THE SUPREME COURT RENEWAL ACT:

A RETURN TO BASIC PRINCIPLES

Paul D. Carrington[*] and Roger C. Cramton[**]

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A. THE NEED FOR LEGISLATIVE ACTION

Article III of the Constitution of the United States provides that judges of constitutional courts shall serve during "good behavior." The purpose of that provision was to secure the independence of the federal judiciary from any efforts of others with political power to influence judicial decisions improperly. The term has often been assumed to mean that Supreme Court Justices may hold office until they resign, die or are removed for serious misfeasance. Our nation has greatly benefitted from the exceptional independence of the federal judiciary, but the independence principle does not require lifetime tenure for Justices. The conventional assumption has become unsound because of increases in our longevity and other changes that have increased the tenure of Justices.

Since 1971:

(1) Average tenure in office, historically about 16 years, has increased to 25.5 years;

(2) The average age upon leaving office has increased from about 70 to 79; and

(3) The average number of years between appointments has increased from the historical figure of a vacancy every 2 years to one every 3 years. The nine Justices of the current Court have served together for more than ten years, the longest such period in our history since 1824.

The Founders, acting at a time when life expectancy at birth was less than 40 years, could not foresee that lifetime tenure would result in persons holding so powerful an office for a generation or more. Today an American at age 40 has a life expectancy of 39 years and at age 53 (the average age of appointees to the Supreme Court) a life expectancy of about 30 years. These changes have at least three unwelcome secondary consequences that need to be addressed:

First, as Justices Serve Ever Longer Terms, Rotation in Office Occurs Infrequently and the Higher Stakes of Appointing a Justice for 25-40 Years Places Stress on the Confirmation Process.

Lengthened terms diminish the accountability of the Court to the political process. Until recently, virtually all Presidents who served at least four years made at least one

appointment to the Supreme Court. But that is no longer the case. Some Presidents are now afforded no appointments during a four-year term. When an opportunity to make an appointment is presented, Presidents have incentives to appoint younger appointees likely to serve 35 years or more. A President serving two terms might hope to appoint five Justices who could control the Court for a full generation. And Senators voting to confirm a nominee may need to take into account the prospect that the nominee will be exercising political power over his or her constituents for as far into the future as one can see. Meanwhile Justices have an incentive to time their retirements strategically to assure that their successors will be appointed by a President likely to select a like-minded justices.

Moreover, the absence of rotation in membership elevates the Court's role as a political institution. Presidents, heads of departments, Senators, and members of Congress come and go, but today Justices stay and stay. An important reason Justices stay on when they are eligible to retire at full pay, as United States Circuit Judges generally do, is that Justices enjoy the exercise of such great power and the celebrity that flows from it. True, an individual Justice is constrained by the differing views of other Justices and the necessity of building a coalition. But the institution has come to exercise powers over the lives of citizens that in important respects exceed those of the other branches of the federal government and even more those of the states. The Constitution the Justices interpret is extremely difficult to amend – perhaps more difficult to amend than any other on the planet – and the word of the Justices is the last word on many important political questions. The result is that many major policy issues are removed from any opportunity of political correction. Whatever one's view on a particular issue of individual rights or government structure, the removal of some of these questions from any legislative authority creates frustration and bitterness because it leaves those in dissent with no practical political recourse. The compromise and mutual accommodation characteristic of the legislative process, and the possibility of revision, make that form of lawmaking less divisive and contentious. Experience of other constitutional governments in dealing with gravely divisive issues confirms that this is so.

The political prominence of the Supreme Court and its Justices has been steadily enlarged in recent decades. In each of the last six presidential elections the identity of persons or types of person the rival candidates might appoint to the Court has been an important issue. In the 2000 election, the Court decided who would be the person to nominate its own members. Supreme Court appointments have become politically contentious not only because the Justices exercise great power but because they exercise it for so long.

This problem of persons holding very high political office for decades on end is unique to the Supreme Court of the United States. In the last century and a half, hundreds of constitutions have been written and ratified. Many of these became the law of American states, while many others have been adopted in nations that share our commitment to individual freedom and representative democracy. None of these hundreds of constitutions has provided for a court of last resort staffed by judges who are entitled to remain in service until they die or are found guilty of very serious misfeasance. Every group of constitution makers – forced to think responsibly about the issue under modern

conditions – has concluded that there must be periodic movement of persons through offices in which so much power is vested, either through the imposition of term limits or age limits, by requiring reelection from time to time, or by allowing for removal by legislative action.

