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Attached are four proposals of provisions suitable for inclusion in a Judiciary Act for 2009. The proponents do not all agree on all of them, but are unanimous that Congress should soon reconsider the law applicable to the Supreme Court of the United States, a subject it appears not to have seriously considered for at least seventy years. They are also agreed that the Department of Justice should play a more active role in the consideration of issues of judicial organization and administration as it did briefly in the years 1977-1981 and should also attend to issues such as those posed in these four proposals.

The proponents are a diverse group whose political views extend across the political spectrum. Most but not all are law professors. Most but not all are lawyers with extended experience in public affairs. Five have held Presidential appointments in the Department of Justice under Republican or Democratic Presidents. Many served as members of five groups that were commissioned in the last half century to study the federal judiciary to make recommendations for law reform, but whose

* This communication was dispatched to the addressees in February 2009, but has since acquired additional signers who are listed here.

recommendations were never seriously considered by Congress or advanced by the Department of Justice. To emphasize their prayer that the subject of the law governing the Supreme Court be considered, they present the four proposals, not as mere political or scholarly utterances, but in the form of proposed statutory texts.

All the proponents of each proposal would be grateful for any responses that any of the addressees might be willing to share. Their names and addresses are:

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FOUR PROPOSALS FOR A JUDICIARY ACT OF 2009

In his 2008 annual report to Congress, Chief Justice Roberts has raised an important question about the compensation and support of the federal judiciary. The undersigned ask Congress and the Department of Justice to consider as well issues of constitutional importance regarding the evolving status and role of the Justices. Each of the four proposals advanced might be considered with issues raised by the Chief Justice, or separately.

Congress has given scant attention to the role and structure of the Third Branch since the days of the ill-advised “Court-packing” proposal of 1937. With rare exception, it has wisely entrusted the law governing that Branch to the Judicial Conference of the United States that it established in 1922. But given its inherent limitations, the Conference has been unable to consider issues arising from the work of the Supreme Court. From 1977 to 1981, the Department of Justice had an office concerned with judicial law reform, but then abandoned that concern and closed the office without turning attention to the Supreme Court..

Felix Frankfurter and James Landis wisely said that good judiciary acts are not written for all time. From time to time, the other branches of the federal government need to reconsider how the judicial branch has evolved, and adapt it to changed circumstances. Adequate attention by the other branches calls for the re-establishment of the abandoned division of the Department of Justice so that it can assist Congress in considering proposals such as those we advance here.

We do not suggest, and would oppose, any interference with the substance of the Court’s work. The integrity of our Constitution requires that Justices be free fearlessly to decide any disputed case or controversy they deem it appropriate to decide. We ask Congress and the Department of Justice only to consider problems of judicial administration that are beyond the reach of the Judicial Conference or of the Court itself. The four specific proposals presented here are not interdependent and, as the listings of supporters for each reveal, we do not all favor enactment of all of them. We

unite fully only on our main point, that the task of addressing the public office of the Justices is one that Congress and the Department of Justice have neglected for too long.

PROPOSAL I: REGULAR APPOINTMENTS TO THE SUPREME COURT

One question to be considered is the prospect that as Justices retain power for extended lengths of time, appointments to the Court are made so infrequently as to diminish the likelihood that the Court's many important policy decisions will reflect the moral and political values of the contemporary citizens they govern.

The first reform presented here therefore provides for regular biennial appointments of new Justices selected by the then sitting President and Senate in order to assure timely rotation within the membership of the Court. To assure a Court of nine Justices, this will require a modification of the duties of Justices who have remained on the Court for more than eighteen years. A variation on this specific proposal was advanced and widely discussed in 2005. It won approval from many, including bar leaders and former judges. Most opposition rested on a constitutional argument that any term or age limits imposed by Congress would violate Article III and require a constitutional amendment. But no proposal for such an amendment has been advanced, and we see no serious constitutional problem in legislating regularized appointments with diminished but continuing roles for those Justices holding office for very long terms.

Almost everywhere high court judges are subject to term or age limits that prevent the risk of superannuation. Our proposal is not a term limit but a system of rotation to assure some regularity of change in the composition of the Court. If necessary to meet the constitutional objection, the allocation and assignment of duties when there are more than nine active Justices could be left for the Justices themselves to resolve by a rule of court. There is surely no constitutional objection that could be made to that scheme, but it would be more cumbersome than the one proposed.

