

Op-ed | **Should We Alter the Number of Justices?** **U.S. Supreme Court: Former Member of N.J.'s High Court Weighs In**

by *Peter G. Verniero*

U.S. Supreme Court Justice Stephen Breyer made news recently by seemingly rejecting proposals to expand the number of court members from nine to some larger number (“nine is fine,” as he put it). He also endorsed term limits for himself and his colleagues (“say eighteen years or something like that”).

Some historical perspective is in order. As for the number of high court members, the U.S. Constitution is silent on the subject.

The Constitution leaves it up to Congress to determine the number of Supreme Court justices, as lawmakers have done over different periods. At one juncture the number was set as low as five and as high as 10, before it settled in at nine under the Judiciary Act of 1869. The number has held ever since.

As for a judicial term of office, the Constitution says only that federal judges, including justices of the high court, “shall hold their offices during good behavior.” That language essentially was intended to confer lifetime tenure on judges as a way of ensuring judicial independence.

Which brings us back to Justice Breyer. Some may construe his “nine is fine” remark as a rebuttal to proposals being floated in some quarters to alter the court’s composition as a way of diluting the influence of so-called conservative jurists. The justice himself has disclaimed that he was speaking about any particular proposal.

In any event, for the past century and a half, a composition of nine justices has served the high court well. Yes, there have been highs and lows in the court’s jurisprudence during that period, but that could have been the case had the number been other than nine.

It seems that Americans are comfortable with having nine members seated on the high bench, even when we sometimes disagree with the court’s rulings. Judicial stability, especially in today’s time of division and discord between the other two governmental branches, argues in favor of leaving the court’s composition alone.

The same is true about lifetime judicial tenure (although I agree with Justice Breyer that, perhaps, some outer term limit would be worth exploring). Undoubtedly, a guaranteed lengthy tenure fortifies a judge’s independence, which is vital to protecting the rule of law. And without the rule of law, our American democracy is sunk.

Proposals to alter the Supreme Court appear to assume that justices are incapable or unwilling to decide a question inconsistent with some preset judicial philosophy. And yet we know from recent experience that justices over time do, in fact, have the capacity to surprise us with their decisions by voting “against type.”

In New Jersey, there is an unwritten rule of judicial selection that no appointing governor since the adoption of the 1947 state Constitution has ever violated. The rule says there shall be no more than four members of the same political party appointed to the seven-member state Supreme Court.

Because governors of both parties have honored the unwritten rule, the public has been assured a bipartisan state Supreme Court. This has helped dispel the notion that the court is a political body, which it decidedly is not.

Perhaps New Jersey’s rule of bipartisan judicial selection someday will find its way to Washington, D.C., and be applied to the nation’s highest court. In the current climate, however, I wouldn’t expect such reform anytime soon.

In the meantime, I wouldn't change the composition of the U.S. Supreme Court or alter the lifetime tenure of the justices who serve on that court. Even when I might disagree with some of their decisions, the court's members appear to strive for principled rulings, based on their best thinking at the time of each case.

If such thinking is sometimes guided by a broad jurisprudential approach, whether it be from a purported liberal or conservative perspective, it does not diminish the independence of the judicial function. And such independence remains the best check against the unfair excesses of government by any party, at any level. Just as the founders had intended.

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