive or functionalist reading of the Good Behavior Clause, read in conjunction with the Necessary and Proper Clause.”).

⁹⁷ Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73.

⁹⁸ Circuit riding was originally instituted by the Judiciary Act of 1789, which explicitly called for “any two justices of the Supreme Court” to hear cases in the Circuit Courts. See *Landmark Legislation: Judiciary Act of 1789*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1789-0> (citing 1 Stat. 73, § 4 (Sept. 24, 1789)) (last visited June 1, 2026). Justices were required to undertake arduous travel in order to serve as trial judges in criminal and civil cases. See *A Brief History of Circuit Riding*, FED. JUD. CTR., <https://www.fjc.gov/history/spotlight-judicial-history/circuit-riding> (last visited June 1, 2026). Congress abolished circuit riding two years later through the Judiciary Act of 1801. See *Landmark Legislation: Judiciary Act of 1801*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1801> (citing 2 Stat. 89 (Feb. 13, 1801)) (last visited June 1, 2026). It would then reinstate it through the Repeal Act of 1802 and Judiciary Act of 1802 after control of Congress changed hands. See *Landmark Legislation: Judiciary Act of 1802*, FED. JUD. CTR., <https://www.fjc.gov/history/legislation/landmark-legislation-judiciary-act-1802> (citing 2 Stat. 156 (Apr. 29, 1802)) (last visited June 1, 2026). The Supreme Court would confirm the constitutionality of circuit riding one year later in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), and it remained a defining feature of Supreme Court service for more than a century. As Professor Akhil Amar observed, this arrangement “built squarely on earlier practices and traditions in various states and colonies, and in Britain—traditions of assize courts and nisi prius, in which the jurists of a legal regime’s highest court sat individually or in smaller groups in courts across the countryside, bringing justice to every man’s door.” Amar, *supra* note 13, at 18.

In 1803, the Supreme Court considered the constitutionality of circuit riding in *Stuart v. Laird*, weighing the claim that Supreme Court Justices had never been separately appointed as circuit judges.⁹⁹ The Court rejected the argument that riding circuit fell outside the office of Supreme Court Justice, pointing to the “practice and acquiescence” of circuit riding from the very beginning of the U.S. judicial system as affording an “irresistible answer” to any constitutional objection.¹⁰⁰ In this light, *Stuart v. Laird* reflects an early and enduring understanding that judicial service on the Supreme Court can entail a wide set of judicial responsibilities established by Congress.

Moreover, as Akhil Amar has observed, when the First Congress’s prescriptions governing circuit riding are considered together with its establishment of “when, where, and how the Justices should sit en banc” and hear cases under the Supreme Court’s jurisdiction,¹⁰¹ the resulting regulation of the Court looks remarkably similar to today’s proposals for Supreme Court term limits: “If the First Congress could say that a given Justice must sit en banc in month X and ride circuit in month Y, why cannot today’s Congress say that a given Justice must sit en banc in years 1–18 and ride circuit thereafter?”¹⁰²

Second, the senior judges statute, which applies to and has been regularly used by Supreme Court Justices for nearly a century, and which explicitly provides that senior Justices “retain the office,”¹⁰³ suggests that Congress has broad latitude to lighten Justices’ duties after a period of time consistent with the Supreme Court office. Under existing law, a Justice who retires from regular active service has diminished responsibilities, including being barred from participating in Supreme Court hearings.¹⁰⁴ Yet it has never been understood that the Justices have thereby been removed from their Supreme Court office.¹⁰⁵ Nor have they relinquished their Supreme

⁹⁹ 5 U.S. (1 Cranch) 299 (1803).

¹⁰⁰ *Id.* at 309.

¹⁰¹ Amar, *supra* note 13, at 18 (citing Judiciary Act of 1789, 1 Stat. 73, § 1).

¹⁰² *Id.* (emphasis omitted).

¹⁰³ See Act of June 25, 1948, ch. 646, § 371, 62 Stat. 903.

¹⁰⁴ Block, *supra* note 57, at 536 (citing 28 U.S.C. § 371(e)(1)). See *id.* at 541 (citing 28 U.S.C. § 294(a)).

¹⁰⁵ Notably, when Justice Douglas retired from active service in 1975, he argued that he continued to have the right to participate in matters before the Supreme Court. Chief Justice Warren Berger concluded that the relevant statutes governing senior status barred participation in any duties of an active justice. Chief Justice Berger’s analysis did not raise any constitutional concerns with the statutory scheme, nor did he suggest that Congress would be prohibited from structuring the system differently. See Jake Kobrick, *The Evolution of Judicial Retirement*, FED. JUD. CTR., <https://www.fjc.gov/history/spotlight-judicial-history/judicial-retirement> (last visited June 1, 2026).

Court office to assume a new one: Under the Appointments Clause, assuming a new judicial office would require nomination by the president and Senate confirmation.¹⁰⁶ Moreover, the statute provides that Justices who have retired from active service are still eligible to serve as a circuit Justice,¹⁰⁷ a position that only Justices can hold, further indicating that they continue to serve as Justices. The senior judges statute is therefore best understood as an example of Congress using its power to define the content of the Supreme Court office, providing that Justices' duties can be reduced and modified over time.

Thus, to the extent that critics have argued the Supreme Court office includes certain “essential powers” that cannot be diminished by Congress,¹⁰⁸ the proposals for statutory Supreme Court term limits exceed any such minima. They incorporate judicial activities that have long been recognized to be within Congress’s power to assign to Supreme Court Justices, such as hearing lower court cases,¹⁰⁹ and are consistent with the reduced duties for Justices that have been a feature of the senior judges system for generations. Indeed, most term limit proposals provide for more extensive involvement by senior Justices on the Supreme Court than under current practice, including allowing them to participate in Supreme Court cases when fewer than nine active Justices are available, such as in the event of judicial recusal or an untimely vacancy.¹¹⁰

Finally, to the extent that some critics suggest that senior Justices must regularly participate in merits cases on the Supreme Court docket in order to retain their office — a conclusion at odds with history, precedent, and the text and purpose of the Good Behavior Clause — some term limit proposals further provide that all Justices, including senior Justices, are authorized to hear

¹⁰⁶ U.S. CONST. art. II, § 2, cl. 2.