Applying any of these remedies to the Supreme Court would require a constitutional amendment. Our effort has been to craft a statutory provision falling within the broad authority of Congress to legislate concerning matters relevant to the definition of the "office" of being a judge of an Article III court such as the Supreme Court. Congress possesses and has long exercised broad legislative authority concerning the structure of the federal court system, the jurisdiction and procedure of federal courts, the number of judges or Justices, the terms of their service and retirement, and their compensation.

Second, the Power and Status of Supreme Court Justices Carry Dangers of Arrogance, Hubris and Abuse that Can Only Increase as Terms Lengthen.

The Federalist Papers emphasized that representative government was dependent upon rotation in office on the part of those exercising political authority and that the exercise of political power had to be checked by the tripartite structure of the federal government and the role of the states as governments closer to the people. While Article III judges were exempt from rotation, 18th and 19th century circumstances made fairly frequent rotation of in the chambers of the Supreme Court office almost certain to occur. And it did occur until recently. During the 215 years of the Court's history (1789-2004), 102 Justices have been appointed to the Court – an average of a new appointment every 2.1 years. But Justices in the past thirty years have been about ten years older at the time of retirement or death than their predecessors during the prior two hundred years. The current nine Justices have served together for more than ten years; the last appointment was made in 1994.

Unchecked power, the Founders correctly believed, has a tendency to produce a degree of hubris and arrogance among those who exercise that power. Many thoughtful citizens are persuaded that even now the Supreme Court's conception and exercise of its power have manifested those traits. And more are likely to reach that conclusion if the trend toward longer periods of service continues.

The result is a situation needing correction. Liberals and conservatives will identify different decisions or lines of authority that they believe involve over-reaching by the current Court and its recent predecessors, but both can agree that the extension of the Court's political role and its unchecked quality have created a serious problem that will only grow worse if left unattended.

Third, Increased Longevity Enables Supreme Court Justices, Unlike Lower Court Federal Judges, to Continue Serving Until Incapacitated Because the Conditions Under Which They Now Work Enable Them to Do So.

It has long been recognized that the life tenure of federal judges has created problems of sitting judges who have suffered loss in energy or mental capacity, become disabled or disturbed, or have served too long. During the twentieth century the Congress gradually devised a system of dealing with the aging of federal judges that works reasonably well with judges of United States district courts and circuit courts. These judges are provided with very generous retirement benefits, and those who take "senior status" can enjoy full paychecks with a reduced workload. Elderly judges of these courts generally subside with grace when their time comes. And Congress has devised a procedure, conducted by the judiciary itself through the circuit councils, of reducing or canceling the work assignments of those district and circuit judges who are physically or mentally unable to perform.

The rotation in office that results from the retirement of lower federal court judges is assisted by the fact that the workloads of these judges are not under their own control but are dependent on the caseloads created by litigants and their lawyers. Substantial and regular growth in the caseloads of trial and appellate federal courts often occurs faster than congressional willingness to create new judicial positions. The heavy case load and the burden of work that can not be delegated to others lead these judges to choose senior status and retirement as they age.

None of these forces apply to Justices of the Supreme Court who may be disabled or superannuated or have been in service too long. Although Justices are permitted by law to take senior status, none do so unless their personal condition has rendered further service on the Court virtually impossible or there is reason to believe that a timely surrender of a seat will assure the appointment of a successor who is like-minded on the issues that come before the Court.

Unlike the judges of lower federal courts, the Supreme Court controls its own workload. This control was conferred in 1925 and then broadened in 1988 by the virtual elimination of the right of a party to invoke the jurisdiction of the Court. Although the Court assured Congress in 1925 that it would continue to decide about 350 cases a year on the merits, the Court year after year has reduced the number of cases decided on the merits and now decides fewer than 100 cases a year on the merits. Meanwhile, conflicting decisions between lower federal courts on federal questions have continued to grow in number, creating inequality in treatment of persons and litigants in the various federal circuits.

The Court sits nine months a year and, during that time, a Justice must write on average about one opinion of the Court a month; there were only 70 signed opinions of the Court in the 2003-2004 Term. Time spent hearing oral argument has been reduced to an average of six hours a week during term time. A comparable amount of time is required for conferences with other Justices. Justices may and do choose to write concurrences and dissents. And time must be spent to decide which cases should be among the few the Court will decide.

