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Renewing The U.S. Supreme Court In An Era Of Superannuation

Der vorliegende Beitrag befasst sich mit einem juristisch interessanten und zugleich politisch brisanten Thema: Wie lang sollen die Richter am Obersten Gerichtshof der Vereinigten Staaten von Amerika im Amt bleiben dürfen? Richternominierungen und -besetzungen waren und sind, wie jüngst die Berufungen von John Roberts als Chief Justice und Samuel Alito abermals offenbart haben, stets außerordentlich politisch aufgeladen. Gelingt es einem amtierenden Präsidenten nicht, seinen "Wunsch Kandidaten" durch den Justizausschuß des Senats zu bringen, wird ihm von der interessierten Medienöffentlichkeit politische Schwäche, Instinktlosigkeit, ja gar Handlungsunfähigkeit vorgeworfen. Das enorme öffentliche Interesse resultiert aus einem Umstand, der spezifisch us-amerikanischer Natur ist: Während in der Bundesrepublik die Amtszeit der Richter am obersten deutschen Gericht, dem Bundesverfassungsgericht, auf maximal 12 Jahre ohne Wiederwahlmöglichkeit beschränkt ist, werden die Richter am Supreme Court auf Lebenszeit ernannt. Einmal im Amt, bestimmen sie oftmals über Jahrzehnte die Rechtsprechung des höchsten US-amerikanischen Gerichts und haben damit erheblichen Einfluss auf die gesellschaftliche, soziale und politische Entwicklung in den Vereinigten Staaten. Die Autoren haben deshalb den Kongreß in ihrem "Supreme Court Renewal Act" aufgefordert, der Amtszeit der Supreme-Court Richter in Washington gleichfalls Grenzen zu setzen. Dieser Vorschlag ist freilich nicht unumstritten. So wird bezweifelt, dass bei einer Amtszeitbegrenzung und der Abschaffung der "life tenure" die erbitterten ideologischen und politischen Gefechte abebben würden. Vielmehr habe der Schutzschild Lebensanstellung den Supreme Court wirksam davor bewahrt, in den Strudel populistischer Strömungen gerissen zu werden. Der vorliegende Beitrag stellt demgegenüber die Vorzüge einer derartigen Amtszeitbegrenzung dar und gibt zugleich Einblick in interessante Spezifika des US-amerikanischen Justizsystems.

S. 40

- HFR 4/2006 S. 1 -

- ¹ 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.
- ² Since 1971: (1) Average tenure in office, historically about 16 years, has increased to nearly 26 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 lengthening of tenure is illustrated by the fact that, prior to the Rehnquist and O'Connor vacancies in 2005, there was no new appointment on the Court for more than eleven years, the longest period without change since the Court was increased to nine justices nearly 150 years ago.
- ³ 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:

- 4 *First, as justices serve ever longer terms, rotation in office occurs infrequently and the higher stakes of appointing a justice for 25-40 years place stress on the confirmation process.*
- 5 A principal consequence of the lengthening tenure of Supreme Court justices is that the Court has become less accountable to the people. This accountability, under the U.S. Constitution, flows from the appointment process; the remedy of impeachment is only available when a Senate trial has determined that a justice has committed a major crime. And the appointment process only comes into play when a vacancy arises or the Court is expanded in size by legislation. As the Court's accountability has declined, it has exercised increased authority and has seen fit to displace state and federal legislative bodies by its own ideas of social structure or moral conduct. Matters as disparate as abortion, the death penalty and the boundaries of voting districts have become fields in which it purports to exercise ultimate authority.
- 6 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 persons likely to serve 35 years or more. A President serving two terms may 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 on a future that cannot be foreseen. .
- 7 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.

S. 41

- HFR 4/2006 S. 2 -

- 8 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 these questions from any legislative authority creates frustration and bitterness because it leaves those in dissent with no practicable 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.
- 9 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 aftermath of the 2000 election, the Court in a total unique proceeding selected the president who would 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.
- 10 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 Ameri-

can 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.

- 11 Direct application 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.
- 12 *Second, the increased power and status of Supreme Court justices carry dangers of arrogance, hubris and abuse that will grow as terms continue to lengthen.*
- 13 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 justices almost certain to occur. And it did occur until recently. During 215 years of the Court's history (1789-2004), 102 justices were appointed to the Court - an average of a new appointment every 2.1 years. But justices in the past thirty years have served about eleven years longer and been about eleven years older at the time of retirement or death than their predecessors during the prior two hundred years.

S. 42

- HFR 4/2006 S. 3 -

- 14 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.
- 15 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.
- 16 *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 almost invariably elect this option, usually at about age 65. 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.

- 17 The rotation in office that results from the retirement of lower federal court judges is assisted by the fact that the work of these judges is not under their own control but is dependent on the caseloads created by litigants and their lawyers. Substantial and steady growth in the caseloads of trial and appellate federal courts occurs faster than congressional willingness to create new judicial positions. The heavy burden of a caseload that can not be delegated to others leads these judges to choose senior status or retirement when they reach the ordinary retirement ages of 65-68.
- 18 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.
- 19 Unlike the judges of lower federal courts, the Supreme Court now controls its own workload. This control was conferred in part by a 1925 statute and then broadened in 1988 by the virtual elimination of the right of a party to invoke the jurisdiction of the Court. Since then, the Court has had virtually total control over its own workload, an opportunity it has freely exercised. 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 only about 75-85 cases a year. 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 and between lower federal courts and the high courts of American states. The Court now takes the position that federal or state legislation, not its decisions, must deal with the inequalities and costs of these conflicting decisions.