¹⁰⁷ See 28 U.S.C. § 294(a) (“Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of circuit justice, as he is willing to undertake.”); see also AM. ACAD. OF ARTS & SCI., *supra* note 2, at 11 (“[Senior Justices] should also be available to perform duties that only Supreme Court justices can perform. One such duty, also found in 28 U.S.C. § 294, is serving as a circuit justice.”).

¹⁰⁸ See Stras & Scott, *supra* note 51, at 1415 (arguing Congress may not “subtract from the responsibilities of an office in a way that deprives officers of the essential powers and duties of the office..., [which] include adjudicating disputes that come before the court to which they are assigned”).

¹⁰⁹ See Gryskiewicz, *supra* note 85, at 285; Raymond, *supra* note 85.

¹¹⁰ See, e.g., Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025), <https://www.congress.gov/bill/119th-congress/house-bill/3544>.

merits cases brought under the Court’s original jurisdiction.¹¹¹ Supreme Court original jurisdiction cases enjoy a special status under the Constitution, because Congress can neither add to¹¹² nor remove¹¹³ categories from the Court’s original jurisdiction, and such cases are not subject to the same “exceptions” and “regulations” by Congress as the Court’s appellate jurisdiction.¹¹⁴ For this reason, original jurisdiction cases are uniquely core to the Supreme Court’s docket. Insofar as the Supreme Court “office” requires that Justices participate in merits adjudication, original jurisdiction cases offer a clear line for defining the essential powers of the office, rooted in the text of Article III.¹¹⁵

At core, the Constitution leaves Congress with substantial power and discretion to structure and allocate judicial responsibilities within the office of Supreme Court Justice, including through establishing different phases of judicial service, so long as the constitutional guarantees of the Good Behavior Clause — tenure and compensation — remain intact.¹¹⁶ Supreme Court term limit proposals are fully consistent with these requirements.

B. Congress can also modify the Justices’ duties through its authority to regulate the Court’s appellate jurisdiction

As discussed in the prior section, some term limit proposals provide that all Justices would hear the cases for which the Constitution grants the Supreme Court original jurisdiction — in other words, where it hears cases in the first instance as a trial court. By contrast, only the nine most recently appointed Justices would hear cases under the Supreme Court’s appellate jurisdiction.

¹¹¹ See, e.g., Supreme Court Biennial Appointments and Term Limits Act of 2023, S. 2096, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/3096>.

¹¹² *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

¹¹³ *California v. Arizona*, 440 U.S. 59, 65 (1979) (“The original jurisdiction of the Supreme Court is conferred not by the Congress but by the Constitution itself. This jurisdiction is self-executing, and needs no legislative implementation. . . . Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States, but it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution.”).

¹¹⁴ U.S. CONST. art. III, § 2.

¹¹⁵ *Id.*

¹¹⁶ For this reason, former Federal District Judge Nancy Gertner correctly recognizes that “Congress could [also] specify additional duties or leave it to the [J]ustices themselves to decide through an internal rule.” Gertner, *supra* note 13.

Congress's power to enact this "original jurisdiction" version of statutory term limits has an additional constitutional grounding: Article III, Section 2 of the Constitution, which provides that the Supreme Court shall have appellate jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make."¹¹⁷ As Diane Wood, former Chief Judge of the Court of Appeals for the Seventh Circuit, has argued, this provision is dispositive of Congress's power to establish a system of active and senior Justices: "The Constitution grants Congress extensive powers over how the Supreme Court handles appeals, which comprise the vast majority of its caseload. . . . That authority, enhanced by Congress's 'necessary and proper' powers under Article I, section 8, clause 18, is all that is required for Congress to limit a [J]ustice's automatic participation in appellate cases to 18 years."¹¹⁸

In 1816, Justice Joseph Story explained in *Martin v. Hunter's Lessee* that the Constitution's Exceptions Clause "enable[s] [C]ongress to regulate and restrain the [Supreme Court's] appellate power, as the public interests might, from time to time, require."¹¹⁹ From the founding, Congress has widely exercised this power to both regulate and place limits on the Supreme Court's appellate jurisdiction. For example, the Judiciary Act of 1789 did not grant the Supreme Court jurisdiction to hear appeals of criminal cases heard by the lower federal courts,¹²⁰ and authorized Supreme Court review of civil cases from the lower federal courts only when they satisfied specified monetary thresholds.¹²¹ The Judiciary Act also restricted the Supreme Court's appellate review of state court judgments on federal questions, providing no avenue to review state rulings decided in favor of the validity of a treaty or federal statute.¹²²

¹¹⁷ U.S. CONST. art. III, § 2.

¹¹⁸ Wood, *supra* note 13.

¹¹⁹ *Martin v. Hunter's Lessee*, 14 U.S. 304, 333, 4 L. Ed. 97 (1816).

¹²⁰ PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 1, at 155 (citing *Forsyth v. United States*, 50 U.S. (9 How.) 571, 572 (1850)).

¹²¹ See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 262 (1985) ("No dollar minimum limited automatic appeals from state courts arising under federal law, but appellate review over federal circuit courts was limited to civil cases involving more than \$2,000, and was nonexistent in criminal cases.").

¹²² See Ch., § 25, 1 Stat. at 85–86 ("That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."); see also Thomas H. Lee, *Article IX, Article*

In *Ex parte McCardle*,¹²³ the Supreme Court addressed Congress's repeal of the Supreme Court's appellate jurisdiction under the Habeas Corpus Act of 1867,¹²⁴ recognizing Congress's broad power to make exceptions to Supreme Court jurisdiction, even when it impacts ongoing cases. In 1867, military officers had detained a Mississippi newspaper editor named William McCardle for allegedly publishing seditious statements in his anti-government editorials. After the U.S. Circuit Court for the Southern District of Mississippi denied his habeas petition, McCardle appealed the denial to the Supreme Court, arguing that his detention was unlawful. After the case was argued but before the Court issued a ruling, Congress repealed the Supreme Court's appellate jurisdiction over cases brought under the Habeas Corpus Act. The Republican majority in Congress at the time feared that if it did not act, the Court would use this case to declare the Reconstruction laws unconstitutional.¹²⁵

In a unanimous opinion delivered by Chief Justice Salmon P. Chase, the Court held that it no longer had jurisdiction to hear McCardle's appeal.¹²⁶ In upholding Congress's repeal of appellate jurisdiction, Justice Chase noted the Court is "not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."¹²⁷ The Court added that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."¹²⁸

Congress has likewise exercised substantial authority over the "regulation" of the Supreme Court's appellate jurisdiction. For example, in much of the 19th and early 20th century, Congress required the Court to exercise mandatory appellate jurisdiction over broad categories of cases, forcing it to take many cases "it did not want to hear."¹²⁹ Many of these mandatory appeals

III, and the First Congress: The Original Constitutional Plan for the Federal Courts, 1787–1792, 89 *FORDHAM L. REV.* 1895, 1918–19 (2021).