To perform these duties, each Justice is provided with four very able and energetic young law clerks and with ample secretarial and other help. Justices are, of course, deeply

concerned with the quality of work done in their chambers, but much of the work of the Justices can be delegated and each Justice is provided with capable delegates. Justices do very little “scut work” and are thus liberated from the wear and tear associated with most jobs. A Justice must be in very bad shape indeed to be unable to perform at a level that does not call attention to his or her disabilities. This is particularly the case when a Justice has served a number of years on the Court and has well-developed positions on constitutional and other policy questions.

B. THE SUPREME COURT RENEWAL ACT OF 2005

To address these concerns, Congress should enact the following as section 1 of Title 28 of the United States Code:

> **(a) The Supreme Court shall be a Court of nine Justices, one of whom shall be appointed as Chief Justice, and any six of whom shall constitute a quorum.**
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> **(b) One Justice or Chief Justice, and only one, shall be appointed during the first session of Congress after each federal election, unless during that Congress one or more appointments are required by Subsection (c). Each appointment shall become effective on August 1 of the year following the election. If an appointment under this Subsection results in the availability of more than nine Justices, the nine who are junior in commission shall sit regularly on the Court. Justices who are not among the nine junior in commission shall serve as Senior Justices to sit on the Court when needed to assure a full bench, participate in the Court's authority to adopt procedural rules, and perform other judicial duties in their respective circuits or as otherwise designated by the Chief Justice.**
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> **(c) If a vacancy occurs among the nine sitting Justices because of retirement, death or removal a new Justice or Chief Justice shall be appointed and considered as the Justice required to be appointed during that Congress, if that appointment has not already been made. If more than one such vacancy arises, any additional appointment will be considered as the Justice required to be appointed during the next Congress for which no appointment has yet been made.**
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> **(d) If recusal or temporary disability prevents a sitting Justice from participating in a case being heard on the merits, the Chief Justice shall recall Senior Justices in**

reverse order of seniority to provide a nine-member Court in any such case.

(e) Justices sitting on the Court at the time of this enactment shall be permitted to sit regularly on the Court until their retirement, death, removal or voluntary acceptance of status as a Senior Justice. No appointments shall be made under subsection (b) before the Congress that begins after the last of the current Justices so leaves the Court.

C. SUMMARY OF THE PROPOSAL

The proposed Act deals directly with the lengthening of service, gives equal weight in the appointment of Justices to each federal election, reduces the opportunities for individual Justices and Presidents to manipulate current arrangements to perpetuate their own predilections, and may have a beneficial indirect influence on the exercise of judicial power by encouraging judicial restraint. Yet it does not impair the independence of the judiciary from the political branches of government.

The Act will lead to a new appointment to the Court being made during the first session of Congress after each federal election (i.e., an appointment in every odd-numbered year). The office to which these Justices are appointed will still result in judicial service as a constitutional court judge "during good behavior;" they will continue to exercise Article III judicial power until they die, elect to retire, or are removed from office. Judicial independence in the exercise of the Court's judicial power will thus remain intact. The redefined office will involve participation in the adjudicatory activity of the Supreme Court for a period of eighteen years with each appointment beginning on August 1 of the year following a federal election and ending on July 31 eighteen years later. Because each appointment begins in midsummer, when the Supreme Court is in recess, the effect on the Court's ongoing work will be minimized. A regular rotation in the personnel who exercise the Supreme Court's extraordinary power will result.

The full effectiveness of this rotation will be delayed an indeterminate number of years by the provision in Subsection (e) making the Act inapplicable to the current members of the Supreme Court. This approach has been taken for two reasons: First, it strengthens the constitutionality of the Act by eliminating a retroactive application of the Act's redefinition of the "office" of a Supreme Court Justice. Second, it avoids the criticism that the Act is designed to remove specific individuals from the Supreme Court. However, enactment of the statute may persuade individual justices to respect the policy considerations embodied in the Act, leading them to take senior status or retire if they have served more than eighteen years or they are about to reach that length of service.

When fully effective, the Act would operate as follows. In the first congressional term, the President would have one, and only one, appointment to the Court whether or not a member of the current Court resigned, took senior status or died during that period. The

same would be the case in every subsequent congressional term. Eighteen years later, after the ninth congressional term, the Supreme Court of the United States would have undergone a complete rotation of Justices. Eighteen years of regular service on the Supreme Court is ample to guarantee judicial independence from the political branches. But it is short enough and certain enough to serve other equally important policies.

The proposed Act has the effect of giving equal weight in the appointment of Justices to each presidential election. Once a transition period is completed, each four-year presidential term will result in two appointments to the Court. A longstanding deficiency of current arrangements is eliminated: the randomness of appointments to the Court in relation to presidential terms. Because vacancies now turn on the health, death or choice of individual Justices, one President, largely at random, may get three appointments in a four-year term and another gets none. Every presidential election should have a roughly equal participation in the choice of Justices.

