



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

**Testimony in Support of House Concurrent Resolution 5013
Urging the United States Congress to propose the “Keep Nine” amendment
to the United States Constitution**

**Presented to the House Committee on Federal and State Affairs
By Kansas Attorney General Derek Schmidt**

February 26, 2021

Chairman Barker and Members of the Committee:

Thank you for the opportunity to offer this testimony in support of House Resolution 5013.

I have been an early backer of the so-called “Keep Nine” amendment which would change the federal Constitution to permanently set the number of justices on the U.S. Supreme Court at nine. Last fall, I endorsed the effort in a letter to the then-House cosponsors of the amendment. It is “simple and self-explanatory” and is needed to prevent the politics of the day from threatening the independence of the judiciary.

The amendment would add the following thirteen words to our Constitution: “The Supreme Court of the United States shall be composed of nine justices.” If proposed by the requisite two-thirds majority of both houses of Congress and timely ratified by three-fourths of the state legislatures, this amendment would remove from the Congress authority to increase or decrease the number of justices on the Supreme Court in response to political pressures. The passions of the moment must not be allowed to undermine the independence of our Supreme Court.

Under current law, the number of justices is set by federal statute. From the 1790s until just after the Civil War, the number of justices fluctuated between six and 10; Congress set the present nine-member size of the court in 1869. However, twice in the past century – once in 1937 and again in recent months – cries to “pack the court” by adding more justices for the purpose of diluting the influence of those already seated have risen to the fore of our nation’s public discussion. The intent and effect of those cries have been to challenge the Supreme Court’s independence in exercising judgment in cases and controversies before it. For the past 150 years, no other justification or need for altering the number of justices has gained attention, demonstrating that fixing the number of justices at nine, as is currently the case, is administratively and legally suitable. As the late Justice Ruth Bader Ginsburg famously said in 2019, “Nine seems to be a good number.”

Our Constitution already provides mechanisms for public and political considerations to influence the composition of the Supreme Court over time - namely, the processes by which Americans elect a President and United States Senators and by which the President, with the advice and consent of the Senate, appoints justices when vacancies arise. Other provisions of our Constitution, such as the granting of lifetime tenure to justices, are designed to ensure the independence of the judiciary.

By removing from Congress the ability to pack the court with additional justices in response to political pressures – regardless of whether those pressures come from the political left, the political right, or elsewhere – this amendment would reinforce our long and proud American tradition of an independent judiciary that, as Alexander Hamilton put it in Federalist 78, “ha[s] neither FORCE nor WILL, but merely judgment.” The passions of the moment must not be allowed to undermine the independence of our Supreme Court.

I believe the passage of this resolution will provide additional attention to this amendment, which is not only in the interest of Kansans but all Americans.

Thank you again for your consideration of House Resolution 5013.

###