¹²³ 74 U.S. (7 Wall.) 506 (1868).

¹²⁴ The Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (granting federal courts the general authority to issue writs of habeas corpus to state custodians).

¹²⁵ *Ex parte McCardle*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/ex-parte-mccardle> (last visited June 1, 2026).

¹²⁶ *Ex parte McCardle*, 74 U.S. at 508.

¹²⁷ *Id.* at 514.

¹²⁸ *Id.* at 515.

¹²⁹ Benjamin Johnson & Keith E. Whittington, *Why Does the Supreme Court Uphold So Many Laws?*, 2018 *U. ILL. L. REV.* 1001, 1015 (2018) (citing Justin Crowe, *Building the Judiciary* 199–212 (2012)).

involved admiralty cases arising under the Neutrality, Embargo, and Non-Intercourse Acts.¹³⁰ In the Judiciary Act of 1925,¹³¹ also known as the Judges’ Bill,”¹³² Congress fundamentally altered this arrangement by allowing the Court to control most of its docket through the discretionary writ of certiorari process.¹³³ This change enabled the Court to become “less important as a forum for correcting error in the inferior courts and more of an institution devoted to resolving legal and constitutional issues of national importance.”¹³⁴ Subsequent laws, the most recent being the Supreme Court Case Selections Act of 1988,¹³⁵ further reduced the Court’s mandatory jurisdiction. Prior to passage of the Judges’ Bill, the Court heard approximately 330 cases per year.¹³⁶ Today, it hears about 60.¹³⁷

Congress has also consistently regulated the manner in which the Supreme Court can consider appeals. In the Judiciary Act of 1789, for example, Congress established a writ of error process for appellate review in common law cases, which allowed the Court to consider only legal, and not factual, errors, and an appeals process for cases in equity, in which the Court decided questions of law and fact.¹³⁸ These provisions underscore Congress’s broad authority to govern how the Supreme Court exercises its appellate jurisdiction.

¹³⁰ *Jurisdiction: Appellate*, FED. JUD. CTR., <https://www.fjc.gov/history/work-courts/jurisdiction-appellate> (last visited June 1, 2026).

¹³¹ Pub. L. 68-415, 43 Stat. 936 (February 13, 1925).

¹³² Robert Post, *The Supreme Court’s Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, __NOTRE DAME L. REV. __ (forthcoming 2026) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5075524.

¹³³ Johnson & Whittington, *supra* note 129, at 1015 (citing JUSTIN CROWE, BUILDING THE JUDICIARY 199–212 (2012) and DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 11–15 (1980)).

¹³⁴ See Peter Fish, “Judiciary Act of 1925,” in Kermit L. Hall et al., eds., THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 477 (1992) (stating the Act “transformed” the Supreme Court “from a forum that primarily corrected errors arising in ordinary private litigation to a constitutional tribunal that resolved public policy issues of national importance”); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1713–37 (2000) (providing a critique of this transformation).

¹³⁵ See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662, 662 (ending all mandatory appellate jurisdiction except for cases adjudicated by three-judge panels).

¹³⁶ See Paul D. Carrington, *Checks and Balances: Congress and the Federal Courts*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 17 (Roger C. Cramton & Paul D. Carrington eds., 2006), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5502&context=faculty_scholarship.

¹³⁷ Miriam Rosenbaum, *How Cases Get to the Supreme Court*, BRENNAN CTR. FOR JUST. (Mar. 20, 2026), <https://www.brennancenter.org/our-work/research-reports/how-cases-get-supreme-court>.

¹³⁸ Judiciary Act of 1789, Pub. L. No. 1-20, § 3, 1 Stat. 73, 81; see also Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 808–09 (2022).

Moreover, while Congress has not previously used its powers to regulate which Justices can hear appellate cases, it has provided detailed regulation with respect to the lower courts. For example, 28 U.S.C. § 46 provides for the use of three-judge panels in the circuit courts, and establishes a process for hearing cases en banc by the full circuit. Notably, the law excludes senior judges from voting for en banc consideration or participating in en banc hearings, with limited exceptions.¹³⁹

In all, the Constitution’s plain text grants Congress broad power to regulate the Supreme Court’s appellate jurisdiction, power that it has exercised in a wide array of circumstances. The Exceptions Clause thus provides an additional constitutional basis for statutory term limits.

C. The fact that Congress historically has allowed Justices to decide when to leave active service does not mean that an alternative system is unconstitutional

Another set of criticisms of statutory Supreme Court term limits is rooted in history and tradition: that from the founding, Justices have been able to sit in active service until they choose to step down. Critics are correct that adopting any proposal for Supreme Court term limits would represent a significant break from the past. However, there are compelling reasons not to elevate this long-standing default into an implied restriction on Congress’s express authority to organize the federal courts.

To begin with, the historical record is far more equivocal than this objection suggests: Congress has repeatedly reshaped the conditions under which Justices perform their duties, often in ways that have constrained their individual choices. Justices were compelled to ride circuit for more than a century without any regard to their personal preference.¹⁴⁰ In 1911, they were relieved of

¹³⁹ 28 U.S.C. § 46(c) (providing for en banc hearing if “ordered by a majority of the circuit judges of the circuit who are in regular active service” and establishing that a “court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486, except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service”).

¹⁴⁰ Wood, *supra* note 13 (“The Court, while apparently not in love with circuit riding, accepted the constitutionality of the practice in *Stuart v. Laird* (1803). Importantly for present purposes, it was a form of required service by Supreme Court [J]ustices on the lower courts.”).

that same obligation absent their consent.¹⁴¹ Without seeking approval from the Justices, Congress has adjusted jurisdictional responsibilities and prescribed quorum rules and sitting requirements that directly affect when and how they participate in cases.¹⁴² And of course, the senior judge system, while voluntary, has long established Congress's power to modify and reduce Justices' duties. None of these actions by Congress have been understood to infringe upon judicial tenure or require a new appointment, even though they significantly altered judicial service.