The proposed Act will also substantially reduce two problems of strategic behavior: First, the incentive of a President to appoint young nominees to the Court who, it is hoped, will perpetuate the President's policy preferences for a generation or more; and (2) the efforts of individual Justices to increase the likelihood of a similarly inclined Justice being appointed in their stead by the timing of resignation before or after a particular presidential election. Reduction of the incentive to appoint younger Justices may encourage Presidents to appoint very distinguished and healthy appointees of great talent and experience, eliminating a bias against older appointees. The changes may also have the effect of reducing the acrimony and contentiousness of confirmation proceedings.

D. EXPLANATION OF THE PROPOSED ACT

Subsection (a): "The Supreme Court shall be a Court of nine Justices, one of whom shall be appointed as Chief Justice, and any six of whom shall constitute a quorum."

Subsection (a) retains the present language of 28 U.S.C. § 1. It prevents the sitting Court from having more than nine regular members. If a sitting Justice retired, died or was removed after a new appointment had been made in a single term of Congress, the filling of that vacancy would add a tenth Justice to the Court.

The problem of multiple vacancies in a single term of Congress is likely to arise only rarely when the rotation intended by the Act is fully effective. Appointees to the court will be distinguished and healthy lawyers of middle age and nearly all of them will serve eighteen years on the sitting Court before either retiring or continuing to serve as a federal judge as a Senior Justice, which includes some further participation in the work of the Supreme Court.

The language regarding a quorum is unchanged although the occasions in which it might be necessary for the Court to act with a reduced number of Justices will be very few after enactment of this legislation.

Subsection (b), sentences 1 and 2: "One Justice or Chief Justice, and only one, shall be appointed during the first session of Congress after each federal election, unless during that Congress an appointment is required by Subsection (c). The appointment shall become effective on August 1 of the year following the election. . . ."

The principal reforms proposed by the Act are contained in this Subsection. Its initial sentences provide that one appointment to the Court, but ordinarily only one, should be made during the first session of Congress after each federal election and that the appointment will become effective on August 1 of the year following the election. The provision ensures a regular rotation in office by requiring that the President appoint, with the advice and consent of the Senate, a new appointee in each Congress. Thus each President will receive two appointments during a four-year term. The Act is not intended to have any effect on the appointment process itself (the President's selection of a nominee and the Senate's deliberations that provide "advice and consent").

Moreover, the timing of appointments in the first and third years of each President's four-year term, with the appointment to become effective on August 1 of those years, advances three valuable purposes: (1) appointments are likely to be less contentious when they do not occur in the year prior to a federal election; (2) appointments that become effective in mid-summer fit into the calendar of the Supreme Court and will cause much less interference with the Court's October Term (with rare exceptions, the Court hears and decides cases between October and the end of July of each year); and (3) a Justice will be regularly reassigned to other judicial duties on July 31 of each odd-numbered year, resulting in a regular rotation in the Justices responsible for the Court's adjudicatory work.

Subsection (b), sentences 3 and 4: ". . . If an appointment under this Subsection results in the availability of more than nine Justices, the nine who are junior in commission shall sit regularly on the Court. Justices who are not among the nine junior in commission shall become Senior Justices who shall participate in the Court's authority to adopt procedural rules and perform judicial duties in their respective circuits or as otherwise designated by the Chief Justice."

The central feature of the proposal is stated in the third sentence of Subsection (b). It provides that the adjudicatory functions of the Supreme Court will be performed by the Court consisting of the nine most recently appointed Justices, one of whom shall serve as Chief Justice. The other Justices, described in the fourth sentence as "Senior Justices," will continue to perform the remainder of their judicial office as Article III judges of an Article III court. Normally those judicial services will be performed on the Circuit Court of Appeals to which they were designated while a regular Justice, but with the approval of the Chief Justice they could be designated to another Circuit, a district court, or another Article III court. The Senior Justices would retain the title of a Justice of the United States Supreme Court during the period in which they were "riding circuit" on lower federal courts, as Supreme Court Justices were required to do for 121 years (1790-1911).

The fourth sentence of subsection (b) provides that Senior Justices would continue to participate in the rulemaking authority the Court exercises under its statutory authority to adopt rules of procedure for federal courts subject to review by Congress. They also would sit on the Court as needed to assure a full bench of nine Justices. Their involvement in the judicial work of a lower federal court would assist the Court in the exercise of its rulemaking authority and would provide an additional mechanism of communication among the federal courts.