Two alternatives for avoiding any constitutional problem are available if thought to be necessary. One response would be to provide a large bonus to Justices who retire in good time. It would seem unjust to give such a bonus to Justices and not to circuit or district judges who now tend to surrender their power and accept senior status in good time. Another response to the constitutional question would be to revive the practice of required circuit riding. If each Justice were required to sit on a district court bench a few times a year, that requirement would again serve, as it long did, to keep the Justices in closer contact with the citizens they govern and the realities that citizens perceive. And it would reduce the likelihood that Justices will cling to an office they are no longer willing or able fully to perform. We do not favor either of these reforms but mention them as alternatives to be considered if the more modest proposal we advance is thought to raise a problem under Article III.

Our specific proposal is:

TITLE 1: THE ORGANIZATION OF THE SUPREME COURT

§1. NUMBER OF JUSTICES SITTING TO DECIDE CASES ON THE MERITS; QUORUM. *The Supreme Court shall generally sit as a Court of nine Justices but if necessary six Justices shall constitute a quorum. The Court may by rule authorize a single Justice to make provisional rulings when necessary.*

§2. REGULARITY OF APPOINTMENTS. *One 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 Section 3. Each appointment shall become effective on August 1 of the year following the election. If an appointment under this section results in the availability of more than nine Justices, the nine who are junior in time of service shall sit to decide each appeal certified for its decision on the merits.*

§3. VACANCIES. *If a retirement, death or removal of a Justice results in there being fewer than nine Justices, including Senior Justices, 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.*

§4. THE OFFICE OF SENIOR JUSTICE. *A Justice who is senior to nine or more Justices shall unless disabled continue to hold office as a Senior Justice. If there is a vacancy on the Court or if a Justice is recused a Senior Justice shall be called by the Chief Justice in reverse order of seniority to sit when needed to provide a nine-member Court to decide a case. A Senior Justice shall also participate in any other matter before the Court including decisions to grant or deny a petition for certiorari or to promulgate rules of court in compliance with the rules enabling provisions of Title 28.*

§5. TEMPORARY DELAY IN COMMENCEMENT OF REGULARITY OF APPOINTMENTS. *Justices sitting on the Court at the time of this enactment shall 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 Section 2 of this Title before the Congress that begins after the last of the present Justices so leaves the Court, but any Justice appointed after the date of enactment shall become a Senior Justice in accordance with the provisions of Section 4 of this Title.*

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PROPOSAL II: DISABILITY OF JUSTICES

A second problem deserving the attention of Congress and of the Department of Justice is the possibility that a Justice in failing health will continue in office when no longer able to perform the attendant duties. The second proposal is therefore that the law should impose on the Judicial Conference of the United States a duty to advise the House of Representatives when a Justice of the Supreme Court is no longer able to perform the duties of the office. The Conference performs that duty with respect to all other Article III judges, and similar systems of accountability are commonplace in state judicial systems. It is a duty that was long performed within the Court, but that practice has been abandoned as older Justices have been increasingly prone to remain in office and retain their political power even if no longer able to perform their office. We perceive no reason to continue to allow Justices to hold offices that they are not able to perform, sometimes perhaps merely to prevent the appointment of a successor by a President whose politics are disapproved by a disabled Justice.

We suggest the following enactment as an addendum to Title 1, *supra*.

TITLE 2. FITNESS AND DISABILITY OF JUSTICES.

§1. THE DUTIES OF JUSTICES. *It is the duty of a Justice or a Chief Justice to voluntarily retire when he or she is no longer able fully to perform the duties of the office held.*

§2. A DUTY OF THE CHIEF JUSTICE. *It is the duty of the Chief Justice to advise another Justice to retire from office when that Justice is no longer fully able to perform the duties of the office, and promptly to report that fact to the Judicial Conference of the United States.*

§3. DISABILITY OF THE CHIEF JUSTICE. *When a Chief Justice is no longer fully able to perform the duties of that office, it is the duty of other Justices to report that fact to the Judicial Conference of the United States.*

§4. DUTY OF THE JUDICIAL CONFERENCE. *On receiving a report made pursuant to Section 2 or 3 of this Title, that a Justice or Chief Justice is no longer able fully to perform the duties of the office held, the Conference shall refer the matter to the Chief Judges of the United States Courts of Appeals. The Chief Judge most senior in years in that office shall promptly call a meeting of the Chief Judges to consider the report. If a majority of the Chief Judges find that there is substantial evidence that a Justice or Chief Justice is not able to perform the duties of the office, they shall report that finding to the Judiciary Committee of the United States House of Representatives.*