Critically, the fact that Congress has not yet regulated a schedule for senior status does not establish that it lacks constitutional authority to do so. Legislative inaction is an unreliable guide as to constitutional meaning, particularly where the Constitution affirmatively grants Congress the power to structure the federal judiciary and Supreme Court under Article III and the Necessary and Proper Clause.¹⁴³ Indeed, Justice Amy Coney Barrett made this point in her concurring opinion in *United States v. Rahimi*,¹⁴⁴ in which the Supreme Court ruled that the Second Amendment did not bar the government from prohibiting individuals subject to domestic violence restraining orders from owning a gun.¹⁴⁵ In her concurrence, Justice Barrett offered a pointed critique of a common inferential error in originalist analysis: the assumption that the absence of founding-era regulatory examples establishes a constitutional limitation on modern legislative authority. In rejecting this assumption, Justice Barrett cautioned against an interpretive framework that “assumes that founding-era legislatures maximally exercised the power to regulate, thereby adopting a ‘use it or lose it’ view of legislative authority.”¹⁴⁶ Such an assumption is “flawed,”¹⁴⁷ she explained, and “originalism does not require” it.¹⁴⁸ The same can be said about the scope of Congress's power to regulate the Supreme Court.

¹⁴¹ When Congress abolished U.S. Circuit Courts through the Judicial Code of 1911, it fundamentally altered the scope of justices' duties by eliminating their circuit riding obligations. *See* Abolition of U.S. Circuit Courts, 36 Stat. 1087, 1167 (Mar. 3, 1911).

¹⁴² *See, e.g.*, 28 U.S.C. § 1 (stating the Supreme Court consists of the Chief Justice and eight associate justices, and six members constitute a quorum).

¹⁴³ *See* *McCulloch v. Maryland*, 17 U.S. at 415 (The Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”).

¹⁴⁴ 602 U.S. 680 (2024).

¹⁴⁵ *Id.* at 690.

¹⁴⁶ *Id.* at 739–40.

¹⁴⁷ *Id.* at 740.

¹⁴⁸ *Id.*

This is especially so when, as with Supreme Court term limits, a modern reform is prompted by new challenges.¹⁴⁹ Notably, calls for Supreme Court term limits were not a feature of earlier eras because creating a fixed term or regularizing appointments for Justices was not responsive to contemporary concerns about the operation of the Supreme Court. As Rachel Shelden, a professor of history at Penn State whose scholarship has focused on the 19th-century Supreme Court, has observed, “It was not that term limits were controversial. Instead, restricting a [J]ustice’s years on the bench simply was not an effective solution to the issues of power and partisanship as they operated in the 18th and 19th centuries.”¹⁵⁰ For example, in those eras Supreme Court vacancies were generally filled by nominees from the circuit in which they arose, with substantial input from local and state political leaders, and Justices remained closely connected to the communities they serviced through circuit riding.¹⁵¹ These features helped mitigate concerns about judicial detachment, democratic accountability, and the concentration of judicial power that have become central justifications for Supreme Court term limits today.

Moreover, until the 1970s, Justices also served significantly shorter terms on average than they do today, approximately 15 years on average.¹⁵² Since that time, the average term of a Supreme Court Justice has grown by more than a decade and is expected to increase further.¹⁵³ Until recent decades, a pattern of lengthy Supreme Court terms was simply not a problem in need of a solution. Instead, earlier eras were more concerned with ensuring that the federal government could attract, select, and retain a pool of highly qualified judges. In Federalist No. 78, for

¹⁴⁹ See, e.g., *Pensacola Tel. Co. v. W. Union Tel. Co.*, 96 U.S. 1, 9 (1877) (stating the powers granted to Congress to regulate commerce and establish post offices and roads “are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances”); see also Calabresi & Lindgren, *supra* note 96, at 831–42 (2006) (discussing how Supreme Court term limits address current issues).

¹⁵⁰ Rachel Shelden, *A Transformed Supreme Court Requires Different Solutions*, BRENNAN CTR. FOR JUST. (Oct. 8, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/transformed-supreme-court-requires-different-solutions>.

¹⁵¹ *Id.*

¹⁵² BANNON & MILOV-CORDOBA, *supra* note 3, at 2 (“For the first 180 years, of U.S. history, justices served an average of 15 years.”).

¹⁵³ See *id.* at 1 (“On average, justices today sit on the bench for more than a decade longer than their predecessors did as recently as the 1960s.” (citing Calabresi & Lindgren, *supra* note 96, at 771)); see also MIRIAM ROSENBAUM & EMILY WHITEHEAD, *SIX SOLUTIONS TO FIX THE SUPREME COURT*, BRENNAN CTR. FOR JUST. 2 (Mar. 3, 2026), <https://www.brennancenter.org/our-work/policy-solutions/six-solutions-fix-supreme-court>.

example, Alexander Hamilton observed that there were “few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.”¹⁵⁴

Thus, it is neither surprising nor constitutionally suspect that new policy challenges would prompt Congress to regulate the Supreme Court differently today. Indeed, many of the Court’s most significant features, including the scope of its control over its docket, changed dramatically in the 20th century in response to new policy needs.

D. Additional constitutional considerations

Some critics have raised other constitutional objections to proposals for Supreme Court term limits. This memo briefly considers them in turn.

1. Existing term limit proposals are consistent with the establishment of “one” Supreme Court under the Constitution

Some critics of statutory term limits have suggested that a system in which senior Justices do not hear most cases on the Supreme Court’s regular docket is inconsistent with Article III’s establishment of “one supreme Court.”¹⁵⁵ However, this argument runs against constitutional text and history as well as long-standing practice.

First, the most natural reading of “one supreme Court” is that it prohibits the creation of multiple apex courts, not that it requires every Justice to hear every case on the Court’s docket or prohibits the creation of a panel of active Justices to hear most matters. The drafting history of this clause likewise suggests that the constitutional framers were focused on debates over whether to establish any lower courts as part of the federal judiciary, and not on “some theoretical sense of oneness.”¹⁵⁶ The view that “one supreme Court” governs the number of apex courts, and not how members of the Supreme Court adjudicate individual cases, is also consistent with how courts are understood in other contexts. For example, as Jamal Greene, a constitutional

¹⁵⁴ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁵⁵ See Baude, *supra* note 94, at 2640 (“Under a proposal for Supreme Court term limits, either the Justices start holding an office other than Supreme Court Justice after the term is up, or the Court has two tiers, in tension with the unitary Court implied by the Constitution.”); Stras & Scott, *supra* note 64, at 453.