The result is that all Justices appointed to the Court in the future would serve as the nine deliberating and deciding members for a period of eighteen years (August 1 of the year following a federal election through July 31 eighteen years later). However, the Act does not restrict the lifetime tenure of the Article III judges appointed as a Justice or Chief Justice of the Supreme Court. Instead, it defines the regular membership of the Court as consisting of the nine most recently appointed Justices. Some of the Senior Justices who no longer participate regularly in the Court's decisional work may be called upon to provide a nine-member Court when that is necessary (see Subsection (d)). And all of them continue to retain the title of "Justice of the Supreme Court" and to exercise the judicial power of the United States as judges of a circuit court, a district court, or some other Article III court. In short, the Act defines the "office" of a Supreme Court "judge" in a new way. This feature distinguishes the Act from statutory proposals to place age limits or fixed terms of service on Supreme Court Justices. Senior Justices will continue to have lifetime tenure as Article III judges in accordance with the "good behavior" clause of Section 3 of Article III.

Subsection (c): "If a vacancy occurs among the nine sitting Justices, the Chief Justice shall fill any temporary vacancy by recalling Senior Justices in reverse order of seniority. If no Senior Justice is available, a new Justice or Chief Justice shall be appointed and considered as the Justice required to be appointed during that session of Congress. If more than one such vacancy arises, any additional appointment will be considered as the Justice required to be appointed during the next Congress for which no appointment has yet been made."

The Act does not alter the powers or functions of the Chief Justice, who is appointed by the President with the advice and consent of the Senate when a vacancy in that office exists, either by death or resignation or when the Chief Justice becomes a Senior Justice eighteen years after initial appointment to the Court. The first sentence of Subsection (c) requires the Chief Justice to provide a full court of nine by recalling the most junior Senior Justice to fill any temporary vacancy that has arisen because of the retirement, death, or removal of a Justice. Thus the Justice who has most recently become a Senior Justice will return to the Court to ensure that the Court is fully staffed, a policy further elaborated in Subsection (d).

Subsection (c) also deals with two transition problems. First, during the initial years after the legislation is enacted, no Senior Justices may be available to "fill any temporary vacancy" until a new appointment becomes available during the next Congress. The second and third sentences of Subsection (c) provide that, when that occurs, a new

appointment to the Court shall be made by the President, subject to Senate confirmation. These sentences also provide that the appointment will constitute the appointment required to be made during that Congress or, when more than one appointment is required, in a subsequent Congress.

In the unlikely event that two sitting Justices died in office in the years immediately after enactment, the first appointment would be treated as the appointment required to be made during that session of Congress. The second appointment, however, would be considered to be the one required during the next Congress. If a new President has been elected in the subsequent term of office, that President would be denied an appointment in that Congress. But this congruence of events is unlikely and the difficulties it would create is only a more limited instance of what now regularly occurs in a system in which vacancies turn on the randomness or choice of Justices' death or resignation. In this rare situation, the period of service on the sitting Court would also be somewhat longer because the appointment's term would be measured from August 1 of the first session of Congress to which the appointment is attributed. This is necessary to maintain the regularity of the rotation in office.

Second, the last sentence of Subsection (c) also deals with the transition problems flowing from the decision to apply the Act only prospectively. The retirement or death of the nine Justices in office at the time of enactment will be filled pursuant to the provisions of Subsection (c).

Subsection (d): "If recusal or temporary disability prevents a sitting Justice from participating in a case being heard on the merits, the Chief Justice shall recall Senior Justices in reverse order of seniority to provide a nine-member Court in any such case."

The recusal or temporary disability of a sitting Justice often provides a Court of less than nine Justices for a number of cases in each Term of the Court. If an even number of Justices participate in the decision, an equal division of the Court may result in continued uncertainty on an important question of statutory or constitutional law. Although this problem is much less pressing than that of the lengthening tenure of members of the Court, it is desirable to include it the proposed statute. The provision also ensures that some of the Senior Justices will be engaged at least part of the time in the continuing adjudicatory work of the Court.

Subsection (e): "Justices sitting on the Court at the time of this enactment shall be permitted to sit on the Court until their retirement, death, removal or voluntary acceptance of status as a Senior Justice. No appointments shall be made under subsection (b) before the Congress that begins after the last of these current Justice so leaves the Court."

Application of the Act to the current members of the Court raises a question of retroactivity. The "office" which they held at the time of appointment would be changed retrospectively. In addition, the application of the statute to current Supreme Court

Justices might be viewed as an effort to remove specific individuals from the Court. For these reasons, the Act has only prospective application.