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PROPOSAL III THE OFFICE OF CHIEF JUSTICE

Many also join in urging Congress and the Department of Justice to give special attention to the office of the Chief Justice of the United States. Over time, the powers and responsibilities of that office have been extended into numerous other political, administrative, and non-judicial roles calling for a measure of special accountability for the Justice holding office as Chief. Not least of these many other duties is presiding over the Judicial Conference of the United States, a complex institution that has acquired numerous important roles in the administration of the federal courts. That concern leads the undersigned to propose that appointment of the Chief Justice be for a limited term. We propose for the future a term of seven years that would be subject to automatic extension until such time as the President is authorized to appoint a new Justice to the Court or until resolution of any pending impeachment proceeding over which the Chief Justice is needed to preside. This extension is needed to assure that the selection of the new Chief Justice is not limited to those Justices then sitting on the Court. Specifically, we suggest the following addition to Title I, supra:

§5. THE OFFICE OF CHIEF JUSTICE. *A Chief Justice appointed after the date of this enactment shall be appointed and may be reappointed by the President with the consent of the Senate for a term of seven years and an additional time until the next opportunity for the President to appoint a new Justice arises or until resolution of any pending impeachment over which the Chief Justice must preside.*

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PROPOSAL IV: THE CERTIORARI PROCESS

Many also join in asking Congress and the Department of Justice to consider another problem in the conduct of the Supreme Court that has arisen over time and received no attention from Congress or the Executive Branch.

The fourth proposal is that the excessive independence of the Justices in choosing their own work be reduced. As members of the Court itself have recently observed, there is widespread public concern about what is perceived to be the excessive independence of our judiciary. That public concern is generally directed more at other courts, but it is the Supreme Court of the United States that shapes the judicial role and sets a style that judges in state courts and lower federal courts replicate. As the Justices have by stages gained almost total control of their workload, they have greatly reduced the number of cases they consider and have delegated ever more tasks to their personal staffs and to lower courts, while largely confining their attention to the gratifying task of writing new law. Lower courts have increasingly tended to follow that model.

A secondary consequence of this widespread delegation of the task of deciding less interesting disputes has been a fading of the distinction between adjudication and legislation. The independence of the judiciary is indispensable to the Rule of Law, but it is increasingly difficult to justify absolute independence for Justices whose chief work is expressing and imposing on the public laws on topics of their choice. Chief Justice John Marshall justified his Court's review of the constitutionality of Congressional enactments as an unavoidable consequence of the Justices' duty to decide the contested cases presented to them as provided by law. That explanation is less convincing when the Court is free and independent in its choice of the cases and issues it chooses to decide.

This steady enlargement of discretion in the choice of cases has resulted in a decline in the Supreme Court's participation in the basic judicial tasks of judging cases, reconciling conflicts in interpretations of Congressional legislation in lower courts, and assuring adherence to appropriate procedures in mundane criminal cases, tasks that are the basis of its entitlement to independence from democratic accountability. In turn, the Court's steady enlargement of its political role has encouraged lower federal courts, and a growing number of state supreme courts to direct their attentions to the making of new law. They, too, are visibly more given to writing extended opinions of the court while delegating to their subordinates more responsibility for the less gratifying work of assuring, in less salient cases, faithful obedience to enacted legislation and the procedural constraints set forth in the Bill of Rights.

The increasing likeness of high courts to robed legislatures has, we believe, contributed to the growing unrest of citizens with the tradition and practice of judicial independence, an unrest to which Justices themselves point with concern. Congress and the Department of Justice should therefore attend to their duty to provide constructive "checks and balances" to our highest Court to reassure the public that its great judicial power is being exercised with appropriate self-restraint and fidelity to law.

Congress and the Department of Justice should therefore reconsider the law enabling the Justices to ease their workload by choosing any cases they decide. We

propose the establishment of a body of experienced appellate judges empowered and required to designate a substantial number of cases that the Court would then be required to decide on their merits. This would be intended to correct the steady shrinkage of the docket and engage the Supreme Court's attention on matters selected by persons suitably independent of the Justices and their personal or professional concerns. It would also correct a visible tendency of the Justices to place greater reliance on their staffs, a practice increasingly replicated at all levels of the judicial system. The work of this Certiorari Division of the Supreme Court (or perhaps it might be designated as a Certiorari Court) would be performed on a part-time basis by appellate judges with suitable experience who would rotate the duty to rule on petitions for certiorari filed with the Court.