¹⁵⁶ Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 189 (2019); see also Michael J. Klarman, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 164–67 (2016) (discussing the compromise that led to empowering Congress to create lower federal courts).

scholar at Columbia Law School, has observed, “[E]very court of appeals sits in panels, and it has never occurred to anyone to suggest that there are vastly more than thirteen courts of appeals, one for each panel.”¹⁵⁷

The proposed system of term limits simply designates which Justices are eligible to participate in the Court’s merits docket at a given time, much as Congress distinguishes among Justices who are present, recused, or otherwise unavailable through statutory provisions governing quorum requirements,¹⁵⁸ recusal standards,¹⁵⁹ and, in limited circumstances, the transfer of cases to lower courts.¹⁶⁰ These distinctions regulate Justices’ duties and participation, not the Supreme Court’s identity as an institution. As Akhil Amar notes, “The Constitution vests no particular power in any *individual* judge or [J]ustice to hear this case or that one, apart from the power of the Chief Justice to preside at presidential impeachments.”¹⁶¹

Historical practice reinforces this understanding that a subset of Justices can resolve cases. From the early years of the Court, there have been instances in which the full Court did not participate in deciding cases, for reasons including illness, recusal, or vacancy. The clearest examples arose in the 1790s and early 1800s, when Supreme Court Justices spent much of the year riding circuit throughout the country. During periods in which some Justices were absent or unable to participate in Supreme Court proceedings, the Court nevertheless continued to operate as a single institution under congressionally prescribed quorum rules that authorized fewer than all Justices to decide cases on behalf of the Court.¹⁶² The continued existence of these quorum requirements thus confirms that the Constitution tolerates, and indeed anticipates, different levels of participation among Justices.

¹⁵⁷ Jamal Greene, *The Nonpartisan Case for Supreme Court Expansion*, __ HARV. J.L. & PUB. POL’Y __, 24 (Sept. 1, 2025), <https://ssrn.com/abstract=5871962>.

¹⁵⁸ See, e.g., 28 U.S.C. § 1 (stating the Supreme Court consists of the Chief Justice and eight associate justices, and six members constitute a quorum).

¹⁵⁹ Congress has mandated that justices must disqualify themselves in any proceeding where their “impartiality might reasonably be questioned,” such as having a financial interest, prior involvement as counsel, or personal bias. 28 U.S.C. § 455.

¹⁶⁰ If a case brought by direct appeal (rather than *certiorari*) cannot be heard due to a lack of a quorum caused by illness, disqualification, or other unavailability, 28 U.S.C. § 2109 authorizes the Chief Justice to remand the case to the appropriate U.S. Court of Appeals for final determination.

¹⁶¹ Amar, *supra* note 13, at 17.

¹⁶² See *id.* at 18 (citing Judiciary Act of 1789, 1 Stat. 73, § 1).

Justice William O. Douglas's tenure on the Court provides a more modern illustration of the same principle. After suffering a debilitating stroke in 1974, Justice Douglas was unable to participate meaningfully in the Court's work for more than a year.¹⁶³ During this time, he neither wrote opinions nor reliably engaged in conferences or oral arguments. Yet he did not immediately resign from his commission, and the Court continued to operate with eight Justices. No one contended that Justice Douglas's continued tenure created a second Supreme Court or fractured the institution into multiple constitutional entities. Instead, his situation was widely understood as a matter of participation and capacity, addressed through informal adjustments to the Court's functioning.¹⁶⁴ Thus, if the Court remains "one Supreme Court" when some Justices do not engage in judicial activities, it follows that Congress may structure participation through mechanisms such as senior status without creating multiple Supreme Courts.

Moreover, as previously noted, it is well established that Congress has broad power to "lighten judicial duties" over the course of a judge's tenure, as the Supreme Court recognized in *Booth*.¹⁶⁵ For nearly 100 years, Justices have regularly retired from active service while retaining their judicial office without any suggestion that their status violates the establishment of one Supreme Court.

Finally, Congress also assigns certain Supreme Court business to individual Justices, further supporting an understanding that Justices may hold different duties within "one" Supreme Court. Notably, from 1802 to 1839, Congress established a "rump court" assigned to the Justice residing in the fourth judicial circuit, which heard procedural matters in an August sitting.¹⁶⁶ Its constitutionality was never questioned by the Justices, litigants, or any members of Congress, despite heated constitutional debates about other laws targeting the judiciary during the same

¹⁶³ Artemus Ward, *The Tenth Justice: The Retirement of William O. Douglas*, 25 J. SUP. CT. HIST. 296, 300–02 (Nov. 2000).

¹⁶⁴ *Id.*

¹⁶⁵ *Booth v. United States*, 291 U.S. at 351.

¹⁶⁶ Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156. The law was passed as part of the fight between the Federalists and Republicans over the so-called Midnight Judges, whose seats as circuit court judges were added during the lame duck at the end of President Adams' term, which also eliminated circuit riding. Republicans then repealed the (already occupied) judgeships and reestablished circuit riding. In order to avoid immediate Supreme Court review, Congress also canceled the Court's August 1802 sitting so it would not be able to hear a challenge until February 1803. However, it created the August rump court to allow procedural matters to move forward. Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 689–94 (2006).

period.¹⁶⁷ Today, applications for a stay of a lower court judgment can be granted by an individual Justice,¹⁶⁸ and as Jamal Greene notes, several Justices have relied upon the All Writs Act, which dates to the First Congress, as authority for individual Justices to issue both stays and injunctive relief without the participation of the full Court.¹⁶⁹ Congress has also designated a number of specific duties to the Chief Justice, even though the Constitution provides only that the Chief Justice shall preside over a president's impeachment trial.¹⁷⁰ None of these practices have been understood to be inconsistent with the establishment of one Supreme Court.

