

ON POLITICS

Breyer Worries Retiring Could Add to Polarization. Would It?

The Supreme Court's oldest justice has hinted that he may decline to step down, defying activists' pressure. His reasoning would be hotly debated on the left.



By Giovanni Russonello

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When the Senate voted in 1994 to confirm Justice Stephen G. Breyer to the Supreme Court, the final tally was 87-9. Though he'd been nominated by President Bill Clinton, a wide majority of Republicans voted in his favor.

Particularly for members of the Senate Judiciary Committee, much of Justice Breyer's appeal came from his work in the late-1970s as a lead counsel to that committee. In those years, just after the civil rights movement and Watergate, the ideological divide between Democrats and Republicans on many issues was hazy at best, and he developed a reputation for being evenhanded.

That kind of bipartisan camaraderie is mostly a thing of the past these days — but Justice Breyer, who at 82 is the oldest member of the Supreme Court's diminished liberal wing, hasn't forgotten about it. And he'd like to play some part in bringing it back.

But how, exactly?

Justice Breyer recently raised the hackles of liberal activists who have said he should resign quickly to allow President Biden to replace him. In fact, he said he was ethically opposed to the idea.

As our courts reporter **Adam Liptak** pointed out in an article published yesterday, Justice Breyer, giving a speech at Harvard University that will later be published in book form, argued that justices must be “loyal to the rule of law, not to the political party that helped to secure their appointment.”

Justice Breyer continued, “If the public sees judges as politicians in robes, its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the court's power.”

Liberal groups like Demand Justice have mounted a sometimes public, mostly private campaign to persuade Justice Breyer to retire, saying that Republicans could easily take back the Senate next year. But as Adam reports, that effort has mostly served to irritate the justice, who would hate to be seen as leaving out of deference to partisan pressure.

His concerns that the country's political polarization has seeped into the judicial system are clearly justified. Political scholars who study the courts have consistently confirmed it, in study after study. But experts are more skeptical of whether any one man has the power to meaningfully push back against the trend.

“Breyer is embracing an image of the judge as being above partisan labels,” Neal Devins, a professor at William and Mary Law School and co-author of “The Company They Keep: How Partisan Divisions Came to the Supreme Court,” said in an interview. He pointed to Justice Breyer's past criticism of proposals to expand the court, which Justice Breyer has openly worried would increase the court's reputation for partisanship.

“There's a coherent, consistent theme coming from him,” Professor Devins added.

Still, he couldn't help feeling that the justice was stuck in the past. “Is Breyer aware of the world that he lives in?” he said. In this day and age, “it's quite obvious that there is this divide where the Republican justices are to the right and the Democratic justices are to the left.”

The Senate is more partisan.

Justices have only so much ability to affect the court's future development, which is more directly tied to the way partisan politics go at the legislative and executive levels. Gerrymandering and the effects of money in politics have driven up polarization in Congress and state legislatures: Primary elections now often matter more than the general. Democratic candidates tend to align with a standard liberal agenda, and Republican candidates are usually staunchly conservative (which, these days, frequently means Trumpian).

That polarization plays out in the way that justices are confirmed, said Richard Hasen, a law professor at the University of California, Irvine, who studies politics and the courts. Justice Breyer was the last justice to receive a yes vote from as many as 80 senators. Since the mid-1990s, only Chief Justice John G. Roberts Jr. has gotten considerably more than two-thirds. Most recently, the three jurists nominated by President Donald J. Trump were confirmed almost entirely along party lines.

As a result, the high court's justices are more starkly divided along partisan lines today than at any point in recent memory: On hot-button political topics like gun control and voting rights, it's become fairly easy to guess how each justice will vote — the vote almost always lines up with the party of the president who appointed the justice to the bench.

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Professor Hasen pointed to his research showing a stark increase in votes decided by a 5-4 margin during the Obama presidency, as the divided court settled into its partisan positions.

"We're in a situation that we haven't been in — in the modern period, at least," Professor Hasen said in an interview. "All the conservatives on the court were appointed by Republican presidents, and all the liberals on the court were appointed by Democratic presidents."

"You used to have a justice like Stevens or Souter," he said, referring to Justices John Paul Stevens and David H. Souter, "who were moderate-to-liberal, depending on the issue, appointed by Republican presidents."

Retirement habits are already more politically driven nowadays.

Whatever the case may be with Justice Breyer, a new study found that federal judges do in fact tend to retire more readily under a president from the same party that appointed them. That is, politics seem to matter to judges when deciding when to retire. (The study looked at jurists up and down the federal bench, not only Supreme Court justices.)

The tendency to retire at a politically convenient moment has been more prevalent among judges appointed by Republicans, the study showed. Considering the facts, Professor Hasen said, "it's inevitable that the Supreme Court itself is going to be seen as a partisan institution." Indeed, polling has shown that views of the Supreme Court are increasingly divided along partisan lines.

"Justice Breyer is trying to fight against that because he believes that the legitimacy of the court depends on the acceptance of its rulings by everybody across society," Professor Hasen added.

The question, he said, is whether Justice Breyer really intends to stay on the court as long as he can, or if his public statements are simply a calculation of their own.

"I don't know if Justice Breyer is drinking his own Kool-Aid or not," Professor Hasen said. "Do you believe what you're saying? I understand the incentive to say it, but I don't know if he believes it." The professor pointed to Justice Amy Coney Barrett's bitterly divided confirmation, days before the 2020 presidential election, to fill the vacancy left by Justice Ruth Bader Ginsburg.

"If he does believe it, I would say: Look at what happened with Justice Ginsburg being replaced by Justice Barrett," Professor Hasen said. "You staying on the court for another year is not going to make things less politicized."

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