S. 43

- HFR 4/2006 S. 4 -

- 20 Although the Court's annual term lasts for about nine months, it now hears oral argument in only about 75-100 cases during September-November and January-May. During that time, a Justice must write on average about one opinion of the Court a month; there were only 75 signed opinions of the Court in the 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.
- 21 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.
- 22 *Current arrangements provide strong incentives for harmful strategic behavior by justices, presidents, and senators.*
- 23 The randomness of a justice's death or a justice's choice of a time of retirement may lead to one president getting three appointments (as President Nixon did) and another none (President Carter's experience). If another justice chooses to retire before 2008 (Justice Kennedy, for example, is 83), President Bush may receive a third appointment to the Court. Such an event might lead to a faction of five or six justices controlling the Court's decisions for one or two decades. Similarly, presidents have an incentive to ap-

point younger, but like-minded, appointees who were serve for a very long period. Fortunately, this has happened only infrequently in recent years; Justice Thomas, appointed at age 43, is the most recent example.

- 24 In the past, a number of justices have attempted to hold on to their office for two primary reasons: First, they enjoy the celebrity of the office and the ever-increasing power the office has to shape U.S. policy on important issues. Second, they sometimes want to stay until a like-minded president would made the appointment. This has resulted in repeated instances of justices becoming physically and mentally impaired during their final years on the Court.
- 25 Justice Black, appointed in 1937, attempted but failed to survive President Nixon's two terms; he was in his eighties during his final years and his eyesight and health had deteriorated. Justice Douglas held on to office for nearly 38 years, the longest service in the nation's history. During his final years, when he was in the mid-eighties, Douglas was first physically disabled and then mentally impaired, but he refused to retire until public embarrassment from his evident disability forced him to do so. Shortly thereafter, two other long-serving Justices, William J. Brennan, Jr. and Thurgood Marshall, followed the same pattern, staying on into their eighties despite physical and mental impairment that became more and more evident. Since then justices have tended to retire before their disability became evident in public, and only two (Whittaker and perhaps Rehnquist) appear to have stayed on longer than they should have.

S. 44

- HFR 4/2006 S. 5 -

- 26 This history reveals problems that should be solved by federal statute. Paul D. Carrington and I have developed a statutory reform proposal that is supported in principle, although not necessarily in all of its details, by about fifty eminent constitutional law and federal courts scholars in the United States. The proposed statute would amend the U.S. Judicial Code to redefine the "office" of being a Supreme Court justice to involve lifetime service on a federal constitutional court but with the tenure of service on the U.S. Supreme Court running for only a fixed period, such as eighteen years. Such a period would be long enough for the development and implementation of a well-rounded understanding of federal law, but not lead to a justice operating for a very long time on intellectual autopilot without any new ideas. It also would lead to a new justice being appointed every two years, making the Court more accountable to the popular will but providing a great deal of stability and continuity on the Court as a whole. A complete turnover in the Court's personnel would usually then occur after about eighteen years.
- 27 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 necessary independence of the judiciary from the political branches of government.
- 28 The proposed act would 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 would 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 would be minimized. A regular rotation in the personnel who exercise the Supreme Court's extraordinary power would result.

29 The full effectiveness of this rotation would be delayed an indeterminate number of years if the Act did not apply to current members of the Court. This approach seems appropriate for two reasons: First, the elimination of a retroactivity argument strengthens the argument that the Act is consistent with the Constitution. 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 voluntarily to take senior status or retire when they have served eighteen years.

S. 45

- HFR 4/2006 S. 6 -

30 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 Court 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.

31 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.

32 The proposed Act would 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, second, the efforts of individual justices to influence the appointment of a like-minded successor by timing a 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 older lawyers of great talent and experience, reducing the current bias against older appointees. The changes may also have the effect of reducing the acrimony and contentiousness of confirmation proceedings.

33 *The proposed Act is consistent with the U.S. Constitution.* 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.

S. 46

- HFR 4/2006 S. 7 -

34 In *Stuart v. Laird*, 1 Cranch (5 U.S.) 299 (1803), the Court upheld, first, the congressional abolition of the circuit courts created by the outgoing administration in the Judiciary Act of 1801; and, second, 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 the effect of leaving 17 appointed judges without

any cases to decide. And, more pertinent here, 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.

- 35 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 here 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.
- 36 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.

S. 47

- HFR 4/2006 S. 8 -

- 37 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, Justice Douglas, would not be taken into account if that vote would decide the case.
- 38 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.
- 39 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.

- 40 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.

S. 48

- HFR 4/2006 S. 9 -

- 41 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 the office of "Judges" of the Supreme Court and of "Judges" of the inferior courts, even though both are entitled to life tenure under the same provision. 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.
- 42 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.
- 43 The proposed legislation 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 the problem squarely and provide an adequate remedy.

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