2. Supreme Court term limits are consistent with the Appointments Clause and do not impact any vested property interest

Another set of objections to statutory term limit proposals focuses on the changes to Justices' duties when they become senior Justices. Some critics suggest that service as a senior Justice constitutes a new office that requires a new appointment under the Constitution's Appointments Clause, or that the change from active to senior status constitutes the loss of a vested property interest.

There are strong arguments that the prospective application of statutory term limits to future Justices does not implicate these concerns, because such a system would not change any settled expectations.¹⁷¹ Under the prospective scenario, the duties associated with the active and senior phases of service are defined *ex ante* as part of the terms of the Justice's office; indeed, the two phases of office could be explicitly laid out in the Justice's commission. In this scenario, a Justice's transition to senior status would not reflect a change in previously defined duties because the office's duties would have always consisted of two phases. The Justice would receive exactly the office to which they were appointed.

¹⁶⁷ See Davies, *supra* note 166, at 689, 694.

¹⁶⁸ 28 U.S.C. § 2101(f); SUP. CT. R. 23.

¹⁶⁹ 28 U.S. Code § 1651. See also Greene, *supra* note 157; Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159, 1168 (2008).

¹⁷⁰ See Amar, *supra* note 13, at 17.

¹⁷¹ See, e.g., PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 1, at 131 (in addressing questions about whether a change in duties for senior Justices might amount to an appointment to new offices, the Commission notes that "it is not clear that the germaneness requirement applies to the prospective redefinition of an office").

With respect to proposals that apply the active/senior proposal to currently sitting Justices, a closer analysis is warranted. Some scholars who believe that Congress has the power to impose statutory term limits have argued that it should only be applied prospectively, for either constitutional or prudential reasons.¹⁷² However, setting aside what is preferable as a policy matter, there are strong constitutional arguments that changing the duties of sitting Justices also falls within Congress's extensive powers to regulate the Supreme Court, as long as it is implemented in a neutral manner that does not single out particular Justices or otherwise undermine judicial independence.

First, as the Supreme Court has held, a change in an officer's duties does not require a separate appointment under the Constitution's Appointments Clause if the new duties are sufficiently germane to those of the original position.¹⁷³ The germaneness requirement is intended "to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office."¹⁷⁴

In *Weiss v. United States*,¹⁷⁵ for example, the Court considered whether a commissioned military officer, who had been appointed by the president with advice and consent of the Senate, could be designated as a military judge without a separate appointment. Assuming without deciding that the germaneness principle applied, the Court held that its requirements were met because while "military judges obviously perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system."¹⁷⁶ For example, the Court pointed out that military officers can quell disorder and apprehend individuals subject to the Uniform Code of Military Justice and that they can have a role in various court-martial proceedings.¹⁷⁷ "Commanding officers can also impose nonjudicial

¹⁷² See, e.g., AM. ACAD. OF ARTS & SCI., *supra* note 2, at 12–13.

¹⁷³ See, e.g., *Shoemaker v. United States*, 147 U.S. 282, 300–01 (1893) (concluding two officers assigned additional duties "germane to the offices already held by them" did not need to be "[re]appointed by the President and Confirmed by the Senate" because "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed").

¹⁷⁴ *Weiss v. United States*, 510 U.S. 163, 174 (1994).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 174–75 (1994).

¹⁷⁷ A court-martial is a temporary court, called into existence by a military order and dissolved when its purpose is accomplished. See Arts. 22–24 U.C.M.J., 10 U.S.C. §§ 822–24 (1988).

disciplinary punishments for minor offenses.”¹⁷⁸ Thus, the fact that these commissioned officers were reassigned to a role with different, and in some respects more specialized, duties did not transform their position into a new office.

Like the officers in *Weiss*, a Justice moving from active to senior status continues to hold the same commission, retains the same constitutional tenure and salary, and exercises authority derived from their original presidential appointment and Senate confirmation. The change lies only in the configuration of duties. Notably, the tasks assigned to senior Justices under the leading proposals are generally all duties currently authorized under existing law for either active or retired Justices,¹⁷⁹ strongly suggesting that a separate appointment is not required. On that understanding, if Congress may authorize already commissioned officers to undertake tangential adjudicative responsibilities without reappointment, it likewise may assign a Justice to senior service without implicating the Appointments Clause. Because the duties of a senior Justice substantially overlap with responsibilities that active Justices may already perform, the transition is best understood as a modification of their judicial assignment rather than an appointment to a new office.

Nor does such a change in responsibilities constitute the denial of a property interest in the Supreme Court office. During a July 2024 appearance at the University of Zurich, Justice Sonia Sotomayor provided impromptu remarks acknowledging that Supreme Court term limits offer advantages,¹⁸⁰ but expressed the concern that “I am promised my job for life, and that can’t be taken away constitutionally.”¹⁸¹ Justice Sotomayor suggested that even a constitutional amendment could not be applied to sitting Justices, because “you cannot have a retroactive law

¹⁷⁸ *Weiss v. United States*, 510 U.S. at 175–76.

¹⁷⁹ Current federal law authorizes Justices to sit on circuit courts by designation. *See* 28 U.S.C. § 43(b) (1948). Furthermore, each justice is assigned by the Court to a circuit and hears applications for temporary relief from that circuit, *see* 28 U.S.C. § 42 (1948), and a retired justice “may be designated . . . to perform such judicial duties in any circuit, including those of a circuit Justice, as is willing to undertake.” 28 U.S.C. § 294(a). *See also* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1830–31 (2003) (listing Justices who have served in lower federal courts after retiring from the Supreme Court).

¹⁸⁰ ‘*Virtually All of Us Are Committed*’ to SCOTUS’s Ethics Code, *Justice Sotomayor Tells Swiss Audience in Newly Unearthed Audio*, FIX THE COURT (Aug. 5, 2025), <https://fixthecourt.com/2025/08/new-audio-suggests-justice-sotomayor-wants-to-fix-the-court/#:~:text=With%20respect%20to%20life%20tenure,he%20was%2090%20years%20old>.

¹⁸¹ *Id.*

changing something that you've earned.”¹⁸² Given the context of the question she was responding to, which was a general inquiry about the desirability of Supreme Court term limits, it appears likely that Justice Sotomayor was speaking to the legality of removing a Justice from office after a fixed term (i.e., imposing true term limits) rather than analyzing the proposals that are the subject of this memorandum, which would change Justices' duties over time but not remove them from office. These proposals, while colloquially referred to as term limits, do not impose a fixed term as a legal matter, and they were not mentioned, much less described, in the question posed to Justice Sotomayor.