Subsection (e) provides, in essence, that no change is made in the "office" of the current members of the Supreme Court, who may continue to serve until they retire, die or are removed. The effectiveness of the rotation in office envisioned by the Act will be delayed for an indeterminate time unless the current members of the Court, persuaded by the wisdom of the Act's underlying policy, choose to respect that policy through voluntary retirement.

A vacancy will arise when a current member of the Court resigns or dies. The Justice or Chief Justice appointed to fill this vacancy will be subject to the redefined "office" provided for in paragraph (b). To prevent the Court from having more than nine sitting Justices, a size required by subsection (a), no appointments are to be made under subsection (b) until the last of the current Justices retire.

Prospective application of the Act creates complexities, two of which were discussed under Subsection (c). If two of the present Justices were to resign or die during a single Congress, the second vacancy would be governed by Subsection (c). If a Senior Justice is available, that Justice will be recalled to provide a temporary replacement until the successor to the second Justice is appointed in the following Congress. The rotation in office intended by the Act thus would still be implemented.

However, the scheme of rotation in office would be postponed if two or more of the current Justices retired or died in the same term. The filling of these vacancies pursuant to subsection (c) would lead to appointments attributed to a subsequent Congress. The President in office when the vacancy arose would make the appointments needed to maintain a Court of nine Justices even though this would result in premature filling of the vacancies otherwise available to be filled in later Congresses. A succeeding President in this unlikely situation might be deprived of the opportunity to make one or more appointments. The decision not to apply the Act to the current Justices of the Supreme Court may in this way postpone the rotation contemplated by the Act. The result, however, would do no more than continue current arrangements in which vacancies arise because of the death or choice of individual Justices.

E. THE CONSTITUTIONALITY OF THE PROPOSED ACT

Congress has broad authority, among other things, to create and abolish federal courts (other than the Supreme Court), determine the jurisdiction of federal courts (providing an uncertain minimum jurisdiction is left to the Supreme Court), establish rules regulating federal courts, provide the terms of employment of judges subject to the Compensation Clause, and prescribe procedures by which the federal judiciary may discipline itself. The Supreme Court's appellate (as distinct from original) jurisdiction is exercised "with such Exceptions, and under such Regulations, as the Congress shall make." Article III, Section 2. The constitutional limitations on this legislative authority are that the regulation must not violate the prescribed methods for appointment and removal of Article III judges and

be consistent with the judicial independence protected by the Good Behavior and Compensation Clauses of Article II, Section 1.

In *Stuart v. Laird*, 1 Cranch (5 U.S.) 299 (1803), the Court upheld (1) Congress' abolition of the circuit courts created by the Judiciary Act of 1801; and (2) the circuit-riding practice that had existed from the beginning of the Court. The decision was rendered six days after *Marbury v. Madison*, with Chief Justice Marshall not participating – he had tried the case and heard the appeal in question in his capacity as a circuit judge. The abolition and re-creation of the circuit courts in a different form had deprived some judges who had been appointed to the circuit courts of their positions. And the decision also held that Supreme Court Justices could be required by statute to sit as lower court judges. *Stuart v. Laird* establishes the proposition that Congress has broad power to define and redefine the "Office" of a federal judge, including that of a Supreme Court Justice, and that a contemporaneous intermixture of duties on the Supreme Court with those of a lower Article III court is constitutionally permissible.

Opposing arguments, rejected in the decision, rest on the uniqueness of the constitutional position of the Supreme Court as the only federal court that Art. III, § 1 requires Congress to "establish." Article III does confer an uncertain degree of uniqueness on the Court, but that uniqueness does not include the requirement that the office of being a Supreme Court Justice cannot be combined with subsequent service on other constitutional courts. *Stuart v. Laird* established that contemporaneous service on the Court and inferior courts could be required. The statutory proposal advanced in this document rests on the proposition that Article III, read in conjunction with the Good Behavior Clause, does not deprive Congress of authority to layer lifetime service in ways that respond to circumstances that exist today and were not foreseen in 1789.

For many years Congress and the federal judiciary have struggled to apply this constitutional language to a federal judicial system that has currently grown to 853 authorized Article III judges and carries on its judicial business with a total judicial complement that far outnumbers the authorized Article III judges and their senior status colleagues. A large portion of federal judicial business is handled by nearly 3000 judicial officers who do not have life tenure: 1,328 statutory judges (magistrates and bankruptcy court judges), 29 judges and senior judges of the Federal Court of Claims, and 1370 administrative law judges. Efficient utilization of the services of the minority who are Article III judges is a major endeavor.