The Supreme Court would remain free to grant additional petitions either before or after they were considered by this screening forum, but it would be required to decide a substantial number of cases designated by its subordinate circuit judges, as required by the Act. An effect of this proposed reform would be to present the Supreme Court, to the Justices themselves as well as to the citizens they govern, more as a law court performing its public duty and less as a legislative body freely choosing to reshape civil society to accord with the preferences of Justices. This reform would thus make the Supreme Court a better model for lower courts responsible for effective administration of the national law.

This proposal is complex and its details will be improved in the course of legislative deliberation. Set forth below is a tentative draft of a law achieving what we seek to achieve. Perhaps the number of petitions to be granted by the new Division should be greater or fewer than we presently propose. Surely the role of the new institution should be subject to continuing study by Congress and by the Department of Justice to assure that the Court, as a court of law, continues to provide active oversight of the administration of the law in the lower courts subject to its review.

TITLE 3. APPELLATE JURISDICTION OF THE SUPREME COURT.

§1. REVIEW OF DECISIONS OF UNITED STATES COURTS OF APPEALS. *Any judgment or order of a United States Court of Appeals may be reviewed by writ of certiorari.*

§2. REVIEW OF DECISIONS OF HIGHEST STATE COURTS. *Final judgments or decrees rendered by the highest court of a State in which a decision may be had may be reviewed by writ of certiorari where a question of federal law is presented.*

§3. CASES CERTIFIED BY THE CERTIORARI DIVISION.* *Primary authority for granting or denying a petition of any party seeking to invoke the*

* This institution could be designated as a separate Certiorari Court if that designation is preferred.

discretionary appellate jurisdiction of the Supreme Court shall be exercised by its Certiorari Division in accord with the Court's standards promulgated under Section 2 of Title 4. Cases so certified shall then be decided on the merits by a full Supreme Court. The Court may reverse a denial of certiorari by its Certiorari Division or may grant a petition for certiorari prior to its consideration by the Certiorari Division. The Court may also by an order signed and explained by a majority vote reverse an order of the Certiorari Division granting a petition.

§4. TERMS OF COURT. *The Supreme Court shall hold at the seat of the government a term of court commencing on the first Monday in October of each year. It shall hear and decide all cases certified in the preceding calendar year pursuant to Section 3 of this Title for its decision on the merits*

TITLE 4. JURISDICTION AND ORGANIZATION OF THE CERTIORARI DIVISION

§1. JURISDICTION. *The Certiorari Division of the Supreme Court shall consider all pending petitions for writs of certiorari and shall during each calendar year grant not less than eighty nor more than one hundred petitions for cases to be decided on the merits. The Supreme Court may by rule increase the number of petitions that its Certiorari Division shall grant.*

§2. STANDARD FOR GRANTING CERTIORARI. *The Certiorari Division shall by majority vote grant writs in those pending cases in which a decision on the merits by the Justices would appear to best serve the public interest. The Supreme Court may by published rule provide a more explicit definition of the public interest and establish such other procedures as it deems appropriate for its Certiorari Division including a rule authorizing parties to seek in urgent circumstances immediate consideration of a petition by the Supreme Court.*

§3. SESSIONS OF THE DIVISION. *The Certiorari Division shall confer at the seat of the government for at least four terms each year at such times as the Supreme Court by rule shall establish. At each session, it shall consider all pending petitions for writs of certiorari and shall grant a number reasonably proportionate to the limits specified in Section 1 of this title.*

§4. JUDGES OF THE CERTIORARI DIVISION. *The judges of the Certiorari Division shall include all available Senior Justices and all United States Circuit Judges who have held office for eight years and are not serving as chief judges of their respective circuits. Five shall be designated by the Judicial Conference of the United States to sit at each session of the division, one of whom shall be designated as chief judge for that session. The Judicial Conference shall by rule establish a system of random rotation to assure that*

this duty is evenly distributed among the eligible Senior Justices and Circuit Judges and that the five-member panels shall not be constant.

§5. PROCEEDINGS OF THE CERTIORARI DIVISION. *The Certiorari Division shall conduct no formal hearings. Its judges may attend its sessions by videoconference. It shall publish no opinion of the division, but the votes of the five judges shall be recorded and any member of the conferring panel may publicly dissent from a denial of a writ for the purpose of encouraging the Supreme Court to grant a petition notwithstanding its denial by the Certiorari Division.*

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