To the extent critics may raise similar objections to proposals for statutory term limits, however, there are strong arguments that such changes in duties do not undermine any property or other vested interest in the office of a Supreme Court justice. While under some circumstances public employment can generate entitlements that constitute property interests,¹⁸³ the scope of protections associated with a Supreme Court Justice's employment is specifically provided for in Article III's Good Behavior Clause.¹⁸⁴ This provision specifies the aspects of judicial employment that are constitutionally protected: a Justice's office, salary, and tenure.¹⁸⁵ By expressly identifying these guarantees, the Constitution establishes what interests are vested in the office and leaves other attributes of judicial service subject to congressional regulation. Indeed, there is no individual right to a judicial office — tenure protections attach to the *office* under the Constitution and are structural in nature. And neither the Good Behavior Clause nor any other constitutional provision guarantees that the duties associated with a Justice's office will remain unchanged.

Congress's modification of circuit-riding duties through the Evarts Act of 1891,¹⁸⁶ and the eventual elimination of circuit riding in 1911,¹⁸⁷ highlight how the “office” of Supreme Court

¹⁸² *Id.*

¹⁸³ *See, e.g.,* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

¹⁸⁴ U.S. CONST. art. III, § 1.

¹⁸⁵ *Id.*

¹⁸⁶ F. Frankfurter & J. Landis, THE BUSINESS OF THE SUPREME COURT 101 (1927) (acknowledging that “while Evarts hardly expected any more circuit attendance by the Justices in the future than in the past, he did not disturb the deep sentiment behind the old tradition by explicitly eliminating them from the composition of the circuit courts of appeals”).

¹⁸⁷ Glick, *supra* note 179, at 1829 (“In the Judicial Code of 1911, circuit riding dies a quiet death.” (internal citation omitted)).

Justice endures even as Congress reshapes the work attached to it.¹⁸⁸ When Congress abolished U.S. Circuit Courts through the Judicial Code of 1911,¹⁸⁹ it altered the scope of Justices' duties and narrowed their workload. Yet no one suggested that this statutory change divested Justices of a vested right, created a new office, or required reappointment to a redefined role. Instead, the rise, normalization, and eventual abolition of circuit riding illustrates how Congress may both impose and withdraw major categories of judicial responsibility without triggering the Appointments Clause or any vested property interest. The creation of the senior judge system likewise demonstrates the breadth of Congress's power to "lighten judicial duties" consistent with the judicial office.¹⁹⁰

The reorganization of the Fifth Circuit Court of Appeals and the resulting creation of the Eleventh Circuit offer a more modern example of Congress's broad powers to alter the duties of judicial offices. When Congress passed the Fifth Circuit Court of Appeals Reorganization Act in 1980, it split the old Fifth Circuit into two new, autonomous circuits — the new Fifth Circuit (comprising Louisiana, Mississippi, and Texas) and the Eleventh Circuit (comprising Alabama, Florida, and Georgia).¹⁹¹ This change, which "relieve[d] pressure on the largest and most rapidly growing appellate docket,"¹⁹² reassigned dozens of Article III judges to either a newly created circuit or a recently reconfigured one without new nominations or confirmations.¹⁹³ Those judges suddenly served on a different court, with a different docket and different geographic

¹⁸⁸ *Id.* at 1829–31 (describing how Congress's elimination of circuit riding changes the responsibilities of Supreme Court justices without altering the office itself).

¹⁸⁹ Abolition of U.S. Circuit Courts, 36 Stat. 1087, 1167 (Mar. 3, 1911). *See especially id.* at § 289 ("The circuit courts of the United States, upon the taking effect of this Act, shall be, and hereby are, abolished."). There were eight Justices who were confirmed prior to the official abolition of circuit riding and who stayed on after the Act came into effect. These justices were Joseph McKenna (Jan. 26, 1898 – Jan. 5, 1925); Oliver Wendell Holmes Jr. (Dec. 8, 1902 – Jan. 12, 1932); William R. Day (Mar. 2, 1903 – Nov. 13, 1922); Horace Harmon Lurton (Jan. 3, 1910 – July 12, 1914); Charles Evan Hughes (Oct. 10, 1910 – June 10, 1916); Edward Douglass White (Dec. 19, 1910 – May 19, 1921); Willis Van Devanter (Jan. 3, 1911 – June 2, 1937); and Joseph Rucker Lamar (Jan. 3, 1911 – Jan. 2, 1916). Although the practice of circuit riding was formally abolished with this Act, there had been a gradual phasing out of the practice.

¹⁹⁰ *Booth v. United States*, 291 U.S. at 351, 354.

¹⁹¹ Pub. L. No. 96-452, 94 Stat. 1994 (1980).

¹⁹² Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CAL. L. REV. 789, 825 (2020).

¹⁹³ Of the twenty-six judgeships authorized for the former Fifth Circuit, fourteen were assigned to the new Fifth Circuit and twelve to the Eleventh Circuit based on their states of residence. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994 ("Fifth Circuit Court of Appeals Reorganization Act").

jurisdiction, yet their commissions remained valid and uninterrupted.¹⁹⁴ Notably, no court ever suggested that the reassignment implicated vested property interests or violated the Appointments Clause.

While a retroactive change in Justices' duties would be controversial, the relevant constitutional question is whether Justices continue to hold their office during good behavior and retain their salary. There are strong arguments that the proposed term limit system comports with these constitutional requirements.

3. The active/senior Justice system would not unconstitutionally remove the Chief Justice from office

An additional consideration is whether the office of Chief Justice is a distinct constitutional office such that the imposition of senior status on the Chief Justice would constitute a removal from office in violation of the Good Behavior Clause.

There are strong constitutional arguments that the Chief Justice designation is “simply the designation of the [J]ustice who serves as chief, rather than a distinct office,” as the American Academy of Arts and Sciences working group concluded.¹⁹⁵ The only constitutional reference to the Chief Justice is in Article I, Section 3, which lays out the procedure for impeachment trials and provides that the Chief Justice shall preside over an impeachment trial for the president of the United States. The remaining duties of the Chief Justice — which include presiding over the Judicial Conference,¹⁹⁶ assigning opinion writing responsibilities when in the majority,¹⁹⁷ overseeing administrative functions of the federal judiciary,¹⁹⁸ and appointing judges to specialized tribunals like the Foreign Intelligence Surveillance Court¹⁹⁹ — derive from congressional statutes, judicial practice, or institutional tradition. Because these responsibilities

¹⁹⁴ *Id.*

¹⁹⁵ AM. ACAD. OF ARTS & SCI., *supra* note 2, at 9.