Problems of misconduct in office by Article III judges or physical or mental decrepitude interfering with the proper administration of justice have led to statutory procedures by which complaints against judges of U.S. district and circuit courts may be considered and remedied by action through the respective circuit councils. 42 U.S.C. § 351-364. On rare occasions the cases assigned to a judge have been reassigned and no new cases assigned. These methods of judicial discipline, which are authorized by statute and implemented by the federal judiciary, have withstood challenges to their constitutionality. See *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84 (1970), in which Chief Justice Burger stated in dictum: "[There is] no disagreement among us as to the imperative need

for total and absolute independence of judges in deciding cases. . . . [But] Congress can vest in the Judicial Council the power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine [administrative] matters."). Although these internal disciplinary mechanisms do not apply to the Supreme Court, the Court at least in one instance in the twentieth century determined that the vote of an impaired Justice would not be taken into account if that vote would decide the case.

Other longstanding practices authorized by statute involve the designation of Article III judges to provide judicial services in a court other than that of initial appointment. 28 U.S.C. §§ 291-294. These designation practices are designed to further the efficiency of the system and encourage the continuing involvement of Article III judges in its work. Under them a judge appointed by one federal court may handle the judicial business of another: (1) retired Supreme Court Justices and retired lower court federal judges may sit on lower federal courts; (2) the Chief Judges of a Circuit Court may designate district judges to serve on appellate panels of the circuit court; and (3) the Chief Justice and the Chief Judge of a circuit may designate a lower court judge of one judicial circuit to serve in another circuit.

The Act proposed here was designed with these elements of current law and practice in mind. Thus a Senior Justice continues to participate in the work of the Supreme Court in two ways: (1) full participation until retirement or death in the rule-making authority of the Court; and (2) the recall of a Senior Justice to fill a temporary vacancy or to provide a full Court in situations of recusal or temporary disability in the term or terms immediately following becoming a Senior Justice.

The circuit riding required of Supreme Court justices in the 19th century (a practice that led to some Justices retiring early) and upheld by the Court in *Stuart v. Laird*, establishes that today's justices could be required, for example, to spend three months per year handling cases as a circuit or district court judge. The question, then, is whether spreading the alternative constitutional court service over time is somehow different from contemporaneous service.

Article III, Section 1 of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . . ." This language can be read as drawing a distinction between "Judges" of the Supreme Court and "Judges" of the inferior courts even though both are entitled to life tenure. But this construction, reaching the conclusion that tenure as a Supreme Court Justice must continue in that capacity for life, is not a necessary reading. An equally plausible and straightforward interpretation would read it as requiring that "Judges" at all levels ("both of the supreme and inferior Courts") must enjoy life tenure but that the office of each may include not only contemporaneous service, as held in *Stuart v. Laird*, but successive service that started in the Supreme Court and moved to a lower court or vice versa.

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. The function and purpose of the Good Behavior Clause is apparent from the uniformity of statements both of those supporting and opposing the Constitution: Its purpose was 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. "Judicial independence" has become the rubric for an essential requirement: decisions of federal judges must be protected from improper executive or congressional influence, approval or retaliation. This purpose is served by a definition of judicial office that guarantees life tenure and includes a lengthy and fixed term of service in the judicial work of the Supreme Court. The proposed statute is constitutional because (1) it provides for life tenure on a constitutional court and (2) the term of full service on the Supreme Court is lengthy, fixed in time, non-renewable and cannot be affected by the political branches of government. The proposed Act protects judicial independence just as well as do current arrangements.

CONCLUSION

The legislation we propose is not as simple as we might wish. This is so because it deals with a problem that is as sensitive as it is important. In advancing a detailed proposal, we do not mean to exclude simpler or better proposals that address the problem more effectively or have a better chance of enactment. Our aim in confronting the detail of a statutory resolution of this complex problem is to convince the reader that rotation in the membership of the Supreme Court is not only indispensable but feasible. The problem of rotation is a stunning example of the adage that what is everyone's business is no one's special concern. On that account, the problem has been permitted to languish for far too long. Congress should face it squarely.

The following individuals have endorsed the Carrington-Cramton proposal "in principle." They endorse the statutory proposal in general terms without commitment to the specific form or language of either the proposed statute or the document presenting it.

