DAN O’HANLON ESSAY COMPETITION: 2019

This year’s essay question asks the writer to consider:

Should the United States Supreme Court be changed, perhaps by expanding the number of seats on the Court, imposing term limits, or in some other way? Or should the Court remain the same?

There is no correct answer to the question. The winning essay will answer the question with facts and reasoning to support its conclusions.

Your answer should thoroughly explain the reasons for your conclusions (the WHY) and if change is advocated, should state HOW the change must be made (through legislation or constitutional amendment); conversely, if no change is advocated, the essay should make the case for WHY NOT.

Background

Article III, Section 1 of the United States Constitution provides that

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress shall from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour <sic>, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const., Art. III, Section 1.

Chief Justice John Marshall, for whom this University is named, confirmed and defined the Court’s role as a co-equal branch of government in *Marbury v. Madison*, holding that “A law repugnant to the Constitution is void,” and that “[i]t is emphatically the duty of the Judicial Department to say what the law is.” In other words, the Supreme Court, in exercising what is called “judicial review” can strike down laws as unconstitutional if they violate the Constitution. (The holdings in *Marbury* were consistent with Alexander Hamilton’s understanding set forth in Federalist No. 78, recognizing the Constitution as the supreme law of the land, as specified in the Supremacy Clause of the Constitution.) *See* Federalist No. 78 (Hamilton)

The Constitution does NOT specify the number of Supreme Court justices; that number has been set by Congress and has varied from time to time. The Judiciary Act of 1789, passed by Congress and signed into law by President George Washington, set the number of justices at six (one Chief and five Associate Justices). The short-lived Judiciary Act of 1801 reduced the number to five but was repealed and replaced by the Judiciary Act of 1802, which restored the number to six. In the 1800s, as the country grew, seats were added, briefly reaching the number of 10 justices for a short period, before Congress reduced the Court to seven justices in 1866. In 1869, a new Judiciary Act, signed by President Ulysses S. Grant, established the number of Supreme Court justices as nine and the Court remains this size today.

Article III, Section 1 does establish judicial tenure: federal judges are appointed for life, assuming they maintain "good behavior." Therefore, historically, justices' terms have ended either when they decide to retire or when they die.

As stated above, in Federalist No. 78, Alexander Hamilton expounded on the intended role of the judiciary as well as the reason the Constitution specified life tenure during good behavior. Arguments over the Court today incorporate his reasoning or contradict it. Your essay should evidence an understanding of Federalist No. 78, no matter where you come out in response to the question.

Although recent proposals for expansion and court packing have arisen in the context of the controversies surrounding the Republican Senate's refusal to consider Merrick Garland, President Obama's nominee for the Court, and again in the wake of President Trump's appointment of Justices Gorsuch and Kavanaugh, such proposals are neither new nor can they be attributed to one or the other party or to a particular political persuasion.

For a succinct explanation of the early history of such proposals, you might wish to read "Packing the Supreme Court explained" on the blog of the National Constitution Center, Constitution Daily.

Arguably, the most famous proposal for Court packing came from President Franklin D. Roosevelt, who, when faced with Supreme Court decisions invalidating key parts of his New Deal, advocated a bill expanding the Court to as many as 15 justices through a system of Presidential appointments of a justice each time a sitting justice reached the age of 70 and opted not to retire. This proposal ultimately failed in Congress, after being opposed by members of Roosevelt's own party, and garnered disapproval from the American public at large.

In 2004, George Washington University Law School Professor Jonathan Turley published a paper advocating Supreme Court expansion for various reasons, mostly focusing on the inordinate power that the "swing justice" on the court holds in a time of extreme partisanship and division on the court. *See* "Unpacking the Court; The Case for Expansion of the United States Supreme Court in the Twenty-first Century," 33 Perspectives on Political Science, No. 3, p. 155 (June 22, 2004) (available through the Marshall University Library website). Turley was discussing the "swing" role at a time that it was filled by Justice Sandra Day O'Connor.

More recently, after the election of President Trump, conservative legal scholar and Northwestern Pritzker School of Law Professor Steven G. Calabresi, with his former student Shams Hirji, published a paper in which he proposed a dramatic expansion of the federal judiciary *at levels below* the Supreme Court. One of Calabresi's stated goals was to allow President Trump to pack the lower courts with an unprecedented number of federal judges in order to "undo[] the judicial legacy of President Barack Obama." Calabresi, a co-founder of the conservative Federalist Society, was met with criticism of his court-packing idea from all parts of the political spectrum. For examples, *see* opinion pieces by Josh Blackman of the Cato Institute, George Mason University Professor of Law Ilya Somin, and Richard Primus, University of Michigan law professor While Calabresi did *not* propose to expand the Supreme Court (which now has a majority of conservative Republican appointees), the reaction to it

includes valuable insight into issues with court packing in general and into a mentality that accepts naked politicization of the courts generally. This attitude – when conveyed by President Trump – was soundly rejected by Chief Justice John Roberts, who, in a rare rebuke of a sitting President by a Chief Justice, reminded the President of the importance of an independent judiciary.

Most recently, in the wake of President Trump's appointments of Justice Neil Gorsuch and Justice Brett Kavanaugh, and the Supreme Court's June decision refusing to strike down partisan gerrymandering, proposals to expand the Supreme Court have been emanating from the progressive wing of the Democratic party, but again, are also opposed by both liberals and conservatives. For examples, see recent interviews on the topic with some of the Democratic contenders for President saying they are open to such proposals and others saying they are not: as well as the Constitutional amendment favored by Republican Senator Marco Rubio and a recent opinion piece in *The Atlantic* by former Obama White House counsel Bob Bauer titled "Don't Pack the Courts."

For yet another interesting perspective on dealing with the politicization issue, *see* a proposal for how to "fix the court" by a group including conservative and liberal legal scholars, who wrote to the chairs and ranking members of the Judiciary Committee in 2017, forwarding proposed legislation they drafted to address "politics [that] has infected the Supreme Court confirmation process." According to these professors, "Everyone knows it. Denying it is pointless, and so is blaming one another for starting it. The American People do not care who created this problem or how it began. They want their elected representatives to fix it."