¹⁹⁶ 28 U.S.C. § 331.

¹⁹⁷ See Linda Greenhouse, *Chief Justice Roberts in His Own Voice: The Chief Justice's Self-assignment of Majority Opinions*, 97 JUDICATURE 90, 90 (“Among the most significant prerogatives that a [C]hief [J]ustice enjoys is the power to assign an opinion when in the majority.”).

¹⁹⁸ 28 U.S.C. § 601.

¹⁹⁹ 50 U.S.C. § 1803.

exist by virtue of congressional enactment or internal administration, Congress retains authority to define, modify, or reallocate them.

Moreover, the Constitution “mentions only ‘judges of the Supreme Court’ when describing the presidential appointment power.”²⁰⁰ While existing statutes provide a distinct role and nomination process for the Chief Justice, “there is no reason why [the statute] could not also be amended to change the method of the [C]hief [J]ustice’s selection,” as retired Chief Judge Diane Wood has argued.²⁰¹ For example, the Chief Justice role could rotate to the active Justice with the most seniority, the Justices themselves could select their own Chief Justice, as is the practice on many state supreme courts, or a given Justice could hold the Chief Justice role during their 18-year active term.

That said, a term limit statute could also be designed to accommodate the view that the Chief Justice is an independent office. For example, it could provide that when the Chief Justice takes senior status, that Justice would continue to retain the office and be designated to preside over presidential impeachment trials. A new Chief Justice would then be appointed only after the sitting Chief Justice resigned from the Court.

While a law implementing Supreme Court term limits should address the role of the Chief Justice, the Constitution’s reference to a Chief Justice does not preclude adopting a system of term limits.

4. Regular appointments are consistent with the Constitution

While most scrutiny of Supreme Court term limit proposals focuses on the establishment of two phases of service, it is worth noting that most proposals also include a provision to regularize Supreme Court appointments, typically providing each president with two nominations per four-year term.²⁰² Regularizing appointments in such a manner through a fixed schedule is within

²⁰⁰ U.S. CONST. art. II, § 2, cl. 2; AM. ACAD. OF ARTS & SCI., *supra* note 2, at 9.

²⁰¹ See Wood, *supra* note 13.

²⁰² See, e.g., Supreme Court Tenure Establishment and Retirement Modernization Act of 2025, H.R. 3544, 119th Cong. (2025); Supreme Court Biennial Appointments and Term Limits Act of 2023, S. 3096, 118th Cong. (2023); Supreme Court Term Limits and Regular Appointments Act of 2025, H.R. 1074, 119th Cong. (2025).

Congress’s authority to create and remove seats on the Supreme Court, a power that Congress has repeatedly exercised.²⁰³

The regularized appointments component of Supreme Court term limits simply sets a schedule for filling vacancies on the Court. Specifically, it creates new judicial seats in the first and third years of a president’s term that a president may then fill, with the advice and consent of the Senate, pursuant to the president’s ordinary authority under the Constitution’s Appointments Clause. And when a senior Justice either dies or resigns their seat, that seat is eliminated. Since Congress can create new seats on the Court and eliminate seats not currently occupied, it can also set a schedule for doing so to ensure the effective functioning of the courts. Likewise, because a Justice’s seat is eliminated when they depart the bench, there is no constraint placed upon the president’s appointment power.²⁰⁴

Conclusion

The Constitution designates to Congress substantial power to pass “necessary and proper” legislation regulating the Supreme Court, including with respect to the duties exercised by Supreme Court Justices. Constitutional history, text, structure, and precedent establish that Congress has the power to modify and reduce Justices’ duties, to require them to sit on lower courts, and to regulate the Court’s appellate jurisdiction.

²⁰³ *About the Court: FAQs – General Information: Who decides how many Justices are on the Court? Have there always been nine?*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx (last visited May 30, 2026) (“The Constitution places the power to determine the number of Justices in the hands of Congress. The first Judiciary Act, passed in 1789, set the number of Justices at six, one Chief Justice and five Associates. Over the years Congress has passed various acts to change this number, fluctuating from a low of five to a high of ten. The Judiciary Act of 1869 fixed the number of Justices at nine and no subsequent change to the number of Justices has occurred.”); see also Michael C. Blumm, Kate Flanagan & Annamarie White, *Right-Sizing the Supreme Court: A History of Congressional Changes*, 72 CASE W. RES. L. REV. 9 (2021) (discussing how major nineteenth-century statutes changed the Court’s size from 6 (Judiciary Act of 1789), to 5 after the next vacancy (Midnight Judges Act of 1801), to 6 (Judiciary Act of 1802), to 7 (Seventh Circuit Act of 1807), to 9 (Judiciary Act of 1837), to 10 (Tenth Circuit Act of 1863), to 7 through attrition (Judicial Circuits Act of 1866), and back to 9 (Judiciary Act of 1869)).

²⁰⁴ BANNON & MILOV-CORDOBA, *supra* note 3, at 8 (“One potential question is whether an early departure from the Court poses issues with respect to the president’s appointment power, because under most versions of this proposal the president would not have an immediate opportunity to appoint a replacement. Critically, however, under this circumstance no vacancy would exist for the president to fill: the existing seat would be eliminated upon the [J]ustice’s departure and a new seat would be created only according to the schedule set by Congress.” (internal citation omitted)).

The statutory term limit proposals described in this memorandum fall well within Congress's authority and are consistent with the limits imposed by the Constitution's good behavior protections. Under these proposals, Justices continue to hold their office, receive their full salary, and sit according to the same judicial commission. The proposals also preserve judicial independence from political retaliation. Indeed, statutory term limits would strengthen the Court's public legitimacy by creating a predictable schedule of appointments, eliminating the happenstance of vacancies driven by death or strategic retirement, and tempering the extraordinary political stakes that currently surround each Supreme Court nomination.

As explained in this memorandum, it is within Congress's constitutional power to enact 18-year Supreme Court term limits.