Bruce A. Ackerman, Sterling Professor of Law & Political Science, Yale Law School
Vickram D. Amar, Professor of Law,Univ. of California, Hastings College of Law
Jack M. Balkin, Knight Professor of Constitutional Law, Yale Law School
Jerome A. Barron, Harold H. Greene Professor, George Washington University Law School
Kevin M Clermont, James & Mark Flanagan Professor, Cornell Law School
John J. Costonis, Chancellor & Albert Tate Jr. & Rosemary Neal Hawkland Prof of Law, Louisiana State University
John J. Curtin, Jr., Partner, Bingham & McCutcheon, Former President, American Bar Association
Walter E. Dellinger III, Blount Maggs Professor, Duke University School of Law
Norman Dorsen, Frederick I. & Grace A. Stokes Professor and Co-Director, Arthur Garfield Hays Civil Liberties Memorial Program, New York University School of Law
Garrett Epps, Professor of Law, University of Oregon School of Law
Richard A. Epstein, Distinguished Service Professor, University of Chicago Law School
James G. Exum, Smith Moore LLP, Greensboro, North Carolina, Former Chief Justice of North Carolina

Richard H. Fallon, Ralph Tyler, Jr. Prof. of Constitutional Law, Harvard Law School
John H. Garvey, Dean and Professor of Law, Boston College Law School
Lino A. Graglia, A. Dalton Cross Professor, University of Texas School of Law
Michael Heise, Professor of Law, Cornell Law School
Wythe Holt, University Research Professor, University of Alabama
R. William Ide III, Partner, McKenna Long & Aldridge, Former President, American Bar Association
Yale Kamisar, Clarence Darrow Distinguished Univ. Professor, University of Michigan Law School
Larry D. Kramer, Richard E. Lang Professor of Law, Stanford University
Lewis Henry LaRue, Alumni Professor, Washington & Lee University School of Law
Sanford Levinson, Garwood Regents Chair, University of Texas School of Law
George Liebmann, Esq., Baltimore MD, Visiting Scholar, Wolfson College, Cambridge University
Theodore J. Lowi, J. L. Senior Professor of American Institutions, Cornell University
Ira C. Lupu, Professor of Law, George Washington University School of Law
Robert MacCrate, Senior Counsel, Sullivan & Cromwell, Former President, American Bar Association
Frank I. Michelman, Robert Walmsley University Professor, Harvard University Law School
Thomas D. Morgan, Oppenheim Professor, George Washington University Law School
Alan Morrison, Visiting Professor, Stanford University Law School
Robert R. Nagel, Ira G. Rotherberger, Jr. Prof. of Const'l Law, University of Colorado School of Law
Philip D. Oliver, Ben J. Altheimer Distinguished Professor, Univ. of Arkansas at Little Rock School of Law
Russell Osgood, President, Grinnell College
Richard D. Parker, William Professor Criminal Justice, Harvard University Law School
William G. Paul, Crowe & Dunleavy, Oklahoma City OK, Former President, American Bar Association
Michael John Perry, Robert W. Woodruff Professor, Emory University School of Law
H. Jefferson Powell, Professor of Law and Divinity, Duke University School of Law
L. A. Scot Powe, Jr., Ann Green Regents Professor, University of Texas School of Law
John Phillip Reid, Russell Niles Professor of Law, New York University School of Law
William L. Reynolds, Joseph A. France Professor of the Judicial Process, University of Maryland
Thomas D. Rowe, Jr., Elvin R. Latty Professor, Duke University School of Law
Theodore St. Antoine, Degan Professor Emeritus and Dean Emeritus, University of Michigan Law School
Peter H. Schuck, Simeon E. Baldwin Professor, Yale Law School
David L. Shapiro, William Nelson Cromwell Professor, Harvard University Law School
Carol S. Steiker, Professor of Law, Harvard University Law School
Nadine Strossen, Professor of Law, New York Law School
Peter L. Strauss, Betts Professor of Law, Columbia University
Lawrence H. Tribe, Ralph S. Tyler Jr. Professor of Constitutional Law, Harvard University Law School
Mark V. Tushnet, Carmack Waterhouse Professor of Const'l Law, Georgetown University Law Center
Jon M. Van Dyke, Professor of Law, University of Hawai'i
Herbert P. Wilkins, Visiting Professor, Boston College Law School, former Chief Justice of Massachusetts
Michael D. Zimmerman, Esq., Snell & Wilmer LLP, Salt Lake City UT, former Chief Justice of Utah

[*]Paul D. Carrington is Professor Law, Duke University School of Law. He may be reached at <pdc@law.duke.edu.>

[**]Roger C. Cramton is Stevens Professor of Law Emeritus, Cornell Law School. He may be reached at <rcc10@cornell.edu.>